The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?

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In *Local 512 v. NLRB*, the Ninth Circuit Court of Appeals ordered the National Labor Relations Board (NLRB or Board) to award backpay to undocumented workers who had been unlawfully laid off by their employer. The court decided *Local 512* before enactment of the Immigration Reform and Control Act of 1986 (IRCA). One of the aims of the IRCA is to keep undocumented aliens out of the workplace by making it illegal to knowingly employ undocumented aliens. Because protection of undocumented workers like that granted in *Local 512* might undermine pursuit of this IRCA objective, apparent conflict arises between National Labor Relations Act (NLRA) and IRCA objectives regarding undocumented workers. This apparent conflict merits careful consideration.

This Comment focuses on how the NLRB should resolve conflicts between NLRA and IRCA workplace objectives. It begins by discussing the scope of the Board's discretion to fashion remedies for unfair labor practices and the limitation imposed on that discretion by the requirement that remedial orders accommodate non-NLRA statutory objectives. Next, the Comment summarizes pre-IRCA treatment of undocumented workers under the NLRA. The *Local 512* decision and the employer sanctions provisions of the IRCA are then described. The Comment suggests that the *Local 512* court reached the correct result. Nevertheless, *Local 512* gives the Board little guidance regarding how it should treat non-NLRA objectives such as those of the IRCA. Accordingly, a proposal for clarifying the NLRB's duty to accommodate non-NLRA objectives in its remedial orders is presented. The Comment then examines whether, consistent with this duty, the NLRB could award reinstatement and backpay to an undocumented worker given the employer sanctions provisions of the IRCA. Finally, pertinent general policy considerations are taken into account. The Comment concludes that an NLRB reinstatement and backpay order for unlawfully discharged undocumented workers would not, under most circumstances, impermissibly fail to accommodate IRCA objectives.

1. 795 F.2d 705 (9th Cir. 1986).
3. See H.R. REP. No. 1000, 99th Cong., 2d Sess. 45-46 (1986), reprinted in 10C U.S. CODE CONG. & ADMIN. NEWS 5649 (1986). The employer sanctions provisions of the IRCA ultimately aim at the deterrence of illegal immigration to this country. The Act's supporters cited employment opportunity as providing the primary impetus to cross the border illegally. Thus, they expect that decreasing employment opportunities for unauthorized aliens should deter illegal immigration. *Id.*
I. BACKGROUND

A. NLRB Remedial Discretion and the Duty to Accommodate Non-NLRA Objectives

Congress enacted the NLRA in 1935. The Act's primary objective is to preserve industrial peace through promotion of the collective bargaining process. Congress established the NLRB to pursue NLRA objectives by discouraging unfair labor practices. The Board discourages unfair labor practices primarily by issuing remedial orders. The Board generally should remedy unfair labor practices involving improper discharge by ordering that discharged employees be reinstated with backpay.

5. Id.
7. Id. § 153. Unfair labor practices include employer interference with employee organizational rights guaranteed by § 8 of the Act. Id. § 158. Only “employees” are protected from unfair labor practices. Id. § 151. The Board determines who is an employee for purposes of the Act. NLRB v. Hearst Publishing Co., 322 U.S. 111, 130 (1944).
8. The Board’s authority to remedy unfair labor practices is granted by NLRA § 10(c), 29 U.S.C. § 160(c). United Steelworkers of Am. v. NLRB, 646 F.2d 616, 629 (D.C. Cir. 1981). Section 10(c) reads in part:
   
   If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

   Courts have removed the Board’s authority to remedy unfair labor practices in some instances. Generally, these instances occur when employees seek NLRA protection from unfair labor practices that the employees have protested in an unlawful manner or for an unlawful purpose. See NLRB v. Drivers Local Union 639, 362 U.S. 274, 281 (1960). Accordingly, if employee protests involve conduct that contravenes clearly applicable federal or state criminal and tort law, the employees may lose NLRA protection. R. Gorman, Basic Text on Labor Law; Unionization and Collective Bargaining 311 (1976). A strike constitutes unprotected activity when participants unlawfully seize an employer’s property, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 252 (1939), or when strikers use deliberate or reckless falsehoods to further their goals, Montefiore Hosp. & Medical Center v. NLRB, 621 F.2d 510, 517 (2d Cir. 1980). The Board also may not protect employees who act “irresponsibly” in so timing a protest that a risk of injury to the employer’s physical plant or equipment is created. See NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 (3d Cir. 1955); see also Montefiore Hospital, 621 F.2d at 515.
9. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187–88 (1941). The Board may order reinstatement without backpay or backpay without reinstatement. Indianapolis Power & Light Co. v. NLRB, 122 F.2d 757, 763 (7th Cir. 1941), cert. denied, 315 U.S. 804 (1942). A backpay award should compensate a
The Board has broad remedial discretion, limited primarily by the principle that a remedial order must effectuate NLRA objectives. In *Southern Steamship Co. v. NLRB*, the Supreme Court further limited the Board's remedial discretion. The *Southern Steamship* Court imposed a duty on the Board to "accommodate" the objectives of statutory schemes other than those of the NLRA when making a remedial order. The extent of this restriction on Board discretion, however, is unclear. The Court set out no precise guidelines indicating how and to what extent the Board should accommodate non-NLRA objectives.

The Supreme Court, however, has indicated that *Southern Steamship's* restriction on Board discretion should be interpreted narrowly, and lower courts have consistently done so. *Southern Steamship's* narrow reading is

discriminatee for wages actually lost because of an unlawful discharge. NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1392 (8th Cir. 1974). Interest may be added to a backpay award. Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962), *enf. denied on different grounds*, 322 F.2d 913 (9th Cir. 1963); *see also* Bagel Bakers Council v. NLRB, 555 F.2d 304, 306 (2d Cir. 1977). A remedial award must not be punitive. Republic Steel Corp. v. NLRB, 311 U.S. 7, 9–12 (1940). The Court in *Sure-Tan v. NLRB*, 467 U.S. 883, 900–01 (1984), equated a speculative award with a punitive award. Thus, an award redressing losses which may never occur is probably not enforceable.


11. 316 U.S. 31 (1942).

12. The Court stated:

[The Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for the careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. *Id.* at 47.]

At issue in *Southern Steamship* was the propriety of an NLRB order reinstating several shipping line employees who had struck their employer in a manner apparently constituting a criminal violation of the Mutiny Act. The Court stated, "We cannot ignore the fact that the strike was unlawful from its very inception." *Id.* at 48. *Southern Steamship* was a 5–4 decision. The dissenters would have upheld the Board's reinstatement order: "We can see no justification for an iron rule that a discharge of a striker by his employer for some particular, unlawful conduct... is sufficient to bar his reinstatement as a matter of law." *Id.* at 51.

13. See *Local 1797, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 111 (1958). The Court has otherwise offered little guidance to the Board regarding what its duty of accommodation encompasses. However, some members of the Court have indicated that *Southern Steamship* at least imposes a duty on an agency to consider relevant statutes which are not part of the statutory or regulatory scheme which the agency is charged with enforcing. *See Community Television v. Gottfried*, 459 U.S. 508, 517 (1983) (Marshall, J., dissenting).

14. *See, e.g.*, Schmerler Ford, Inc. v. NLRB, 424 F.2d 1335, 1339–40 (7th Cir. 1970) (role of union in allegedly fostering price-fixing scheme in violation of Sherman Act does not disqualify it from acting as employees' bargaining agent); NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1951) (NLRB may order reinstatement of employees who conducted a strike which, although not illegal in itself, resulted in noncompliance with provisions of the Federal Communications Act).
appropriate since the case involved a unique set of facts.\textsuperscript{15} The \textit{Southern Steamship} Court considered whether a strike conducted on board a ship away from home port and in violation of the Mutiny Act constituted protected NLRA activity.\textsuperscript{16}

The Board has not allowed \textit{Southern Steamship} to greatly restrict its remedial powers. The Board has often made orders which contravene other statutory or regulatory objectives. For example, the Board has determined that a bankruptcy court may not extinguish backpay liability assessed against an employer by the Board.\textsuperscript{17} The Board has also awarded reinstatement and backpay to an employee who had been working for a liquor retailer in contravention of a municipal ordinance prohibiting persons under twenty-one years of age from so doing.\textsuperscript{18}

\textbf{B. Undocumented Workers and the NLRA}

In \textit{Sure-Tan, Inc. v. NLRB},\textsuperscript{19} the Supreme Court considered whether the Board’s duty to accommodate non-NLRA objectives required it to consider a discriminatee’s immigration status in devising a remedy.\textsuperscript{20} The Court vacated a Seventh Circuit decision that enforced a backpay award to undocumented workers\textsuperscript{21} who had left the country after the Immigration and Naturalization Service (INS) commenced an investigation into their

\begin{footnotesize}
\begin{enumerate}
\item The court in \textit{Globe Wireless} stated that \textit{Southern Steamship’s} facts were such that the case “stands in a class by itself.” 193 F.2d at 751.
\item \textit{Southern Steamship}, 316 U.S. at 47.
\item Before \textit{Sure-Tan}, the Board had consistently deemed undocumented workers to be employees for the purposes of the NLRA and thereby entitled to the Act’s protections. \textit{See Amay’s Bakery & Noodle Co., 227 N.L.R.B. 214 (1976); Handbilling Equip. Corp., 209 N.L.R.B. 64, 65 (1974); Lawrence Rigging, Inc., 202 N.L.R.B. 1094, 1095 (1973).} However, the Board had issued inconsistent decisions regarding whether a discriminatee’s immigration status should bear on a remedy determination. \textit{Compare Amay’s Bakery & Noodle Co., 227 N.L.R.B. 214, 220 (1976) (accommodation principles preclude unconditional reinstatement order for undocumented workers in view of state law prohibiting employment of those not lawful residents) with Apollo Tire Co., 236 N.L.R.B. 1627 (1978) (undocumented status of discriminatees has no bearing on discriminatees’ entitlement to a reinstatement award).} Judicial approval of the Board’s decision that undocumented workers are entitled to NLRA protections first came in \textit{Sure-Tan v. NLRB}, 583 F.2d 355 (7th Cir. 1979), \textit{reh’g after remand}, 672 F.2d 592 (7th Cir. 1982), \textit{aff’d in part, reversed in part}, 467 U.S. 883 (1984), and \textit{NLRB v. Apollo Tire Co.}, 604 F.2d 1180 (9th Cir. 1979).

A Board award of reinstatement and backpay to an unlawfully discharged undocumented worker provided for conflict with immigration concerns even before enactment of the IRCA. This is because an NLRB reinstatement and backpay award to an undocumented worker could be seen as tacit sanction for the continued unlawful presence of that worker in the United States.

\item For purposes of this Comment, “undocumented workers” refers to individuals not lawfully authorized to work in the United States. “Undocumented aliens” refers to individuals present in the United States in violation of 8 U.S.C. § 1181 (1982).
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immigration status. The Court agreed with the Board that undocumented workers should be considered employees for purposes of the NLRA. However, the Court determined that when an undocumented discriminatee has left the United States, his or her status should bear on NLRB consideration of how to remedy the unfair labor practices perpetrated against that discriminatee.

Citing Southern Steamship, the Court stated that Immigration and Naturalization Act (INA) concerns are among those which the Board has a duty to accommodate in fashioning remedies. Nonetheless, like Southern Steamship, Sure-Tan offers little guidance to the Board as to the weight it should give non-NLRA concerns when pursuit of those concerns conflicts with NLRA objectives. The Sure-Tan Court merely held that proper accommodation of INA objectives precluded the Board from awarding backpay to discriminatees who had been outside the country and physically unavailable for work after their discharge.

C. The Local 512 Decision

In Local 512, the Ninth Circuit considered an NLRB petition to enforce a conditional backpay award the Board had ordered. The Board had awarded backpay after finding an employer, Felbro, had committed

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22. The Sure-Tan Court rejected the Court of Appeals' order on two grounds. First, the Court stated that the order represented an impermissible substitution of the court's judgment for that of the Board regarding how to best remedy unfair labor practices. Sure-Tan, 467 U.S. at 899. The Board had awarded backpay only after being ordered on remand to do so by the Court of Appeals. Id. Second, the Court found the Court of Appeals' remedy inappropriate because it focused on speculative rather than actual harm suffered by the discriminatees—backpay was computed on the basis of how long the discriminatees would have remained on the job if not for their improper discharge. Id. at 900-01. At the time of the award, the discriminatees were apparently in Mexico. Id. at 887.

23. Id. at 891-92.

24. Id. at 902-03. When the discriminatees left the United States, they became unavailable for work. A backpay award to a discriminatee who has not remained available for work would compensate the discriminatee for wages not actually lost because of an unlawful discharge. The theory is that it is the discriminatee's unavailability for work, not the discharge, which has caused the lost wages. Id.

The Court did state that in computing backpay on remand, "the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and working in the United States." Id. at 903. The Court's holding, however, appears limited. The Court rejected the manner in which the backpay was awarded, not the fact of a backpay award to undocumented workers in itself. The Court indicated that under different circumstances such an award would be appropriate. Id. at 901 n.11.

25. Id. at 903.

26. Id. at 903-04. Four Justices would have enforced the Board's backpay award in spite of the discriminatees' absence from the country. Id. at 910 (Brennan, J., concurring in part, dissenting in part). Justice Brennan suggested that discriminatees that have become unavailable for work because of the employer's unlawful conduct, should not be considered unavailable for remedial purposes. Id.

27. 795 F.2d 705 (9th Cir. 1986).

certain unfair labor practices. The Board determined that backpay could be awarded on the condition that the discriminatees prove their legal entitlement to work in the United States. Local 512 petitioned for review of the conditional aspect of the Board’s remedy.

The Board had issued its order after reviewing an Administrative Law Judge’s (ALJ) order. The ALJ had disregarded the legal status of Felbro employees appearing before him, although he noted that several of the discriminatees were apparently undocumented aliens. After finding that Felbro had committed unfair labor practices, the ALJ awarded backpay to those employees discriminated against through improper layoffs. He also ordered retroactive implementation of the collective bargaining agreement that Felbro had refused to execute and he ordered that Felbro cease and desist from like conduct in the future.

The Board amended the ALJ’s backpay award. The Board interpreted Sure-Tan as permitting backpay awards only to those lawfully entitled to work in the United States. It stated that because several employees affected by the backpay order were apparently undocumented workers, the determination of those employees’ entitlement to backpay should be left to the compliance stage. Accordingly, the Board would not have awarded backpay unless a discriminatee was able to prove legal entitlement to work in the United States.

In Local 512, the Ninth Circuit Court of Appeals rejected the Board’s approach to the backpay issue. The court began its review of the Board’s
order by distinguishing *Sure-Tan*. The court interpreted *Sure-Tan* as permitting the Board to award backpay to undocumented workers, at least so long as they remained in the United States. The court noted that, unlike the *Sure-Tan* discriminatees, there was no record the Felbro discriminatees had ever been the subjects of INS deportation proceedings or actually unavailable for work. Accordingly, the court found that *Sure-Tan* presented no obstacle to an award of backpay to undocumented workers who remain in the United States and who have not been the subjects of INS deportation proceedings.

Next, the court considered whether a backpay award would be consistent with NLRA objectives. The court stated that the Board’s proposed order would permit employers to disregard labor laws with regard to undocumented workers because the employers would incur no backpay liability for improperly discharging them. Further, the court stated that all workers, not just undocumented workers, would suffer from an order denying backpay liability. The court suggested that some employers would be encouraged to hire undocumented aliens because of the competitive advantage gained by hiring workers relatively unprotected by the NLRA. Accordingly, the court found that a backpay award to the Felbro discriminatees would serve NLRA goals by promoting the collective bargaining process.

The court then found that a backpay award would not conflict with the INA’s objectives since the INA is only “peripherally” concerned with the employment of undocumented workers. It stated that the INA did not prohibit an employer from hiring an undocumented alien nor did it prohibit an undocumented alien from accepting employment after entering the country illegally. The court recognized that the INA was more concerned

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40. *Local 512*, 795 F.2d at 717.
41. *Id*.
42. *Id*. Because the Felbro discriminatees had already been reinstated, the *Local 512* court did not have to speculate as to the actual harm suffered by them. *Id*. The amount of wages lost was easily calculable since the discriminatees had missed an identifiable number of days of work due to the lay-offs. *Id*. Thus, the *Local 512* court did not face the issue of a speculative award, see supra note 22, which the *Sure-Tan* Court considered a major obstacle to the backpay award sought therein. *Local 512*, 795 F.2d at 717.
44. *Id*. at 719.
45. *Id*.
46. *Id*.
47. *Id*.
48. *Id*. In fact, although 8 U.S.C. § 1324(a) (1982) made harboring an undocumented alien unlawful, that section specifically excluded employment from the definition of harboring. The exclusion of employment of undocumented aliens from the scope of unlawful conduct is, of course, changed by the IRCA.
with the terms and conditions of admission into the United States and the treatment of documented aliens already in the country.\textsuperscript{49}

Further, the court found that NLRA protection of undocumented workers might actually serve the INA objectives of protecting American workers' jobs, wage rates, and working conditions.\textsuperscript{50} The court suggested NLRA protection of undocumented workers might serve these goals by lessening any economic advantage gained by hiring undocumented aliens.\textsuperscript{51} A corresponding increase in job opportunities for American workers should result.\textsuperscript{52}

Finally, the court suggested that the NLRB should not inquire into a worker's status in any event because "determining alien status is a matter peculiarly within the expertise of the INS."\textsuperscript{53} NLRB officials have no authority to make such a determination.\textsuperscript{54} Accordingly, the court found that the INA did not prohibit a backpay award to the Felbro discriminatees, and it ordered the Board to make that award with no conditions attached.\textsuperscript{55}

\textbf{D. Employer Sanctions Provisions of the IRCA}

The \textit{Local 512} court supported its backpay award to undocumented workers by stating that the employment of undocumented aliens already in the United States was a "peripheral" concern of the INA since such employment was not prohibited by the INA.\textsuperscript{56} However, the recently enacted IRCA now makes such employment unlawful and imposes sanctions on employers who knowingly hire undocumented aliens.\textsuperscript{57} Under the

\textsuperscript{49.} \textit{Local 512}, 795 F.2d at 719; see also De Canas v. Bica, 424 U.S. 351, 360 (1976). The court found it unlikely that a backpay award to undocumented workers already in the country would impinge on this concern by encouraging illegal entry or reentry. \textit{Local 512}, 795 F.2d at 720. In fact, the court suggested that to the extent that affording undocumented workers protection under the NLRA would deter employers from hiring illegal aliens, there could be a corresponding reduction in illegal entry into the United States because the market for illegal labor might be lessened. \textit{Id.}

\textsuperscript{50.} 795 F.2d at 710.

\textsuperscript{51.} \textit{Id.}

\textsuperscript{52.} \textit{Id.}

\textsuperscript{53.} \textit{Id.}

\textsuperscript{54.} See \textit{Bevies Co. v. Local 986}, 791 F.2d 1391, 1393 n.3 (9th Cir. 1986) (NLRB determination of INA issues entitled to no deference).

\textsuperscript{55.} Judge Beezer dissented from the majority in \textit{Local 512} on the basis that the majority construed \textit{Sure-Tan} too narrowly. 795 F.2d at 722 (Beezer, J., dissenting). He read \textit{Sure-Tan} as requiring that those seeking backpay under the NLRA first establish their legal entitlement to be present and working in the United States. \textit{Id.} at 725. He found that an undocumented worker should not be awarded individual relief since he or she had no right to employment in the first place. \textit{Id.} Finally, Judge Beezer suggested that permitting backpay awards to undocumented workers effectively sanctions their continued violation of the INA by their very presence in the United States. \textit{Id.} at 726.

\textsuperscript{56.} See supra text accompanying notes 47-48.

IRCA, an affirmative defense to a charge of unlawful employment of an unauthorized alien is that the employer, in good faith, verified the status of the employee at the time of hiring. The IRCA does not impose a duty on the employer to continually check into the residency status of its employees. However, it is unlawful for an employer to continue to employ a person if, after hiring, the employer discovers that person is not authorized to work in the United States. These provisions bring into question whether NLRA protection of undocumented workers, like the protection ordered in Local 512, is permissible since those workers should not be employed according to the IRCA.

II. ANALYSIS

The Local 512 court ordered a backpay award after weighing NLRA and INA objectives. The court determined that the objectives of both acts would be served by permitting the NLRB to award backpay to undocumented discriminatees who remain in the United States and available for work. By discussing INA objectives, the Local 512 court implicitly recognized that the Board has a duty to accommodate INA concerns. The court,

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58. Id. § 101(b) (to be codified at 8 U.S.C. § 1324A(b)). Satisfaction of § 101(b)'s verification requirement imposes a rather minimal burden on an employer. For instance, an employer satisfies its verification requirement by attesting, on a form supplied by the Attorney General, that it verified an employee's legal status by examining a social security card and a driver's license with a photograph belonging to the employee and that those documents appeared to be genuine.


60. Immigration Reform and Control Act § 101(a)(2) (to be codified at 8 U.S.C. § 1324A(a)(2)) reads:

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

This provision on its face does not impose a duty on an employer discovering an employee to be an unauthorized alien to report that employee to the INS. The employer's only apparent duty would be to discharge the employee.

61. See supra notes 43–52 and accompanying text.

62. See supra notes 47–52 and accompanying text.
however, set out no guidelines regarding how the Board should accommodate immigration objectives when they conflict with NLRB objectives. The court may not have set out any guidelines because it determined that awarding the Felbro discriminatees backpay presented no conflict between NLRA and INA objectives. The Board nevertheless would benefit from guidelines regarding its duty to accommodate non-NLRA objectives. These guidelines should take the form of a precise methodology. Providing the Board with a precise methodology would enable it to satisfy its duty to accommodate competing statutory schemes in a reasoned and consistent manner. Such a methodology is proposed below. A discussion of how this methodology would guide Board accommodation of IRCA objectives follows.

A. A Proposed Methodology for NLRB Accommodation of Non-NLRA Objectives

The Board's first task in any NLRA remedy determination should be to consider what remedy would most promote NLRA objectives. A remedial order may not stand unless it effectuates NLRA policies. Non-NLRA concerns should be ignored in this initial determination. Requiring that the Board pursue its own mission before considering non-NLRA objectives will ensure that Board remedies are principally geared toward effectuating NLRA policies.

If it is clear to the Board that enforcement of its proposed remedy would necessarily compel a violation of a specific provision of a competing statutory scheme, the Board should devise a different remedy. But, the Board must be able to readily ascertain that such a violation would occur without making an involved factual determination or any inquiry into the policies underlying the competing statutory scheme. For instance, the Board should not unconditionally order reinstatement of an unlawfully discharged truck driver to a truck driving job if the truck driver does not have a driver's license. The illegality of driving without a license is easily ascertainable and determining compliance with the license requirement involves only a simple factual inquiry. This inquiry would not require the Board to examine the policies underlying the license requirement nor

63. The court would have had little to draw from in setting out accommodation guidelines since the Supreme Court has not set out any such guidelines. Both the Southern Steamship and the Sure-Tan Courts recognized the Board's duty to accommodate non-NLRA objectives but neither precisely defined that duty. See supra notes 25–26 and accompanying text.
64. See supra note 10 and accompanying text.
65. See infra notes 80–87 and accompanying text.
66. A reinstatement order conditioned on the driver obtaining a license, together with a backpay award, might be appropriate.
would it require the Board to balance the license policies against NLRA policies to determine which merit priority.

If enforcement of the proposed remedy would not compel a violation of a particular provision of another statutory scheme, the Board should order that remedy. This result should prevail even if enforcement of the remedy would contravene the general policies underlying the competing scheme. Accordingly, the Board's duty to accommodate non-NLRA objectives may be characterized as a negative rather than an affirmative duty: the Board has no duty to accommodate non-NLRA objectives unless, on the basis of the facts before it, the Board can readily ascertain that the contemplated action would compel a specific violation of a non-NLRA statutory scheme. The goal is to preclude the Board from inquiring into another agency's policy objectives with regard to the discriminatee.67

The Board's duty to accommodate non-NLRA objectives should be limited to a requirement that the Board avoid compelling violations of specific provisions of non-NLRA statutory schemes for five reasons. First, the Board's duty to accommodate competing statutory objectives should be narrowly construed so that the Board can effectively pursue its own objectives. The Board is charged with discouraging unfair labor practices and courts have accorded the Board broad authority to deal with those practices.68 Second, the Board is not charged with enforcing another agency's mission.69 Third, the Board has no expertise in any field but labor.70 The Board is not equipped to determine what action would best promote the policies underlying a statutory scheme other than the NLRA.71 Fourth, the Board is not the proper body to determine which statutory scheme should be given preference when statutory objectives conflict. This task is best left to Congress or the judiciary. Finally, a duty of accommodation that precludes the Board from inquiring into non-NLRA policy objectives is easy for the Board to apply.

B. NLRB Accommodation of IRCA Objectives

The methodology proposed for ascertaining the Board's duty of accommodation would guide the Board in a remedy determination when faced

67. The Board stated in Bekins Moving & Storage Co., 211 N.L.R.B. 138, 139 (1974), "We do not disagree substantially with the view that we should not undertake the enforcement of statutes which Congress has given to other agencies to administer." See also Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 111 (1958).
68. See supra notes 7-10 and accompanying text.
69. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 110-11 (1958); see also Local 512 v. NLRB, 795 F.2d 705, 721-22 (9th Cir. 1986).
70. NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180, 1183 (9th Cir. 1979).
71. Local 1976, 357 U.S. at 110-11; see also Local 512, 795 F.2d at 721-22.
with conflicting IRCA and NLRA policies. Under this methodology, the Board's first task would be to determine the appropriate remedy for an unlawfully discharged employee. The Board should focus solely on the remedy that would best promote the collective bargaining process or otherwise effectuate NLRA policies. Because the collective bargaining process generally is promoted by reinstatement and backpay awards to any unfairly discharged worker, regardless of status, the discriminatee's immigration status and IRCA concerns should have no bearing on this determination. The potential for a reinstatement and backpay order deters employers from committing unfair labor practices and encourages employees to report such practices. A blanket prohibition of reinstatement and backpay awards to undocumented discriminatees would seriously undermine NLRA objectives by encouraging employers to hire workers with no effective protection from or impetus to report unfair labor practices. Thus, in terms of promoting NLRA objectives, the Board should not consider a discriminatee's immigration status in a remedy determination.

The Board would next consider whether awarding reinstatement and backpay would violate any specific IRCA provision. The Board should not undertake this determination unless an employer claims that a particular remedy would compel an IRCA violation. A backpay award could not

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72. Undocumented workers will undoubtedly remain in the workforce and continue to be hired in spite of the IRCA employer sanctions provisions. The INS will likely face difficulties such as inadequate funding and employer resistance, among others, in enforcing the new Act. Accordingly, the NLRB is likely to continue to be presented with claims involving unfair labor practices committed against undocumented workers.

73. See supra text accompanying note 64.

74. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 195 (1941).

75. Local 512, 795 F.2d at 718.

76. Id. at 719. The prospect of an award of reinstatement and backpay undoubtedly provides the strongest impetus for an individual discriminatee to pursue an unfair labor practices complaint before the NLRB. This is particularly so for an undocumented worker who might have a heightened fear of officials and agencies because of his or her immigration status. Without a compelling reason to challenge an employer's unfair labor practices, undocumented workers would become readily exploitable by employers. Id.

77. If undocumented workers were denied NLRA protections, the collective bargaining process would be severely injured. Undocumented workers are increasingly unionizing and represent an ever-larger percentage of the American union labor force. Bracamonte, The National Labor Relations Act and Undocumented Workers: The De-Alienization of American Labor, 21 SAN DIEGO L. REV. 29, 34–35 (1983). Accordingly, continued union vitality may well depend on the unionization of undocumented workers. With no prospect of effective protection by unions, undocumented workers would have little reason to unionize.

78. The legislative history of the IRCA indicates that the Act was not intended to eviscerate NLRA
The NLRA and Undocumented Workers

compel an IRCA violation. However, a reinstatement order could violate the IRCA's prohibition of the knowing employment of unauthorized aliens if an employer asserts that the discriminatee is an unauthorized alien.

An employer’s claim that reinstatement would violate the IRCA would present a difficult choice to the Board. It could either permit the employer to use a self-serving and possibly pretextual claim to avoid a reinstatement order, or order an act which might be illegal. Faced with this choice, the Board would have two reasonable options.

The Board's first option would be to simply ignore the employer's claim and order reinstatement. At least four considerations support such action. First, ordering reinstatement in this situation would not compel a readily ascertainable violation of the IRCA because the Board is not authorized or equipped to determine the accuracy of the employer's claim. Only the

protections for undocumented aliens:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in Sure-Tan Inc. v. NLRB ..., application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."


80. Of course, Sure-Tan's prohibition of reinstatement or backpay awards to discriminatees outside the United States remains unaffected by the IRCA's enactment.

81. Such a claim would likely be raised at the NLRB hearing investigating the employer's alleged unfair labor practices. To preclude admission of an IRCA violation, the employer would likely claim that it learned of the discriminatee's illegal status after his or her discharge.

82. In reality, few employers would be likely to make this claim since it would be made at the risk of attracting INS attention to either past employment of unauthorized aliens or possible present employment of unauthorized aliens.

83. A third option would be to order reinstatement contingent on an INS determination that the discriminatee is entitled to work in the United States. Following this procedure would likely deter pretextual claims because no employer is apt to want two administrative bodies inquiring into its employment practices, especially if those practices have involved unlawful conduct. However, undocumented workers would also undoubtedly be deterred from reporting unfair labor practices committed against them to the NLRB. Undocumented workers are unlikely to participate in an unfair labor practices investigation if INS involvement is likely. The Local 512 court stated "the knowledge that deportation proceedings are a likely consequence of filing a successful unfair labor practice charge would chill severely the inclination of any unlawfully treated undocumented worker to vindicate his or her rights before the NLRB." Local 512 v. NLRB, 795 F.2d 705, 719 (9th Cir. 1986). For this reason, this third option is not attractive.

84. See supra notes 70-71 and accompanying text. Of course, if the Board were presented with a deportation order regarding a particular discriminatee, the accuracy of the employer's claim would be

607
INS or the Attorney General may appropriately make this determination. 85 Second, the IRCA's legislative history indicates that the employer sanctions provisions of the Act should not be construed to limit the NLRB's power to remedy unfair labor practices committed against undocumented workers. 86 Third, ignoring an employer's claim that a discriminatee is unauthorized to work would preclude an employer from benefitting by making a pretextual claim. Finally, since the employer would be the only party harmed by reinstatement, fairness would prevail. It is the employer's unlawful conduct in the first place that got the employer into the position of possible liability under two statutory schemes. 87

Alternatively, to avoid any possibility of compelling a violation of the IRCA, the Board could accept the employer's claim and decline to order reinstatement. The Board's task would then be to fashion a remedy that most nearly makes the discriminatee whole without reinstatement. A backpay award with interest covering the time from discharge to the time of the employer's claim before the Board of the discriminatee's illegal status would be a minimum remedy. 88

The Board would avoid a direct conflict with the IRCA by following this latter course. Employers would be encouraged, however, to assert pretextual claims that discriminatees are unauthorized aliens. Labor objectives

85. Local512, 795 F.2d at 721. The Board, however, could properly conduct a minimal inquiry into the discriminatee's status to assess the validity of the employer's claim. Thus, the Board could request the discriminatee to show papers which satisfy the IRCA verification scheme. See supra note 58 and accompanying text. Failure to be able to meet this threshold burden could properly preclude a discriminatee's reinstatement.

86. See supra note 78.

87. See W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers, 461 U.S. 757 (1983). In W.R. Grace, the Court enforced an arbitrator's award of backpay to two employees who had been discharged in violation of the seniority provisions of the existing collective bargaining agreement with the employer. The employer discharged those employees in order to uphold a conciliatory agreement reached with the Equal Employment Opportunity Commission aimed at rectifying past discrimination against women. The Court upheld the award, stating that the employer had "cornered [itself] by its own actions." Id. at 770.

88. If the Board were to take this option, it should inquire into the circumstances of the employer's alleged discovery of the discriminatee's undocumented status. If it is apparent that the employer investigated the discriminatee's status after commencement of the Board's investigation into the employer's unfair labor practice, the Board could appropriately find an additional unfair labor practice on the employer's part. It is an unfair labor practice to pursue an employee's deportation in order to avoid compliance with an NLRB remedial order. Sure-Tan v. NLRB, 467 U.S. 883, 895–96 (1984). If the Board found such an unfair labor practice, it could enter a cease and desist order.
The NLRA and Undocumented Workers

would correspondingly suffer. 89 Because the Board's primary task is to effectuate NLRA objectives and not to enforce another agency's mission, the Board should be permitted to order a discriminatee's reinstatement unless that discriminatee has left the country or has been ordered deported. 90 Requiring that the Board deny reinstatement because such an order might compel a violation of the IRCA would be inconsistent with the wide latitude the Board has been granted to deal with unfair labor practices. 91

Finally, if the Board determines that a desired remedial award is appropriate under the NLRA and would not compel a specific violation of the IRCA, the Board's inquiry should cease and it should order that remedy. The Local 512 court undertook an extensive examination of INA policies in justifying the backpay award it ordered. 92 The Board should not be required to examine immigration policies since the Board is not equipped to consider the policies underlying non-NLRA statutory schemes and such examination would interfere with the Board's pursuit of its own objectives. 93 Board action consistent with this proposal would assure the widest latitude for pursuit of NLRA objectives while giving sufficient consideration to immigration concerns.

III. THE WISDOM OF NLRA PROTECTION FOR UNDOCUMENTED WORKERS

In determining whether an individual discriminatee, alleged to be an undocumented alien, is entitled to reinstatement and backpay under the NLRA, the NLRB need only undertake the inquiry outlined above. Thus, from a purely procedural stance, policy considerations regarding the wisdom of NLRA protections for undocumented workers need not concern the Board. Nevertheless, courts may have to weigh competing policy interests in reviewing a future Board award of reinstatement and backpay to an undocumented worker. Undoubtedly, an employer appealing a future

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89. See supra note 76 and accompanying text.
90. See supra notes 80, 84 and accompanying text.
91. Whatever the Board's choice of remedy when faced with an employer's claim that reinstatement would compel violation of the IRCA's employer sanctions provisions, that remedy must be designed to encourage undocumented workers to pursue unfair labor practices claims before the Board. Effective enforcement of labor laws depends initially on unfair labor practices being reported. Thus, a discriminatee should be assured that at least a backpay award will result from pursuing a successful unfair labor practices claim involving the discriminatee's discharge and that the INS will not become involved in the Board's remedy determination.
92. See supra notes 47-52 and accompanying text.
93. See supra notes 68-71 and accompanying text.
Board order awarding reinstatement and backpay is likely to assert the award manifests bad policy, regardless of any procedural advantages that might be gained by permitting the Board to make such an award. Therefore, this Comment examines the wisdom of NLRA protection for undocumented workers from a general policy perspective.

The court in Local 512 suggested that NLRA protection of undocumented workers does not conflict with immigration objectives. Nonetheless, the analysis of the consistency between NLRA protection of undocumented workers and INA concerns has changed with the enactment of the IRCA. The new Act clearly prohibits the knowing employment of undocumented aliens. Accordingly, the INS might view NLRB protection of undocumented workers’ employment rights as discordant with IRCA policies.

In spite of the IRCA’s provisions, however, Local 512’s assertion that NLRA protection of undocumented workers would serve general INS concerns still has merit. Specifically, the court suggested that affording labor law protections to undocumented workers reduces the desirability of employing them and should, by correspondingly reducing the market for their labor, diminish the impetus to cross the border illegally. NLRA protection of undocumented workers should act together with the employer sanctions provisions of the IRCA to deter employers from knowingly hiring undocumented aliens. Immigration concerns would accordingly be furthered.

NLRA protection of undocumented workers should also be considered good policy because immigration status has been disregarded in other contexts. For instance, in Ayala v. California Unemployment Insurance Appeals Board, the court disregarded immigration status in upholding an award of unemployment compensation to an undocumented alien claimant. Similarly, the court in Perez v. Health & Social Services held that an undocumented alien was entitled to medical benefits under a wholly state sponsored plan. In Hagl v. Jacob Stern & Sons, Inc., the court held that...
The NLRA and Undocumented Workers

an undocumented alien has standing to sue in a federal court and that illegal status should not preclude a claim for damages for lost future wages. Additionally, in *Alvarez v. Sanchez*,\(^\text{102}\) the court determined that an undocumented alien may recover under the Fair Labor Standards Act for underpayment and nonpayment of wages. Finally, in *Philer v. Doe*,\(^\text{103}\) the Supreme Court found that undocumented aliens are guaranteed due process of law through the fifth and fourteenth amendments.\(^\text{104}\)

A further reason to permit NLRA protection of undocumented workers is that a violation of NLRA provisions is no less egregious than a violation of immigration laws. Prosecution of unfair labor practices claims is undertaken in the public interest; the aim of such prosecution is not the vindication of private rights.\(^\text{105}\) Accordingly, prosecuting and remedying unfair labor practices is just as important as enforcement of the immigration laws. Pursuit of labor policy should not be subordinated to that of immigration whenever the two policies conflict.

Finally, NLRA protection of undocumented workers is good policy because, without such protection, an already weak and readily exploitable segment of the American workforce would be left without any formal means of correcting abuses in the workplace committed against its members.\(^\text{106}\) Failure to provide undocumented workers protection in the workplace could result in an underclass of workers with little stake in the common good.\(^\text{107}\) Basic notions of an ordered, egalitarian society would seem to require more.\(^\text{108}\)

IV. CONCLUSION

The NLRB has a duty to accommodate IRCA objectives when it issues orders remedying unfair labor practices. The Board would satisfy this duty if, before issuing an order, it first ascertains what remedy would best effectuate NLRA policies and does not modify that remedy unless it would compel a violation of a particular IRCA provision. Accordingly, when an undocumented discriminee remains in the United States after discharge, the Board may disregard the IRCA unless the employer charged with unfair


\(^{103}\) 457 U.S. 202 (1982).

\(^{104}\) The Court did state, however, that "undocumented status is not irrelevant to any proper legislative goal." *Id.* at 220.


labor practices claims that reinstatement would compel violation of the IRCA’s prohibition against the knowing employment of unauthorized aliens. If the INS has determined the discriminatee to be deportable, the Board should not order reinstatement. In the absence of such a determination, however, the employee’s status should not bear on the Board’s determination of the discriminatee’s entitlement to reinstatement or any other remedial award. This narrow interpretation of the NLRB’s duty to accommodate IRCA objectives would further NLRA objectives by giving undocumented workers a stake in the collective bargaining process and thereby promote that process. A narrow interpretation would also do much to prevent the abuse of undocumented workers, who represent a significant and growing segment of the American work force.

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