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Providing Illegal Alien Employees A Remedy For Discriminatory Discharge: *Sure-Tan, Inc. v. NLRB*

Employees are protected from discriminatory discharge based on union affiliation by section 8(a)(3) of the National Labor Relations Act (NLRA).[1] If the National Labor Relations Board (Board or NLRB) finds a discriminatory discharge, it may order reinstatement and backpay. The backpay award is usually tailored to actual employee loss. Focusing on employee loss provides the Board with evidence on which to base an award and avoids the possibility of punitive awards, which are not authorized by the NLRA.[2] In the typical 8(a)(3) case, reinstatement and backpay based on employee loss effectively protects an employee's right to bargain collectively: the employee is made whole and the employer's incentive to violate section 8(a)(3) is removed.

In *Sure-Tan, Inc. v. NLRB*,[3] questions arose concerning the adequacy of backpay awards tailored to employee loss in cases involving undocumented alien workers. The Board has consistently held that undocumented aliens are "employees" within the meaning of section 2(3) of the NLRA and are therefore protected from discriminatory discharge under section 8(a)(3).[4] In *Sure-Tan*, the Board, reacting to directions from the Seventh Circuit Court of Appeals, ordered a six-month backpay award admittedly not based on employee loss.[5] On appeal, the United States Supreme Court held that the Board's award was speculative. The Court mandated the tailoring of backpay awards to actual employee loss even in cases involving alien employees.[6]

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1. The National Labor Relations Act (NLRA) is codified at 29 U.S.C. §§ 151-169 (1982), and section 8(a)(3) of the NLRA is codified at 29 U.S.C. § 158(a)(3) (1982).

2. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938); D. McDowell & K. Huhn, NLRB Remedies For Unfair Labor Practices 12-15 (Labor Relations and Public Policy Series No. 12, 1976).

3. 104 S. Ct. 2803 (1984).

4. *Id.* at 2808; *see also* Sure-Tan, Inc., 246 N.L.R.B. 788, 789 (1979) (in broadly enforcing the Board's reinstatement and backpay orders, the court made no distinction between resident and illegal alien status).

5. 104 S. Ct. at 2808, 2814 n.11.

6. *Id.* at 2814.

Although the Court was correct in finding the Board's award in *Sure-Tan* speculative, the Court's emphasis on actual employee loss to determine the appropriate backpay award unnecessarily impedes the Board's ability to remedy 8(a)(3) violations involving alien employees. Once deportation occurs, the information necessary to formulate an award under an employee loss standard is unavailable. Since alien employees usually cannot reenter the country legally, their employers are free to violate the act with impunity.

The Court should allow the Board to focus on employer gain resulting from the discriminatory discharge in cases involving alien employees. Backpay awards tailored to employer gain would remove an employer's incentive to violate the act and provide a remedy for deported employees. This result restores the status quo without authorizing either a punitive or speculative award, thereby protecting the right of employees to bargain collectively.

I. THE *Sure-Tan* CASE

Sure-Tan employees elected an AFL-CIO unit as their collective bargaining representative. The company president filed election objections with the NLRB, asserting that six of seven eligible voters were illegal aliens. After being notified that his objections were overruled, the president asked the Immigration and Naturalization Service (INS) to investigate the immigration status of his employees. As a result of the subsequent INS investigation, five employees voluntarily left the country to avoid deportation.[7]

After finding Sure-Tan guilty of a discriminatory discharge in violation of section 8(a)(3), the Administrative Law Judge (ALJ) ruled that reinstatement must be conditioned on the employees' legal reentry into the United States. Realizing that legal reentry was unlikely, the ALJ ordered a four-week minimum backpay award as affirmative relief.[8]

The NLRB agreed that Sure-Tan had violated section 8(a)(3) but held that reinstatement need not be conditioned on

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7. *Id.* at 2806-07.

8. Sure-Tan, Inc., 234 N.L.R.B. 1187, 1192-93 (1978) (reinstatement offers could remain open for an additional six-month period to give aliens "ample opportunity to return legally").

legal reentry.[9] The Board found the ALJ's four-week minimum backpay award unnecessarily speculative because it assumed that reinstatement must be conditioned on legal reentry.[10] The Board ruled that reinstatement should be unconditional and replaced the ALJ's award with the traditional reinstatement and backpay measured by actual employee loss.[11] The Seventh Circuit Court of Appeals enforced the Board's order without modification.[12]

However, when the Seventh Circuit reviewed the Board's subsequent petition for enforcement, it reversed the Board's ruling by conditioning reinstatement on legal reentry.[13] This reversal invalidated the Board's affirmative orders of reinstatement and backpay because the discharged employees were not available to provide the evidence necessary to determine a traditional backpay award.[14] After reversing a Board order, the court normally would remand, allowing the Board to formulate an alternative remedy.[15] Instead, in *Sure-Tan* the Seventh Circuit suggested that the Board adopt a six-month minimum backpay award. The court reasoned that "it would better effectuate the policies of the Act to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs."[16] The court's suggestion was eventually accepted by the Board and included in the court's final order.[17]

On appeal the Supreme Court agreed that reinstatement must be conditioned on legal reentry but held that the Seventh

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9. *Id.* at 1187.

10. *Id.*

11. *Sure-Tan*, 246 N.L.R.B. at 788 (1979).

12. NLRB v. Sure-Tan, Inc., 583 F.2d 355, 361 (7th Cir. 1978).

13. NLRB v. Sure-Tan, Inc., 672 F.2d 592, 606 (7th Cir. 1982).

14. Reinstatement and backpay remedy loss due to the unfair labor practice. Conditioning reinstatement on legal reentry may prevent any individual remedy for the unfair labor practice.

15. *See, e.g.*, NLRB v. Local 347, Amalgamated Meat Cutters, 417 U.S. 1, 10 (1974).

16. 672 F.2d at 606.

17. *Id.* The court's action is more clearly described in footnote four of the Supreme Court opinion:

> The Board did not issue a new decision regarding the 6-month backpay award, but merely submitted a proposed judgment order that was evidently intended to incorporate the proposed award. Upon reviewing the Board's proposed order, the court still remained uncertain whether the Board had in fact adopted its suggestion, and so modified the order to make clear that the employees were entitled to a minimum award of six months' backpay.

Sure-Tan, 104 S. Ct. at 2808 n.4.

Circuit had overstepped "the limits of its own reviewing authority" by not immediately remanding the remedy determination to the Board.[18] The Court held that the Seventh Circuit's minimum backpay award "effectively compelled the Board to take action that simply does not lie within the Board's own powers."[19] While agreeing that the NLRB had broad power to fashion affirmative relief to " 'effectuate the policies' of the NLRA," the Court reasoned that "a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practice."[20] Implicitly, the Court held that the Board's award was speculative because it was not tailored to actual employee loss.[21]

II. Analysis

Under the NLRA and its extensive interpretive case law, the NLRB has broad authority to order whatever affirmative relief is necessary to effectively protect the statutory right of employees to bargain collectively.[22] However, the NLRB's authority is not unlimited; rather it is circumscribed by prohibitions against speculative or punitive awards.[23] The effect of the *Sure-Tan* decision can be properly understood only when examined in light of the NLRB's authority to remedy 8(a)(3) violations.

A. The NLRB's Authority to Remedy 8(a)(3) Violations: Traditional Remedies

One of the primary objectives of the NLRA is to protect

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18. 104 S. Ct. at 2813, 2816.

19. *Id.* at 2813. Despite textual language stating that the Board had overstepped its powers, footnote nine indicates that the Court did not consider the six-month backpay award a Board decision. However, if the Court had considered the backpay award as coming exclusively from the Seventh Circuit, to be consistent with its own holding, it would have remanded the remedies issue to the Seventh Circuit with instructions to remand to the Board. Instead the Court invalidated the six-month backpay award. *Id.* at 2816 (the Board shall formulata "an appropriate remedial order consistent with this Court's opinion"). Therefore, despite what the Court said in footnote nine, its holding treats the six-month backpay award as coming directly from the Board. This characterization is important because if the Supreme Court is merely overruling the Seventh Circuit opinion, the Board has no limitation placed upon it by this opinion. If, on the other hand, the Court is overruling the Board, on remand the Board is bound by this opinion.

20. *Id.* at 2813-14 (emphasis in original).

21. *Id.* at 2812-14.

22. D. McDowell & K. Huhn, *supra* note 2, at 6-8.

23. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938); D. McDowell & K. Huhn, *supra* note 2, at 12-15.

workers' rights to organize and bargain collectively.[24] Section 8(a)(3)'s prohibition on discriminatory discharge is designed to further that objective. Employers cannot legally discharge an employee solely for engaging in union activity. If the Board finds a violation of 8(a)(3), it is required to implement a cease and desist order and take affirmative action, "including reinstatement of employees with or without backpay," if such action "will effectuate the policies" of the Act.[25]

The Board's purpose in remedying 8(a)(3) violations is to assure workers that they may exercise their statutory rights without fear of economic reprisal.[26] The Board attempts to achieve this purpose by restoring the "situation . . . to that which would have obtained but for the [unfair labor practice]."[27] Thus, remedies are designed to (1) make the employees whole and (2) remove any advantage the employer may have gained by violating the Act. The Supreme Court has generally endorsed this approach. For example, in *Phelps Dodge Corp. v. NLRB,* the Court stated that "[m]aking the workers whole for losses" serves to vindicate "the public policy which the Board enforces."[28]

Theoretically, one could vindicate the policies of the NLRA in two ways: restoring the employee's position by reimbursing him for actual loss due to discharge, and restoring the employer's position by removing any gain due to the discriminatory discharge.[29] Despite the theoretical validity of these approaches, courts have generally utilized only actual employee loss to measure backpay liability.[30] This emphasis on loss is so predominant that backpay awards are typically called "make-whole" orders,[31]

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24. 29 U.S.C. § 151 (1982).

25. 29 U.S.C. § 160(c) (1982).

26. *E.g.,* Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 541 (1943); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965), *cert. denied,* 384 U.S. 972 (1966).

27. *Phelps Dodge,* 313 U.S. at 194 (1941).

28. *Id.* at 197.

29. At first glance there seems to be no difference in the two approaches. However, an employer may be able to hire another worker at a much lower rate than the discharged employer, thus realizing gain. The employer's gain may not match the discharged employee's loss, particularly if the discharged employee quickly finds other work at a comparable wage.

30. *Consolidated Edison,* 305 U.S. at 235-36; *see also* Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases,* 84 HARV. L. REV. 1670, 1680-81 (1971).

31. D. MCDOWELL & K. HUHN, *supra* note 2, at 81.

and awards making an employee more than whole are considered punitive and therefore invalid.[32]

An emphasis on employee loss may be appropriate in the typical 8(a)(3) case involving resident employees. However, the traditional focus on employee losses is inadequate for alien employees. First, it may be impossible to tailor an award to employee loss because the information necessary to calculate those losses may not be available; the aliens may have been deported and be unable to reenter the country. Second, if the employer is allowed to keep gain engendered because employee awards are in excess of actual employee losses, then the employer has an economic incentive to violate section 8(a)(3). This problem is not unique to cases involving alien employees, but it is exacerbated for discharged alien employees because the employer will probably not be liable for any backpay.

B. Backpay Awards Tailored to Employer Gain

Using employer gain to tailor backpay awards for discriminatory discharge is not completely unknown. In *National Licorice Co. v. NLRB,* the Court noted that NLRA policy extends "to the prevention of [the employer's] enjoyment of any advantage which he has gained by violation of the Act. . . ."[33] Nevertheless, the Court in *Sure-Tan* appears to reject such an approach.

1. Arguments against using employer gain

Sure-Tan implies two arguments against using employer gain to measure backpay awards. First, the Court intimates such awards are arguably punitive because they may more than compensate for employee loss. Second, focusing on employer gain may he more difficult and less accurate than looking at employee loss, thus raising the possibility of a speculative award.

a. Punitive awards. The *Sure-Tan* Court said that it need

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32. *See, e.g., Consolidated Edison,* 305 U.S. at 235-36 (an award making an employee more than whole is considered inherently punitive and therefore invalid); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) (employee has responsibility to mitigate interim damages); *Phelps Dodge,* 313 U.S. at 198 (backpay reduced by amount employee earned or should have earned).

33. 309 U.S. 350, 364 (1940); *see also Virginia Elec.,* 319 U.S. at 541; NLRB v. Coats & Clark, Inc., 241 F.2d 556, 561 (5th Cir. 1957) (backpay awards are valid not only when they make the injured employee whole, hut also when they deprive the employer of the benefit of his wrong).

not consider whether the six-month backpay award was punitive.[34] However, by stating that the six-month backpay award was speculative and that it did not comport with the general reparative policies of the NLRA, the *Sure-Tan* Court, in essence, called the award punitive.[35] Though producing some laudable results, the award was also punitive because there was no rational relationship between the remedy and the unfair labor practice.[36] "Rational relation" means that the remedy must fit or be "tailored to" the violation. The Court in *NLRB v. Seven-Up Bottling Co.*,[37] said that the remedy must be a function of the purpose to be accomplished. In *NLRB v. Pennsylvania Greyhound Lines*,[38] the Court required affirmative orders to be adapted to the needs of the individual case. In other words, there must be some logical nexus between the affirmative order and the violation. That nexus is established by evidence. Since the Board introduced no evidence in this case,[39] the rational relation test was not met, and the award is punitive. These cases well illustrate the confusion surrounding the characterization of an award as punitive and the reluctance of the *Sure-Tan* Court to enter into this "bog of logomachy."[40]

b. Speculative awards. The Board's decision in *Sure-Tan*

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34. 104 S. Ct. at 2816 n.14.

35. *See Consolidated Edison*, 305 U.S. at 235 (suggesting that an award that is not reparative or remedial is punitive).

The language of the Court in past cases sets up a dichotomy between the exercise of Board power for affirmative remedial relief and illegal exercise of its power for punitive awards. However, the distinction between the two concepts is unclear at best:

> Conceptually, this remedial-punitive distinction is perhaps more troublesome than the requirement that the Board relief must not conflict with the policies of the Act, because, in a sense, each order directing a violator to take affirmative action contains an element of punishment, at least in the subjective judgment of the party required to comply with the Board's order.
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> At the outset, it should be noted that the terminology employed by the Court in describing nonremedial orders as "punitive" is unfortunate in that it implicitly introduces considerations which are not relevant to the issue. The Supreme Court itself, in *NLRB v. Seven-Up Bottling Co.* referred to the remedial-punitive debate as a "bog of logomachy" into which it preferred not to enter. The punitive label is actually shorthand for the concept that a Board order is invalid where it is shown to be a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

D. McDowell & K. Huhn, *supra* note 2, at 12-13 (footnotes omitted).

36. D. McDowell & K. Huhn, *supra* note 2, at 8.

37. 344 U.S. 344, 346 (1953).

38. 303 U.S. 261, 268 (1938).

39. *Sure-Tan*, 104 S. Ct. at 2814.

40. *Id.* at 2816 n.14.

was also speculative because there was no evidence of employee loss or employer gain to support the backpay award.[41] To support a backpay award the Board must "introduce evidence of the *gross* back pay due, as calculated in the back pay specification."[42] To meet this burden, the Board must generally produce the employee who was discriminatorily discharged.[43] However, when it is not possible to produce the employee, the Board may accept other evidence tending to establish the amount of gross backpay due.[44] Other evidence is likely to be more acceptable if the scarcity of available direct evidence is caused by the employer.[45] In such cases the Board may approximate amounts due employees by using reasonable formulas.[46] The Eighth Circuit has held that the judiciary can interfere with such formulas only if they are arbitrary and unreasonable.[47] A formula is speculative and therefore unreasonable if it lacks an evidentiary foundation.[48]

2. *Backpay awards tailored to employer gain are neither punitive nor speculative*

The above arguments have merit in the standard 8(a)(3) case. It is easier and more accurate to measure employee loss than it is to estimate employer gain. However, when discharged employees are illegal aliens, damages cannot usually be calculated on the basis of employee loss because of unavailable information. In such circumstances, the Board should be free to award backpay based on employer gain.[49] When alien employees

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41. *Id.* at 2814.

42. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175-76 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966) (emphasis in original).

43. *Id.* at 177.

44. *Id.* at 178-79.

45. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946).

46. *See, e.g.*, D. McDOWELL & K. HUHN, *supra* note 2, at 84; *see also Virginia Elec.*, 319 U.S. at 544.

47. NLRB v. Brown & Root, Inc., 311 F.2d 447, 452 (8th Cir. 1960) (quoting NLRB v. Ozark Hardwood Co., 282 F.2d 1, 7 (8th Cir. 1960)).

48. *Sure-Tan*, 104 S. Ct. at 2814.

49. *Sure-Tan* presents a situation in which tailoring an award to employee losses is impossible, leaving employer gain as the only viable yardstick for measuring backpay liability. Since this is such a novel fact situation, few cases have challenged the use of employee loss as the sole yardstick for measuring monetary reimbursement, and then only in dicta. In *Virginia Electric*, the Court etated that the Board should not be forced "to inquire into the amount of damages actually sustained" by employees but should be allowed to exercise "its administrative experience and knowledge" in deciding complex problems. *Virginia Electric*, 319 U.S. at 543.

are involved, backpay awards based on employer gain are neither unduly speculative nor punitive.

a. Punitive awards. The *Sure-Tan* Court requires backpay awards to be tailored to employee loss to insure that awards are not punitive.[50] An award is not punitive if it is rationally related to the unfair labor practice. Awards equal to the employer's gain meet this rationality test.[51] Removing employer gain neutralizes the major consequence of unfair labor practices—the insecurity of workers exercising collective bargaining rights.[52]

An award that leaves the employer in a position no worse than that enjoyed before its unfair labor practice is, by definition, restitutionary not punitive.[53] Such an award has the effect of correcting the negative consequences of discharge and deterring future violations.[54]

That discriminatorily discharged employees are made more or less whole by such awards is not relevant. The public nature of the NLRA[55] makes incidental the personal gains and losses of

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50. *Sure-Tan*, 104 S. Ct. at 2813-14.

51. *See supra* notes 34-40 and accompanying text. If an award effectuates the policies of the Act by neutralizing the consequences of an unfair labor practice, it is not punitive. But if an award does significantly more than neutralize consequences, it is punitive because it looks into the future instead of into the past. D. McDOWELL & K. HUHN, *supra* note 2, at 12-13. The rational relation test provides the same safeguard as this neutralizing test by requiring evidence establishing a logical nexus between the affirmative relief and the violation.

52. Affirmative action is ordered only when it "effectuates the policies" of the Act. *Sure-Tan*, 104 S. Ct. at 2812 (citing 29 U.S.C. § 160(c) (1982)). The policy of the Act is to eliminate both unfair labor practices and their consequences. The most important consequences are those which negatively affect workers' collective perceptions. *See, e.g., Virginia Elec.*, 319 U.S. at 541; *see also* Graves Trucking, Inc. v. NLRB, 692 F.2d 470, 475 (7th Cir. 1982) (award must demonstrate to other employees that the law will protect the exercise of protected rights). These consequences are neutralized by reassuring employees that they may exercise their statutory rights without fear of economic reprisal.

53. RESTATEMENT OF RESTITUTION § 1 (1936 & Supp. 1984). Such an award denies unjust enrichment by transferring benefits to the victim.

54. The deterrence effect may be only incidental. *See, e.g., Phelps Dodge*, 313 U.S. at 194; Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940) (Board order may not act solely as a deterrent to future unfair labor practices); *Consolidated Edison*, 305 U.S. at 236; *Mastro*, 354 F.2d at 175 (backpay serves the purpose of reimbursing actual losses and of deterring discriminatory discharges).

55. Though affirmative awards may "resemble compensation for private injury. . . . [t]hey vindicate public, not private rights." *Virginia Elec.*, 319 U.S. at 543 (1943). Reinstatement puts the worker back in the workplace, thus strengthening the collective organization (a finding of discriminatory discharge presumes that the dischargee was active in collective activity). Both reinstatement and backpay demonstrate to the public that it, too, may exercise its rights to organize collectively without fear of reprisal. *See, e.g., Phelps Dodge*, 313 U.S. at 193-94. Any private benefit accruing to a worker is merely

individual workers. A particular case is only important in terms of its effect on collective perceptions.[56] Therefore, awards that put an employee in a better position than before the unfair labor practice are not punitive unless they also put the employer in a worse position.[57]

b. Speculative awards. Attempting to ascertain employee loss when the discharged employee cannot be produced may be speculative because evidence in support of the award may be unavailable. But awards based on employer gain are not necessarily speculative since the employer's records are likely to be available to the Board. Backpay awards based on employer gain are not arbitrary or unreasonable if the employer is placed in the same position it would have enjoyed absent its unfair labor practice.[58]

The *Sure-Tan* Court found the Board's six-month backpay

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incidental. Both reinstatement and backpay depend on public needs, not private needs. *Id.* at 194-95, 198. *See also* UAW v. Russell, 356 U.S. 634, 643 (1958). For this reason reinstatement and backpay are ordered only when they secure the public's right to organize collectively.

56. *See, e.g., Virginia Elec.*, 319 U.S. at 541; *see also Graves Trucking*, 692 F.2d at 475 (the award must demonstrate to other employees that the law will protect the exercise of protected rights).

57. When the employer gains nothing from its violation but must nevertheless give backpay to a discriminatorily discharged employee, the employer is placed in a position worse than prior to the violation. This backpay award is not considered punitive, however, because the employee is being made whole. The result seems fair because the employer violated the Act. A more troubling result arises when the employer has gained more from its unfair labor practice than its discharged employee lost. If the employer is allowed to keep the excess gain because awards in excess of actual employee loss are labeled punitive, then the employer has an incentive to violate section 8(a)(3). *See, e.g., Consolidated Edison*, 305 U.S. at 235-36; *see also* Note, *supra* note 30, at 1680-81.

58. To neutralize the consequences of an unfair labor practice, the award must assure workers of their rights to organize collectively by restoring the status quo. This entails restoring both parties to positions they would have obtained but for the employer's unfair labor practice. *Phelps Dodge*, 313 U.S. at 194; *Virginia Elec.*, 319 U.S. at 541. The Board has usually accomplished this by compensating the worker based on his loss.

A series of cases has required that the affirmative award be tailored to the unfair labor practice to prevent it from being punitive. The original tailoring case, NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938), did so by taking away the employer's gain. It involved company domination of a union, and the company was ordered to withdraw its recognition and support of the union. In removing the company from its advantaged position, the Court held that, as a rule, Board orders " 'will of course be adapted to the need of the individual case . . . .' " *Id.* at 268 (quoting REPORT OF THE HOUSE COMMITTEE ON LABOR, H.R. 1147, 74th Cong., 1st Sess. 18, 24 (1935)). Applying this language to an unlawful discharge fact situation in NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938), the Court tailored its backpay award to injuries sustained by employees. Modern courts typically award backpay based on employee injuries. Note, *supra* nota 30, at 1680-81. However, removing employer gain is an equally plausible alternative, particularly for discharged illegal aliens. *Id.*

award to be unduly speculative because of "the total absence of record evidence as to the circumstances of the individual employees . . . ."[59] The Court was correct, but it only approached the problem from one angle: employee injuries. If given the opportunity, the Board could have produced evidence concerning employer gain resulting from the unfair labor practice. If *Sure-Tan* allows only backpay awards based on actual employee loss, then it excludes alien employees from the protection of section 8(a)(3).

Difficulty in measuring employer gain has been an obstacle to tailoring backpay awards to employer gain. However, as the Court noted in *Phelps Dodge Corp. v. NLRB*, the Board "overestimates administrative difficulties and underestimates its administrative resourcefulness . . . . [I]n 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."[60] The *Phelps Dodge* standard is broad enough to allow the Board to use its expertise to ascertain what the employer gained from discriminating against alien employees. Measuring employer gains may require subtle and complex calculations if the employer has replaced discharged employees. Even though the Board may be forced to approximate,[61] evidence used for approximation is not speculative if it is based on information obtained from the employer. For example, if the employer failed to replace discharged employees or paid new employees lower salaries there would be illegal gain. More subtle measurements are undoubtedly possible. The consequences of delay or intimidation could be reduced to a dollar value and included in employee awards. Since finding discriminatory discharge is presumptive proof that some payment is owed to the employee,[62] some employer gain may also be presumed. Finally, even if the Board finds no employer gain in *Sure-Tan*, or similar cases, the Board's effort to remove any possible gain assures workers their rights and deters employers from seeking benefits by violating the Act.

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59. *Sure-Tan*, 104 S. Ct. at 2814. The award is speculative because it fails to tailor the award to the employees' individual injuries and therefore fails to "comport with the general reparative policies of the NLRA."

60. *Phelps Dodge*, 313 U.S. at 198.

61. NLRB v. Brown & Root, Inc., 311 F.2d 447, 452 (8th Cir. 1963).

62. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir.), *cert. denied*, 384 U.S. 972 (1965).

C. *The Effect of* Sure-Tan

The Court's exclusive focus on employee loss as the measuring stick for backpay awards effectively leaves the Board without authority to remedy 8(a)(3) violations involving alien employees. Since alien employees are generally unable to reenter the country legally, tailoring an award to employee loss is impossible. Information regarding employee losses is simply not available.

The Court should have held the Board's award invalid without limiting the Board's authority to tailor backpay awards using other methods, such as employer gain. Using employer gain to formulate backpay awards still deters future violations by allowing the Board to formulate a remedy for 8(a)(3) violations involving alien employees.

The *Sure-Tan* Court explains at length that illegal aliens should be defined as "employees" within the meaning of the Act.[63] The Court argues that excluding undocumented aliens from the protection of section 8(a)(3) creates a subclass of workers with no stake in the collective bargaining process—a result that weakens unions, depresses wages and working conditions, and generally impedes effective collective bargaining.[64]

The anomaly of *Sure-Tan* is that it creates such a subclass of workers.[65] Under the Court's employee loss standard, no backpay will be awarded illegal aliens because employee loss is unknown. Thus, unless the Board is permitted some creativity to fashion affirmative relief in cases such as *Sure-Tan,* the only remaining effective remedy is injunctive relief.[66] An injunctive order directing the employer to cease its unlawful behavior in the future does nothing to neutralize retrospective consequences of unfair labor practices.[67] Undocumented alien workers thus are

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63. *Sure-Tan,* 104 S. Ct. at 2808-10.

64. *Id.* at 2809.

65. *Id.* at 2819 (Brennan, J., dissenting). Justice Brennan does not characterize this anomaly in exactly the same words:

> More importantly, the Court never addresses the disturbing anomaly it creates by holding in Parts II and III that undocumented aliens are "employees" within the meaning of the Act, and thereby entitled to all of the protections that come with that status, but then finding in Part IV that these same alien employees are effectively deprived of any remedy, despite a clear violation of the NLRA by their employer.

66. *Id.* at 2815 n.13.

67. NLRB remedial orders are either injunctive or affirmative. 29 U.S.C. § 151 (1982); BUREAU OF NATIONAL AFFAIRS, THE DEVELOPING LABOR LAW 1653 (J. Morris 2d ed.

unprotected from personal economic injury and employers may violate the Act with impunity. Aliens will therefore refrain from participating in collective bargaining.

III. Conclusion

In recognizing illegal aliens as employees under the Act, *Sure-Tan* gave illegal aliens collective bargaining rights coextensive with native employees. Those rights are meaningless unless an adequate remedy exists to enforce them.

Sure-Tan presents a situation requiring a remedy that provides affirmative relief to illegal aliens without punishing employers. Since information concerning actual employee loss is generally unavailable when alien workers have been deported, backpay awards measured by the gain received by an employer are the most effective means of protecting employee rights to organize and bargain collectively.

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1983) (helpful interpretation of the section). Injunctive orders stop and prevent unfair labor practices by ordering violators to cease certain behavior. In contrast, affirmative orders demand positive action. They are intended to neutralize the consequences of unfair labor practices, though they may also deter future unfair labor practices.

A Board finding of an unfair labor practice mandates an injunctive order. 29 U.S.C. § 160(c) (1982). Thus, after the injunctive order has been issued, only retrospective consequences of the unfair labor practice remain to be eliminated, and this is the purpose of the affirmative remedy. *See, e.g.*, D. McDowell & K. Huhn, *supra* note 2, at 12. Because of this sequence of events, affirmative action deals only with unfair labor practices already under injunction. Since future unfair labor practices and their consequences have not yet occurred, no affirmative action can be taken concerning them.

Affirmative orders are subject to limited judicial review (*see, e.g.*, *Phelps Dodge*, 313 U.S. at 188), but are only overturned when they are a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec.*, 319 U.S. at 540. In other words, remedial orders are overturned only when they do more than assure the public of its statutory rights.