CASENOTES

Rights Without A Remedy — Illegal Aliens Under The National Labor Relations Act: *Sure-Tan, Inc. and Surak Leather Company v. NLRB*[1] — Section 2(3) of the National Labor Relations Act[2] (NLRA or Act) defines who shall be an "employee" for the purposes of the Act. Courts have traditionally given broad latitude to the National Labor Relations Board's (NLRB or Board) interpretation of this section. An employer who discharges an employee under the Act because of that employee's exercise of his or her NLRA rights commits an unfair labor practice in violation of sections 8(a)(1) and (3) of the Act.[3] This prohibition extends to surreptitious efforts by employers to rid themselves of employees who exercise their NLRA rights by making it appear that the employees quit. This situation is termed a constructive discharge.[4] Section 10 of the Act grants the NLRB the power to prevent anyone from engaging in unfair labor practices,[5] and the Board may under section 10(c) take such affirmative action as will effectuate the policies of the Act in redressing unfair labor practices.[6] Courts have permitted the Board wide discretion in fashioning remedies, deferring to the Board's expertise in labor relations, as long as the remedial order effectuates the Act's policies and is not punitive. In *Sure-Tan, Inc.*

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[1] 104 S. Ct. 2803 (1984).

[2] 29 U.S.C. § 152(3) (1982). The statutory text of § 2(3) reads:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

[3] 29 U.S.C. § 158(a)(1), (3) (1982). The text of § 8(a)(1) and (3) reads in relevant part:

> It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

The text of § 7, 29 U.S.C. § 157 (1982), reads, in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."

[4] A constructive discharge is where the employer, motivated by anti-union animus, creates "intolerable" conditions so that the employee is forced to quit. Such quits are seen as constructive discharges and as such the employer violates § 8(a)(1) and (3). *See* T. KHEEL, LABOR LAW § 12.05[1][a] (1982).

[5] 29 U.S.C. § 160 (1982).

[6] Section 10(c) of the NLRA, 29 U.S.C. § 160(c) (1982), reads, in relevant 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 practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .

and Surak Leather Co. v. NLRB[7] the United States Supreme Court addressed the issues of whether illegal aliens[8] can be employees within the meaning of the NLRA, whether certain illegal aliens had been constructively discharged, and whether the remedies fashioned by the Board and the court of appeals were appropriate.

The petitioners in *Sure-Tan* were small leather processing firms, deemed a single integrated employer,[9] located in Chicago, Illinois.[10] In July, 1976, a union[11] (Union) began to organize the employees,[12] most of whom were illegal aliens.[13] The Union was elected on December 10, 1976.[14] The petitioners filed objections[15] to the election on the

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[7] 104 S. Ct. 2803 (1984).

[8] This casenote uses the term "illegal alien employees" rather than "undocumented aliens" or "undocumented workers" so as to better convey their situation in our society. The illegal immigration status of an alien is defined by the Immigration and Naturalization Act (INA), § 275, 8 U.S.C. § 1325 (1982). The pertinent statutory text reads:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor . . . and for a subsequent commission of any such offenses shall be guilty of a felony.

[9] 104 S. Ct. at 2804. The two firms — Sure-Tan, Inc. and Surak Leather Co. — were found by the Board to constitute a single employer within the meaning of the Act. Sure-Tan & Surak Leather Co., 231 N.L.R.B. 138, 139 (1977), *enf'd*, 583 F.2d 355, 358 (7th Cir. 1978). The Board based this holding on its finding that the two businesses were affiliated, with common officers, ownerships, directors, and operators, and with a common labor policy. *Id.*

[10] 104 S. Ct. at 2806.

[11] The union was the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America. *Id.*

[12] *Id.* The employer coercively interrogated, threatened, and cajoled the employees in an attempt to defeat the organizing campaign. *Id.*

[13] *Id.* These employees were Mexican nationals present in the United States without visas or immigration papers authorizing them to work. *See supra* note 8.

[14] 104 S. Ct. at 2806.

[15] *Id.* A union (or employees) may file an election petition with the Regional Office of the NLRB. 29 C.F.R. § 101.18(a) (1984). To invoke the Board's election machinery the union must also submit proof that at least thirty percent of the employees have designated the union as their representative. This showing of interest is usually demonstrated by signed authorization cards. *Id.* § 101.17. A field examiner from the Regional Office will then investigate the petition to determine whether the Board has jurisdiction, whether there are reasonable questions of the bargaining unit configuration, whether the election would effectuate the purpose of the Act, and whether there is sufficient probability that the employees have selected the union as their representative. *Id.* § 101.18(a). If there are questions raised concerning representation which are not informally adjusted, notice is given of a formal, nonadversarial hearing before the regional director. *Id.* § 101.20(a), (c). The regional director then issues a decision either directing an election or dismissing the case. *Id.* During the election the employer may challenge ballots individually on the basis of voter eligibility, *id.* § 101.19(a)(4), (b), and may also file objections to the election results generally within five days of the election tally. *Id.* The regional director then conducts an investigation. *Id.* If the parties have not previously agreed to be bound by the regional director's determinations, *id.* § 101.19(a), the parties may file exceptions to the regional director's report within ten days with the Board. *Id.* § 101.19(b). If the parties have agreed to follow the informal decision of the regional director, the regional director may dismiss the objections and certify the union, or order a new election. *Id.* § 101.19(a)(4). Section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1982), provides that a party may have judicial review if "aggrieved by a final order," but any Board decision at this point is not judicially reviewable, since decisions in representation proceedings are not "final orders." American Federation of Labor v. NLRB, 308 U.S. 401, 411 (1940). To secure judicial review of its objections the employer must commit an unfair labor practice. R. GORMAN, BASIC TEXT ON LABOR

grounds, *inter alia*, that six of the seven eligible voters were illegal aliens.[16] The Regional Director found that the employees were entitled to the protection of the NLRA despite their illegal alien status,[17] and consequently certified the Union on January 17, 1977.[18] Petitioners received notice of this decision on January 19, 1977.[19]

On the next day, January 20, 1977, petitioners' president sent the Immigration and Naturalization Service (INS) a letter giving the names of five employees, claiming they were Mexican nationals, and asking the INS to check their status as soon as possible.[20] On February 18, 1977 INS agents inspected petitioners' premises, and found that the five employees were living and working illegally in the United States.[21] The INS agents arrested the five employees and removed them.[22] Later that day these five were placed on a bus, at their own expense, bound ultimately for Mexico.[23]

An administrative law judge (ALJ) heard the unfair labor practice complaints issued by the NLRB Regional Director against Sure-Tan.[24] The ALJ concluded that the illegal aliens were employees within the meaning of the Act, and that the employer had constructively discharged them in violation of the Act.[25] The ALJ reasoned that the aliens' removal to Mexico made them unavailable for reinstatement or backpay.[26] The ALJ recommended, however, that the Board issue a reinstatement order allowing the illegal alien employees six months to return to the United States,[27] and suggested a four month minimum backpay award.[28] The Board adopted the ALJ's decision[29] except for

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LAW 43 (West 1976). If the union files a complaint, and the Board finds a violation, the employer may then go to court to have the Board's order set aside on the grounds of error in the representation proceeding. *Id.*

[16] 104 S. Ct. at 2806.

[17] NLRB v. Sure-Tan, Inc., 583 F.2d 355, 357 (7th Cir. 1978).

[18] *Id.* The Board denied Sure-Tan's request for a review of the ruling. *Id.* Sure-Tan refused to bargain collectively. *Id.* The Union filed a charge on March 1, 1977, and the Board's General Counsel issued a complaint. *Id.* A refusal to bargain collectively with a certified union is an unfair labor practice, in violation of section 8(a)(1) and (5) of the Act. The text of section 8(a) of the NLRA, 29 U.S.C. § 158(a) (1982), reads in relevant part: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (5) to refuse to bargain collectively with the representatives of his employees'. . . ." The Board granted summary judgment on August 4, 1977, ordering Sure-Tan to bargain with the Union and to post appropriate notices. 583 F.2d at 357.

[19] *Sure-Tan*, 104 S. Ct. at 2806.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] NLRB v. Sure-Tan, Inc., 672 F.2d 592, 599 (7th Cir. 1982). Each employee executed an INS Form I-274, acknowledging his illegal status and accepting the INS's grant of voluntary departure as a substitute for deportation. *Id.* To be eligible for voluntary departure the alien must pay for his or her own departure and establish to the satisfaction of the Attorney General that he or she is, and has been, a person of good moral character for the last five years. 8 U.S.C. § 1254(e) (1982). The grant of voluntary departure avoids the stigma of deportation, allows the alien to choose his or her destination, and makes future legal reentry into the United States considerably easier than if he or she were deported. *See* Jain v. Immigration and Naturalization Service, 612 F.2d 683, 686 n.1 (2d Cir. 1979), *cert. denied*, 446 U.S. 937 (1980).

[24] 104 S. Ct. at 2807. *See* Sure-Tan, Inc., 234 N.L.R.B. 1187 (1978).

[25] 104 S. Ct. at 2807.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

the remedies portion, ordering instead the conventional remedy of reinstatement with backpay, and leaving questions of unavailability to compliance proceedings.[30]

The United States Court of Appeals for the Seventh Circuit enforced the Board's ruling, except as to remedies.[31] The court modified the order to condition reinstatement on the discharged aliens' legal presence in the country and to expand the reinstatement period to four years.[32] As to backpay, the court required that backpay be tolled for periods when the discharged employees were not legally in the country, but also ordered a six month minimum backpay award.[33]

The United States Supreme Court in *Sure-Tan, Inc. and Surak Leather Co. v. NLRB*[34] held that illegal alien workers are employees within the meaning of section 2(3) of the NLRA,[35] and that section 8(a)(3) of the Act applies to unfair labor practices committed against such illegal aliens.[36] The Court stated that when an employer reports the presence of an illegal alien employee to the INS in retaliation for the employee's protected union activity, and the employer's report then results in the illegal alien's exit from the country, there is a discriminatory constructive discharge in violation of section 8(a)(3).[37] While acknowledging that the Board is empowered by section 10(c) of the Act to take affirmative remedial action for section 8(a)(3) unfair labor practices,[38] the Court took care to mark the boundaries of the Board's remedial power. According to the Court, the Board, not the courts of appeals, should fashion remedial measures,[39] and those measures must comport with federal immigration law.[40] Specifically, the Court ruled that a reinstatement order must be conditioned on legal presence in the United States.[41] In addition, the Court held that the Board cannot order a conjectural minimum backpay award. According to the Court, a backpay order must be based on concrete evidence and be sufficiently tailored to the specific unfair labor practice it is intended to redress.[42] Finally, the Court ruled that backpay must be tolled during the aliens' illegal presence in the United States.[43]

The *Sure-Tan* decision will have a significant impact on the rights of the 3.5 to 5 million illegal aliens in the United States.[44] By holding that illegal aliens are employees under the Act, the Court recognizes that this group must be taken into account in

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[30] *Id.*

[31] *Id.* at 2808. *See* NLRB v. Sure-Tan, Inc., 672 F.2d 592 (7th Cir. 1982).

[32] 104 S. Ct. at 2808.

[33] *Id.*

[34] *Id.* at 2803.

[35] *Id.* at 2808, 2809. 29 U.S.C. § 152(3) (1982).

[36] 104 S. Ct. at 2811. 29 U.S.C. § 158(a)(1), (3) (1982).

[37] 104 S. Ct. at 2810–12.

[38] *Id.* at 2812.

[39] *Id.* at 2812–13. The majority held that the court of appeals had erred in modifying the Board's order by expanding the reinstatement period to four years. *Id.* at 2816. The majority similarly reversed the court of appeals for exceeding its reviewing authority on drafting and verification. *Id.*

[40] *Id.* at 2815.

[41] *Id.*

[42] *Id.* at 2814.

[43] *Id.* at 2815.

[44] *See* Kutchins & Tweedy, *No Two Ways About It: Employer Sanctions Versus Labor Law Protections For Undocumented Workers*, 5 INDUS. REL. L.J. 339, 343 (1983) (citing CONGRESSIONAL RESEARCH SERVICE, SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW 6 (1980)).

national labor policy. The Court's holding that the employer's notification of the employees' illegal alien status to the INS constituted a constructive discharge could have provided greater protection of NLRA rights to illegal aliens. The Court's establishment of a stricter standard of judicial review of the Board's decision, however, narrows the scope of the Board's remedial powers and results in illegal aliens having NLRA rights, but no remedy. Thus, the *Sure-Tan* decision undercuts the strength of unions attempting to organize illegal alien employees and provide them with protection. Moreover, the *Sure-Tan* decision undercuts the ability of American workers to organize and elect a union to represent them. An employer can now hire illegal aliens — who will avoid unionization for fear of provoking their employer into notifying the INS of their presence — in order to dilute the strength of unionization sentiment among its legally present employees.

Part I of this casenote presents the background on the significant aspects of the *Sure-Tan* decision. This section focuses on the status of illegal aliens under the NLRA by examining the legislative history of the Act as well as relevant Board and court decisions. Part I concludes with a discussion of the background of the constructive discharge doctrine and the scope of the Board's remedial power. Part II examines the procedural history of *Sure-Tan* and the reasoning of the Supreme Court. Part III critiques the Supreme Court decision. This section maintains that the Court's holding that illegal aliens are employees under the NLRA is consistent with previous interpretations of the Act. Part III also argues that the Court's finding of constructive discharge, though proper, was not necessary under the previous contours of the constructive discharge doctrine. Finally, Part III asserts that the Court in *Sure-Tan* announced a new, more intrusive standard of review and stated a narrower scope of the Board's remedial authority without sufficient justification. By reaching this decision the Court mocks its own holding that the court of appeals had overstepped its bounds in modifying the Board's order, as well as its own holding that illegal aliens are employees under the Act. Thus, this casenote concludes that the *Sure-Tan* decision endows illegal aliens rights without a remedy.

I. History of the Status of Illegal Aliens Under the NLRA, the Doctrine of Constructive Discharge, and the Scope of the NLRB's Remedial Authority

The Background section examines the three large topics that the *Sure-Tan* decision covers. Section A examines the Board's and courts' decisions concerning whether illegal aliens are employees under the NLRA. Section B then presents the background of the doctrine of constructive discharge, that is, when the employer will be deemed to have discharged an employee in violation of the NLRA without having formally fired the employee. Finally, section C examines the nature and scope of the NLRA's grant of remedial power, thereby providing a context for analyzing the remedial orders in *Sure-Tan*.

A. *Illegal Aliens as Employees Under the NLRA*

In determining whether illegal aliens are "employees" within the meaning of the Act, subsection 1 will examine the legislative history of the NLRA. Because this legislative history is inconclusive, subsection 2 looks to past Board decisions for further authority on the status of illegal aliens under the Act. After subsection 3 presents the standard of judicial review of the Board's construction of the NRLA in general and the definition

of "employee" in particular, subsection 4 examines courts of appeals' reviews of NLRB rulings regarding whether illegal aliens are employees within the meaning of section 2(3) of the NLRA.

1. Legislative History

The legislative history of the NLRA indicates that Congress never specifically considered whether an illegal alien worker could be included in the term "employee." The Senate and House reports referred to the definition of employee in section 2(3) of the Act as "self-explanatory."[45] The legislators intended the meaning to be broad and accordingly a common-sense definition, being understood on the House floor during debates as including "every individual on th[e] pay roll."[46] When Congress amended section 2(3) of the NLRA through the Labor Management Relations Act of 1947, the House report reiterated this understanding.[47] The 1947 amendments specifically exclude from the definition of "employee" any individual employed as a supervisor and any individual having the status of an independent contractor.[48] These distinctions further indicate that Congress intended "employee" be given a broad, common-sense definition based upon the workplace function of the laborer, and the economic relationship between the laborer and employer, rather than upon legal classifications.

While legislative history must be referred to as an initial source when interpreting a statute, in this case Congress did not specifically consider the status of illegal aliens under the Act, although Congress did intend the definition of "employee" to be applied broadly and functionally. Because the legislative history of the NLRA is inconclusive on this issue, further assistance in interpreting the meaning of employee under the Act can be found by examining NLRB practice.

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[45] *See* Note, *Illegal Aliens as "Employees" Under the National Labor Relations Act:* NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979), 68 GEO. L.J. 851, 856 (1980) [hereinafter cited as Note, *Illegal Aliens as Employees*] (citing S. REP. No. 573, 74th Cong., 1st Sess. 6–7 (1935) (definition of "employee" called self-explanatory); H.R. REP. No. 1147, 74th Cong., 1st Sess. 9–10 (1935) (definition of "employee" called self-explanatory)). *See also* Note, *Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict*, 80 COLUM. L. REV. 1296, 1297–98 (1980) [hereinafter cited as Note, *Retaliatory Reporting*].

[46] 79 CONG. REC. 9686 (1935) reports the following exchange between Rep. Taylor and Rep. Connery, chairman of the Committee on Labor:

> Mr. Taylor: Does that mean that every man on the payroll has it within his own right or privilege to join whatever labor union he wants at that plant? Mr. Connery: Yes .... Mr. Taylor: Beginning at the top of the scale of the payroll, at what point would you segregate them and say to one that he belongs to the employer class and to another that he belongs to the employee class? Mr. Connery: They have not had any difficulty about that in any of the boards. The Federal Trade Commission or any other Federal board never had any trouble finding out who was an employer or employee.

[47] *See* Note, *Retaliatory Reporting*, *supra* note 45, at 1298 n.9 (1980), which quotes H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947) as follows:

> "An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone ... means someone who works for another for hire .... Congress intended then [in 1935, when it passed the NLRA], and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings."

[48] *See* 29 U.S.C. § 152(3) (1982), *as amended by* 61 Stat. 137 (1947).

2. NLRB Decisions

The Board has consistently held that illegal aliens are employees within section 2(3) of the Act,[49] but this practice has not had a long history, dating back only to 1973.[50] Despite these several years of consistently ruling that illegal aliens are employees within section 2(3), and thus entitled to protections of the Act, the Board has not provided a sound rationale for reaching this result.[51] In finding that illegal aliens are employees under the Act, the Board has merely cited to previous Board decisions which stood either for the same proposition,[52] or for the rule that noncitizenship is not a basis for exclusion from a bargaining unit or disqualification from voting in elections conducted by the Board.[53] The Board, therefore, has held that the NLRA accorded protection to illegal aliens' exercise of section 7 rights without clearly articulating the reasons for extending such protection from noncitizens to illegal aliens.[54] There has been a similar

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[49] See *infra* notes 53–54 for cases holding that illegal aliens are employees within the meaning of the NLRA.

[50] *See* Lawrence Rigging, Inc., 202 N.L.R.B. 1094 (1973).

[51] *See* Casenote, *Labor Law — Illegal Aliens Are Employees Under 29 U.S.C. § 152(3) (1976) And May Vote in Union Certification Elections: NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978)*, 10 RUT.-CAM. 747, 751 n.34 (1979) [hereinafter cited as Casenote, *Illegal Aliens in Certification Elections*]; Note, *Illegal Aliens as Employees*, *supra* note 45, at 856–57. In NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978), Judge Wood stated: "I am not persuaded in this instance by the argument that since the Board's interpretation is one of long standing it is therefore entitled to great weight. I view it as only a case of the Board having been wrong for a long time." *Id.* at 361–62 (Wood, J., dissenting).

[52] See *infra* note 54 for cases supporting this proposition.

[53] *See, e.g.*, Lawrence Rigging, Inc., 202 N.L.R.B. 1094, 1095 (1973) (eligibility of aliens to vote in Board elections "well established"); Seidmon, Seidmon, Henkin & Seidmon, 102 N.L.R.B. 1492, 1493 (1953) (eligibility of aliens to vote in Board elections "well established"); Cities Service Oil Co. of Pennsylvania, 87 N.L.R.B. 324, 331 (1949) (Board rejected employer's objections to election, responding, "[t]he eligibility of aliens to cast ballots in Board elections is too well established to warrant justification anew here"); Azusa Citrus Assoc., 65 N.L.R.B. 1136, 1138 (1946) (Board rejected petition to exclude Mexican Nationals from bargaining unit, stating, "[i]n accordance with our prior determination we shall permit Mexican Nationals to participate in the election hereinafter directed if they are otherwise eligible"); Allen & Sandilands Packing Co., 59 N.L.R.B. 724, 730 (1944) (Board rejected petition to exclude Mexican Nationals from bargaining units, stating, "noncitizenship is neither a ground for exclusion from a bargaining unit nor a disqualification for participating in elections conducted by the Board"); *In re* Dan Logan & J.R. Paxton, 55 N.L.R.B. 310, 315 n.12 (1944) (Board held that noncitizenship does not disqualify employees from voting in elections because the Act does not differentiate citizens from noncitizens, and not making such a distinction effectuates the purposes of the Act).

[54] *See, e.g.*, Sun Country Citrus, 268 N.L.R.B. 700 (1984) (illegal aliens possess § 7 rights and may not be discriminatorily treated for their exercise, in violation of § 8(a)(1)); La Mousse, Inc., 259 N.L.R.B. 37 (1981) (employee's illegal alien status is irrelevant in a discriminatory discharge case); Apollo Tire Co., 236 N.L.R.B. 1627 (1978) (employee's illegal alien status is irrelevant in a discriminatory discharge case); Hasa Chem., Inc., 235 N.L.R.B. 903 (1978) (NLRA extends protections to illegal alien employees who are interrogated and coerced by their employer in violation of § 8(a)(1)); Sure-Tan, Inc., 234 N.L.R.B. 1187 (1978) (employee's illegal alien status is irrelevant in a discriminatory discharge case); John Dory Boat Works, 229 N.L.R.B. 844 (1977) (NLRA extends protections to illegal alien employees who are interrogated and coerced by their employer in violation of § 8(a)(1)); Sure-Tan, Inc., 231 N.L.R.B. 138 (1977) (immigration status of employees in bargaining unit is no bar to Board certification of union); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976) (NLRA protects illegal alien employees from discriminatory discharges violative of § 8(a)(3)); Handling Equipment Corp., 209 N.L.R.B. 64 (1974) (aliens "lacking working papers"

lack of analysis in representation cases.[55] Thus the Board's consistent rulings merely amounted to reiteration rather than analysis.[56]

The Board finally recognized in the 1980 case of *Duke City Lumber, Inc. v. NLRB*[57] that its previous decisions had only analyzed the Act's coverage in terms of alienage per se, rather than on the basis of the legal or illegal status of such aliens in determining exclusions from bargaining units. In *Duke City Lumber* an employer owned two sawmills in Texas and employed 185 employees.[58] A labor organization at the sawmills sought to represent a unit formed by all employees except illegal aliens.[59] The labor organization contended that the illegal aliens had an insufficient community of interests with the other employees.[60] The Board held that under the NLRA no distinctions can be made between citizens and noncitizens.[61] Thus there was no reason, the Board stated, to exclude employees from a bargaining unit on the basis of their illegal immigration status.[62]

In explaining its decision not to distinguish illegal alien employees from other employees, the Board noted that the evidence failed to show that the employees — illegal aliens and other workers — did not have a community of interest with regard to wages, hours, benefits, job duties, or terms and conditions of employment.[63] The fact that the aliens were illegally present in the United States was irrelevant, the Board further stated, because no Federal legislation prohibited the hiring of illegal aliens,[64] and it was not within the Board's authority to alter the obligations imposed by the NLRA in order to pursue immigration policies.[65]

This review of NLRB practice shows that the Board has consistently deemed illegal aliens to be covered by the Act without giving any justification. Only recently in *Duke City Lumber* has the Board explained its rationale, and there the rationale was that no exclusion of illegal aliens appeared within the four corners of the Act. As a final aid to interpreting the definition of "employee" in the NLRA, this casenote turns, after briefly setting out the standard of judicial review of the status of illegal aliens under the Act, to decisions of courts of appeals.

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are employees under the Act); Lawrence Rigging, Inc., 202 N.L.R.B. 1094 (1973) (an alien employee, legally in the country on a student visa, but without a green card, held to be eligible to vote as an "employee" in a Board election).

[55] *See infra* note 53 and accompanying text.

[56] Note, *Illegal Aliens as Employees, supra* note 45, at 851 n.3; Casenote, *Illegal Aliens in Certification Elections, supra* note 51, at 751 n.34. The rule that the Board will not distinguish between citizens and noncitizens is itself without a firm analytic foundation. The NLRB formulated the rule in dicta in *In re* Dan Logan & J.R. Paxton, 55 N.L.R.B. 310, 315 n.12 (1944), a representation case. The *In re Dan Logan* Board supported its rule by a "cf." cite to *In re* United States Bedding, 52 N.L.R.B. 382, 388 (1944), a case which held that race is an impermissible criterion in the determination of the appropriate bargaining unit, because of the national policy of nondiscrimination on the basis of race, creed, color, or national origin.

[57] 251 N.L.R.B. 53, 53 (1980).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 53–54.

[65] *Id.* at 54.

3. The Standard of Judicial Review of the NLRB's Construction of the NLRA

In *Ford Motor Co. v. NLRB*[66] the Court stated that the Board's construction of the Act should be upheld if it is "reasonably defensible" and should not be rejected merely because the reviewing court might prefer another view of the statute.[67] In the 1978 case of *NLRB v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers*[68] the Court stated that although the reviewing court might prefer a different application of the NLRA, Congress committed primarily to the Board the responsibility of interpreting the NLRA to effectuate national labor policy.[69] Moreover, in the 1944 case of *NLRB v. Hearst Publications*[70] the Court explained that the expertise of the Board will frequently bear on the question of who is an employee under the Act.[71] Courts should give considerable deference to the Board's decisions in this area, the Court further reasoned, because Congress assigned the task of defining who is an employee under the Act primarily to the Board, and because the Board, through its everyday experience in the administration of the Act, is more familiar with the circumstances and backgrounds of employment relationships in various industries.[72] The "reasonably defensible" standard of review, therefore, entails a significant degree of deference to the Board's determination of who constitutes an employee under the Act.

4. Circuit Courts of Appeals' Decisions

Prior to the *Sure-Tan* case only two circuit courts of appeals had faced the question of whether illegal alien employees are "employees" within the meaning of the NLRA. The first was the United States Court of Appeals for the Seventh Circuit in *NLRB v. Sure-Tan, Inc. and Surak Leather Co.* (*Surak Leather*),[73] and the second was the United States Court of Appeals for the Ninth Circuit in *NLRB v. Apollo Tire Co., Inc.*[74]

Surak Leather involved a challenge to a union authorization campaign[75] preceeding the events leading to *Sure-Tan*, although the cases are unrelated procedurally.[76] In *Surak Leather* the controversy arose when, after the Union won the ballots of six out of the seven employees eligible to vote,[77] the employer refused to bargain collectively with the union.[78] The Board held that illegal aliens are employees under the NLRA, and therefore can vote in a Board election.[79]

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[66] 441 U.S. 488 (1979).

[67] *Id.* at 497.

[68] 434 U.S. 335 (1978).

[69] *Id.* at 350.

[70] 322 U.S. 111 (1944).

[71] *Id.* at 130–31.

[72] *Id.* at 130.

[73] 583 F.2d 355 (7th Cir. 1978). For the sake of clarity, this case will be referred to as *Surak Leather*, but courts and commentators refer to it as *Sure-Tan* or *Sure-Tan I*. As stated previously, *supra* note 9, this case is factually connected but procedurally unrelated to the *Sure-Tan* case that is the subject of this casenote.

[74] 604 F.2d 1180 (9th Cir. 1979).

[75] *Surak Leather*, 583 F.2d at 356.

[76] 672 F.2d 592 (7th Cir. 1982), *rev'd in part and remanded*, 104 S. Ct. 2803 (1984).

[77] 583 F.2d at 357.

[78] *Id.*

[79] *Id.*

In the *Surak Leather* enforcement proceedings[80] the employer argued that the certification of the Union was improper because a majority of the employees who voted were illegal aliens.[81] The Seventh Circuit held that illegal aliens were employees under the Act and thus were eligible to vote in a certification election.[82] In explaining its decision, the court first noted the longstanding and consistent interpretation by the Board that aliens are employees under the Act.[83] Second, the court determined that the language of the Act does not specifically exclude aliens, but instead is written broadly.[84] Third, the court stated that the Board's interpretation is entitled to great deference and will be upheld unless there are "compelling indications that it is wrong."[85] The court then determined that holding illegal aliens to be covered by the Act was consistent with federal immigration policy, because no immigration statute prohibits illegal aliens from employment nor from voting in a Board election.[86] Declining to certify the Union on the grounds that it is composed of illegal aliens, the court concluded, would actually encourage illegal immigration, because employers would have an extra incentive to hire illegal aliens and thus decrease the likelihood of unionization.[87]

The Ninth Circuit addressed the same question of the status of illegal aliens under the NLRA in *NLRB v. Apollo Tire Co.*[88] In this case, several alien employees were discharged by their employer in retaliation for the employees' filing of a complaint with the Secretary of Labor charging that the employer had failed to pay its employees overtime wages.[89] The court affirmed the Board's finding of unfair labor practices and its issuance of cease and desist and reinstatement orders.[90] At issue before the court of appeals in *Apollo Tire* was whether the Board's exclusion of evidence of the employees' undocumented immigration status was improper.[91] The court enforced the Board's order,[92] holding that the Board had not erred in excluding evidence that the employees were illegal aliens.[93] The *Apollo Tire* court followed the reasoning of the Seventh Circuit in *Surak Leather* and held that illegal aliens were employees within the meaning of the Act.[94] The court agreed with the *Surak Leather* decision that deference to the Board's consistent interpretation of the Act as including aliens is appropriate and that giving illegal aliens the protection of the NLRA would best further the policies underlying the immigration laws.[95]

Thus, prior to the Supreme Court's decision in *Sure-Tan*, the Seventh and Ninth Circuits — the only circuits to address the issue — held that illegal alien workers were

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[80] *Id.*
[81] *Id.* at 358.
[82] *Id.* at 359.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 360.
[88] 604 F.2d 1180 (9th Cir. 1979).
[89] *Id.* at 1181–82.
[90] *Id.* at 1182, 1184. The unfair labor practices were held to be violations of section 8(a)(1) and (4) of the Act.
[91] 604 F.2d at 1181.
[92] *Id.* at 1184.
[93] *Id.*
[94] *Id.*
[95] *Id.*

"employees" within the meaning of the NLRA. Both circuits based their decisions on judicial deference to the Board's past practice, and the absence of any explicit exclusion of illegal aliens within the language of the NLRA itself, or any explicit conflict with immigration legislation. Finally, both courts considered their holding to be consistent with the immigration laws' policy of curtailing illegal immigration. Even though the *Surak Leather* and *Apollo Tire* courts relied heavily on the doctrine of judicial deference to the NLRB, these courts of appeals looked beyond the inconclusive legislative history of the Act and the four corners of the Act itself in concluding that illegal aliens are employees under the Act.

If illegal alien employees are considered to be "employees" within the meaning of the NLRA, as they were in past NLRB decisions and in the courts of appeals' decisions in *Surak Leather* and *Apollo Tire*, then the illegal alien employees will receive the rights and protections of the NLRA. One of the most important rights given to employees under this national labor legislation is protection against discharges — including constructive discharges — which are motivated by the employees' exercise of their NLRA rights.

B. *The Doctrine of Constructive Discharge*

Section 8(a)(1) and (3)[96] of the NLRA prohibits an employer from discharging an employee for that employee's membership in or support of a union.[97] An employer may try to effectively fire a worker because of that worker's union activity by arranging working conditions in such a way that the worker appears to quit voluntarily rather than remain under the terms and conditions of employment established by the employer.[98] If the NLRB finds that the employer's conduct was motivated by an employee's exercise of rights guaranteed by the NLRA, the Board will find the apparent "quit" to have been in fact a "constructive discharge,"[99] and thus rule that the employer violated section 8(a)(1) and (3) of the Act.[100]

The United States Court of Appeals for the Fifth Circuit in the 1981 case of *NLRB v. Haberman Construction Co.*[101] articulated a two-prong test for finding a constructive discharge.[102] The first prong of the test is that the employer must have created working conditions so intolerable that an employee is forced to quit.[103] The Board and courts have defined broadly the element of intolerable working conditions, finding that such working conditions may be characterized by harassment and humiliation,[104] and material

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[96] See *supra* note 3 for the pertinent statutory text of section 8(a)(1) and (3).

[97] R. GORMAN, *supra* note 15, at 137.

[98] *Id.*

[99] *Id.*

[100] T. KHEEL, *supra* note 4, § 12.05[1][a].

[101] 641 F.2d 351 (5th Cir. 1981) (rehearing en banc).

[102] *Id.* at 358.

[103] *Id. See, e.g., In re* Texas Textile Mills, 58 N.L.R.B. 352, 353–54 (1944), where the employer, contrary to its usual practice, replaced an employee in the work he ordinarily performed and required him to perform duties which, as the employer knew, were injurious to the employee's hands and caused intolerable physical pain.

[104] *See, e.g.*, NLRB v. Holly Bra of California, Inc., 405 F.2d 870 (9th Cir. 1969). In *Holly Bra* the court affirmed the Board's finding that an employee had been constructively discharged by her employer. *Id.* at 871–72. The employee was active in organizing for a union. *Id.* at 871. After the election, the employer harrassed the employee on the job, claiming her work was intentionally done

changes in job assignment and conditions.[105] Moreover, the Board has in one case held that it is unnecessary that an employer's use of harassment and humiliation occur at the work site or be closely connected with working conditions for the intolerable working conditions prong of the constructive discharge test to be satisfied.[106]

The second prong of the constructive discharge test is that the employer must have acted with anti-union animus, that is, with specific intent "to encourage or discourage membership in any labor organization" within the meaning of section 8(a)(3) of the Act.[107] Where anti-union animus is specifically shown, the employer may still raise the defense that it also acted for nondiscriminatory reasons. Accordingly, the Board and courts must determine if the purportedly legitimate reasons are actually pretext, in

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carelessly and poorly. *Id.* The administrative law judge had concluded that the employer's treatment of the employee was a management scheme to humiliate and harass her, so as to force her into quitting her job. *Id.* at 872. In Perko's, Inc., 236 N.L.R.B. 884 (1978), the Board also held that an employee who quit had been constructively discharged. The Board found that the employer subjected the employee to petty verbal harassment; threatened to eliminate her hours of work; reduced her hours of work; scheduled her for Sunday work knowing it was especially onerous due to her family responsibilities; and was motivated by anti-union animus, with intent to discourage the employee's engaging in protected union activity. *Id.* at 901. *But see* P.E. Van Pelt, 238 N.L.R.B. 794 (1978), where the Board found anti-union animus by an employer, but held that an employee who quit was not working under sufficiently adverse conditions to find that he had been constructively discharged. *Id.* at 802. The employer in that case had issued written warnings to employees because of their union activities. *Id.* Although this conduct by the employer in and of itself violated the Act, the improper warnings and harassment directed toward the employees did not make the working conditions "physically or emotionally impossible." *Id.* Similarly, in Keller Mfg. Co., 237 N.L.R.B. 712 (1978), the Board held that an employee who quit due to stressful working conditions had not been constructively discharged. *Id.* at 723. The Board found that the evidence failed to establish that such intolerable conditions were imposed such that employer reasonably should have expected employee to quit. *Id.* at 724. Alternatively, according to the Board, the stressful conditions — derogatory remarks by another employee — were not attributable to the employer. *Id.* at 723.

[105] *See, e.g.*, Transportation Management Corp., 257 N.L.R.B. 760 (1981), where the Board found that employees had been constructively discharged where the employer took away the employees' delivery trucks, making it impossible for them to do their jobs. *Id.* at 760. Return of the trucks was conditioned on the employees' waiving their right to strike. *Id. See also* J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972), where the court, affirming the Board, held that a female employee who quit had been constructively discharged. *Id.* at 491. The employee had supported unionizing at a nonunion plant. *Id.* at 494. The employer changed her pay from hourly wage to piecemeal rate. *Id.* At the new rate she was unable to make even federal minimum wage. *Id.* at 494 n.2. The employer's anti-union animus was clear. *Id.* at 495. *Cf.* Thurston Motor Lines, 237 N.L.R.B. 498 (1978), where the Board held that there was no constructive discharge where the change in the working conditions was justified, not pretextual. *Id.* at 523, 535. The employer transferred an employee from a position as driver to a position on the loading dock, *id.* at 523, because of the employee's poor driving. *Id.* at 535. The transfer entailed neither loss of income nor more burdensome working conditions. *Id.* Similarly, in Charles Carter & Co., 236 N.L.R.B. 37 (1978), the Board held that there was no discriminatory discharge. *Id.* at 40. The employer's termination of an employee working on its construction operations did not violate § 8(a)(3) of NLRA, the Board ruled, because, after the employee was temporarily laid off because of poor weather conditions, the employee, in effect, quit voluntarily by failing to return to the construction site. 236 N.L.R.B. at 40. The employer did not know that employee had joined a union or was seeking union-scale wages. *Id.*

[106] Goodman Lumber Co., 166 N.L.R.B. 304, 304–05 (1967) (father's attempts to carry out at home employer's instructions to obtain son's resignation from union which led to son's "quit" held constructive discharge).

[107] *Haberman*, 641 F.2d at 358.

which case they will be disregarded,[108] or if the proffered reasons are bona fide. If the proferred reasons are bona fide, then there is what is called a mixed motive situation, that is, the employer was motivated to discharge the employee for permissible *and* impermissible reasons. Courts have used several different calculations of what degree the anti-union animus must be in proportion to the permissible motivation to find that the employer violated the Act.[109]

Under the *Haberman* formulation, where an employer imposes conditions which are inherently destructive of employee rights, anti-union animus is presumed, and no specific finding of discriminatory intent under the second prong of the constructive discharge test is required.[110] For this presumption to operate, however, the employer's conduct must be egregious, that is, it must directly and unambiguously penalize or deter protected activity.[111] The *Haberman* court derived this presumption from the 1967 case of *NLRB v. Great Dane Trailers, Inc.*[112] In *Great Dane* the United States Supreme Court, distilling several principles from its prior decisions in section 8(a)(3) cases,[113] held that if it can reasonably be concluded that the employer's discriminatory conduct was "'inherently destructive' of important employee rights," no proof of anti-union animus is needed.[114]

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[108] *Id.*

[109] *Compare* Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90 (2d Cir. 1978) (Board must prove that the discharge would not have occurred absent the protected activity), *and* Midwest Regional Joint Bd. v. NLRB, 564 F.2d 434 (D.C. Cir. 1977) (same), *with* Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977) (Board must prove that the illegal motive partially caused the discriminatory conduct), *and* Stone & Webster Eng'r Corp. v. NLRB, 536 F.2d 461 (1st Cir. 1976) (Board must prove that illegal motive predominated).

[110] *See Haberman*, 641 F.2d at 359.

[111] *Id.* In *Haberman* five employees resigned in response to their employer's decision to have an open shop and to unilaterally cease payment of union benefits. *Id.* at 358. The ALJ found, and the Board and court of appeals affirmed, that this conduct conveyed an intent not to abide by the labor contract. *Id.* The employer's conduct forced the employees to choose between quitting or continuing work in the face of the employer's unlawful repudiation of its bargaining obligations under the Act. *Id.* Thus, the ALJ found, there was a constructive discharge. *Id.* Even if anti-union animus had been absent, the court of appeals stated in its decision enforcing the Board's order, there would be a constructive discharge because the employer's actions were "inherently destructive" of employee rights. *Id.* For cases involving conduct claimed to rise to the level of "inherently destructive," see, e.g., Tricer Products, Inc., 239 N.L.R.B. 65, 71 (1978) (Board held that an employer constructively discharged its employees by giving them a choice of working without union representation or quitting, and the employees chose to quit); Superior Sprinklers, 227 N.L.R.B. 204, 207, 210, 211 (1976) (Board held that employer constructively discharged its employees by conditioning their further employment with the company upon the employees performing nonunion work, where employer had committed unfair labor practice by refusing to bargain collectively with the employees' union). The Board in *In re* Atlas Mills, Inc., 3 N.L.R.B. 10 (1937) stated: "To condition employment upon the abandonment by employees of the rights guaranteed them by the NLRA is equivalent to discharging them outright for union activity."

[112] 388 U.S. 26 (1967).

[113] *See, e.g.*, American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965) (Court held that once an impasse was reached, an employer's use of a lockout and temporary layoff of employees to bring economic pressure to bear in support of his bargaining position was not inherently destructive of employee rights, since there was no showing that the lockout would necessarily destroy the union's ability to act effectively as the employees' bargaining agent); NLRB v. Erie Resistor Co., 373 U.S. 221 (1963) (Court stated that proof of subjective intent to discriminate or to interfere with union rights is not necessary where conduct is such that the motive can be founded upon the "inherently discriminatory or destructive nature of the conduct itself").

[114] *Great Dane*, 388 U.S. at 34.

In such situations, the Court ruled, the Board can find an unfair labor practice even if the employer raises the defense, and supports it with evidence, that the conduct was motivated by business considerations.[115]

Subsequent to the Board's *Sure-Tan* decision, but prior to the Supreme Court decision, the Board faced a case, *La Mousse, Inc.*,[116] raising the issue of constructive discharge of illegal alien employees. This case presents an important application of the *Haberman* test's first prong, whereby the employer must have created working conditions so intolerable that the employee is forced to quit. In *La Mousse* the employer ran a business making desserts.[117] Interest in a union arose,[118] and a representation election was scheduled for August 31.[119] After receiving a copy of the petition for a union election, the employer hired two attorneys from a Los Angeles law firm.[120] About a week prior to the election, one of the attorneys made arrangements with the INS to check the employees' immigration status.[121] While the employer appeared to have expressed some reservations about following this course, she did nothing to impede the forthcoming INS raid until the night before the raid, when the employer apparently had second thoughts.[122] On that night she told one employee that she had received an anonymous call that the INS would be in the area the following day and that the employee should call the other employees and tell them not to come to work.[123] Several employees conferred that evening with a union representative, who was of the opinion that the INS would not conduct a raid and that some other government agency was coming to check business records.[124] All but two of the kitchen employees reported to work on the following morning.[125] At 7:30 am the INS conducted a raid, and ten illegal alien employees were voluntarily deported.[126] Noting that the attorney who made arrangements with the INS had acted as the employer's agent, the ALJ found, and the Board affirmed, that the employer had constructively discharged the employees in violation of section 8(a)(3) of the NLRA.[127] Thus in *La Mousse* the employer's report of her illegal alien employees to the INS, and their resulting departure, was held to satisfy the *Haberman* test's first-prong requirement of the employer creating intolerable working conditions.

In cases involving the discharge of illegal aliens, the Board has required a specific showing of employer discriminatory intent to satisfy the *Haberman* second prong, and thus, has not availed itself of the *Great Dane* presumption. For example, in the 1974 case of *Handling Equipment Corp.*,[128] the day after the union had won an election, the employer

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[115] *Id.* Applying this formulation, the Court found the company's refusal to pay vacation benefits to strikers to be discrimination in its simplest form, and therefore specific proof of anti-union animus was not required. *Id.*

[116] 259 N.L.R.B. 37 (1981), *order enf'd without opinion*, 703 F.2d 576 (1983).

[117] *Id.* at 39. The employer began the operation in the kitchen of her home and in a few years moved the business to another building and employed approximately twenty persons. *Id.*

[118] *Id.*

[119] *Id.* at 40.

[120] *Id.* at 39–40.

[121] *Id.* at 40.

[122] *Id.* at 40, 45.

[123] *Id.* at 45.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 45–46.

[127] *Id.* at 45, 51.

[128] 209 N.L.R.B. 64, 65–66 (1974).

discharged all alien employees without green cards.[129] In response to the claim that the discharge was an unfair labor practice, the company argued that it had discharged several of its illegal alien employees out of concern that the company might be violating the law. The ALJ held, and the Board affirmed, that discriminatory intent was not sufficiently shown, even though the Board had held that the employer committed numerous unfair labor practices during the course of a union election campaign.[130] The ALJ found persuasive the employer's claim that its president had discussed the pending election in the shop with a friend, and the friend told him that he might be violating the law by employing illegal aliens.[131]

Similarly, the Board dismissed a discriminatory discharge complaint two years later in *Bloom/Art Textiles, Inc.*[132] when the evidence failed to specifically show that the employer was motivated by anti-union animus.[133] In that case the union had filed a complaint against the employer on behalf of an illegal alien employee, who was also a union activist, for failure to pay overtime wages that were due.[134] The employer subsequently discovered that the employee was probably an illegal alien. Upon being advised by its attorneys that employment of illegal aliens was against state public policy and perhaps in violation of state law,[135] the employer fired the illegal alien employee. The Board held that the reason for the discharge was not the employee's protected concerted activities, but the employer's concern that employment of illegal alien workers violated state law.[136] Thus, in this case, the Board ignored the possibility that the employer's firing of an illegal alien employee shortly after he filed an unfair labor practice charge could give rise to a *Great Dane* presumption of anti-union animus. Instead, the Board required a specific showing of that discriminatory intent.

From the Board's decisions in *Handling Equipment* and *Bloom/Art Textiles*, it appears that the *Great Dane* presumption has not been considered appropriate when addressing the issue of discriminatory discharge of illegal alien employees. Thus, to be successful in demonstrating that an employer's notification to the INS is a constructive discharge, a specific showing of anti-union animus is required. Courts' refusal to allow the *Great Dane* presumption of anti-union animus to operate, as was the case in *Handling Equipment* and *Bloom/Art Textiles*, may reflect a policy that reporting illegal aliens to the INS is to be encouraged, and should not, therefore, give rise to an inference of anti-union animus.[137]

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[129] *Id.* at 65.

[130] *Id.* at 64, 66.

[131] *Id.* at 65–66. The ALJ took official notice of California Labor Code section 2805, an employer sanction law, although noting that the provision had been invalidated. *Id.* at 66. The Board adopted the ALJ's conclusions. *Id.* at 64.

[132] 225 N.L.R.B. 766 (1976).

[133] *Id.* at 769.

[134] *Id.* at 767.

[135] *Id.* at 768.

[136] *Id.* at 769. The ALJ summarized, "In short he impressed me when testifying concerning this facet of the case as a person who had done what he had been told was the correct thing and who was genuinely surprised that his conduct was now being challenged." *Id.*

[137] The United States Court of Appeals for the Ninth Circuit echoed this reasoning in *Apollo Tire*, where it stated in dicta that absent the demonstrated intent to discriminatorily discharge an illegal alien employee, an employer who suspects an employee is illegally present in the United States should report this information to the INS. 604 F.2d at 1183.

In summary, the *Haberman* case sets out a clear two-prong test for analyzing constructive discharge cases. The first prong requirement that the employer purposefully created intolerable working conditions has been very loosely interpreted, extending in *La Mousse* to an employer's arranging an INS raid to remove her illegal alien employees. The second prong requires a specific showing that the employer acted out of anti-union animus. Although the *Haberman* test endorses the use of the *Great Dane* presumption, the case law shows that it is not used when illegal aliens are involved. If both anti-union animus and legitimate motives are shown, a mixed motives analysis applies, in which case the employer's constructive discharge of the employee violated the NLRA only if the employer's anti-union animus outweighed his legitimate business motivation.

Once it is determined that an employer's discharge of an employee violated the NLRA, the next issue is what remedial order the Board will issue. Ordinarily the remedy in a discriminatory discharge situation is an order that the employer reinstate the discharged employee with backpay. Sometimes, however, the situation makes the conventional remedy inappropriate. What the Board can do under the Act, and what it does in such situations, is the subject of the next section. This inquiry is pertinent because the discharge of illegal alien employees will probably create special circumstances, such as the illegal status of the employees, or their removal from the country, that will make the conventional remedies problematic. This next section examines how the Board and courts have responded to these situations.

C. *Remedies*

Subsection 1 looks at the legislative history of the remedies section of the Act, the remedy provisions in the Act itself, and significant Supreme Court decisions which have interpreted those provisions. This first subsection indicates that the Board has broad remedial power under the statute in general. Subsection 2 treats the standard of judicial review of Board remedial orders. The standard of review demonstrates the degree of deference given by courts to the Board's orders. Subsection 3 shows how this broad remedial power has been used by the Board and upheld by the courts in a whole range of labor law cases. Subsection 4 examines Board remedial orders involving illegal aliens, so as to provide a basis for analyzing the remedial orders in *Sure-Tan*. Subsection 5 discusses the permissibility of conjectural backpay orders, and the various degrees of conjecture the Board has engaged in when fashioning backpay orders.

1. The Board's Order-Making Power Under the Act

Although the legislative history of the NLRA contains little discussion of the Board's order-making power,[138] it appears that Congress recognized as vital the Board's authority to flexibly fashion its remedial orders.[139] The language of the Act is broad, stating its

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[138] *See generally*, 79 CONG. REC. 9704 (1935).

[139] *See*, Note, *The Need For Creative Orders Under Section 10(c) Of The National Labor Relations Act*, 112 U. PA. L. REV. 69, 70 (1963) [hereinafter cited as Note, *Need For Creative Orders*] (citing H.R. REP. No. 1147, 74th Cong., 1st Sess. 23 (1935) ("The orders will of course be adapted to the needs of the individual case."); 79 CONG. REC. 6184 (1935) (speech of Senator Wagner read into the record) ("The power of this board to issue orders is strictly limited to the preservation of the industrial freedom guaranteed specifically by the bill."); 79 CONG. REC. 9699 (1935) (remarks of Representative Marcantonio)).

purposes as industrial peace,[140] collective bargaining,[141] and restoration of equality of bargaining power between employer and employee.[142] Coupled with the grant of power to the Board in section 10(c) to take any affirmative remedial action that will effectuate these broad purposes,[143] the language of the Act indicates that Congress intended to endow the Board with broad remedial powers to devise remedial measures appropriate to accomplishing the broad public goals which lay behind the enactment of the Act.

The congressional determination to draft section 10(c) in indefinite language, rather than to formulate specific penalties for each offense, is additional evidence that the Board is empowered to set the tenor of its own authority by imaginative and specific treatment of the unique circumstances surrounding each unfair labor practice.[144] In 1947 Congress considered amending the Act with the Labor Management Relations Act (LMRA).[145] The House version of the LMRA would have set up an independent administrator who would issue complaints and ask the Board for specific affirmative remedial action.[146] Under this proposal, the Board would have been limited to granting the relief requested.[147] Because the administrator would determine the type of relief before the facts were fully developed at the hearing, the type of relief would have to be preordained by formula, and therefore, would be less adaptable to each specific situation.[148] The defeat of this House version of the LMRA reaffirmed the Congressional determination to grant broad remedial discretion to the NLRB under section 10(c) of the original Act.[149]

Supreme Court decisions support this view that the NLRA is designed for a broad public mission, and that the Board is empowered to act accordingly. The Supreme Court stated unequivocally in the 1940 case of *Phelps Dodge Corp. v. NLRB*[150] that the Act creates a scheme for the vindication of public, not private, rights.[151] Thirty-five years later the Court reiterated this understanding of the Act, stating that section 7 rights are protected "not for their own sake but as instruments of national labor policy."[152] With this broad mission, the Board logically should possess broad remedial powers.[153]

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[140] 29 U.S.C. § 151 (1982) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by removing certain recognized sources of industrial strife and unrest").

[141] *Id.*

[142] *Id.* For example, the policy statement speaks of safeguarding and promoting the free flow of commerce, of restoring equality of bargaining power between employers and employees, and of protecting the exercise by workers of full freedom of association, self-organization, and collective representation. *See id.*

[143] *Id.* at § 160(c).

[144] *See* Note, *Need for Creative Orders*, *supra* note 139, at 70.

[145] 61 Stat. 136 (1947), *as amended*, 29 U.S.C. § 141 (1958) (Taft-Hartley Act) [hereinafter cited as LMRA].

[146] *See* Note, *Need for Creative Orders*, *supra* note 139, at 70.

[147] *See id.*

[148] *See id.*

[149] *See id.* Although the passage of the LMRA generally expressed a concern that courts were giving too much deference to the Board's expertise, the concern was focused on findings of fact, not to the Board's determination of appropriate remedies. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

[150] 313 U.S. 177, 194 (1940).

[151] *Id.*

[152] Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975).

[153] *See Phelps Dodge*, 313 U.S. at 194, where the Court stated:

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the

2. Standard of Judicial Review of Board Remedial Orders

Remedial orders require the respondent to take specified affirmative action to dissipate the effects of the unfair labor practices. The foundation cases interpreting the NLRA's grant of remedial power to the Board are *Republic Steel Corp. v. NLRB*,[154] *Phelps Dodge Corp. v. NLRB*,[155] and *NLRB v. Seven-Up Bottling Co.*[156] These cases stand for the proposition that the Board should be allowed broad latitude in fashioning remedies. The Court has advanced two separate rationales for why the Board should have this broad remedial power. The first reason is tied to the concept of separation of powers. Under this analysis, because Congress set up a special body, the NLRB, to administer the NLRA, it is this special body, and not the courts, which should have the power to fashion appropriate remedies under this legislation.[157] Second, the Court has emphasized the expertise which the Board possesses in the field of labor relations. According to the Court, because the Board is in daily contact with the whole seemless web of labor relations, it possesses expertise, which the courts do not share, and which the Board uses to reach the appropriate result under the Act.[158] The *Seven-Up* Court held that the NLRA gives the Board freedom to attain just results in diverse and complicated situations. In the context of deciding whether a Board backpay order should be upheld, the *Seven-Up* Court asserted that "the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[159]

The *Phelps Dodge* and *Seven-Up* Courts also identified limits on the Board's remedial power, stating in the former that only actual losses should be made good, and in the latter that the Board's orders must be functions of the purpose to be accomplished.[160] Moreover, the Court in *Republic Steel* further held that punitive orders are beyond the authority of the Board. The case law on what constitutes a punitive order, however, is unsettled. Courts are likely to refuse enforcement of creative orders when they are not restitutionary, but rather serve as punishment and are not reasonably related to the wrong,[161] or are aimed at a wrong not within the Board's jurisdiction.[162] This zone is

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> task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

[154] 311 U.S. 7, 8–9 (1940) (upholding Board order for reinstatement with backpay, but rejecting further order directing company to deduct from the payments to the reinstated employees the amounts they had received for work performed upon "work relief projects" and to pay over such amounts to the appropriate governmental agencies).

[155] 313 U.S. 177, 194 (1940) (upholding Board order compelling employer to offer strikers the opportunity for employment which should not have been denied them and to make such employees whole for loss of pay due to the discrimination).

[156] 344 U.S. 344, 346 (1953) (Board can compute backpay on basis of segregated quarterly periods, with deduction being made from amount which would normally have been earned in a particular quarter for amount earned by employer during that period in other employment).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See, e.g., id.* (Board orders must be "functions of the purpose to be accomplished").

[161] *See generally*, T. KHEEL, *supra* note 4, § 1106.

[162] *See Republic Steel*, 311 U.S. at 8–9, where the Supreme Court struck down a Board order

marked semantically by the use of the labels that the Board order is "punitive,"[163] or "arbitrary,"[164] rather than remedial.[165]

3. The Board's Creative Fashioning of Remedies

Inside the boundary of punitive orders, courts have permitted the Board wide discretion in creatively fashioning orders.[166] The particular fashioning of backpay orders is often complex, due to the many forms of section 8(a)(3) violations which employer discrimination may entail.[167] When making backpay determinations, the Board must take into account the period of time during which backpay will accrue and how the dollar amount is to be calculated. The general rule is that backpay may be awarded from the time of the discriminatory action to the time a proper reinstatement offer is made.[168] The Board has included lost fringe benefits[169] and interest payments[170] in its backpay calculations. Under some special circumstances, furthermore, the Board may fashion a different timetable suitable to the facts of the particular case.[171]

The Board has also fashioned creative remedial orders for section 8(a)(1)[172] and 8(a)(2) violations.[173] In the section 8(a)(2)[174] area the Board has created a distinction

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that required the employer to pay the government the expenses that it had incurred as a result of hiring the affected employees in work-relief programs. The Court noted that the order was not directed to the appropriate goal of effectuating the policies of the Act, but rather to a distinct and broader policy with respect to unemployment, i.e., reimbursing communities and governments for expenses incurred in connection with work-relief programs. *Id.* at 13.

[163] *See* Local 60, United Brotherhood of Carpenters v. NLRB, 365 U.S. 651, 655 (1961) (where union was found to have violated NLRA by enforcing closed shop preferential hiring conditions, Board order compelling union to refund dues collected from employees in the "closed shop" held to be, when lacking further evidentiary support, not remedial, but punitive, and thus beyond the competence of the Board to issue).

[164] NLRB v. Adhesive Prods. Corp., 258 F.2d 403, 409 (2d Cir. 1958) (reimbursement remedy deemed "inappropriate and arbitrary"). *See also Buncher v. NLRB*, 405 F.2d 787, 791 (3d Cir. 1968), *cert. denied*, 396 U.S. 828 (1969), where Judge Van Dusen, dissenting, argued that the seniority system adopted by the Board was arbitrary and unreasonable, and therefore the order of a substantial award by it was punitive rather than remedial. The finding of a violation of § 8(a)(3) "proves only that some backpay is owed; if the precise amount cannot be determined, the Board's approximation must still have a rational basis. This basis for the backpay does not become more rational because the trial examiner rejects some of the employer's evidence as subjective and self-serving." *Id.* at 792 (Van Dusen, J., dissenting).

[165] *Id.*

[166] *See generally* T. KHEEL, *supra* note 4, § 1106.

[167] *See infra* text accompanying notes 172–83.

[168] Richard W. Kaase Co., 162 N.L.R.B. 1320 (1967); Kohler Co., 128 N.L.R.B. 1062 (1960).

[169] *See generally* T. KHEEL, *supra* note 4, § 7.04[2] at 7–156.

[170] *See id.*

[171] *See id.* In calculating backpay, the Board has divided the calendar year into four quarters. F.W. Woolworth Co., 90 N.L.R.B. 289, 293 (1950). Backpay is computed on the basis of loss in each quarter, *id.*, that is, the dollar amount the employee would have earned but for the discriminatory conduct, minus the net earnings from any job performed in that quarter. *Id.*

[172] For text of § 8(a)(1), *see supra* note 3.

[173] *See* D. BOK, A. COX, & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 253–54 (1981) (discussion of J.P. Stevens & Co. unfair labor practice litigation). *See also* Comment, *Toward Remedying Deliberate Unfair Practices Under Section 8(a) Of The NLRA: An Inquiry Into The Pathology Of The Willful Violator*, 17 UCLA L. REV. 602 (1970) [hereinafter cited as Comment, *Remedying Deliberate Unfair Practices*].

[174] § 8(a)(2) provides, in relevant part:

between employer domination of unions and employer assistance or interference with unions.[175] In the former the Board orders the complete disestablishment of a union so it can never be certified by the Board,[176] but in the latter orders the employer to withold recognition from the assisted but undominated union until the union receives Board certification.[177]

The Board has equally applied its ingenuity and broad remedial power for violations of the duty to bargain in good faith under section 8(a)(5).[178] For example, the Board may issue bargaining orders against an employer who succeeds to all the rights and powers of the previous unionized employer,[179] and against an employer who moves his business to another location for anti-union purposes.[180] A bargaining order may also issue where it is found that the employer has committed unfair labor practices that are so serious that it is impossible to hold a fair election.[181]

The Board has creatively effectuated other parts of the Act as well. The Board's *Excelsior* rule,[182] requiring that the employer give lists of employees' names and addresses to the union for use in sending them information, shows the Board's creative approach to effectuating the policy of the Act of employee free choice of whether to unionize. Similarly, the Board has expansively interpreted its power to serve the objective of employee free choice by requiring employers to grant access to nonemployee union solicitors where union access to disseminate information to employees is infeasible.[183]

This subsection has shown that the NLRB has many times creatively used its broad remedial power to effectuate the purposes of the Act. In these situations the Board has

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> It shall be an unfair labor practice for an employer — (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

29 U.S.C. § 158(a)(2) (1982).

[175] *See* NLRB v. United Mine Workers, 355 U.S. 453, 458–59 (1958); NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 266 (1937). The basis for the distinction is that, in the Board's judgment, the free choice by employees of an agent capable of acting as their true representative, in the case of a dominated union, is improbable under any circumstances, while the free choice of an assisted but undominated union, capable of acting as their true representative, is a reasonable possibility after the effects of the employer's unfair labor practices have dissipated.

[176] *See* NLRB v. United Mine Workers, 355 U.S. 453, 458 (1958).

[177] *Id.* at 459.

[178] *See generally* T. KHEEL, *supra* note 4, § 7.04[2].

[179] *See*, e.g., John Wiley & Sons v. Livingston, 376 U.S. 543 (1969).

[180] *See, e.g.*, Garwin Corp., 153 N.L.R.B. 664, 665, 667 (1965) (requiring an employer to bargain with the union at its new location even if the evidence discloses that the union only represents a small minority of the employees at that location).

[181] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969).

[182] Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1238–40 (1966); *see also* NLRB v. Wyman Gordon Co., 394 U.S. 759, 762–66 (1969).

[183] *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956), where the Court held "when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

assessed the particular circumstances of the case which call for specially adapted remedies. The next subsection considers the Board's use of its remedial power when illegal aliens are involved.

4. Board Orders Involving Illegal Alien Employees

It is clear that the Board's ability and practice of creatively fashioning remedial orders is also applied in cases dealing with illegal alien employees. In the 1976 case of *Amay's Bakery & Noodle Co.*,[184] for example, the Board held that the employer had discriminatorily discharged illegal aliens in violation of section 8(a)(3), and ordered reinstatement with full backpay.[185] The company had argued that an order of reinstatement with backpay would be improper because it would require the company to violate California Labor Code section 2805(a),[186] which prohibited an employer from knowingly employing an alien not entitled to lawful residence in the United States if such employment adversely affected employment of lawful resident workers.[187] The Board disagreed because section 2805(a) was presently invalid.[188] Section 2805(a) had been challenged before the United States Supreme Court, which remanded the case back to the California courts to resolve questions of construction which would determine the constitutionality of the statute.[189] Reinstatement with backpay, the Board reasoned, thus would not place the company in violation of any valid state statute.[190] Rather, the Board explained, the remedy would return the company to the position in which it had placed itself earlier by hiring illegal aliens, and in which, but for the illegal discharges, it would still be.[191] The Board added, however, that if section 2805 were finally held enforceable the company could petition for modification of the order at the compliance stage.[192]

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[184] 227 N.L.R.B. 214 (1976).

[185] *Id.* at 219.

[186] *Id.* at 214.

[187] *Id.*

[188] *Id.* at 215.

[189] *See* DeCanas v. Bica, 424 U.S. 351 (1976). Section 2805(a) was held unconstitutional in Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).

[190] *Amay's*, 227 N.L.R.B. at 215.

[191] *Id.*

[192] *Id.* The Ninth Circuit in *Apollo Tire*, having found the company to have discriminatorily discharged its illegal alien employees, also confronted the effect of section 2805 on its remedial order. 604 F.2d at 1184. In *Apollo Tire* the court ruled that if section 2805 were subsequently held to be enforceable, the company could petition for modification of the reinstatement order. *Id.* Once the INS has begun deportation proceedings, however, reinstatement orders are apparently impermissible under a later Ninth Circuit case which distinguished *Apollo Tire*. *See* Rodriguez-Gonzalez v. Immigration and Naturalization Serv., 640 F.2d 1139 (9th Cir. 1981). In *Rodriguez-Gonzalez*, five aliens sought review of an order of the Board of Immigration Appeals finding them deportable. *Id.* at 1140–41. The immigration judge had rejected an offer of proof that Vogue Co., the employer of the aliens and the place where they were arrested, and the INS had agreed to interrogate, arrest, and commence deportation proceedings against the alien employees in retaliation for union activities by the aliens. *Id.* at 1140. The aliens argued that they should not be deportable because that would violate the public policy of protecting the exercise of NLRA rights. *Id.* The court affirmed the ALJ's rejection of the offer of proof. *Id.* at 1142. Distinguishing *Apollo Tire*, the court stated that when

The Board in *Amay's* considered the effect of the aliens' illegal immigration status, but asserted that its broad remedial power could redistribute the risks for the employer and the employees back to the status quo ante. The Board also recognized, however, that if section 2805 were subsequently held enforceable, the balance of risks of detection for the employees and sanctions for the employer might change. To allow for this possibility, the Board creatively molded its order to allow future petition for modification.

Similarly, five years later in *La Mousse*, the Board ordered reinstatement with backpay to illegal alien employees who had been constructively discharged by an INS raid which the employer had arranged. In this case several of the employees who had accepted voluntary deportation reentered the country illegally, appeared at the employer's premises, and were permitted to vote in the representation election, under challenge.[193] Of seventeen employees eligible to vote, ten ballots were cast.[194] The ALJ found that the Union had obtained an authorization card majority of ten out of seventeen employees in the proposed unit,[195] and that the employer's unfair labor practices were so pervasive as to preclude the holding of a fair election.[196] The Board issued a bargaining order,[197] even though the majority of the employees were illegal aliens who had been recently deported.[198]

A third case involving illegal aliens shows another use of the Board's remedial power. In the 1984 case of *Sun Country Citrus, Inc.*,[199] a citrus packing plant was facing a union certification drive.[200] The employer raised the issue of immigration status with one employee, saying that without proper immigration papers the union might not let her vote.[201] The Board adopted the ALJ's finding that the employer's statement was a thinly veiled threat to notify the INS in order to dissuade the employee from supporting the union.[202] The Board ordered the employer to post a notice stating that it would not threaten to notify the INS in order to dissuade employees from supporting a labor organization.[203]

This section has shown that the Board's creative application of its remedial powers does not end simply because illegal aliens are involved. On the contrary, the Board has recognized that these cases merit special attention to the particular facts. If the illegal alien employees have been discharged in violation of the Act, and as a result are removed from the country, the question arises whether the Board's remedial power would encom-

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the INA makes an immigrant deportable, the INS enforcement officials cannot terminate proceedings on grounds not specified by the INA. *Id.* Thus, the court ruled, *Apollo Tire*'s finding that illegal alien employees possess NLRA rights does not preempt their deportability. *Id.* at 1142 n.3.

[193] La Mousse, 259 N.L.R.B. at 48.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] Sun Country Citrus, Inc., 268 N.L.R.B. 700 (1984).

[200] *Id.* at 702.

[201] *Id.* at 708.

[202] *Id.* at 700, 708.

[203] *Id.* at 709. *See also* Hasa Chemical, Inc., 235 N.L.R.B. 903 (1978), where the Board ordered the employer to cease and desist from threatening to call the INS in retaliation for illegal alien employees engaging in protected union activity. *Id.* at 913.

pass a minimum backpay order. The next section examines whether such an order is within the Board's remedial power.

5. The Permissibility of Conjectural Backpay Awards

In *Sure-Tan* the court of appeals issued a minimum backpay order, that is, the order provided that each constructively discharged illegal alien employee would receive backpay for at least six months on the ground that six months was a reasonable assumption as to the minimum time the alien employees would have remained employed without apprehension by the INS, but for the employer's unfair labor practice.[204] Other than in *Sure-Tan* the Board and courts have never ordered a minimum backpay award. A minimum backpay order involves conjecture; in order to evaluate the appropriateness of a minimum backpay award, this section examines other types of conjectural backpay awards.

When making conjectural backpay awards, the Board has first concluded that there was not any more precise manner of calculating backpay available.[205] The Board also has provided an opportunity for the employer to present an alternative formula and mitigating evidence.[206] This is consistent with the Supreme Court's directive[207] that the Board must take into account the particular circumstances of a case in order to avoid remedies which are oppressive or are not calculated to effectuate a policy of the Act.[208]

These principles limiting the scope of the Board's fashioning conjectural backpay awards are illustrated in *NLRB v. Superior Roofing Co.*,[209] where an employee was discriminatorily dismissed as the Company's second senior roofer. His replacement worked only nineteen hours before being legitimately replaced.[210] The company argued that nineteen hours should be the amount of backpay earnings awarded, since the company had no seniority system.[211] The Board fashioned a seniority formula of its own to compute the earnings of a representative employee, which it then used to compute the backpay award.[212] The United States Court of Appeals for the Ninth Circuit enforced the backpay order, stating that the Board has wide discretion in selecting criteria for reconstructing what would have happened in a given case but for the discrimination.[213] Here, the court held, the seniority formula was a rationally permissible device in fashioning a backpay remedy.[214] The court reached this decision because there was an absence

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[204] *Sure-Tan*, 672 F.2d at 606.

[205] *See infra* text accompanying notes 209–20.

[206] *See infra* text accompanying notes 215, 220.

[207] NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

[208] *Id.* at 349. *See also Republic Steel*, 311 U.S. at 11–12, where the court stated:

> This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act . . . . We have said that the power to command affirmative action is remedial, not punitive.

[209] 460 F.2d 1240, 1241 (9th Cir. 1972).

[210] *Id.* at 1240.

[211] *Id.*

[212] *Id.* at 1241.

[213] *Id.*

[214] *Id.*

of other objective criteria for the Board to use, the formula was a reasonable approximation of what the employee would have made but for the discrimination, and because the employer failed to come forward to present evidence mitigating liability.[215]

Similarly, in *Buncher v. NLRB*[216] the United States Court of Appeals for the Third Circuit enforced a backpay order for a discriminatorily discharged employee, where the backpay was calculated by a seniority formula fashioned by the General Counsel and approved by the Board, even though the employer did not have a formal seniority system.[217] The Board had affirmed the ALJ's decision to use the remedy on the ground that since the employer's proposed formula had been discredited by the ALJ as a contrivance to avoid backpay liability, it was impossible to determine precisely the amount of backpay, and so the reasonable formula of the General Counsel would be used.[218] The court of appeals enforced the order, finding the application of a seniority rule not arbitrary or unreasonable in light of the fact that seniority was a factor in the company's employment policy, and is a general industrial practice.[219] In enforcing the order the court emphasized that the company had been given and availed itself of the opportunity to present a different scheme to calculate backpay, but that it had failed to supply credible evidence to support the scheme.[220]

While in many cases it may be difficult to determine precisely the amount of backpay due in discriminatory discharge situations, the *Superior Roofing* and *Buncher* cases demonstrate that when such difficulties arise the Board will approximate the amount owed by fashioning a reasonable formula. In these cases, however, the Board engaged in such conjecture only after determining that no more precise manner of calculating backpay would work, and after allowing the employer to present an alternative formula and mitigating evidence. These are limits imposed by the Board itself, however, and so do not necessarily mark the limits of conjectural remedies that the NLRA empowers the Board to issue.

II. *Sure-Tan*: Procedural History and Decision of the Supreme Court

Part II examines the procedural history of *Sure-Tan* and the decision of the Supreme Court. Subsection A examines the decisions of the administrative law judge and the Board. Subsection B then treats the decision of the United States Court of Appeals for the Seventh Circuit. Subsection C sets forth the decision of the United States Supreme Court, and subsections D and E look at the concurring and dissenting opinions of that decision.

In *Sure-Tan*, after an employer's employees elected a union as their collective bargaining representative, the employer informed the INS that some of its employees were illegal aliens. As a result, the INS raided the workplace, and the illegal alien employees were sent out of the country, back to Mexico. In response, the Union brought unfair labor practice charges against the employer. The proceedings that followed raised three discreet questions: first, whether the illegal aliens were "employees" within the meaning

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[215] *Id.*

[216] 405 F.2d 787 (3d Cir. 1968) (rehearing en banc).

[217] *Id.* at 789, 791.

[218] *Id.*

[219] *Id.* at 789–91.

[220] *Id.* at 790.

of the NLRA; second, whether the illegal aliens had been constructively discharged in violation of the NLRA; and third, what remedy would be appropriate and permissible.

A. *Proceedings Before the NLRB*

The Board's Regional Director issued unfair labor practices complaints against the employer Sure-Tan, which were heard by an ALJ.[221] In his decision, the ALJ assumed it to be a basic premise that illegal alien workers are employees within the NLRA.[222] The ALJ found that the employer knew that most of its employees were illegal aliens,[223] that the letter by the president of Sure-Tan to the INS was prompted by the employees' selection of a union,[224] and that sending the letter was the proximate cause of the deportation of the five employees.[225] Thus, the ALJ concluded, there was a constructive discharge in violation of section 8(a)(1) and (3).[226] The Board affirmed and adopted these findings and conclusions.[227]

In determining what remedy should be ordered, the ALJ found that under past Board precedent[228] no backpay remedy was available, reasoning that the constructively discharged employees were physically unavailable for work because of their forced removal to Mexico.[229] To compensate for these remedial deficiencies, the ALJ recommended that the Board issue a reinstatement order allowing six months for the employees to return to the United States and accept reinstatement.[230] The ALJ felt six months was a necessary and sufficient period of time to allow the employees to initiate procedures for legal reentry into the United States.[231]

Moreover, because the lack of backpay would most likely mean that the employer would benefit from his unfair labor practice, the ALJ invited the Board to make an exception to its normal rule regarding tolling of backpay by awarding backpay for a minimum four week period both to provide some measure of relief to the illegally discharged employees and to deter future violations of the NLRA.[232] The ALJ urged this exception because the violations would otherwise go largely unremedied,[233] thus allowing an employer to adopt "an apparently foolproof system" of defeating union

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[221] Sure-Tan, Inc. and Surak Leather Co., 234 N.L.R.B. 1187, 1188 (1978).

[222] *Id.* at 1192.

[223] *Id.*

[224] *Id.*

[225] *Id.* at 1191.

[226] *Id.* at 1192.

[227] *Id.*

[228] *Id.* at 1193. The ALJ relied on several cases for tolling backpay: MSW Construction, Inc. d/b/a Hale & Sons Construction, 219 N.L.R.B. 1073, 1079 (1975) (incarcerated); Gifford-Hill & Co., Inc., 188 N.L.R.B. 337, 338 (1971) (incarcerated); Rice Lake Creamery Co., 151 N.L.R.B. 1113, 1115 & n.10 (1965), *dissenting viewpoint aff'd.*, 365 F.2d 888, 891 (D.C. Cir. 1966) (employee moved from area and no longer in labor market); Park Edge Sheridan Meats, Inc., 139 N.L.R.B. 748, 750 (1962) (employer not available because of illness); John David Brock, d/b/a J.D. Brock et al., 42 N.L.R.B. 457, 468–69 (1942) (armed forces).

[229] 234 N.L.R.B. at 1192.

[230] *Id.*

[231] *Id.*

[232] *Id.* at 1193.

[233] *Id.*

organizing attempts.[234] The ALJ concluded that a minimum backpay award would thus effectuate the policies of the NLRA while also accommodating the INA.[235]

The Board modified the ALJ's proposed order, finding his analysis of the remedial issue "unnecessarily speculative."[236] The Board reasoned that the ALJ's recommendation that the offer of reinstatment be kept open for six months, as well as his failure to recommend an award of backpay, were premised upon the employees' unavailability for work, even though there was no evidence that the employees had not already returned, legally, to the United States.[237] The Board therefore ordered the conventional remedy of reinstatement with backpay,[238] purposefully leaving for future resolution in compliance proceedings matters pertaining to the availability of the employees.[239]

B. *United States Court of Appeals for the Seventh Circuit*

On review of the petition for enforcement, the United States Court of Appeals for the Seventh Circuit first held that illegal alien employees are employees within the NLRA.[240] In next deciding whether a constructive discharge has occurred, the court of appeals applied the *Haberman*[241] test. Under the first prong of this test, the court found that the respondent's conduct was the proximate cause of the alien employees' departure.[242] The court found "specious" the employer's argument that it was the employees' illegal status, not the employer's conduct, which created any intolerable working conditions.[243] Thus, the employer's notification to INS satisfied *Haberman*'s first-prong requirement that the employer purposefully create intolerable working conditions.

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[234] *Id.*

[235] *Id.*

[236] *Id.* at 1187.

[237] *Id.*

[238] *Id.*

[239] *Id.* The Board directed that calculation of backpay in the compliance proceeding would be in the manner prescribed in F.W. Woolworth Co., 90 N.L.R.B. 289 (1950). *Sure-Tan,* 234 N.L.R.B. at 1188. The General Counsel subsequently filed a motion for clarification with the Board, suggesting that the Board's order might violate the national immigration laws and policies and therefore should be modified so that reinstatement would be conditioned on legal reentry into the United States, and backpay would accrue only from time of legal reentry. Sure-Tan Inc., and Surak Leather Co., 246 N.L.R.B. 788, 788 (1979). The Board, two members dissenting, denied the motion, finding that the usual procedures governing the reinstatement and backpay claims would best effectuate the remedial policies of the Act. *Id.* at 788–89. The Board did state that although it had ordered unconditional reinstatement, backpay would be tolled while the alien employees were out of the country. *Id.* at 788.

[240] NLRB v. Sure-Tan, Inc., 672 F.2d 592, 595 (7th Cir. 1982). The court expressly followed its previous holding in NLRB v. Sure-Tan, Inc., 583 F.2d 355, 359 (7th Cir. 1978).

[241] *Sure-Tan,* 672 F.2d at 600. As discussed *supra* notes 101–15 and accompanying text, *Haberman,* 641 F.2d at 358, sets out a test for constructive discharge. The test requires two elements to establish a constructive discharge in violation of section 8(a)(3). First, one must demonstrate that the employer's conduct created intolerable working conditions which resulted in the employee's departure. 672 F.2d at 600. Second, one must show that the employer's conduct was motivated by anti-union animus. *Id.* at 600–01. Under the second prong, proof of anti-union motive is not required if the employer's conduct is inherently destructive of employee rights, thereby giving rise to the *Great Dane* presumption of anti-union animus. *Id.* at 601 n.15.

[242] 672 F.2d at 601.

[243] *Id.*

As to the second prong of the *Haberman* test, the court found the anti-union animus requirement "flagrantly met."[244] The employer argued that it would have engineered the employees' departure by informing the INS even absent its anti-union animus.[245] Rejecting this, the court held that the employer failed to support its contention that the moral obligation to help enforce the law overrode the presence of anti-union animus. Even though the court considered the employer's conduct to have created a presumption of anti-union animus by virtue that the employer's conduct was "inherently destructive of employee rights," the court decided not to rely on this *Great Dane* presumption as an alternative means of finding anti-union animus under the second prong of the *Haberman* test.[246] The court explained that notwithstanding the attractiveness of relying on the *Great Dane* presumption, it would refrain from doing so, as a matter of judicial prudence in a case of first impression.[247] After finding anti-union animus capable of supporting a section 8(a)(3) violation, the court held that the employer had violated the NLRA by constructively discharging its illegal alien employees.[248]

The court, however, modified the Board's order with respect to remedies.[249] The employer argued that the Board's conventional remedies would encourage illegal immigration.[250] Although the court was not convinced by this argument,[251] the court conditioned reinstatement on legal presence in the United States in order to remind the discharged employees that their eligibility for reinstatement was conditioned on being legally present in the United States and legally free to be employed.[252] The court also concluded that the period of time reinstatement offers would be left open should be increased to four years in order to allow reasonable time for legal reentry to the United States.[253]

With respect to backpay, the court ruled that the discharged employees would be deemed unavailable for work — thereby tolling backpay[254] — while they were illegally present and not entitled to be employed in the United States.[255] Recognizing that this conventional analysis would effectively deprive the illegal aliens of much of a remedy, the court decided that setting a six month minimum amount of backpay would better effectuate the purposes and policies of the Act.[256]

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[244] *Id.*

[245] *Id.* at 601 n.13.

[246] *Id.* at 601 n.15. For a discussion of the *Great Dane* presumption, see *supra* notes 113–15 and accompanying text.

[247] 672 F.2d at 601 n.15.

[248] *Id.* at 602.

[249] *Id.* at 606.

[250] *Id.* at 605.

[251] *Id.* at 606.

[252] *Id.* at 605–06.

[253] *Id.* at 606. In addition the court required that the reinstatement offers be written in Spanish, and delivered to allow for verification of receipt. *Id.*

[254] Thus, under the Court's ruling, backpay would not accrue during the tolling period.

[255] *Id.* at 606.

[256] *Id.* The court at first did not set a specific minimum amount of backpay, but rather granted leave to the Board to modify, if the Board saw fit, the order by setting a six month backpay minimum award. *Id.* The Board submitted a proposed final judgment order incorporating the six month minimum backpay award. *See Sure-Tan*, 104 S. Ct. at 2808 n.4. Upon reviewing the proposed order the court was uncertain whether the Board had in fact adopted its suggestion and so modified its order to make clear that the employees were entitled to the six month minimum backpay award.

C. *United States Supreme Court Decision: Explication of Majority Opinion*

After granting the petition for writ of certiorari,[257] the Supreme Court first held that the Board's interpretation of the NLRA as applying to unfair labor practices committed against illegal alien workers would be upheld if it met the "reasonably defensible" standard of review.[258] The Court reasoned that this deferential standard should apply to the Board's interpretation because Congress has assigned primarily to the Board the task of defining "employee,"[259] and because the Board has consistently held that illegal alien workers are "employees" within section 2(3) of the Act.[260]

The Court found the Board's interpretation of who constitutes an employee under the Act reasonably defensible.[261] The Court noted that section 2(3) states that the Act applies to "any employee."[262] The Court stated that this language of the definition of employee is of "striking" breadth.[263] Coupled with this broad inclusive definition in the Act, the Court noted, the Act sets out specific exclusions.[264] Since illegal aliens are not within these few specific exclusions, the Court concluded, they are plainly within the meaning of "employee" in the Act.[265]

In addition to this statutory analysis, the Court found that the inclusion of illegal aliens as protected employees furthers the purposes of the NLRA.[266] The avowed purpose of the Act, the Court noted, is to encourage and protect the collective bargaining process.[267] The Court recalled its discussion in *DeCanas v. Bica*[268] of the impact illegal aliens have on the labor market.[269] In *DeCanas*, the Court had asserted that the acceptance of substandard wages and working conditions by illegal aliens depressed the wages and working conditions in the labor market for everyone.[270] Thus, the *Sure-Tan* Court ex-

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Id. A petition for rehearing en banc was denied, with three judges dissenting. 677 F.2d 584 (7th Cir. 1982).

[257] 460 U.S. 1021 (1983).

[258] 104 S. Ct. 2803, 2809 (1984). *See, e.g.*, Ford Motor Co. v. NLRB, 441 U.S. 488, 496–97 (1979); NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 350 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963). *See supra* notes 241–45 and accompanying text.

[259] 104 S. Ct. at 2808–09 (citing NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944)).

[260] *Id.* at 2808 (citing to Duke City Lumber Co., 251 N.L.R.B. 53 (1980); Apollo Tire Co., 236 N.L.R.B. 1627 (1978), *enf'd*, 604 F.2d 1180 (9th Cir. 1979); Hasa Chem., Inc., 235 N.L.R.B. 903 (1978); Sure-Tan, Inc. and Surak Leather Co., 231 N.L.R.B. 138 (1977), *enf'd*, 583 F.2d 355 (7th Cir. 1978); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976)). *See supra* notes 49–65 and accompanying text.

[261] 104 S. Ct. at 2809.

[262] *Id.*

[263] *Id.*

[264] *Id.* See *supra* note 2 for text of § 2(3) of the Act.

[265] 104 S. Ct. at 2809.

[266] *Id.*

[267] *Id.* The Court cited to NLRB v. Hearst Publications, Inc., 322 U.S. 111, 126 (1944).

[268] 424 U.S. 351 (1976).

[269] 104 S. Ct. at 2809.

[270] *Id.* (citing DeCanas v. Bica, 424 U.S. 351, 356–57 (1976)). *See* Comment, *Illegal Immigration: Employer Sanctions and Related Proposals*, 19 SAN DIEGO L. REV. 149, 154–55 (1981) [hereinafter cited as Comment, *Employer Sanctions*], which presents recent studies supporting this view. For example, a study of 59,728 INS apprehensions during 1977–1978 indicated that 79% of the undocumented workers earned more than the minimum wage. *Id.* at 154 n.29. *But see*, Kutchins and Tweedy, *supra* note 44, at 344–46 (1983). According to these two commentators, there is no evidence that undo-

plained, the exclusion of illegal aliens from NLRA coverage would create a subclass of workers not having a comparable stake in improving wages and working conditions of their legally present co-workers, thereby eroding employee unity in a given workplace, and impeding effective collective bargaining.[271] Conversely, the Court concluded, the inclusion of illegal aliens within NLRA coverage would protect the working conditions of citizens and legally present aliens.[272]

The Court also found that the inclusion of illegal aliens within the NLRA does not directly conflict with the INA.[273] The Court determined that the employment relationship between an employer and an illegal alien is not illegal under the INA.[274] The Court again noted that in *DeCanas*[275] the Court had found that the INA has at best a peripheral concern with employment of illegal entrants.[276] Moreover, the Court noted that the INA explicitly exempts an employer's hiring of illegal aliens from the criminal prohibition on harboring illegal aliens under the statute.[277] In addition, the Court emphasized that to date Congress has clearly decided not to make it a separate criminal offense for an illegal alien to accept employment.[278]

Moreover, the Court continued, the application of the NLRA to illegal aliens is clearly reconcilable with and furthers the policies of the INA.[279] The Court stressed that a primary purpose of the INA is to preserve jobs for American workers.[280] Application of the NLRA, the Court stated, will lessen an employer's incentive to hire illegal aliens when there is no advantage under the NLRA in hiring them.[281] As employer demand

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cumented workers take any significant number of jobs from American workers. *Id.* at 344. The vast majority of positions held by undocumented workers are low-paying, have unattractive working conditions, and have minimal opportunity for advancement. *Id.* These positions constitute a secondary labor market thoroughly unattractive to legal workers. *Id.*

[271] 104 S. Ct. at 2809.

[272] *See id.*

[273] *Id.* at 2809–10. During its proceedings the Board asserted that it could leave off examining any conflict between the INA and the application of the NLRA to illegal aliens until compliance proceedings. Sure-Tan, Inc. and Surak Leather Co., 246 N.L.R.B. 788, 788–89 (1979). The Board's duty to consult the INA as a source of policy in unfair labor practice proceedings, however, is clear from Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942), which held that the Board is not empowered by § 10(c) of the Act to order reinstatement of seamen who were discharged for striking on board their ship, such strike constituting a mutiny in criminal violation of 46 U.S.C. §§ 292–93 (1982). 316 U.S. at 40. The *Southern Steamship* Court ruled that the Board may not ignore the congressional mandate that the seamen's conduct was to be punished as mutiny. *Id.* at 46–48. The Court summarized the Board's duty in such a situation:

> [T]he 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 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.

[274] 104 S. Ct. at 2809.

[275] 424 U.S. 351 (1976).

[276] 104 S. Ct. at 2809.

[277] *Id.* at 2801. The harboring exemption is codified at 8 U.S.C. § 1324(a)(3) (1982).

[278] 104 S. Ct. at 2809. An employer sanction amendment was extensively debated in 1952 congressional debates when the INA was recodified. *See infra* notes 380–81.

[279] 104 S. Ct. at 2810.

[280] *Id.*

[281] *Id.*

for illegal aliens falls, the Court explained, there will be a corresponding decrease in the incentive for aliens to enter the United States in violation of immigration laws.[282] The goals of the INA, the Court concluded, will thereby be served.[283]

The Court then held that the employer Sure-Tan had constructively discharged its illegal alien employees in violation of section 8(a)(3) of the NLRA by reporting them to the INS in retaliation for voting for the Union.[284] The Court approved the Board's long held test[285] requiring a finding of anti-union animus and a determination that the employer acted purposefully to create working conditions so intolerable that the employee had no option but to resign.[286] Regarding the first part of the test, the Court noted that the employer did not contest the lower court's finding that the anti-union animus element of the test was "flagrantly met."[287] As to the other prong of the test — that the employer created intolerable working conditions that forced the departure of the employees — the Court rejected the employer's argument that the workers' illegal status and not their report to the INS was the proximate cause of the employees' departure.[288] The Court stated that the evidence supported the ALJ's finding that the employer's report to the INS was the "but for" cause of the departure, and that the employer foresaw the precise result of its conduct.[289]

The Court asserted, however, that to find illegal aliens to have been constructively discharged, a specific finding of anti-union animus is necessary.[290] The Court reasoned that because reporting of violations of the criminal laws is usually to be encouraged,[291] adding the requirement of a specific finding of anti-union animus harmonizes the INA with the finding of a constructive discharge under the NLRA.[292]

Because the reporting of any violation of criminal laws should be encouraged, the Court stated, situations where an employer's notification of the INS results in departure of its illegal alien employees may present a mixed motive situation when anti-union animus is established. Under the well established mixed motive analysis,[293] the Court

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[282] *Id.* One commentator disagrees with the theory that extending NLRA protection will effectuate policies of immigration laws. *See* Casenote, *Illegal Aliens in Certification Elections*, *supra* note 51, at 753. This casenote argues that illegal aliens will continue to fear detection and deportation and so will not join unions anyway. *Id.* at 753 nn.45–46. Application of the NLRA to illegal aliens, therefore, will have little effect on illegal immigration. *Id.* at 753–54.

[283] 104 S. Ct. at 2809.

[284] *Id.* at 2810–12.

[285] *Id.* at 2810. The Court cited several cases, each articulating the test as set out in *Haberman*, 641 F.2d at 358.

[286] 104 S. Ct. at 2810.

[287] *Id.*

[288] *Id.*

[289] *Id.* at 2810–11.

[290] *Id.* at 2811. The Court noted that in Bloom/Art Textiles, Inc., 225 N.L.R.B. 766, 769 (1976), the Board also stated this limitation. 104 S. Ct. at 2811. Although the court of appeals in *Sure-Tan* had stated that the *Haberman* test was satisfied by its finding of anti-union animus, it nevertheless considered the employer's conduct to be inherently destructive of employee rights. *Sure-Tan*, 672 F.2d at 601 n.15. The lower court had noted that under the constructive discharge test if the employer's conduct was "inherently destructive of employee rights" anti-union animus would be presumed and no specific finding would be required to hold the discharge discriminatory. The Supreme Court in *Sure-Tan* apparently rejected this without explicitly discussing the point. 104 S. Ct. at 2811.

[291] 104 S. Ct. at 2811 (citing *In re* Quarles, 158 U.S. 532, 535 (1895)).

[292] *Id.*

[293] *Id.* at 2811 n.6.

explained, if the legitimate motive was pretext, the nature of the pretext is immaterial,[294] even if the action taken is praiseworthy, or involves a reliance on state or local laws.[295] The Court further added that even a good faith, that is, not pretextual, motive, may not be an absolute defense to a finding of constructive discharge.[296]

After affirming the lower court's finding regarding the meaning of employee[297] and constructive discharge[298] under the NLRA, the Court examined the remedies which had been awarded by the Board and court of appeals.[299] Before discussing the employer's challenge to the court of appeals' remedial order, the Court reaffirmed its often repeated tenet that the Board has primary responsibility and broad discretion in devising remedies.[300]

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[294] *Id. See* NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983) (where anti-union animus is actual contributing cause of discharge of an employee, presence of mixed motives is not a defense unless that other motive would have resulted in the discharge by itself).

[295] 104 S. Ct at 2811 n.6. *See* New Foodland, Inc., 205 N.L.R.B. 418 (1973). In this case a Las Vegas, Nevada grocery and liquor store was held to have violated section 8(a)(3) by discriminatorily discharging an underage employee. *Id.* at 419, 421. The store employed a minor as cashier and stockperson, a position where she might handle liquor. *Id.* at 418. The Nevada Code and Las Vegas ordinance restricted the handling of liquor by minors. *Id.* at 420. The employer hired her knowing that she was a minor. *Id.* at 420. After she joined the union at the store, the employer said he could no longer afford her at union rates and discharged her. *Id.* at 419. He claimed he discharged her to comply with the law restricting minors from handling liquor. *Id.* at 419, 420. The ALJ stated that the reliance on local law was pretext. *Id.* at 420. The Board ordered reinstatement with backpay, noting that the local laws posed no obstacles to this remedy because the employee had since turned twenty-one. *Id.* at 421.

[296] 104 S. Ct. at 2811 n.6. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). In *Erie Resistor*, the employer offered super-seniority to strike replacements. *Id.* at 223. The Supreme Court upheld the Board's analysis that there was a violation of section 8(a)(3) because the business purpose of the super-seniority system did not outweigh its harmful impact on interests of employees in concerted activity which the employer must have foreseen and intended. *Id.* at 236–37.

[297] 104 S. Ct. at 2808–10.

[298] *Id.* at 2810–12. The Court completely rejected petitioners' argument, based on the Court's recent decision in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), that petitioners' first amendment right to petition the government for redress barred a finding of unfair labor practice. 104 S. Ct. at 2811–12. The Court explained that whereas in *Bill Johnson's Restaurants* there was an actual injury which the State had an interest in redressing, in *Sure-Tan* petitioners did not contact the INS to redress wrongs committed against them. *Id.* at 2812. *Cf.* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 516 (1972) (cause of action found to exist where trucking company filed civil suit claiming competitor violated Clayton Act by concerted action to institute state and federal proceedings to resist and defeat applications to acquire operating rights or to transfer or register those rights). The *Sure-Tan* Court noted that the employer Sure-Tan had not suffered significant injury at the hands of its employees. 104 S. Ct. at 2812. The Court further deemed the *Bill Johnson's Restaurants* analysis inapplicable by upholding its past determination that private persons have no judicially cognizable interest in procuring enforcement of the immigration laws. *Id. Cf.* Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973) (class action by mothers to enjoin failure of prosecution of the fathers of their children for violation of law that married parents must support their children dismissed for lack of standing). Moreover, the Court continued, *Bill Johnson's Restaurants* involved federalism concerns of allowing states to provide civil remedies for conduct touching deeply rooted local interests, whereas in *Sure-Tan* there was no asserted state interest. 104 S. Ct. at 2812.

[299] 104 S. Ct. at 2812.

[300] *Id. See, e.g.*, NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262–63 (1969); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

The Court held that the court of appeals had erred by modifying the Board's order and expanding the reinstatement period from six months to four years.[301] The Court similarly held that the court of appeals erred in substituting its own judgment for the Board's discretion by ordering a minimum six month backpay award, instead of remanding the case to the Board with instructions to reformulate the remedy, as is usual practice.[302] The Court further asserted, in dicta, that the Board itself could not order a minimum award not based on a record of actual evidence of the particular circumstances of the individual employees.[303] Section 10(c) of the Act,[304] the Court explained, requires that a remedy be "sufficiently tailored" to the unfair labor practice it is intended to redress.[305] Applying that principle to the backpay remedy, the Court stated that "sufficiently tailored" means that a backpay remedy must be fashioned on "concrete evidence"[306] and designed to expunge only the actual, not speculative, consequences of the unfair labor practices.[307] The Court concluded that a minimum required award not based on a record is speculative, and therefore is impermissible under the Act.[308]

The Court ruled that the court of appeals was correct, however, in conditioning offers of reinstatement on the employees' legal reentry into the country.[309] This holding, the Court explained, is necessary to avoid a potential conflict with the INA.[310] Similarly, the Court ruled that in computing any backpay, the employees must be deemed unavailable for work, thereby tolling backpay, during any period the employees were not lawfully present and entitled to be employed in the United States.[311]

The Court remanded the case to the Board, stressing that subsequent compliance hearings, where the Board would employ its expertise,[312] are the place to decide what, if any, backpay is appropriate.[313] The Court noted the probable unavailability of any reinstatement or backpay remedy.[314] The Court rejected the dissenters' argument that

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[301] 104 S. Ct. at 2816.

[302] *Id.* at 2813 n.10. The Court explained that although courts of appeal have the power under the Act, 29 U.S.C. §§ 160(e), (f) (1982), to modify orders of the Board, "the power to fashion remedies 'is for the Board to wield, not for the courts.'" 104 S. Ct. at 2813 (quoting *Seven-Up*, 344 U.S. at 346). The rationale for this deference, the Court explained, is that the relation of remedy to policy is peculiarly a matter for the Board's expertise. *Id.* at 2813 (quoting *Phelps*, 313 U.S. at 194).

[303] *Id.* at 2813, 2814. The Court emphasized that a formal record would provide particular facts and opportunity for the employer Sure-Tan to present mitigating evidence. The Board could then apply a reasonable formula to these facts, and thereby determine the compensation due. *Id.* at 2814 n.11.

[304] See *supra* note 6 for relevant text of § 10(c) of the Act.

[305] 104 S. Ct. at 2813.

[306] *Id.* at 2814.

[307] *Id.* at 2813–14.

[308] *Id.* at 2814. The Court objected in particular to the absence of any evidence whatsoever as to the period of time the illegal alien employees might have continued working before apprehension by the INS, and to the absence of opportunity for the employer Sure-Tan to present mitigating evidence. *Id.* at 2814 n.11.

[309] *Id.* at 2815.

[310] *Id.*

[311] *Id.*

[312] *Id.* at 2816. The majority similarly reversed the court of appeals for exceeding its reviewing authority on drafting and verification. *Id.*

[313] *Id.* at 2814–15.

[314] *Id.* at 2815. On remand before the Board, *Sure-Tan*, 277 N.L.R.B. No. 23, 120 L.R.R.M. 1278 (1985), the Board did not order any backpay award. Regarding the subject of a minimum

the absence of such remedies for the illegally discharged aliens was a "disturbing anomaly."[315] The cease and desist order would remain intact, the majority reasoned, and were petitioners to engage in similar activities, they would be subject to contempt sanctions.[316] Moreover, the majority explained, adopting novel reinstatement or minimum backpay awards would be in derogation of the statutory limits placed on the Board's discretion by Congress through the statutory directives of the INA and the NLRA.[317] Any resultant anomaly, the majority concluded, is one which Congress, not the Court, has the perogative to correct.[318]

D. *Concurring and Dissenting: Justice Brennan, Joined by Justices Marshall, Blackmun, and Stevens*

Justice Brennan, with whom Justices Marshall, Blackmun, and Stevens joined, concurred in the Court's holding that illegal aliens are "employees" within the NLRA, and that the employer Sure-Tan violated the Act by constructively discharging the illegal aliens,[319] but dissented on the remedial issue.[320] Justice Brennan agreed that the proper course for the court of appeals, if it was unsatisfied with the proposed order, would be to remand the case to the Board.[321] Because the Board acquiesced in the six month minimum backpay element imposed by the court of appeals, however, Justice Brennan felt that no purpose would be served by a remand.[322] In Justice Brennan's view, therefore, the Court should have approached the case as if the Board had developed the remedial order on its own and the court of appeals had simply enforced that order.[323]

Justice Brennan noted that the majority had in essence devised a new, less deferential standard for reviewing the propriety of remedies ordered under the NLRA by the Board.[324] This new standard, requiring that the remedy be "sufficiently tailored" to the particular unfair labor practice, Justice Brennan maintained, represented a departure from the traditional deference given by the Court to the Board's remedial formulations.[325] Justice Brennan stated that the appropriate standard of review[326] is to uphold a backpay order by the Board unless it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[327]

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backpay award, the Board stated, "[t]he Board is now mindful of the Court's holding that we may not order a minimum backpay award without specific regard to the discriminatees' actual economic losses or legal availability for work." *Id.* at 1279. The Board ordered the employer to draft reinstatement offers in Spanish, to deliver the offers in a manner that would allow verification of receipt, and to keep the offers open for four years. *Id.* The reinstatement offers were conditioned on legal reentry into the United States. *Id.* at 1279 n.5.

[315] 104 S. Ct. at 2815 n.13.

[316] *Id.*

[317] *Id.*

[318] *Id.* The Court apparently recognized in its finding that illegal aliens are employees within the meaning of the NLRA yet are without a remedy for violations of their protected rights.

[319] *Id.* at 2816 (Brennan, J., concurring in part and dissenting in part).

[320] *Id.* at 2816, 2817 (Brennan, J., concurring in part and dissenting in part).

[321] *Id.* at 2817 (Brennan, J., concurring in part and dissenting in part).

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] *Id.* (quoting *Seven-Up*, 344 U.S. at 346–47).

In analyzing the remedial issue under this traditional standard of review, Justice Brennan first noted that the the purpose of the backpay remedy is to restore the victims of discrimination as nearly as possible to the status quo and to effectuate the important public purposes of the Act.[328] A minimum award would fulfill this function, Justice Brennan argued, because the illegal alien workers clearly suffered some loss of income due to the employer's unfair labor practices.[329] Justice Brennan further contended that a minimum backpay award to illegal alien victims of discrimination would not be impermissibly conjectural as it would not be in any way more conjectural than other remedies developed by the Board and approved by courts.[330] Moreover, Justice Brennan maintained that a minimum backpay award would be warranted because a conventional calculation of backpay would leave the illegal alien workers without remedy.[331]

Justice Brennan also noted that the majority's instructions on remand stated that the discharged employees must be deemed unavailable for work during any period in which they are not lawfully entitled to be present and employed in the United States.[332] Such an approach, Justice Brennan maintained, directly conflicts with the Board's longstanding practice of forgiving unavailability when caused by employers' illegal conduct.[333]

Thus, Justice Brennan concluded that the majority created an anomaly by, on the one hand, declaring that illegal aliens are covered by the protections of the NLRA, while on the other hand, effectively depriving them of any remedy.[334] By preventing the Board from granting an effective remedy, Justice Brennan reasoned, the majority actually undermined the NLRA and INA,[335] because employers will realize that they may discriminate against their illegal alien employees without risk of having to pay backpay. According to Justice Brennan, such effective immunity from the mandates of the NLRA will in turn increase the incentive to employers to hire exploitable illegal aliens.[336]

E. *Concurring and Dissenting: Justice Powell, Joined by Justice Rehnquist*

In a concurring and dissenting opinion, Justice Powell, joined by Justice Rehnquist, criticized the Court's finding that illegal alien employees are "employees" within the

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[328] *Id.* at 2818 (Brennan, J., concurring in part and dissenting in part).

[329] *Id.* at 2817 (Brennan, J., concurring in part and dissenting in part).

[330] *Id.* at 2818 (Brennan, J., concurring in part and dissenting in part). *See, e.g.*, NLRB v. Superior Roofing Co., 460 F.2d 1240, 1241 (9th Cir. 1972); Buncher v. NLRB, 405 F.2d 787, 789–90 (3d Cir. 1968), *cert. denied*, 396 U.S. 828 (1969); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 572–73 (5th Cir. 1966). See *supra* notes 205–20 and accompanying text for discussion of the permissibility of conjectural backpay awards.

[331] 104 S. Ct. at 2819 (Brennan, J., concurring in part and dissenting in part).

[332] *Id.* at 2818 (Brennan, J., concurring in part and dissenting in part).

[333] *Id. See, e.g.*, Graves Trucking Inc., 246 N.L.R.B. 344, 345 (1979), *enf'd as modified*, 692 F.2d 470, 474–77 (7th Cir. 1982); Moss Planning Mill Co., 103 N.L.R.B. 414, *enf'd*, 206 F.2d 557 (4th Cir. 1953).

[334] 104 S. Ct. at 2819 (Brennan, J., concurring in part and dissenting in part).

[335] *Id.*

[336] *Id.* Justice Brennan also discussed the court of appeals' modification of the reinstatement period, and the drafting and verification of the reinstatement offers. *Id.* at 2820 (Brennan, J., concurring in part and dissenting in part). Justice Brennan reiterated his contention that although the lower court should have remanded the case, the Court should treat the order as the Board's own. Such a result is justified, in Justice Brennan's view, because the Board fully accepted the lower court's modifications. *Id.*

meaning of the NLRA.[337] Terming the illegal alien employees as persons wanted by the United States for violation of its criminal laws, Justice Powell found it unlikely that Congress intended to accord such persons the protections of the Act.[338] Justice Powell then stated that he would logically therefore also dissent from the remedies part of the Court's opinion, since he would hold that the deported workers are not entitled to any remedy.[339] Nevertheless, Justice Powell joined the Court's opinion on remedies, asserting that given the Court's holding that the illegal aliens were covered by the Act, they are entitled to the protections of the NLRA.[340] In a footnote Justice Powell added that he preferred the Court's remedy rather than that urged in the dissenting opinion, because the former provides less incentive for aliens to enter and reenter the United States illegally.[341]

III. Critique of the Court's Opinion in *Sure-Tan*

In *Sure-Tan* the Supreme Court held that illegal aliens are employees within the meaning of the NLRA and that the employer had constructively discharged the aliens by reporting them to the INS in retaliation for their union activities. The Court, however, overturned the court of appeals' remedial order, effectively depriving them of any backpay award.

This section maintains that the Court's holding that illegal aliens are employees under the NLRA is consistent with previous interpretations of the Act. Part III also argues that the Court's finding of constructive discharge was proper, even though it extended the constructive discharge doctrine and was not necessary under the previous contours of the doctrine. Finally, Part III asserts that the Court in *Sure-Tan* announced a new, more intrusive standard of review, without sufficient justification, that marks a narrower scope of the Board's remedial authority. By reaching this decision, the Court mocks its own holding that the court of appeals intruded into the Board's domain by modifying the Board's order, as well as its own holding that illegal aliens are covered by the NLRA. Thus, in reality the Court endows illegal aliens rights without a remedy.

A. *Illegal Aliens Are "Employees" Under The NLRA*

The Court divided its analysis of whether illegal aliens are employees under the NLRA into two inquiries. The first was the construction of section 2(3)'s definition of employee. For this inquiry the Court looked to past Board practice, the significant deference owed to the Board's expertise, and the Court's own facial reading of the Act. The second inquiry was whether reading the NLRA to protect illegal aliens would conflict with the INA. The following two subsections correspond to the Court's two stage analysis of the status of illegal aliens under the NLRA.

1. Construction of Section 2(3) of the NLRA

The Supreme Court's holding that illegal aliens are employees within the meaning of section 2(3) of the NLRA is based on two rationales. The first rationale articulated by

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[337] *Id.* at 2820 (Powell, J., concurring in part and dissenting in part).

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] *Id.* at 2820 n.* (Powell, J., concurring in part and dissenting in part).

the Supreme Court in *Sure-Tan* for including illegal aliens in the definition of employee, namely that it effectuates the policies of the Act by permitting employee solidarity,[342] is persuasive. The Supreme Court has emphasized the critical importance of employee solidarity in previous cases concerning the exclusivity of employees' selected collective bargaining agent.[343] Employee solidarity expressed through exclusivity, the Court has explained, is a prerequisite for effective collective bargaining.[344] If different groups advanced their separate demands with regard to job assignments and promotions,[345] then the competing demands would set one group against the other. As a result the collective strength of the employees would be weakened.[346] When employees come together under a regime of majority rule and selection of an exclusive bargaining agent, on the other hand, the employees wield their collective strength to secure themselves benefits.[347] This efficacious solidarity, the Court has observed, is an essential condition of industrial peace.[348] The Court's holding in *Sure-Tan* that illegal aliens are employees within the NLRA thus has sound support within the Act itself because it encourages the employee solidarity which is necessary to realize the fundamental aims of the Act.

The Court's second rationale is that the Board has consistently held that illegal aliens are employees within section 2(3) of the Act.[349] The consistent Board practice which the Court relies on, however, is weak support for the Court's holding because this NLRB practice has not had a long history,[350] and boils down to nothing more than the proposition that there is no reason to distinguish legal from illegal aliens.[351] Thus, the Board has not articulated a persuasive rationale for its decisions that illegal aliens are employees under the Act. Noncitizens certainly might be distinguished from illegal aliens. Having entered and remained in the country in knowing violation of the laws, it can be reasonably maintained that illegal aliens should not enjoy the same privileges as those who have respected the federal immigration laws by following the formal procedure, waiting, and then gaining lawful entry into the United States. In other areas of law such a distinction is made between legal and illegal aliens. For example, the benefits of federal social security,[352] medicare,[353] and food stamps,[354] are denied to illegal aliens, but not to aliens

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[342] *See* Plyler v. Doe, 457 U.S. 202, 223 (1982).

[343] *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975).

[344] *Id.* at 62.

[345] *Id.* at 67.

[346] *Id.* at 67–68.

[347] *Id.* at 62.

[348] *Id.* at 68.

[349] See *supra* notes 258–60 and accompanying text for the Court's treatment of the NLRB decisions holding that illegal aliens are employees within the meaning of the NLRA.

[350] See *supra* notes 49–65 and accompanying text for discussion of the NLRB's decisions involving the status of illegal aliens under the NLRA.

[351] See *supra* notes 53–56 for a presentation of the Board's analysis in cases holding that illegal aliens are covered by the NLRA.

[352] Section 1614(f) of the Social Security Act, 42 U.S.C. § 1382c(a)(1)(B) (1976), denies Supplementary Security Income benefits to aliens unlawfully present in the United States.

[353] 42 U.S.C. § 1395(o)(2) (1976). Those legally present aliens qualifying must also have resided in the United States continually for five years prior to application for medicare benefits. This provision was held constitutional in Matthews v. Diaz, 426 U.S. 67, 87 (1976). The Court in *Matthews* reasoned that aliens, as guests, are not constitutionally entitled to privileges available to citizens. *Id.* at 82. Congress had to draw a line somewhere, and its choice was not unreasonable, the Court

lawfully admitted for permanent residence or otherwise lawfully residing permanently in the United States.[355] Furthermore, in the recent case of *Plyler v. Doe*[356] the Court recognized the legitimacy of special exclusions of illegal aliens stating that illegal alienage is not a suspect classification under the Equal Protection clause because their presence in this country in violation of federal law is not a "constitutional irrelevancy."[357]

Even though the reasoning of past Board decisions extending NLRA coverage to illegal aliens is weak, the Court's reliance on past Board practice was nevertheless appropriate because of the significant deference owed to the Board's interpretation of who is an employee under the NLRA. The Supreme Court in *Sure-Tan* correctly stated that the standard of review in the section 2(3) context is that the Board's interpretation will be upheld where it is "reasonably defensible."[358] Despite the weak rationale in the Board's line of cases holding that illegal aliens are employees within the meaning of section 2(3) of the Act, the simple fact that the Board has over a period of time flexibly applied the definition of employee suggests that considerable judicial deference to the Board's definition of employee is appropriate. Moreover, the Court's approval of the Board's manner of construction of this Act is logically sound. The broad terms of the definition of employee in the statute contrast sharply with the specific statutory exclusions.[359] When an individual worker does not fall within one of these specific exclusions, a presumption would seem to arise that he or she is included in the term "employee" of section 2(3) of the Act.

A closer analysis than that given by the Board or the Court shows that there is further support for holding illegal aliens to be employees under the NLRA. Past interpretation of who is an employee under the Act has focused on the functional, economic role of the individuals in question. The anchor case for this kind of analysis, and of the interpretation of section 2(3), is *NLRB v. Hearst Publications Inc.*, where the Supreme Court upheld the Board's ruling that newsboys were employees within the meaning of the Act.[360] In *Hearst* the Court stated that the NLRA's applicability is to be determined broadly, by underlying economic facts rather than technically by previously established legal classifications.[361] Viewed in terms of economic relationships, a worker's immigration

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explained. *Id.* at 83. "In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not." *Id.*

[354] 7 U.S.C. § 2015(f) (Supp. IV 1980).

[355] But undocumented aliens do have many rights. *See, e.g.*, Moreau v. Oppenheim, 663 F.2d 1300, 1307–08 (5th Cir. 1981) (undocumented aliens entitled to damages for breach of contract of a sale); Gates v. River Constr. Co., 515 P.2d 1020, 1021–22 (Alaska 1973) (illegal aliens entitled to wages under labor contract); Nizamuddowlah v. Bengal Cabaret, Inc., 92 Misc. 2d 220, 399 N.Y.S.2d 854, 857 (Sup. Ct. 1977) (undocumented aliens entitled to wages due under a labor contract).

[356] 457 U.S. 202 (1982). In *Plyler* the Court struck down a state statute which witheld from local school districts any education funds going to educate illegally present children. *Id.* at 205–06. The Court ruled that illegal aliens are covered by the Equal Protection clause of the fourteenth amendment of the United States Constitution. *Id.* at 210. The Court found the state failed to show that the statute furthered some substantial goal of the state. *Id.* at 217–18. The decision in *Plyler* is a departure from conventional equal protection analysis, which would have required only a showing that the statute had a rational basis, since no suspect classification of fundamental right was involved. *See* Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 54–58 (1984).

[357] *Plyler*, 457 U.S. at 223.

[358] *Sure-Tan*, 104 S. Ct. at 2803, 2809.

[359] *See* 29 U.S.C. § 152 (1982).

[360] 322 U.S. 111, 132 (1944).

[361] *Id.* at 129.

status is irrelevant to whether he is functionally in an employee relationship with the employer.[362] The Act itself addresses the workplace in terms of functions performed and economic relationship of the people there, identifying groups as "employees," "supervisors," "professional employee," and "employer."[363]

This argument, taken together with the Court's and Board's reasoning that the inclusion of illegal alien workers as employees is consistent with the language of the Act and the Act's policy of encouraging and protecting the collective bargaining process by removing a catalyst for employee fragmentation, makes for a persuasive and strong basis for upholding the Board's interpretation. The Court, therefore, correctly applied the standard of review, finding that the Board's interpretation was "reasonably defensible."[364] Interpretation of the NLRA alone, however, was not sufficient to rule in *Sure-Tan* that illegal aliens are employees under the Act; the Court also had to address the employer's argument that the INA would conflict with such a holding.

2. Interface of NLRA Section 2(3) and the INA

The Court's ruling that extension of the protections of the NLRA to illegal immigrants does not conflict with the mandate of the INA and actually serves its purposes is persuasive, because in other statutory contexts illegal aliens are given the protections of other labor market statutes. For example, an employer of illegal aliens must meet the standards of the Occupational Safety and Health Act[365] and the Fair Labor Standards Act.[366] An employer must also pay social security taxes for illegal alien workers,[367] and in forty-nine out of fifty states must provide workers' compensation protection to injured workers regardless of whether the worker is an illegal alien.[368] The rationale for extending these protections to illegal aliens is that it will eliminate the advantages to employers in hiring illegal aliens. As a result there will be a decreased demand for illegal aliens, and supply — the level of illegal immigration — will correspondingly decrease, thus effectuating policies of the INA.

Although the extending of the protections of the NLRA to illegal aliens also serves the purposes of the INA, the Court is incorrect in stating that the Board's interpretation is consistent with the INA for the reason that employment of illegal aliens is only a peripheral concern of the INA.[369] The Court's assertion simply does not square with the fact that a primary purpose of the INA is to preserve jobs for American workers.[370] In *DeCanas v. Bica*,[371] for example, the Court upheld a state employer sanctions statute against a challenge that the state statute was preempted by federal immigration law.[372] In a later case the Court explained that in *DeCanas* the state statute was not preempted

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[362] The Court took such a functional analysis approach in NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974) (Court defined "managerial employees" by reference to the functions performed at the workplace).

[363] 29 U.S.C. § 152 (1982).

[364] *Sure-Tan*, 104 S. Ct. at 2809.

[365] North, *Labor Market Rights of Foreign-born Workers*, MONTHLY LAB. REV., May, 1982, at 32, 33.

[366] *Id.*

[367] *Id.*

[368] *Id.* The exception is Vermont. *Id.*

[369] *See, e.g.*, *Sure-Tan*, 104 S. Ct. at 2809 (citing DeCanas v. Bica, 424 U.S. 351, 360 (1976)).

[370] *Id.* at 2810.

[371] 424 U.S. 351 (1976).

[372] *Id.* at 362.

by the INA because the state statute reflected Congress's intention embodied in the INA to bar from employment all aliens except those possessing a grant of permission to work in this country.[373] The INA, therefore, has much more than merely a peripheral concern with the employment of illegal aliens. This congressional intent, moreover, is concretely fulfilled through the enforcement of the INA provisions through INS raids such as in *Sure-Tan* and by allowing only the entry of immigrants who will not displace American workers.[374]

The Court's conclusion that the INA is only peripherally concerned with the employment of illegal aliens, though incorrect, is understandable because the INA does not express a uniform policy toward the employment of illegal aliens. Although the INA prohibitions on the entry of aliens who do not comply with its provisions regarding employment indicate the INA's concern with the general issue of the employment of illegal aliens, two other aspects of the INA point to the opposite conclusion. First, Congress has not made it a separate criminal offense for an illegal alien to accept employment.[375] Second, when the INA was originally passed, a specific exemption was included in the INA, the so-called "Texas Proviso," which stated that employment of illegal aliens did not constitute the offense of "harboring" illegal aliens.[376] As a result, employers are free under the INA to employ illegal aliens. Thus, although the Court in *Sure-Tan* was incorrect in stating that the INA has only a peripheral concern with the employment of illegal aliens, the Court was correct to hold that the INA does not bar the Court from holding illegal aliens to be protected by the NLRA. The Court's conclusion is correct because the INA is internally inconsistent, with the effect that it does not express a uniform policy of protecting American labor as well as the NLRA does.[377]

Concern about the growing influx of illegal aliens into the country, and the realization that the INA is internally inconsistent, may lead to the amending of the INA to include sanctions against employers who hire illegal aliens so as to make employment of illegal alien workers less desirable.[378] On the federal level, the Simpson-Mazzoli bill,[379] which would subject employers who knowingly hired illegal aliens to fines and prison terms, has been defeated for yet another congressional session. But it will surely be back again[380] for future debate.[381]

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[373] *Plyler*, 457 U.S. at 225. *See also* Saxbe v. Bustos, 419 U.S. 65, 76 n.29 (1974) (INA concern is to preserve jobs for American workers).

[374] Section 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) (1982), states in relevant part:

> The following classes of aliens . . . shall be excluded from admission into the United States . . . (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available . . . to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . . .

[375] *See Sure-Tan*, 104 S. Ct. at 2809.

[376] *DeCanas v. Bica*, 424 U.S. 351 (1976). The specific INA "harboring" exemption is 8 U.S.C. § 1324 (1976).

[377] See *supra* text accompanying notes 273–83 for the *Sure-Tan* Court's reasoning on the issue of INA/NLRA conflict.

[378] *See infra* note 380.

[379] Passed May 18, 1983 by Senate. *See* 129 CONG. REC. 6970 (1983); S. REP. NO. 62, 98TH Cong., 1st Sess. 98 (1983).

[380] The United States Senate and House of Representatives passed comprehensive immigration bills in 1983 and 1984. The legislation died in October 1984 after a conference committee failed

If Congress passes such an amendment to the INA then any conflict between the NLRA and the INA would probably be resolved in favor of the INA because of the "accommodation doctrine."[382] This doctrine requires the NLRB to take into account other federal statutes when administering the NLRA. In *Sure-Tan* the Court applied this doctrine by deciding that illegal aliens could be deemed employees within the meaning of the NLRA only after carefully noting that the INA was not in conflict with the NLRA.[383] Similarly, the Court in *Sure-Tan* explained that accommodating the INA with the NLRA required that the discharged illegal alien employees be deemed unavailable for work while not entitled to be present in the United States.[384] Given the *Sure-Tan* Court's emphasis on deciding whether a NLRA/INA conflict exists, and deferring to the INA when it perceived such a conflict, if the INA were amended to outlaw the employment of illegal aliens, the Court might well rule that the illegal alien employees should no longer be deemed employees within the NLRA.[385]

B. *Constructive Discharge*

In finding that the retaliatory notification of INS and subsequent arrest and exit of the illegal aliens was a constructive discharge,[386] the *Sure-Tan* Court extended the constructive discharge doctrine.[387] In examining this doctrine, the Court adhered to the

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to reach agreement. Senator Alan K. Simpson, Republican of Wyoming, and now the Senate majority whip, said he intended to resume his efforts to pass a bill prohibiting employment of illegal aliens. N.Y. Times, Jan. 27, 1985, at 1, col. 4. In 1952 when the INA was on the Senate floor, Senator Douglas proposed an amendment for sanctions on employers who knowingly hired illegal aliens. This amendment was also extensively debated before being defeated. 98 CONG. REC. 798–802, 803–11 (1952).

[381] For a thoughtful and critical analysis of employer sanction legislation, see Smith & Mendez, *Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The "Scorched Earth" Approach to Immigration Control*, 6 N.C.J. INT'L & COMM. REG. 19 (1980–1981). For a review advocating employer sanction legislation, see Comment, *Employer Sanctions*, *supra* note 270.

[382] *See* Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942).

[383] *Sure-Tan*, 104 S. Ct. at 2815.

[384] *Id.*

[385] Given the Court's decision in *Sure-Tan*, however, the question remains whether the NLRA preempts state illegal alien employment legislation where exercise of NLRA rights is involved. The Court's decision in *DeCanas v. Bica*, 424 U.S. 351 (1976), clears the way for state employment sanction laws. In *DeCanas*, the Court ruled that the INA does not necessarily preempt harmonious state regulation, or state regulation where the federal immigration scheme is only peripherally concerned and the state interest — employment of its residents — is in the mainstream of the police power. The Court remanded to the California court to determine the scope of section 2805. *Id.* at 364–65. Thus, state employer sanctions are apparently permissible under the present INA. Several states have employer sanction laws. *See generally* Note, *State Regulation of Employment of Illegal Aliens: A Constitutional Approach*, 46 S. CAL. L. REV. 565 (1973).

The recent decision in Plyler v. Doe, 457 U.S. 202 (1982), however, undercuts the scope of permissible state regulation of illegal aliens because it may signal a perception by the Court that illegal aliens are becoming part of the nation, integrating themselves into both the local and national community. For an excellent and thought-provoking analysis of *Plyler* and immigration law, see Schuck, *supra* note 356. It is yet to be seen whether the fact that *Plyler* involved education and concerned children was of special significance to the Court, as perhaps is evidenced by the hybrid equal protection analysis, rather than the fact that illegal aliens were involved.

[386] See *supra* text accompanying notes 285–92 for the *Sure-Tan* Court's reasoning on the issue of constructive discharge.

[387] See *supra* notes 96–137 and accompanying text for a discussion of the case law on the development and meaning of the constructive discharge doctrine.

Haberman two-prong test[388] — which requires that the employer create working conditions so intolerable that the employee is forced to resign, and that the employer act with intent to "encourage or discourage membership in any labor organizations"[389] — and found each prong to be satisfied in *Sure-Tan*.[390] In its application of the *Haberman* test, the *Sure-Tan* Court broadened the definition of "intolerable working conditions" under the first prong of the test. The notification of the INS in *Sure-Tan* does not fit any definition of intolerable working conditions under the already loose definitions in prior case law. In *Sure-Tan* the employer did not change the nature of the job[391] nor verbally harass and humiliate its illegal alien employees.[392] The Court's extension of the constructive discharge doctrine was sound nevertheless, because the employer's conduct in *Sure-Tan* was simply a covert equivalent of directly firing the illegal aliens for having supported the union.

The Supreme Court in *Sure-Tan*, however, in explaining the limits of its decision, noted that absent anti-union animus the Board will not find constructive discharge of illegal aliens where the alleged reason is their immigration status.[393] Evidently an employer's deeds alone — discharge of illegal aliens, or notification of INS of illegal aliens who have engaged in NLRA protected activities — will never be sufficient to trigger the *Great Dane* presumption.[394] A stronger showing of anti-union animus is required, as in *Sure-Tan* where the Board found that the anti-union animus requirement was "flagrantly met."[395]

The Court thus effectively precludes the use of the *Great Dane* presumption of anti-union animus when illegal aliens are involved, even where the employer's conduct is egregious and is inherently destructive of employee rights under the NLRA. The *Great Dane* presumption is an important protection for employees because intent can be difficult to prove. In *Sure-Tan* the Court found the requirement of the presence of anti-union animus to have been flagrantly met. In other, less clear cases, however, the *Great Dane* presumption might be the only way the illegal aliens would be protected from a constructive discharge. The *Sure-Tan* Court explained its requirement of a specific showing of anti-union animus by stating that the reporting of illegal aliens is ordinarily to be encouraged, not penalized. This rationale, however, overlooks the fact that when the *Great Dane* presumption of anti-union animus operates, the employer can rebut it by proffering a legitimate basis — desire to help enforce the immigration laws, for example — for its conduct, or raise the defense that a legitimate motive outweighed its anti-union animus. Thus, the Court should not have foreclosed the use of the *Great Dane* presumption in cases involving the discriminatory discharge of illegal aliens. The effect of rejecting the use of the *Great Dane* presumption is a dampening of the likelihood of the illegal aliens' expression of their NLRA rights.

If either state or federal employer sanction laws were involved in a *Sure-Tan*-like situation there would likely be a mixed motive situation because helping to enforce laws

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[388] NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981) (en banc).

[389] *Sure-Tan*, 104 S. Ct. at 2810.

[390] *Id.*

[391] See *supra* note 105 for constructive discharge cases involving claims of material changes in job conditions.

[392] See *supra* note 104 for constructive discharge cases involving claims of harassment and humiliation.

[393] *Sure-Tan*, 104 S. Ct. at 2811.

[394] *See supra* notes 110–15 and accompanying text.

[395] *Sure-Tan*, 104 S. Ct. at 2810.

prohibiting the hiring of illegal aliens would be presumed to be a good faith motive.[396] Notification of government authorities to help enforce the laws has been deemed a right and even an obligation of citizenship.[397] The existence of valid state or federal employee or employer sanction laws would therefore shape the issues in cases similar to *Sure-Tan*. The motive of helping enforce the law or avoiding sanctions would not be dispositive, however, if it were pretextual.[398] The Court in *Sure-Tan* stated that the nature of the pretext is immaterial even if the pretext is a reliance on state or local laws.[399] It would appear, therefore, that an employer's defense that it acted out of concern for employer or employee sanction laws would not be an absolute defense to an allegation of a constructive discharge of an illegal alien.

It will be easier, nevertheless, for an employer to establish a bone fide motive for a discharge (and constructive discharge) when illegal aliens are involved. When the employer does establish a good faith legitimate motive, and anti-union animus has also been proven, there is a mixed motive situation. Whether the employer violated the NLRA will depend on whether, under the various judicial formulations, the legitimate motive outweighs the illegitimate motive. When illegal aliens are involved, that determination will be whether the employer's legitimate motive of helping enforce the immigration laws outweighs his anti-union animus.

Even an employer motivated by anti-union animus, therefore, can constructively discharge illegal alien employees and increase the likelihood of successfully defending against unfair labor practice charges if his conduct fits the following pattern. First, the employer learns of the illegal alien employees' status after the employees engage in protected activity. Second, the employer knows of valid employer or employee sanction laws. Finally, the employer notifies the INS to check on the immigration status of the employees. A shrewd employer would thus make sure not to learn of the employees' immigration status until the right time.[400] In this manner, the employer's subsequent constructive discharge of the employees would seemingly be protected under the *Sure-Tan* decision.

The Court's analysis of the constructive discharge issue is straightforward, and leads easily to the conclusion that the employer in *Sure-Tan* constructively discharged his illegal alien workers when he retaliated against their exercise of NLRA rights by arranging for an INS raid of the workplace, knowing that some of its employees were illegal aliens.

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[396] See *supra* notes 107–09 and accompanying text for discussion of the *Great Dane* presumption of anti-union animus.

[397] *See In re* Quarles, 158 U.S. 532, 535 (1895).

[398] See *supra* notes 293–96 and accompanying text for discussion of mixed motive discriminatory discharge cases. The Court in *Sure-Tan* stated that the burden of showing bona fide justification of the purported legitimate motive in a mixed motive situation is on the employer. 104 S. Ct. at 2811 n.6.

[399] *Id.*

[400] The *Sure-Tan* Court stated that reporting violations of any criminal law is ordinarily to be encouraged. *Id.* at 2811. In *Sure-Tan*, however, the privilege of notifying the INS of the employees' illegal presence in the United States was outweighed by the rights of the illegal aliens as employees under the NLRA, because it was motivated by anti-union animus. Proceeding with this analysis, the Court soundly distinguished Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983). In *Sure-Tan*, unlike in *Bill Johnson's Restaurants*, the employer did not have a cognizable legal wrong and was not petitioning the courts for redress of such wrong. In addition there was a diminished state interest in the immigration situation in *Sure-Tan* than in the libel situation in *Bill Johnson's Restaurants*. *See Sure-Tan*, 104 S. Ct. at 2812.

The facts in *Sure-Tan*, however, make this the easy case. In cases where anti-union animus is not flagrant, the illegal aliens may find it more difficult to claim NLRA protections since the Court precluded the possible use of the *Great Dane* presumption from the two-prong test. In addition the Court's approval of employers helping enforce the immigration laws by notifying the INS may make it easier for employers to defend themselves against claims of constructive discharge.

C. *Remedies*

The Court's treatment of remedies in *Sure-Tan* is troubling. The rights under the NLRA, which the Court concluded after careful analysis that the illegal alien workers possess, are given no practical effect by the Court. Using a new standard of review of Board remedial orders, the Court rejected an extended reinstatement period or a minimum backpay award. *Sure-Tan* did present novel circumstances that tested the extent of the Board's remedial power, but the Court refused to address the case in these terms. The Court opted instead for dressing up its new standard of review as a traditional assumption in judicial review of Board remedial orders, and disingenuously disposing of the case on technical grounds.

The majority in *Sure-Tan* held that the court of appeals overstepped its bounds by requiring a six month minimum backpay award and that the order was consequently defective.[401] The majority based its holding on the principle that judicial deference to administrative agencies is owed by courts because administrative agencies have special expertise.[402] Since the Board never applied its expertise to the order at issue, the majority reasoned that the case should be remanded to the Board.[403] By the very action of acquiescing and then advocating the modified order of the court of appeals, however, the Board in effect infused its expertise into the order.

The Court flatly refused to accept that the Board had brought its special expertise to bear in *Sure-Tan* because of the disparity between the Board's original order and the court of appeals' modified order.[404] The Board's "mere acquiescence" in the modified order could not cure its failure to separately apply its expertise, the majority stated.[405] The majority sounded a different note, however, when it addressed Justice Brennan's attack on the majority's ruling that the illegal aliens would be deemed unavailable for work during any period they were not lawfully present in the United States.[406] The majority stated that although the court of appeals had modified the Board order so as to include the unavailability requirement, the Board had "clearly indicated its agreement" with this modification by asking that the judgment be affirmed in its entirety.[407] This inconsistent analysis by the Court indicates that the majority was result oriented in *Sure-Tan*, setting out from the beginning to only grant illegal aliens rights under the NLRA without a remedy.

The majority opinion applied a stricter standard of review which accords less deference to the Board's remedial orders than under the traditional standard of review.

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[401] *Sure-Tan*, 104 S. Ct. at 2813.
[402] *Id.* at 2812.
[403] *Id.* at 2813–16.
[404] *Id.* at 2813 n.9.
[405] *Id.*
[406] *Id.* at 2813 n.12.
[407] *Id.*

The Court paid lip service to the principle of *Phelps Dodge Corp.* that a backpay order is a means to restore the situation as nearly as possible to that which would have been obtained but for the illegal discrimination.[408] The Court in *Sure-Tan* emphasized instead that a backpay remedy must be "sufficiently tailored" so that it expunges "only the actual, and not merely speculative, consequences of the unfair labor practices."[409] By developing this new, less deferential standard of review, the Court has curtailed the remedial power of the Board.

The Court did not discuss its standard of review of Board orders as being new, but rather termed it "a cardinal, albeit frequently unarticulated assumption."[410] The Court supported its standard on the foundation cases interpreting the NLRA's grant of remedial power to the Board: *Phelps Dodge*[411] and *Seven-Up*.[412] Although there is language in these cases to support the majority's standard,[413] the thrust of these cases is that the Board must be allowed broad latitude in fashioning remedies, because the particular nature of labor law calls for creative, particularized fashioning of relief.[414] This is the essence of the standard of review stated by the *Seven-Up* Court, and quoted by the dissent as the appropriate, and previously the prevailing, one: "When the Board . . . makes an order of restoration by way of backpay 'the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'"[415]

The Court's new standard of review requiring the Board's orders to be "sufficiently tailored" encroaches upon the Board's discretion. By violating the traditional standard the majority is guilty of the same offense with which it charged the lower court, namely that it impermissibly interfered with the Board's discretion in order to achieve a particular result. The Court's admonition to the lower court, therefore, applies to its own decision: "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."[416]

The Court in *Sure-Tan* is guilty of this charge despite the fact that the Court formally refused to fashion a new remedy and technically remanded the case to the Board on the grounds that the lower court had surpassed its allowed scope of review.[417] Despite the remand, the Court effectively tied the Board's hands by its pronouncements on the

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[408] *Id.* at 2813 (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).

[409] *Id.* at 2813–14.

[410] *Id.* at 2813.

[411] 313 U.S. 177 (1941).

[412] 344 U.S. at 346–47.

[413] For example, the *Phelps Dodge* Court made the following statements: "[T]he power with which Congress invested the Board implies responsibility . . . . [O]nly actual losses should be made good . . . . The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims . . . ." 313 U.S. at 194, 198, 199.

[414] *Id.* at 198 ("in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations").

[415] *Sure-Tan*, 104 S. Ct. at 2817 (quoting *Seven-Up*, 344 U.S. at 346–47 (quoting Virginia Electric Light & Power Co. v. NLRB, 319 U.S. 533, 540 (1943))); *see also* NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969) (quoting same).

[416] *Sure-Tan*, 104 S. Ct. at 2813 (quoting *Phelps Dodge*, 313 U.S. at 194).

[417] *Id.* at 2813, 2816.

parameters of permissible backpay orders.[418] The "sufficiently tailored" standard applied by the majority is not the traditional standard of deference given to the formulation of remedies by the Board, but is closer to an analysis of whether the order is punitive rather than remedial.[419] The Court has consistently held that Board orders may not be punitive.[420] The Court stated that in light of its disposition of the case by remand it "may thus avoid entering into what we have previously deemed the 'bog of logomachy' as to what is 'remedial' and what is 'punitive.'"[421] The Court's formal disposition of the case is a ruse. The Court has appropriated the boundary of punitive orders, disguised it as the initial standard of review of Board orders, and side-stepped a bog of analysis through which it might not have been able to reach the same result.

Under the traditional standard of review the minimum backpay remedy would probably have been permissible. It is true that the minimum backpay order falls outside of the boundaries of the permissible degree of conjecture permitted by courts in the past.[422] Specifically, in *Sure-Tan* there was no production of a record of relevant information, no analysis of the information in the form of a written opinion, and no opportunity for the employer to present mitigating evidence. The Court was obligated, if it had adhered to the traditional standard of review, to decide whether this high degree of conjecture made the Board order punitive and thus impermissible. The case law on what is punitive is indeed, as the Court characterized it, a bog of logomachy. Avoiding analysis because it is difficult, however, is no excuse for a court. Although the minimum backpay order was more speculative than any past remedies fashioned by the Board, this increased conjecture was essential to avoid depriving the illegal aliens of any remedy and thereby rendering their rights under the NLRA nothing more than empty assurances. Considering that both Congress, through the NLRA, and case law endow the Board with the power to fashion an exceptional remedy in the face of an exceptional situation as in *Sure-Tan*, the minimum backpay award would therefore likely have been upheld under the traditional standard of review.

Conclusion

Sure-Tan presented three significant issues. First, it involved the issue of whether illegal aliens are "employees" within the meaning of the National Labor Relations Act so as to be covered by the Act's protections against unfair labor practices. Second, it addressed the issue of whether the employer's retaliatory notification of the INS and the subsequent raid at the workplace, followed by the voluntary deportation of several illegal alien employees, constituted a constructive discharge. Third, it posed a question as to the appropriate remedies the Board may order when considering three factors: the accepted scope of the Board's remedial power, the fact that the employees' presence in the United States violated federal immigration law, and the right or obligation of citizenship to aid in law enforcement.

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[418] *Id.* at 2813–14.

[419] *See, e.g.*, NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1952); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

[420] *Republic Steel*, 311 U.S. at 10–12.

[421] *Sure-Tan*, 104 S. Ct. at 2816 n.14 (quoting *Seven-Up*, 344 U.S. at 348).

[422] See *supra* notes 204–20 and accompanying text for a discussion of the permissibility of conjectural backpay awards.

Although the Board's short history of holding that illegal aliens are employees under the NLRA is without a sound analytic foundation, the Court recognized that judicial deference is due to the Board's interpretation because of the Board's expertise. Both the statutory analysis and the conclusion that such an interpretation effectuates the policy of the Act strongly argue in favor of including illegal aliens within the term "employees" in section 2(3) of the NLRA. The Court correctly adopted this view. In regard to the issue of constructive discharge, by holding that the employer had constructively discharged his illegal alien employees by arranging an INS raid out of anti-union animus, the Court extended the constructive discharge doctrine from its already amorphous boundaries. This holding was also appropriate, however, given the special circumstances presented by the employees' illegal immigration status.

The Court also introduced a new standard of review of Board remedial orders: they must be "sufficiently tailored" to expunge only actual losses caused by the unfair labor practices. This new standard is more intrusive and breaks with the Court's traditional deference in this area. Although the Court purported to not raise the issue of whether a minimum backpay order is "punitive," and hence not enforceable, the Court injected precisely this prohibition into its new standard of review.

The Court purports to find the illegal aliens in *Sure-Tan* to be employees within, and thus protected by, the NLRA. The constructively discharged aliens are out of their jobs; sent out of the country, deprived of any backpay, and are not entitled to reinstatement until they legally reenter the country, which is likely a long time away. The Court purports to give the illegal aliens full NLRA rights. All the illegal alien workers really got in *Sure-Tan*, however, was a piece of paper saying that their NLRA rights had been trampled upon. By denying a minimum backpay award, the Court in effect deprives illegal alien workers of any remedy. Thus, as Justice Brennan asserted, "[t]he contradiction in the Court's opinion is total."[423] The Court holds that illegal alien workers are to receive the full protection of the NLRA, yet when it comes to giving these paper guarantees practical effect, the Court says no.

JOHN W. SAGASER

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[423] *Sure-Tan*, 104 S. Ct. at 2819.