THE RIGHT OF UNDOCUMENTED WORKERS TO REINSTATEMENT AND BACK PAY IN LIGHT OF *SURE-TAN*, *FELBRO*, AND THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

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INTRODUCTION

Unions and their members are currently fighting in the courts and on the shop floor for the right of undocumented workers to reinstatement and back pay when they are the victims of unfair labor practices. In the past, the National Labor Relations Board (the "Board" or the "NLRB") forcefully protected the rights of undocumented workers regardless of their immigration status.[1] This policy, however, changed dramatically after the Supreme Court's decision in *Sure-Tan v. NLRB.*[2] Beginning in 1985, a year after the *Sure-Tan* decision, the Office of the General Counsel of the NLRB began issuing policy memoranda which virtually eliminated the right of undocumented discriminatees to reinstatement and back pay by conditioning such relief in

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1. Congress created the National Labor Relations Board in 1935. National Labor Relations Act of 1935, ch. 372, § 3, 49 Stat. 449, 451. The General Counsel and her staff implement policy for the NLRB's field staff and investigate and prosecute unfair labor practices upon an initial charge filed with the Board. 29 U.S.C. § 153(d) (1982). Administrative Law Judges hear cases, and unfavorable decisions may be appealed to the Board itself. *Id.* at § 160(c), (d). An adverse decision from the Board may be appealed to the federal court of appeals in the appropriate circuit. *Id.* at § 160(e).

2. 467 U.S. 883 (1984).

both administrative and court proceedings on proof of lawful presence and authorization to work.[3]

The passage of the Immigration Reform and Control Act of 1986 ("IRCA") provided the Board with an additional basis for asserting that the labor rights of undocumented workers should be curtailed.[4] Although the General Counsel's office has recently retreated somewhat from this position, its current practice still raises substantial issues of law and policy and contravenes its fundamental obligation to protect the labor rights of all workers.

The initial impact of IRCA on unionized workers was relatively limited, primarily because a number of unions provided employers with information about the employer sanctions provisions to prevent hasty and illegal reactions by employers.[5] IRCA's sanctions, however, are in effect, and the INS has promulgated regulations enforcing them.[6] It is, therefore, likely that in the near future we will see an increase in violations of the rights of undocumented workers in the union context as well. The NLRB, and ultimately the courts, will have to decide in what ways IRCA will influence their current practice and policy.[7]

The position set forth in this article is that IRCA provides some increased protection to two groups of undocumented workers: those covered by the

3. *See, e.g.,* Office of the General Counsel, National Labor Relations Board, Memorandum OM 85-57, 120 Lab. Rel. Rep. 342 (July 2, 1985) [hereinafter Memorandum 85-57].

4. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C. (Supp. IV 1986)) [hereinafter "IRCA"]. The two most highly publicized sections of IRCA are the program legalizing undocumented persons, 8 U.S.C. § 1255a (Supp. IV 1986), and the creation of sanctions which may be imposed on employers who employ undocumented workers. *Id.* at § 1324a. IRCA provides for the adjustment from unlawful to lawful status of an undocumented person who has maintained continuous illegal residence in the United States since before January 1, 1982 [hereinafter § 1255a legalization]. IRCA contains additional provisions which specifically cover farm workers, Cubans and Haitians, and immigrants who entered prior to January 1, 1972.

The statute prohibits any person from knowingly hiring, recruiting, or referring for a fee, any alien not authorized to work by the Immigration and Naturalization Service ("INS"). 8 U.S.C. § 1324a (Supp. IV 1986). Employers are required to verify the eligibility of all new employees by examining documents such as a passport, birth certificate, social security card, driver's license, or any other of the extensive list of documents set forth at 8 C.F.R. §§ 274a.2(b)(v)(A)-(c)(1988) which constitute proof of identity and employment authorization. *Id.* at § 1324a(b)(1). Employers must attest in writing under penalty of perjury that they have reviewed a new employee's documentation and that the employee is authorized to work in the United States. *Id.* The scheme is enforced through a series of civil penalties which range from $100 to $1000 for each alien with respect to whom a violation has occurred. *Id.* at § 1324a(e)(5). Criminal penalties may be imposed for a "pattern or practice" of violations. *Id.* at § 1324a(f).

5. *See, e.g.,* Letters from Amalgamated Clothing and Textile Workers Union ("ACTWU"), International Ladies Garment Workers Union ("ILGWU"), and the United Electrical, Radio and Machine Workers of America (UE) (on file with the New York University Review of Law & Social Change).

6. *See* 8 C.F.R. § 274a.10 (1988).

7. For example, serious fourth amendment issues are posed by the INS's assertion that it does not need a warrant or subpoena to obtain the records of employers and that failure to provide such documents pursuant to a request would itself be a violation of IRCA. Moreover, the fact that employers may be subject to criminal sanctions adds a new twist to the debate over

"grandfather clause" of IRCA[8] and those eligible for legalization under the Act. For other undocumented workers, IRCA poses additional questions but should not result in a diminution of rights under the National Labor Relations Act (the "NLRA").[9]

This article will examine the conflict between the NLRB and the courts over the remedies of reinstatement and back pay for undocumented workers as well as the impact of IRCA on these remedies. The first section summarizes the Board's decisions prior to *Sure-Tan v. NLRB*,[10] the Supreme Court decision which addressed the rights of undocumented workers under the NLRA. The second section reviews the history and reasoning of the *Sure-Tan* decision. The third section describes two recent cases, decided by the United States Court of Appeals for the Ninth Circuit, in which unions successfully obtained relief for their members. The final section evaluates the impact of IRCA on labor rights and the battles which lie ahead.

I.
THE LONG-STANDING POLICY OF PROTECTION FOR UNDOCUMENTED WORKERS UNDER THE NLRA

The National Labor Relations Board has long treated undocumented workers as employees who enjoy the same rights and protections under the NLRA as other workers. The Board stated, as early as 1949, for example, that "the eligibility of aliens to cast ballots in Board elections is too well established to warrant justification anew here."[11] In the election context, the NLRB has held that undocumented workers may form part of an appropriate bargaining unit,[12] that such workers have the right to vote in union elec-

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what standard must be applied in evaluating a warrant. *See, e.g.*, International Molders and Allied Workers Local Union No. 164 v. Nelson, 799 F.2d 547 (9th Cir. 1986).

In addition, the impact of IRCA on labor rights has already been raised in the context of minimum wage protections under the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq. *See* Patel v. Sumani Corp., 846 F.2d 700 (11th Cir. 1988) and *In re* Reyes, 814 F.2d 168 (5th Cir. 1987), *cert. denied*, __U.S.__(1988). It has also been raised in the context of Title VII. *See* EEOC v. Tortilleria "La Mejor", Civ. No. CV-F-87-505-REC (E. Dist Ca. 1987). In these cases, both the EEOC and the Department of Labor have taken a strong position in favor of the plaintiff worker. Future cases will undoubtedly clarify both the labor protections to be afforded workers and the procedural protections and substantive standards which will apply to prosecutions of employers under IRCA.

8. IRCA, § 101(a)(3)(A) and (B), provide that the sections requiring employers to check documentation and to obtain and maintain verification forms and prohibiting the continued employment of "unauthorized aliens" do not apply to workers hired before November 6, 1986. Ed. Note: Although protions of § 101(a) have been codified as 8 U.S.C.A. § 1324a(a) (Supp. IV 1986), the grandfather provision, § 101(a)(3)(A) and (B) of IRCA, is mentioned only in the notes following the text of § 1324a.

9. Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136, 29 U.S.C. § 141 (1982).

10. 467 U.S. 883 (1984).

11. Cities Service Oil Co. of Pennsylvania, 87 N.L.R.B. 324, 331 (1949).

12. *See* Duke City Lumber Co., 251 N.L.R.B. 53 (1980).

tions,[13] that their deportation or absence from the United States will not preclude them from being counted as members of a bargaining unit,[14] and that an employer's threats to call the INS may provide a basis for setting aside an election.[15]

The Board has also found that an employer's reporting, or threatening to report, undocumented workers to the INS constitutes an unfair labor practice.[16] The subpoena of travel documents and immigration papers of witnesses in order to discourage them from testifying at a Board hearing has also been deemed an unfair labor practice.[17] The United States Court of Appeals for the Seventh Circuit, moreover, recently enforced a Board order that found an NLRA violation when, two days after the union filed a representation petition, the employer posted a notice requiring employees to present their Social Security cards and green cards in order to receive their pay checks.[18] In addition, a number of cases have held terminations allegedly based on immigration status to be illegal and that the employer's claim was merely a pretext for anti-union action against employees.[19] In each of these cases, the courts considered it significant that workers had been employed without question, that the timing of their termination coincided with union activity, or that the discharge accompanied other coercive conduct by the employer, such as arranging for a raid by the INS.

Until the Supreme Court's decision in *Sure-Tan*,[20] the NLRB had consistently held that where appropriate, reinstatement and back pay for undocumented workers would be ordered.[21] As with all workers seeking such relief, the appropriateness of a back-pay award depended on the worker's availability for work.[22] Where undocumented workers were no longer present in the United States, their unavailability for work, not their immigration status, ren-

13. *See* Nestier, Division of Buckhorn, Inc., 266 N.L.R.B. 968 (1983); Lawrence Rigging, Inc., 202 N.L.R.B. 1094 (1973).

14. *See* La Mousse, Inc., 259 N.L.R.B. 37 (1981); Justak Brothers and Co. v. NLRB, 664 F.2d 1074 (7th Cir. 1981).

15. *See* Hasa Chemical, Inc., 235 N.L.R.B. 903 (1978); Sun Country Citrus, Inc., 268 N.L.R.B. 700 (1984); Futuramilk Industries, 279 N.L.R.B. 21 (1986); Local 300 Cosmetic and Novelty Workers' Union, 257 N.L.R.B. 1335 (1981); Westside Hospital, 218 N.L.R.B. 96 (1975); Cannery, Warehousemen, Food Processors, Drivers and Helpers, Stanislaus and Merced Counties, Local 748, 246 N.L.R.B. 758 (1979).

16. *See* La Mousse, Inc., 259 N.L.R.B. at 37; *Justak Brothers and Co.*, 664 F.2d at 1074; Sure-Tan Inc., 234 N.L.R.B. 1187 (1979) [hereinafter *Sure-Tan I*]; Sun Country Citrus, Inc., 268 N.L.R.B. 700 (1984); Viracon, Inc., 256 N.L.R.B. 245 (1981).

17. *See* John Dory Boat Works, Inc., 229 N.L.R.B. 844 (1977).

18. *See* Del Rey Tortilleria, Inc., 272 N.L.R.B. 1106 (1984), *enforced*, 787 F.2d 1118 (7th Cir. 1986).

19. *See* Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976); La Mousse, Inc., 259 N.L.R.B. at 37; Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

20. 467 U.S. 883 (1984).

21. *See Sure-Tan I*, 234 N.L.R.B. 1187, 1193 (1979); NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979); *Amay's Bakery*, 227 N.L.R.B. at 214.

22. Local 512, Warehouse and Office Workers Union v. N.L.R.B., (Felbro) 795 F.2d 705, 717-18 (9th Cir. 1986).

dered them ineligible for such relief.[23] In short, the Board has traditionally protected the rights of workers, whatever their immigration status.

II.
THE HISTORY AND REASONING OF THE *SURE-TAN* DECISION

In 1976, after an election in which the employees selected a union as their bargaining representative, Sure-Tan, two small leather-processing firms, filed objections to the election with the NLRB, claiming that six of the seven eligible voters were undocumented workers.[24] The Board overruled the objections and the union was certified on January 19, 1977.[25] The following day, the employer requested that the INS check the immigration status of each employee.[26] The employer's action led to the arrest of five of the employees. Each signed voluntary departure forms and left for Mexico that afternoon.[27]

The union then filed a complaint with the NLRB. The Board's Administrative Law Judge ("ALJ") found that Sure-Tan had violated the NLRA[28] because the company's notification of the INS constituted a discriminatorily motivated, constructive discharge.[29] The ALJ ordered reinstatement and instructed Sure-Tan to hold open an offer of reemployment for six months.[30] Because back pay is generally not awarded to workers who are not available for employment, the judge proposed an award of four weeks' pay to provide some relief to the workers and to deter future violations by the employer.[31] The Board found this award to be unnecessarily speculative and ordered reinstatement with back pay, leaving to the compliance proceeding the question of whether the employees had been available for work.[32] The NLRB's General Counsel then filed a motion for clarification. The Board denied it over the dissent of two members who argued that the Board's failure to condition reinstatement explicitly on legal presence would encourage illegal reentry.[33]

The Court of Appeals for the Seventh Circuit affirmed the Board's decision but modified the relief, requiring that the reinstatement offer be in Spanish, that it be delivered so as to allow verification of receipt and that it be held open for four years.[34] The court also conditioned reinstatement upon the employees' legal presence in the United States.[35] The court recognized that the employees would probably not be available for work and recommended six

23. *Id.* at 708.
24. 467 U.S. at 887.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 887-88.
29. *Id.* at 888.
30. *Id.*
31. *Id.* at 889.
32. *Id.*
33. *Id.* at 889 n.3.
34. *Id.* at 889-90.
35. *Id.* at 889.

months' back pay as a minimum award.[36] Sure-Tan then appealed to the Supreme Court.

Justice O'Connor, writing for herself, then-Chief Justice Burger and Justice White, first addressed the question of whether undocumented workers are employees for the purposes of the NLRA. She found that the Board had consistently held that undocumented workers are entitled to protection under the NLRA and that the Board's interpretation was entitled to considerable deference.[37] She reasoned that failure to protect undocumented workers under the NLRA would create a subclass of workers without a stake in the collective bargaining process, undermining the purposes of the NLRA itself.[38]

Justice O'Connor then found that coverage for undocumented workers under the NLRA would be consistent with the Immigration and Nationality Act ("INA").[39] Congress had not prohibited employers from hiring undocumented workers, nor was it against the law for a worker to accept employment after entering illegally.[40] There would be, moreover, less incentive to hire undocumented workers if they had to be provided with the same minimum wages and working conditions as other workers.[41] Justice O'Connor reasoned that reducing the incentives for employers to hire undocumented workers would in turn decrease the incentives for such workers to enter the United States in violation of the immigration laws.[42] The Court then concluded that Sure-Tan's notification of the INS was an unfair labor practice.[43]

After affirming the Seventh Circuit's decision that Sure-Tan had violated the NLRA, Justice O'Connor found that the remedy which the Seventh Circuit had fashioned exceeded that court's scope of review in two respects. First, the appellate court should not have fashioned a remedy when it was the place of the Board to do so.[44] Furthermore, by imposing an award of six months' back pay, the Seventh Circuit failed to tailor the relief to the specific circumstances of, and injuries suffered by, each discharged employee.[45] The Supreme Court also noted that to allow reinstatement of an undocumented worker who had been deported would promote illegal reentry in violation of the INA.[46] The Court concluded by remanding the case to the NLRB for the issuance of an order consistent with the Court's decision.[47]

36. *Id.* at 890.
37. *Id.* at 883, 892.
38. *Id.*
39. *Id.* at 892-94.
40. *Id.* at 892-93.
41. *Id.* at 893.
42. *Id.* at 893-94.
43. *Id.* at 894-97.
44. *Id.* at 899.
45. *Id.* at 900.
46. *Id.* at 902-03. Although then-Justice Rehnquist and Justice Powell would have found that undocumented workers are not protected by the NLRA, they agreed with Justice O'Connor about the relief. As the remaining Justices agreed with her about coverage, a majority of the Justices supported her position on both questions.
47. *Id.* at 906.

The Supreme Court's decision in *Sure-Tan* left two major questions unanswered. First, because the denial of reinstatement was tied in part to a policy discouraging illegal reentry, would those undocumented workers who remained in the United States be entitled to reinstatement and back pay? Second, would undocumented workers still be considered employees if Congress passed legislation penalizing employers who hired them?

III.
DECISIONS SINCE *SURE-TAN*

The Ninth Circuit addressed the first question left open by the Supreme Court, whether undocumented discriminatees who remain in the United States are entitled to reinstatement and back pay, in two recent cases, *Bevles v. Teamsters Local 986*,[48] which involved the enforcement of an arbitration award, and *Local 512, Warehouse & Officeworkers' Union v. NLRB (Felbro)*[49] which involved the enforcement of a Board decision. In *Bevles*, the court of appeals stressed the deference to be given to an arbitration award and ordered the workers' reinstatement with back pay.[50] Because the workers had not been subject to deportation proceedings, the court found that the award would not encourage illegal reentry.[51]

In *Felbro*, the Ninth Circuit examined the question of back pay for undocumented workers in light of the policy which the NLRB's General Counsel had promulgated to implement *Sure-Tan*.[52] This policy, outlined in two memoranda issued by the Office of the General Counsel, Memoranda 85-57 and 85-89,[53] provided that although the regional offices should not routinely require proof that a worker was legally entitled to be present and to be employed, an employer could condition reinstatement on presentation of proof that the worker was in the United States legally.[54] Once the employer raised the issue of the worker's immigration status, the regional offices would require proof of legal entitlement to work for all periods for which the worker sought back pay.[55] If the worker failed to provide such proof, the regional offices would not seek enforcement.[56] In resolving the issue of lawful presence, the

48. 791 F.2d 1391 (9th Cir. 1986).
49. 795 F.2d 705 (9th Cir. 1986).
50. 791 F.2d at 1394.
51. *Id.*
52. 795 F.2d at 717-19.
53. After *Sure-Tan* the General Counsel's office of the NLRB issued two memoranda establishing a national policy for the NLRB Regional Offices regarding unfair labor practice proceedings where immigration status was at issue. *See* Memorandum 85-57, *supra* note 3, and Office of the General Counsel, National Labor Relations Board, Memorandum OM 85-89, 120 Lab. Rel. Rep. 343 (October 4, 1985) [hereinafter Memorandum 85-89]. These memoranda were subsequently superceded by OM 88-9. Office of the General Counsel, NLRB Memorandum 88-9 (Sept. 1, 1988) (on file with the New York University Review of Law & Social Change) [hereinafter Memorandum 88-9]. *See infra* text accompanying notes 102-10.
54. *See* Memorandum 85-57, *supra* note 3, at 343.
55. *Id.*
56. *Id.*

NLRB's regional offices would consider evidence presented by the worker, the employer and other sources, including the local INS office.[57] If this evidence did not lead to a clear resolution, they would refer the question to the INS's office in Washington.[58] Most significant, the General Counsel conditioned relief on legal presence in the United States rather than on actual availability for work.[59] Although this policy purportedly followed the Supreme Court's decision in *Sure-Tan*, it was a reversal of the Board's prior policy of protecting the rights of all workers.[60]

The NLRB applied the policy outlined in the two memoranda in *Felbro* where it ordered an employer who had discharged several undocumented workers in violation of the NLRA to make back-pay awards but conditioned the order on proof that each discriminatee was legally entitled to work in the United States.[61] The Ninth Circuit Court of Appeals rejected the NLRB's conditional remedy, holding that the discriminatees were entitled to back pay regardless of their immigration status.[62] The court reasoned that the NLRB had misinterpreted *Sure-Tan*, that *Sure-Tan* did not require the policy which the NLRB had promulgated in Memoranda 85-57 and 85-89,[63] and that this policy undermined both the National Labor Relations Act and the Immigration and Nationality Act.[64] The court also stated that the remedy of back pay was necessary to effect the purposes of the NLRA. The court found that contempt alone would be an ineffective remedy and would not deter employers' violations of the Act.[65] The lack of penalties would, in turn, encourage the hiring of undocumented workers by unscrupulous employers who might seek to gain a competitive advantage from "an environment relatively free of labor safeguards."[66] This result would harm American-born and documented workers by decreasing their job opportunities and would create divisions among workers, undercutting the unity which is necessary for the collective bargaining process to function effectively.[67]

The court also concluded that reinstatement and back-pay awards for undocumented discriminatees would not undermine the two principal purposes of the INA, to prevent illegal entry and to protect wage rates and working conditions in the United States. Reinstatement and back-pay awards would not encourage illegal reentry if the discriminatees, like those in *Felbro*, remain in the United States during the back-pay period.[68] Reinstatement and back

57. Memorandum 85-89, *supra* note 53, at 344.
58. *Id.*
59. Memorandum 85-57, *supra* note 3, at 343.
60. *See supra* text accompanying notes 11-23.
61. 795 F.2d 705, 708 (9th Cir. 1986).
62. *Id.* at 719, 722.
63. *Id.* at 716-17.
64. *Id.* at 719, 720.
65. *Id.* at 718-19.
66. *Id.* at 719.
67. *Id.*
68. *Id.* at 719-20.

pay for undocumented workers, moreover, would protect wage rates and working conditions because employers would then be subject to the same liability for unfair labor practices against undocumented workers as against the documented, eliminating the employer's incentive to employ undocumented workers under conditions which violate the NLRA.[69]

In rejecting the Board's contention that a showing of legal presence should be a prerequisite for a back-pay award, the *Felbro* court also emphasized that, given the complexity of the immigration laws and regulations, the Board lacked the necessary expertise to apply and interpret the immigration laws or to make determinations regarding legal status.[70] The court added that only the INS and the Attorney General have the authority to grant discretionary relief under the INA, in part because the procedural protections in deportation proceedings simply do not exist at NLRB compliance hearings.[71]

Felbro and *Bevles* clearly differentiated between workers who had been deported and those who remained in the United States. As such, they provided a strong argument that the Office of the General Counsel should reevaluate the policy outlined in Memoranda 85-57 and 85-89 which failed to distinguish between the two groups. A subsequent labor dispute in California, however, provided the first indication that the General Counsel's office would be slow to reexamine its position.

During an organizing campaign at the K-Jack Engineering Co., a small Los Angeles plant that manufactures newspaper folding machines, employees were seriously and repeatedly harassed and intimidated.[72] The employer even brandished a gun at a union organizer in the presence of workers who were seeking to organize with the United Electrical, Radio and Machine Workers of America ("UE").[73] Both the UE and individual workers filed numerous unfair labor practice charges during the spring and early summer of 1986. On July 15, 1986, the NLRB issued a consolidated complaint alleging violations including confiscation of union leaflets from employees, illegal surveillance of the employees' union activities, assault and battery by the company's owner against union organizers, threats to close the plant if the UE were successful, illegal interrogation of employees about union activities, and promises of increased employment benefits if the employees repudiated the union.[74] Prominent among the unfair labor practices was the demotion and discharge of a key union activist in the plant.[75] A week after the NLRB issued its complaint, the Regional Director, pursuant to section 10(j) of the NLRA, sought an Order to

69. *Id.* at 720.

70. *Id.* at 720-22.

71. *Id.* at 721-22.

72. Consolidated Amended Complaint of July 15, 1986, NLRB v. K-Jack Engineering Co., 31-CA-15706, 31-CA-15832, 31-CA-15904 (C.D. Cal. 1986) [hereinafter Consolidated Amended Complaint].

73. Affidavit Sworn Before NLRB Agent, April 14, 1986 (on file with the New York University Review of Law & Social Change).

74. *See* Consolidated Amended Complaint, *supra* note 72.

75. *Id.* at 11-12.

Show Cause in federal district court in Los Angeles to restore the status quo and to enjoin K-Jack from engaging in further unfair labor practices during the pendency of the complaint.[76]

In the course of the proceedings, the employer raised the question of the immigration status of two of the workers. When the workers refused to discuss their immigration status, the Board notified the UE that it intended to amend the section 10(j) petition to condition reinstatement and back pay on a showing of legal immigration status in accordance with the national policy set forth in Memoranda 85-57 and 85-89. When questioned by the UE about the Board's position in light of the Ninth Circuit's recent decision in *Felbro*, the Board's counsel responded that the Board was not bound by, and would not follow, the decision in *Felbro*.[77]

Consequently, on July 29, 1986, the UE moved to intervene in the section 10(j) proceeding in order to challenge the relief sought by the Board.[78] The UE was in a difficult position because in all prior cases, the courts had denied the right to intervene in a section 10(j) proceeding, reasoning that it was "inconceivable" that the NLRB could not adequately represent the public interest.[79] The UE emphasized that if intervention were not permitted, no party in the case would be advocating on behalf of the workers the position which the Ninth Circuit had approved in *Bevles* and *Felbro*.[80]

On August 4, 1986, the Federal District Court for the Central District of California granted the UE's motion to intervene, issued a temporary injunction pursuant to section 10(j), and entered an order requiring the unconditional reinstatement of the union activist.[81] On August 12, 1986, however, K-

76. Order to Show Cause of July 21, 1986, NLRB v. K-Jack Engineering Co., 31-CA-15706, 31-CA-15832, 31-CA-15904 [hereinafter Order to Show Cause].

Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) (1982), enables the Regional Director of the Board to petition a federal district court for an injunction to protect workers' rights pending a Board hearing on unfair labor practice charges. There is no express statutory right of intervention available to the charging party.

77. NLRB v. K-Jack Engineering Co., 31-CA-15706, 31-CA-15832, 31-CA-15904 (Declaration of Robert Z. Lewis).

The NLRB takes the position that it may refuse to "acquiesce" in the ruling of a court of appeals on an issue of interpretation of the NLRA. While this policy of non-acquiescence has been resoundingly criticized and found unlawful, *see* NLRB v. Ashkenazy, 817 F.2d 74 (9th Cir. 1987); Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980), *cert. denied* 449 U.S. 975 (1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965 (3d Cir. 1979), the Board has persisted in this view. Interestingly, Chairman Dotson recently advocated abandoning the Board's policy of non-acquiescence in his dissent in Arvin Automotive, 285 N.L.R.B. 102 (1987).

78. *See* Memorandum in Support of Motion to Intervene Under Federal Rule of Civil Procedure 24(b)8-9, NLRB v. K-Jack Engineering Co., 31-CA-15706, 31-CA-15832, 31-CA-15904 [hereinafter Memorandum in Support of Motion to Intervene]. Ira Gottlieb and Jesus Quinonez of Taylor, Roth, Bush and Geffner were local counsel for the UE.

79. *See* Reynolds v. Marlene Industries Corporation, 250 F. Supp. 724 (S.D.N.Y. 1966); Squillacote v. International Union, 383 F. Supp. 491 (E.D. Wis. 1974).

80. Memorandum in Support of Motion to Intervene, *supra* note 78, at 6.

81. NLRB v. K-Jack Engineering Co., 31-CA-15706, 31-CA-15832, 31-CA-15904 (Order Granting Leave to Intervene of August 4, 1986, No. 86-4728; Order Granting Temporary Injunction of August 4, 1986, No. 86-4728).

Jack and the Board reached a settlement, over the objection of the UE, on the question of relief.[82] K-Jack then moved to stay the district court's order. The Court of Appeals for the Ninth Circuit denied K-Jack's motion but held that the district court could decide to extend the stay in light of the settlement. The district court and then the Ninth Circuit denied K-Jack's subsequent motion for a further stay. K-Jack refused to comply with the court's order, and it was only after contempt proceedings and the initiation of the Board trial that the discharged worker was put back to work.[83]

The successful outcome in this matter must be attributed to the courage of the workers who withstood the employer's threats and intimidation. Moreover, despite the tremendous pressure to disclose their immigration status, they exercised their constitutional right to refuse to do so. This case, however, had implications far beyond the particular facts.

K-Jack Engineering was the first opportunity after *Felbro* for the NLRB to reevaluate its policy regarding relief for undocumented workers. Ironically, the NLRB's General Counsel initially took the position that an injunction which included reinstatement was necessary to protect workers' rights, but as soon as the employer raised the specter of the employees' possible unlawful immigration status, the General Counsel reversed position.[84] This rapid turnaround was particularly striking because it occurred within a week and, in the same lawsuit. Not only did the NLRB abdicate its responsibility to safeguard workers' rights under the NLRA, but it also acted to undermine the very rights it is charged with protecting. That the UE had to oppose both the employer and the General Counsel of the National Labor Relations Board in seeking to put one of its members back to work illustrates this irony.

IV. THE IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON LABOR RIGHTS

A. IRCA's Impact on Coverage for Undocumented Workers Under the NLRA

To analyze IRCA's impact on labor rights, one must distinguish coverage under the NLRA from relief. Coverage is the simpler of these two aspects. As discussed earlier,[85] in *Sure-Tan*, Justice O'Connor considered a number of factors before concluding that the NLRA applies to undocumented workers. She found that the Board had consistently considered such workers to be covered, that failure to protect them would create a subclass of workers without a

82. Settlement Stipulation of August 12, 1986, K-Jack Engineering Co., No. 86-4728.

83. Order to Show Cause of October 20, 1986, K-Jack Engineering Co., No. 86-4728. Meanwhile, K-Jack appealed the entire § 10(j) proceeding, including the UE's intervention and the question of relief, to the Ninth Circuit. The appeal was dismissed on April 23, 1987, for lack of prosecution.

84. *See supra* text accompanying notes 74-76.

85. *See supra* text accompanying notes 24-47.

stake in the collective bargaining process, that Congress had not enacted employer sanctions legislation, and that the incentives to hire undocumented workers are lessened by requiring that they receive the same minimum wages and benefits as other workers.[86] Of these four factors, only the third has changed, with the enactment of the employer sanctions provisions in IRCA, since the Supreme Court's decision in *Sure-Tan.*

The legislative history of the employer sanctions provisions demonstrates that Congress did not intend IRCA to undercut the power of labor agencies to remedy unlawful practices. In fact, the report of the House Judiciary Committee on IRCA specifically states:

> It is not the intention of this Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in the existing law, or to limit the powers of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act . . . .[87]

Given the large number of undocumented workers currently employed in the United States, any failure to protect undocumented workers under the NLRA would cast labor relations into chaos.[88] Recognition of a union, for example, could be stalled indefinitely while an employer forced a determination of the immigration status of every worker in the potential bargaining unit. This result clearly was not the intent of Congress when it enacted IRCA, which specifically provides that workers hired prior to November 6, 1986, need not provide any documentation with respect to their immigration status.[89] Certification proceedings, moreover, were intended to be a rapid means of determining the appropriate representative for bargaining purposes. If an employer could introduce the question of immigration status, it would complicate the proceedings immensely, be extremely time-consuming and undoubtedly intimidate workers, deterring them from exercising their rights under the NLRA.

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86. *Id.*

87. *See* COMMITTEE ON THE JUDICIARY, IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS, H.R. REP. NO. 682, 99th Cong., 2nd Sess., pt. 1, at 58 (1986); *See also* COMMITTEE ON EDUCATION AND LABOR, IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1986, H.R. REP. NO. 682, 99th Cong., 2nd Sess., pt. 2, at 8-9 (1986) [hereinafter REPORT OF COMM. ON EDUC. AND LABOR].

88. A recent study based on 1980 census data estimates that there are two million undocumented workers in the United States and discounts the validity of estimates which range as high as twelve million. There can be little doubt, however, that the census data substantially undercounts undocumented workers. Slater, *The Illegals,* 7 AMERICAN DEMOGRAPHICS MAGAZINE 26, 26 (1985).

89. Pre-Enactment Provisions for Employees Hired Prior to Nov. 7, 1986, 8 C.F.R. § 274.a.7(a) (1988) [hereinafter Pre-Enactment Provisions].

The impact of such a stalling tactic would be felt not only by undocumented workers, but by every worker in the bargaining unit. It would deprive all of the workers in that unit of the right to representation by the union of their choice until the immigration status of particular workers could be determined. It would also undermine the protections of the NLRA whose purpose is "to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."[90] Finally, it would create divisions among workers, undercutting the unity which is necessary for the collective bargaining process to function effectively.[91] In short, the legislative history of IRCA, pragmatism, and sound policy make compelling arguments that undocumented workers must still be considered employees for the purposes of the NLRA.

A recent ALJ decision supports this view. In *Ideal Dyeing and Finishing*,[92] an employer, charged with violating the NLRA, attempted to raise the issue of the dismissed employees' immigration status. The charging party moved to revoke the provision in the employer's subpoena instructing the dismissed workers to bring documents showing their immigration status and authorization to work. The charging party also moved to strike the company's affirmative defense, that the company's failure to reinstate the workers was not an unfair labor practice because it would be a violation of IRCA to employ them, and sought an order *in limine* to prevent the employer from making any inquiry or presenting any evidence regarding the workers' immigration status during the trial. The ALJ granted the motion, ruling that the workers' immigration status was relevant, if at all, only at the compliance stage.

B. IRCA's Impact on Relief for Undocumented Workers Under the NLRA

The question of what relief is appropriate for undocumented workers protected by the NLRA is more complex. To answer this question, it is instructive to distinguish between workers hired on or before the passage of IRCA on November 6, 1986, and those subsequently hired. Of those hired after November 6, 1986, it is necessary to analyze the relief which the Board is likely to grant to workers who may be able to legalize their status pursuant to one of the legalization programs as well as the relief which it is likely to grant to those who are not eligible to legalize their status.

1. Relief for Workers Hired on or Before November 6, 1986

The employer sanctions provisions of IRCA impose penalties on employers who fail to verify the immigration status of new employees or who continue to employ workers while knowing that they are, or have become,

90. *Sure-Tan*, 467 U.S. 883, 893 (1984).
91. *Felbro*, 795 F.2d 705, 719 (9th Cir. 1986).
92. NLRB, 21-CA-25307 (1988).

unauthorized.[93] The Act also has a "grandfather clause," which creates a distinction between workers hired *on or before*, and those hired *after*, November 6, 1986.[94] By expressly exempting from the employer sanctions requirements workers hired prior to the law's enactment, Congress has created a class of workers who may legally continue to work for their present employer, but who are still subject to deportation proceedings if arrested by the INS.

For this first group of workers, the case law developed prior to the enactment of IRCA is still applicable because the current position of these workers is no different from what it was prior to the passage of IRCA: while these workers may be present illegally, it is not illegal to employ them. Thus, a grandfathered worker who has suffered discrimination in violation of the NLRA is entitled to reinstatement and back pay under *Sure-Tan* and *Felbro.* In fact, because IRCA expressly preempts state employer sanctions laws,[95] workers hired before November 6, 1986, have a clearer claim to lawful employment now than they did prior to the passage of IRCA.

Both the legislative history cited above[96] and the INS's regulations promulgated under IRCA reinforce this conclusion. The regulations specifically define "continuing employment" to include situations where employees are "reinstated after disciplinary suspension or wrongful termination found unjustified by any court, arbitrator, or administrative body or otherwise resolved through reinstatement or settlement."[97]

Nevertheless, on October 27, 1987, the NLRB's General Counsel issued a memorandum, Memorandum 87-8, that eliminated the right of "grandfathered" employees to reinstatement and back pay except where they had applied for legalization under IRCA, and the INS found that they were prima facie eligible for legalization.[98] This policy permitted the employer to make lawful immigration status a prerequisite for reinstatement and back pay merely by alleging that a worker might be unauthorized. In doing so, the employer was shielded from liability, shifting the burden to the worker to prove eligibility. This result contradicted the statutory scheme of IRCA, which expressly provides for "grandfathered" status and which penalizes only employers.[99]

The Board, moreover, chose to permit workers to exercise their rights under the NLRA only if they were willing to permit scrutiny of their immigra-

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93. *See* IRCA, § 101(e)(4),(5), 8 U.S.C. § 1324a(e)(4),(5) (Supp. IV 1986).

94. *See* IRCA, § 101(a)(3)(A),(B). *See also supra* note 8.

95. IRCA, § 101(h)(2), 8 U.S.C. § 1324a(h)(2) (Supp. IV 1986).

96. *See supra* text accompanying note 87.

97. Verification of Employment Eligibility, C.F.R. § 274.a.2(b)(viii)(E) (1988) [hereinafter Verification of Employment Eligibility]. The regulations explicitly provide that the penalty provisions do not apply to those individuals hired prior to Nov. 7, 1986. Pre-enactment Provisions, *supra* note 89.

98. Office of the General Counsel, NLRB Memorandum GC 87-8, at 2-3 (October 27, 1987) (on file with the New York University Review of Law & Social Change) [hereinafter Memorandum 87-8].

99. *See* IRCA, § 101(e)(4),(5), 8 U.S.C. § 1324a(e)(4),(5) (Supp. IV 1986).

tion status by the INS. This policy effectively denied undocumented workers the right to relief under the NLRA. The Ninth Circuit, in *Felbro*, acknowledged the oppressive effect of this policy: "The knowledge that deportation proceedings were a likely consequence of filing a successful unfair labor practice charge would slow severely the inclination of any unlawfully treated, undocumented worker to vindicate his rights before the NLRB."[100] Fortunately, the NLRB's General Counsel rescinded the memorandum outlining this policy, along with the two memoranda previously discussed, Memoranda 85-57 and 85-89, on March 31, 1988, after receiving extremely critical letters from Congressman William L. Clay, Chairperson of the House Committee on Education and Labor and from the AFL-CIO.[101]

On September 1, 1988, the NLRB's General Counsel issued a new memorandum, Memorandum 88-9,[102] which superseded all previous memoranda regarding the question of back pay and reinstatement for undocumented workers.[103] This memorandum represents a dramatic improvement in the General Counsel's position, particularly with respect to grandfathered employees. Unfortunately, the General Counsel continues to assert the Board's policy of non-acquiescence with *Felbro* by continuing to require that reinstatement and back pay be conditioned on both lawful presence and entitlement to employment in the United States.[104] The General Counsel did, however, finally recognize that both Congress[105] and the INS[106] specifically approved the

100. 795 F.2d. 705, 719 (9th Cir. 1986).

101. *See* Office of the General Counsel, NLRB Memorandum 88-6 (March 31, 1988) (withdrawing Memoranda 87-8, 85-89 and 85-57) (on file with the New York University Review of Law & Social Change). Letter from Rep. William L. Clay to NLRB General Counsel Collyer (Jan. 27, 1988); Letter from the Office of the General Counsel of the AFL-CIO to NLRB General Counsel Collyer (Mar. 1, 1988) (on file with the New York University Review of Law & Social Change).

102. Memorandum 88-9, *supra* note 53.

103. *Id.* at 1. Although the memorandum deals specifically with the relief to be afforded terminated workers, the memorandum states that back pay may be available to remedy other forms of discrimination such as reduction in pay or reassignment. *Id.* at 7 n.15. The memorandum cites Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), to support this statement. The Board's reliance on *Patel* is encouraging given its recalcitrance in recognizing the validity of *Felbro*. *See supra* text accompanying note 77.

104. *Id.* at 2.

105. IRCA, § 101(a)(3)(A) and (B), specifically provide that the sections which require employers to check documentation and obtain and maintain verification forms, and which prohibit the continued employment of "unauthorized aliens" do not apply to workers hired on or before November 6, 1986. This provision is referred to as the "grandfather clause."

106. 8 C.F.R. 274a.2(b)(viii)(E) (1988); 274a.7(a) (1988). General Counsel Collyer also specifically refers to § 274a.2(b)(viii)(G) which provides that successor employers are not required to obtain I-9 forms if they obtain such forms from the previous employer. Memorandum 88-9, *supra* note 53, at 3-4. The I-9 Form is the form which an employer must complete to verify a new employee's immigration status. 8 C.F.R. § 274a.2(a)(1988).

In the memorandum, Collyer states that a *Burns* successor need not comply with the verification requirements for any "grandfathered" employee hired by its predecessor and discriminatarily not hired or fired by the successor. *Id.* at 4. A successor employer is a *Burns* successor "if a majority of [its] employees after the change of ownership or management were employed by the preceding employer." NLRB v. Burns International Security Services, Inc., employment and reinstatement after wrongful termination of grandfathered employees. Her policy, therefore, concludes that entitlement to be employed in the United States is not at issue for this group of workers.[107]

With respect to the issue of lawful presence of grandfathered workers, the General Counsel's new policy not only shifts the burden of proof to the employer when it is the wrongdoer seeking to avoid the Board's normal remedies but also limits the evidence which will satisfy the burden to a final determination by the INS of the undocumented discriminatee's immigration status.[108] As a result, it is now unnecessary for the Board to determine a discriminatee's immigration status — a matter which the General Counsel found to be outside the Board's expertise.[109] Memorandum 88-9 concludes by instructing the Regional Directors that although a final INS ruling that a discriminatee is not lawfully present and entitled to work would preclude reinstatement, they should still seek back pay for the period before the INS order.[110]

Although the General Counsel's present position is far better than the policies expressed in previous memoranda, the new policy leaves open one extremely important question: whether an INS determination which has been appealed will still be considered by the Board to preclude reinstatement and to limit back pay. This issue will be resolved by the Advice section of the NLRB if it arises.[111] When the issue does arise, the Board should wait for a final decision on appeal before taking any action which may later prove to be unwarranted and which may have a devastating impact on the workers involved.

2. *Relief for Workers Hired After November 6, 1986*

The second group of workers to consider are those hired after November 6, 1986, who are eligible for legalization under IRCA. This class of workers may not be deported and must be given work authorization by the INS if the INS determines that they have made a prima facie case for legalization.[112] Because they are legally employable and available for work, these workers would also be entitled to relief under *Felbro.* The Board first addressed this issue in 1987 in the limited context of a compliance proceeding resulting from unlawful discharges.[113] When the Board indicated that IRCA might bar re-

406 U.S. 272, 279 (1972). The INS regulations, however, define a successor employer much more broadly. *See* 8 C.F.R. 274.2(b)(viii)(G)(1)-(3) (1988).

107. Memorandum 88-9, *supra* note 53, at 3-4.

108. *Id.* at 4. The INS's denial of legalized status under IRCA would be insufficient to satisfy the burden of proof because a worker might be eligible to legalize her status under some other provision of the INA and because the INS itself may not deport an applicant based on information contained in the application for temporary resident status. *Id.* at 4-5.

109. *Id.* at 2. Under the new policy, Board proceedings will not be held in abeyance pending the outcome of the INS's determination of the discriminatee's legal status. As a result, Collyer concludes that this will have the added benefit of avoiding potentially lengthy delays. *Id.* at 2-3.

110. *Id.* at 5.

111. Memorandum 88-9, *supra* note 53, at 2 n.4.

112. *See* IRCA, § 201(a)(3), (b)(1)(B), 8 U.S.C. § 1255a(a)(3),(b)(1)(B) (Supp. IV 1986).

113. NLRB v. Ashkenazy Property Mgt. Corp., 817 F.2d. 74 (9th Cir. 1987).

lief, the charging party filed a motion to compel compliance, arguing that the Board had no discretion to consider immigration status in light of the Ninth Circuit's previous order granting unconditional reinstatement and back pay.[114] The motion was denied because the Board agreed to comply with *Felbro* in that specific case. The court, however, termed the NLRB's policy of non-acquiescence "unacceptable" and stated that future acts of non-acquiescence would be dealt with appropriately.[115]

The General Counsel's recently rescinded memorandum, Memorandum 87-8, severely limited the period for which back pay would be sought for discriminatees in this group and appeared to limit relief to those workers who were eligible for the Section 1255a legalization program.[116] In addition, the memorandum stated that while the agency would not raise a question regarding immigration status *sua sponte*,[117] the issue could be raised by an employer during either the investigative or compliance stages and that questions would be resolved by the INS.[118]

The class of workers in the most difficult position are those who were hired after November 6, 1986, and who are not eligible for legalization.[119] For these workers, the General Counsel's recently rescinded memorandum would have provided no relief.[120]

The memorandum which the General Counsel released on September 1, 1988, Memorandum 88-9, it focuses on compliance with IRCA's requirements regarding the completion of I-9 forms[121] rather than on immigration status, thus treating as a single category all workers hired after November 6, 1986. This approach has two obvious advantages. First, it assumes that the issue of immigration status is relevant, if at all, only after reinstatement has been ordered, thus preventing employers from delaying proceedings by raising the matter of immigration status prior to the compliance stage. Second, the inquiry appears to focus on whether the discriminatee has completed an I-9 form rather than on a determination of the discriminatee's immigration status, a matter beyond the Board's expertise.

While this approach initially appears reasonable, it still raises some concerns. First, it is unclear what would happen if the employer contended that it had a reasonable basis for believing that the documentation submitted was fraudulent. The new memoranda leaves the resolution of this issue to the

114. *Id.* at 75.

115. *Id.*

116. *See* Memorandum 87-8, *supra* note 98, at 4.

117. *Id.* at 5 n.9.

118. *Id.* at 4, 5.

119. Such workers might be employed because an employer had failed to verify their status as required by law, because the employee presented fraudulent identification, or because valid identification subsequently expired and the employer failed to require further proof of authorized status.

120. *See* Memorandum 87-8, *supra* note 98, at 5.

121. The I-9 Form is the form which an employer must complete to verify a new employee's immigration status. 8 C.F.R. § 274a.2(a) (1988).

Board's Advice section if it occurs.[122] It should be stressed that the provision of IRCA which addresses the legitimacy of documents does so in a very different context, by providing the employer with a complete defense to a civil or criminal action where documentation appears on its face to be legitimate.[123] If the issue does arise, the Board should place the burden on the employer to show either that the INS has issued a final determination of the discriminatee's status or that the documents on their face appear to be invalid.[124] To do otherwise would once again require the NLRB to determine the immigration status of the discriminatee. The settlement of *Salinas-Peña v. INS*[125] confirms that no simple answers regarding the question of an employee's immigration status are possible. In that case, the INS agreed that it would no longer respond to employer inquiries regarding the status of a worker without the worker's written authorization.[126]

The new policy, which requires the completion of an I-9 form as a prerequisite to reinstatement,[127] raises some troubling questions. The first stems from the General Counsel's policy of non-acquiescence in, and consequent disregard of, *Felbro*. The General Counsel argues that Congress in passing IRCA, "did not intend to overrule *Sure-Tan*" and claims that "it is *Sure-Tan*, not IRCA, that limits the power of the NLRB to order reinstatement and back pay to an employee who is not 'entitled to be employed' in the U.S."[128] She concludes that the legislative history of IRCA does not require a different outcome.[129]

The General Counsel's reasoning is clearly fallacious. It ignores the existence of *Felbro* and disregards the fact that the Court in *Sure-Tan* was facing a very different question. In *Sure-Tan*, the Supreme Court held that workers who had been deported were not entitled to reinstatement and back pay because such a remedy would encourage workers to reenter the country in violation of the INA.[130] Unlike the situation faced by the Court in *Sure-Tan*, Congress has indicated how the policies of the NLRA and IRCA are to be balanced. The legislative history of IRCA specifically provides that it is not intended to "limit the powers of federal or state labor relations boards . . . to

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122. Memorandum 88-9, *supra* note 53, at 6 n.13.

123. IRCA, § 101(a)(3), 8 U.S.C. 1324a(a)(3) (Supp. IV 1986).

124. Where the employer relies on information or documentation previously in its possession, it may effectively concede liability under the employer sanctions provisions of IRCA.

125. CV 86-1033-DA (D.OR. Mar. 15, 1988). *See also* 65 INTERPRETER RELEASES 339 (1988).

126. *Id.*

127. Memorandum 88-9, *supra* note 53, at 6.

128. *Id.* at 6. The General Counsel's analysis of the reference to *Sure-Tan* in the legislative history is seriously misleading, as the legislative history merely cites *Sure-Tan* as support for Congress's view that "application of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.'" COMMITTEE ON THE JUDICIARY, *supra* note 88, at 58.

129. Memorandum 88-9, *supra* note 5, at 6.

130. 467 U.S. 883, 902-03 (1984).

remedy unfair practices."[131] Moreover, although requiring reinstatement and back pay appears to cut against the INA's new policy of prohibiting the employment of undocumented workers, Congress recognized that allowing appropriate relief in the limited cases where the Board finds that unfair labor practices have been committed would help protect the wages and employment conditions of lawful residents from the adverse impact of competition from undocumented workers who are not subject to the same terms of employment.[132] The Report of the House Committee on Education and Labor reflects this view by stressing the importance of leaving state and federal agencies, as well as labor arbitrators, free to remedy unfair practices. It asserts that to do "otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment."[133]

Finally, the Board appears to assume that completion of an I-9 form is a prerequisite to reinstatement irrespective of whether a previous form had been completed or whether the employer had obtained I-9 forms from any other employees.[134] This runs counter to the new immigration regulations which expressly provide that reverification is not required where a discharged employee has been reinstated under the decision of an administrative body or through a settlement.[135]

A final concern involves an apparent inconsistency in the new memorandum with respect to back pay. The memorandum provides that where the discriminatee is unwilling to complete an I-9 form, the Regional Directors are not to seek back pay for "subsequent periods."[136] The memorandum subsequently states, however, that back pay will be sought only for such periods when the discriminatee could meet the I-9 requirements.[137] The former is a clear standard which, although unduly restrictive, may be uniformly enforced. The latter is vague and would require the NLRB to make determinations regarding immigration status, a practice which the General Counsel explicitly rejected earlier in the memorandum.[138]

In short, while far better than the previous memoranda in many respects, particularly where grandfathered employees are concerned, the Board's new policy still raises some serious issues. The true impact of the General Counsel's new policy will, however, be known only after the Board is forced to address some of the particularly difficult questions which will arise.

131. COMMITTEE ON THE JUDICIARY, *supra* note 87, at 58. (emphasis added).

132. *Id.*

133. *See* REPORT OF COMMITTEE ON EDUC. AND LABOR, *supra* note 87, at 9.

134. *See* Memorandum 88-9, *supra* note 53, at 6-7. In other words, the insistence by an employer that the discriminatee complete an I-9 form may itself be a form of discrimination if the employer is not treating the worker in accordance with a uniform policy.

135. *See* Verification of Employment Eligibility, *supra* note 97.

136. Memorandum 88-9, *supra* note 53, at 6.

137. *Id.* at 7.

138. *Id.* at 2.

CONCLUSION

Historically, when economic times become tough, workers born in the United States are urged to turn against their foreign-born brothers and sisters.[139] As the hysteria grows, pressure increases to "protect American jobs" and to deport the more recent immigrants. The present climate is no different, and the passage of the Immigration Reform and Control Act is merely the most recent manifestation of this phenomenon.

Those who supported employer sanctions legislation did so based on the belief that the only way to preserve American jobs is to halt immigration. This belief represents one side of an historic controversy between those who wish to protect "American jobs" from newcomers and those who believe that all workers have common interests and must stand together to defend their rights. Such legislation, however, merely pits one group of workers against another while giving employers a weapon with which they can deter employees from organizing. It will, moreover, ultimately be ineffective in halting immigration because the economic and political pressures which continue to bring immigrants to our shores remain unchanged.

The General Counsel of the NLRB has already used IRCA to try to limit the labor rights of immigrant workers. Because the Board refuses to accept as binding precedent anything but Supreme Court decisions,[140] the Board's policy must be challenged anew each time it is applied to undocumented workers. Each challenge imposes an extremely oppressive burden, in terms of money and effort, on a union seeking to organize groups of employees which may include undocumented workers. More importantly, it places another obstacle in the path of workers, documented and undocumented alike, who are struggling to organize. The Board's policy underscores what we have known for some time: the primary arena for protecting workers' rights is the shop floor, not Congress or the courts. Workers must be educated about their rights and must militantly organize to assert them. As for the lawyers, we have won a few major victories and, together with the workers we represent, we will keep up the fight!

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139. When the transcontinental railroad was completed, the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), and the first Alien Deportation Acts, ch. 60, 27 Stat. 25 (1882), were authorized by Congress in reaction to the depressed economy and virulent xenophobia of the times.

140. *See supra* note 77.