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Recent Decision

R. Christian Hutson

RECENT DECISION

LABOR LAW — Narrowly Interpreting *Sure-Tan* to Provide Traditional Labor Law Remedies to Undocumented Aliens Continually Present in the United States. *Bevles Company, Inc. v. Teamsters Local 986,* 791 F.2d 1391 (9th Cir. 1986).

I. FACTS AND HOLDING

Two dismissed employees,[1] through their collective bargaining agent,[2] sought reinstatement through the arbitration process. Relying on a California statute which made knowing employment of an illegal alien unlawful,[3] the employer determined that the employees resided in the United States illegally and dismissed them.[4] The collective bargaining representative argued that the employer lacked "just cause"[5] to make the dismissal. The arbitrator adopted the representative's position, ruling that continued employment of the two illegal aliens would not subject the employer to criminal liability and holding the California statute "dormant."[6] Based on this finding, the arbitrator awarded reinstatement to each employee[7] and backpay to one employee.[8] The district court affirmed the arbitrator's decision.[9] On appeal, the employer argued that

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1. The employees, Baraza and Dorme, worked in a machine shop for the defendant Bevles Company. Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1392 (9th Cir. 1986).

2. The employees' representative was Teamsters Local 986. *Id.*

3. CAL. LAB. CODE § 2805 (West Supp. 1987).

4. The Bevles Company inquired into Baraza and Dorme's residential status following receipt of an unsolicited letter from its attorney. The attorney advised Bevles that it was unlawful in California to knowingly employ an illegal alien. Bevles then began interrogating employees it suspected of being in the United States illegally. Baraza and Dorme were dismissed, following their failure to satisfy Bevles that they were in the country legally. 791 F.2d at 1392.

5. *Id.*

6. Teamsters Local 986 v. Bevles, Inc., 3 LAB. REL. REP. (BNA) (82 Lab. Arb.) 203 (Dec. 26, 1983) (Monat, Arb.).

7. 791 F.2d at 1392.

8. *Id.* The arbitrator found that Dorme was not entitled to backpay because he had falsified his employment records.

9. *Id.*

the arbitrator's award was in error because the two employees were not legally entitled to work in the United States.[10] The Ninth Circuit rejected the argument and upheld the arbitrator's decision.[11] The court recognized that federal laws subjected neither the employer nor the undocumented aliens to criminal or civil liability because of their employment relationship. The court further supported the arbitrator's decision because it did not encourage the illegal reentry of the discharged employees and thus did not conflict with the Immigration and Naturalization Act.[12] Finally, the court recognized that the Supreme Court had considered section 2805 and found it unconstitutional. The California labor statute upon which the employer relied in dismissing the employees was dormant and therefore was not the basis of a legitimate dismissal. Because the arbitrator did not commit errors in "manifest disregard of the law,"[13] the Ninth Circuit affirmed the decision to provide traditional labor remedies to the discharged employees.[14] *Held:* Relief provisions of collective bargaining agreements protect undocumented aliens. In addition, alien workers may receive reinstatement and backpay for labor law violations if they need not reenter the United States illegally in order to receive the remedies.

II. LEGAL BACKGROUND

Since the early 1970s, United States courts have recognized the impact of undocumented aliens[15] on the domestic workforce.[16] In *De Canas v.*

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10. *Id.* The court gave greater deference to an arbitrator's decision than to a National Labor Relations Board decision. The court also referred to a strong commitment in resolving labor disputes through arbitration rather than litigation. *Id.* at 1392-93 n.2.

11. *Id.* at 1391-93.

12. Immigration and Naturalization Act of 1952, 8 U.S.C. §§ 1101-1557 (1982).

13. The court stated that in order to overturn an arbitrator's award it required a showing that a conclusion of law constituted a "manifest disregard of the law." 791 F.2d at 1393 n.2 (citing George Day Constr. Co. v. United Bhd. of Carpenters, 722 F.2d 1471, 1477 (9th Cir. 1984)).

14. 791 F.2d at 1394.

15. This Comment will use the term "undocumented alien" when referring to a person present in the United States without proper authority. The term "illegal alien" has generally been rejected because it is not used in the text of United States immigration law and serves no relationship to the categories of immigrants created by the Immigration and Naturalization Act. *See* Bracamonte, *The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor*, 21 SAN DIEGO L. REV. 29, 30 n.2 (1983).

16. United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975); Plyler v. Doe, 457 U.S. 202, 218-19 (1982). In *Brignoni-Ponce*, the Court stated that "[undocumented] aliens create significant economic and social problems, competing with citizens and legal

Bica,[17] the Supreme Court stated that employment of undocumented aliens in periods of high unemployment deprives citizens and legally admitted aliens of jobs.[18] In order to prevent the employment[19] of undocumented aliens, several states enacted laws that subject an employer to fines and penalties if the employer knowingly employs an undocumented alien.[20] The Court upheld such a state law in *De Canas.*[21]

In *De Canas,* the Court's primary concern was whether California Labor Code section 2805[22] attempted to regulate immigration and naturalization.[23] If so, federal law, the traditional legislative authority in

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resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation." 422 U.S. at 878-79.

17. 424 U.S. 351 (1976).

18. *Id.* at 356.

19. See Comment, *The Legal Status of Undocumented Aliens In Search of Consistent Theory,* 16 HOUS. L. REV. 667, 669 (1979), which discussed two contradictory approaches. On one hand, commentators view undocumented aliens as outlaws, present in this country at their own risk and devoid of any protections of the law. In Coules v. Pharris, 212 Wis. 558, 250 N.W. 404 (1933), the court barred an undocumented alien's suit for unpaid wages on the grounds that providing assistance to the aliens to recover wages earned while he was unlawfully present in the United States contravened public policy. The opposing view is that undocumented aliens are legal persons once they reside within the nation's borders and thus have certain protections. The rationale here is that a person does not become an outlaw and lose all rights by doing an illegal act. In Janusis v. Long, 284 Mass. 403, 188 N.E. 228, 230-31 (1933), for example, the court held that undocumented aliens may maintain tort actions.

20. *See, e.g.,* CAL. LAB. CODE § 2805 (West Supp. 1987); TENN. CODE ANN. § 50-1-103 (Supp. 1986). Section 2805(a) of the California Labor Code states: "(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."

21. 424 U.S. at 351. Generally, commentators read *De Canas* as holding the provisions of CAL. LAB. CODE § 2805(a) constitutional. *See* Sudomir v. McMahon, 767 F.2d 1456, 1466 n.15 (9th Cir. 1985) (Sneed, J.); Note, *One Step Forward, Two Steps Back: The Court and the Scope of Board Discretion in* Sure Tan, Inc. v. NLRB, 134 U. PA. L. REV. 703, 707 n.20 (1986). Perhaps a more accurate conclusion would be a recognition that *De Canas* did not find § 2805 unconstitutional and remanded it to the state courts for a determination of whether it was in conflict with the federal immigration laws. *See* Comment, *Employment Rights of Undocumented Aliens: Will Congress Clarify or Confuse an Already Troublesome Issue?,* 14 CAP. U.L. REV. 431, 453-54 (1985).

22. *See supra* notes 4 and 20.

23. 424 U.S. at 352-53. In relation to this issue, the Court questioned whether the state law was pre-empted under the Supremacy Clause by the Immigration and Naturalization Act. In their complaint the plaintiffs, migrant farmworkers, alleged they had been refused employment due to a surplus of labor caused by their employer's knowing employment of undocumented aliens in violation of § 2805. The California Court of Ap-

those areas, preempted it. The Court discerned that although the power to regulate immigration had been an exclusive federal power traditionally,[24] state regulation of aliens and their conduct did not necessarily infringe on the federal regulation of immigration.[25] If a state law had a purely speculative and indirect impact on immigration, the regulation did not unconstitutionally conflict with federal immigration statutes.[26] The Court next addressed the question of whether the Immigration and Naturalization Act (INA) precluded a state statute dealing with the employment of undocumented aliens. The *De Canas* Court concluded that the employment of aliens was not within the INA scheme of regulatory immigration,[27] and that the INA had at best a "peripheral concern with employment of illegal entrants."[28] The California statute, however, required that an individual be "entitled to lawful residence"[29] in order to be legally employed. Proponents of section 2805 conceded that this stipulation is, on its face, unconstitutional because in some circumstances federal law permits undocumented aliens to work in this country.[30] The plaintiffs argued, however, that limited construction of the statute in light of administrative regulations[31] minimizes the conflict with federal law. The *De Canas* Court agreed and concluded that the Ninth Circuit

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peals held that § 2805 attempted to regulate the conditions for admissions of foreign nationals and was therefore unconstitutional because of Congress' exclusive power over the area of immigration and naturalization. *Id.* at 353.

24. The Court cited the following cases as authority: Passenger Cases, 48 U.S. (7 How.) 283 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

25. 424 U.S. at 356-57.

26. *Id.* at 355-56. In reaching this conclusion, the Court made reference to California's purpose in enacting § 2805; to strengthen its economy by imposing criminal sanctions against employers who knowingly employ aliens who have no federal right to employment within the country. *Id.* at 355.

27. *Id.* at 359.

28. *Id.* at 360. This concern reflects a proviso to 8 U.S.C. § 1324(a) which made harboring illegal entrants a felony. It also provided that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

29. CAL. LAB. CODE § 2805(a). *See supra* note 21.

30. Under United States immigration laws, aliens may work in this country under certain classifications. 424 U.S. at 364 n.12.

31. *Id.* at 364. The administrative regulations defined an alien entitled to lawful residence as follows, "[a]n alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a . . . document issued by the United States Immigration and Naturalization Service which authorizes him to work." *Id.* The *De Canas* Court noted that the lower California court had not considered the regulations since that court held that § 2805 conflicted with the federal immigration laws. *Id.*

erred in holding that the INA precluded any state authority to regulate the employment of undocumented aliens. The Court remanded the case to the state for review of the effect of state administrative regulations on the interpretation of section 2805.[32]

More recently, the Supreme Court resolved the issue of whether remedies to undocumented aliens under the National Labor Relations Act (NLRA)[33] conflict with the policies of the INA. In *Sure-Tan v. NLRB*[34] the National Labor Relations Board (NLRB) alleged that an employer committed unfair labor practices by retaliating against undocumented alien employees who participated in union activities.[35] The Court first addressed whether NLRA protection should extend to unfair labor practices committed against undocumented aliens. In resolving the issue in the affirmative, the Court relied upon earlier NLRB decisions which held that undocumented aliens are "employees" within the NLRA.[36] The Court reasoned that the NLRA should apply because its broad definition of "employee" included undocumented aliens.[37] The Court rea-

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32. *Id.* at 365. The Court remanded the case to the California courts, stating it was their task to determine the effect of the administrative regulations on the construction of § 2805. Following the lower court's review of the regulations, the *De Canas* Court instructed it to determine whether § 2805 was in conflict with the INA. On remand, the case was "dropped." *Bevles*, 791 F.2d at 1394.

33. 29 U.S.C. §§ 151-69 (1982).

34. Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

35. In *Sure-Tan*, two small leather processing firms, considered as one integrated employer for the purposes of the NLRA, employed eleven persons, most of whom were Mexican nationals present illegally in the United States. Eight of the employees selected the Chicago Leather Workers Union to act as their collective bargaining agent. *Id.* at 886. Following this election, the firm's president, John Surak, unsuccessfully objected to the election on the grounds that six of the voters were illegal aliens. Surak then notified the INS and requested that they check into the status of individuals under his employ. The Mexican nationals were discovered by the INS, acknowledged their illegal presence and accepted voluntary departure in lieu of deportation. Subsequently, the unfair labor practice charges were issued against the employer. *Id.* at 887.

36. *Id.* at 801 n.5. *See* Duke City Lumber Co., 251 N.L.R.B. 53 (1980); Apollo Tire Co., 236 N.L.R.B. 1627 (1978), *enforced*, 604 F.2d 1180 (9th Cir. 1979); Hasa Chemical, Inc., 235 N.L.R.B. 903 (1978); Sure-Tan, Inc. and Surak Leather Co., 231 N.L.R.B. 138 (1977), *enforced*, 583 F.2d 355 (7th Cir. 1978); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976).

37. 467 U.S. at 891. The Court referred to the definition of "employee" at 29 U.S.C. § 152(3) (1982). That portion of the NLRA provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent

soned that the statute referred to "any employee," and did not expressly exempt undocumented aliens with certain other groups in section 152(3) of the NLRA.[38]

More importantly, the *Sure-Tan* Court determined that including undocumented aliens as "employees" under the NLRA was consistent with the policies of that act as well as the INA. First, the Court pointed out that the extension of coverage to undocumented aliens reflected the NLRA's purpose of encouraging and protecting the collective bargaining process.[39] Second, the Court concluded that protection of illegal alien workers conformed with the policies of the INA,[40] because that act did not penalize an employer who hired an alien present or working in the United States without legal authority.[41] The Court thus concluded that the enforcement of the NLRA for undocumented aliens was "clearly reconcilable with and serves the purposes of the immigration law *as presently written.*"[42] Justice O'Connor, author of the *Sure-Tan* opinion, was aware no doubt of the Simpson-Mazzoli Bill[43] pending in Congress at the time of the decision. The Simpson-Mazzoli Bill prohibited employers from knowingly hiring undocumented aliens. The Court's use of the conditional phrase "as presently written" indicates that a modification of federal immigration laws could alter the Court's conclusion that defining undocumented aliens as "employees" within the NLRA does not conflict with the INA.[44]

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employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. §§ 151], as amended from time to time, or by any other person who is not an employer as herein defined.

38. 467 U.S. at 892. *See supra* note 37 (enumerated exceptions listed in 29 U.S.C. § 152(3)).

39. 467 U.S. at 892. The Court supported this reasoning by quoting from *De Canas*: "Acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." 424 U.S. at 356-57.

40. 467 U.S. at 893.

41. *Id.* at 892-93.

42. *Id.* at 894 (emphasis added).

43. The Simpson-Mazzoli Bill, S. 529, 98th Cong., 2d Sess. (1984), failed in a joint conference committee after passing both Houses. The failure was attributed to a disagreement over whether or not a spending cap should be inserted to limit federal reimbursement to states for legislative costs. *See* 43 CONG. Q. 1024, 1025 (1984).

44. *See* Note, *supra* note 21, at 708 n.20; Comment, *supra* note 21, at 453.

Recent legislative activity suggests that this change in the Supreme Court's analysis is imminent. President Reagan signed the Immigration Reform and Control Act of 1986 (IRCA) in November 1986.[45] The IRCA is essentially a restatement of the policies implicit in the Simpson-Mazzoli Bill. The core of the IRCA prohibits all employers from hiring undocumented aliens.[46] Supporters of the bill stated its clear policy: to tighten the nation's borders and to send a message to potential illegal immigrants that jobs in the United States are available only to those legally present in the nation.[47] The stated objectives in the recently adopted immigration reform bill, coupled with the *Sure-Tan* Court's reference to "as presently written," suggests that abandonment of the inclusion of undocumented aliens within the NLRA definition of "employee" is possible, if not inevitable.[48] That conclusion would, in effect, prohibit collective bargaining rights for undocumented aliens under the NLRA, and thus reverse *Sure-Tan.* Until the Supreme Court expressly makes a reversal in light of new federal law, however, *Sure-Tan* will continue to provide authority on whether undocumented aliens may recover for violations of the federal labor laws. Given the present validity of the *Sure-*

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45. Immigration Reform & Control Act, Pub. L. No. 99-603 (1986) [hereinafter Immigration Reform & Control Act]. The House bill, entitled the Immigration Reform Act of 1985, passed by a vote of 238 to 173. Lawmakers described it as a historic step in curtailing the influx of illegal aliens into the United States. Pear, *House Approves Compromise Bill on Illegal Aliens*, N.Y. Times, Oct. 16, 1986, at B15, col. 4. The Senate passed the historic bill by a vote of 63 to 24. Pasator, *Immigration Bill Passes Congress as Session Ends*, Wall St. J., Oct. 20, 1986, at 2, col. 4.

46. Following a six-month grace period, employers of undocumented aliens will be subject to civil penalties ranging from $250 to $10,000 for each such alien hired. Jail terms will be imposed for egregious violations of the new law. Immigration Reform & Control Act, § 112. In addition, the Immigration Reform Act provides citizenship to illegal immigrants who have lived in the United States since the beginning of 1982. Immigration Reform & Control Act, § 201. This measure was designed to have the effect of taking people "out of serfdom" by ending exploitation and illegally low wages. *See* Pasator, *supra* note 45, at 2, col. 4.

47. Immigration Reform & Control Act; *Reaction to Immigration Bill is Sharply Split*, N.Y. Times, Oct. 16, 1986, at 11, col. 3. On the other hand, some supporters expressed misgivings about the bill. There was concern that in times of tight economy, employers would hire Anglos over individuals who looked "different" to avoid potential problems with the new federal law.

48. The *Sure-Tan* dissent will soon be the majority view in light of the passage of the Immigration Reform and Control Act. Justice Powell and Justice Rehnquist dissented from the Court's finding in *Sure-Tan* that undocumented aliens are "employees" within the meaning of that term in the NLRA. 467 U.S. at 913. Justice Powell concluded that it was unlikely that Congress intended the term "employee" to include persons wanted by the United States for the violation of criminal laws. *Id.*

Tan holding, this Comment now shifts to the remedies afforded to aliens under the NLRA by that decision.

After determining that undocumented aliens were "employees" under the NLRA, the *Sure-Tan* Court concluded that the employer committed labor law violations for which the aliens could recover.[49] As it did when considering the status of an undocumented alien as an employee, the Court molded its decision to avoid a conflict with the INA. In fact, the *Sure-Tan* Court's stated objective reflected the objectives embodied in the INA to deter unauthorized immigration.[50] In order to reach this objective the Court conditioned reinstatement on the employees' legal readmittance to the United States.[51] Similarly, the Court held that backpay did not accrue during any period in which the employee was not lawfully entitled to be present and employed in the United States.[52] The Court's imposition of these conditions negated the Seventh Circuit's unconditional award of backpay to the discriminatees in *Sure-Tan*. The circuit court based its remedy on a concern that discharged employees would be unable to reenter the country legally and be unable to prove that they were lawfully "available" for work for backpay purposes.[53] The *Sure-Tan* Court vigorously rejected the Seventh Circuit's rationale, stating that "[t]he probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws . . . simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act."[54]

The message in the *Sure-Tan* decision seemed clear: remedies to un-

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49. 467 U.S. at 894-98. Under § 8(a)(3) of the NLRA (codified at 29 U.S.C. § 158 (a)(3) (1982)), employers cannot legally discharge an employee solely for engaging in union activity. If a violation of § 8(a)(3) is found, the NLRB is empowered to reinstate employees with or without backpay if such awards "will effectuate the policies [of the NLRA]." 29 U.S.C. § 160(c).

50. 467 U.S. at 903.

51. *Id.* at 902-03. The Court asserted that such a conditioning avoids a potential conflict with the INA.

52. *Id.* at 903. The Court cited to 3 NLRB CASEHANDLING MANUAL §§ 10612, 10656.9 (1977) as authority for finding employees "unavailable" for work when they were not legally entitled to work or be present in the United States.

53. NLRB v. Sure-Tan, Inc., 672 F.2d 592, 606 (7th Cir. 1982). The Court of Appeals reasoned as follows:

> It seems to us that it would better effectuate the policies of the [NLRA] 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. . . . In any event, we believe six months' backpay is a minimum amount for purposes of effectuating the policies of the Act.

54. 467 U.S. at 904.

documented aliens for labor law violations would hinge on the alien's ability to demonstrate legal entitlement to both presence and employment in the United States. Once legally readmitted to the United States, an alien could demand reinstatement to the job from which he was illegally dismissed. An alien could recover backpay, however, only for the period during which he was legally entitled to be present in the United States. The instant case presented an opportunity to apply the *Sure-Tan* conditional remedies when the undocumented aliens never left the United States following their illegal dismissal.

III. INSTANT OPINION

In the instant opinion, the Ninth Circuit considered whether the arbitrator awarded reinstatement and backpay either in manifest disregard of the law[55] or in violation of a clearly defined public policy.[56] The Bevles Company contended on appeal that the court should vacate the award to the two undocumented aliens because the employees were not legally entitled to work in the United States.[57] The Ninth Circuit determined that under federal law neither the employer, Bevles Company, nor the employees, the two undocumented aliens, could be held liable for their employment relationship. The employer, therefore, could not use the threat of its liability to dismiss its employees. Citing *Sure-Tan*, the court stated that the immigration laws embodied in the INA did not prohibit an employer from hiring an individual present and working in the United States without appropriate authorization.[58] The majority further rejected Bevles' argument that *Sure-Tan* established a clearly defined public policy applicable in this case. The *Bevles* court recognized that in *Sure-Tan* the Supreme Court reversed awards of reinstatement and backpay to undocumented aliens, but distinguished the Court's denial of remedies for two reasons.[59] First, the Ninth Circuit noted that *Sure-Tan* involved the review of a NLRB decision concerning a labor dispute. The instant court found that an arbitrator's interpretation of a collective bargaining agreement in *Bevles* was entitled to more deference than an NLRB decision. The *Sure-Tan* facts, therefore, are inapposite in *Bevles*. Second, the court referred to the Court's interpretation of the INA objective to pre-

55. 791 F.2d at 1392. The court explained that an error constituting a "manifest disregard of the law" would justify the reversal of a reward. *Id.* at 1393 n.2.

56. *Id.* at 1392.

57. *Id.*

58. *Id.* at 1393. Further, an undocumented alien was not criminally liable for accepting employment in the United States. *Id.*

59. *Id.*

vent unauthorized immigration which limited the NLRB's remedial powers.[60] The *Bevles* majority suggested that in *Sure-Tan* the Court reversed the awards to the undocumented aliens in order to fulfill its conception of the INA's objective.[61] In drawing this conclusion, the Ninth Circuit relied on the fact that in *Sure-Tan* the undocumented aliens left the United States following their discharge. The *Bevles* court reasoned that had *Sure-Tan* upheld unconditional awards of reinstatement and backpay, the Court would in effect encourage the illegal reentry of discharged aliens and enforce the INA's objective.[62] In *Bevles* the court distinguished the *Sure-Tan* rationale, emphasizing the two undocumented aliens, Baraza and Dorme, were not subject to INS deportation proceedings.[63] The court found that this fact removed the possibility of illegal reentry into the United States and avoided a conflict with the INA.[64]

The instant court also held that the arbitrator did not act in manifest disregard of the law[65] by refusing to rely on section 2805 of the California Labor Code.[66] The arbitrator determined that section 2805 was "in limbo and still enjoined."[67] The court also cited two earlier cases which interpreted section 2805 as either unconstitutional[68] or inapplicable.[69] In *Dolores Canning Co. v. Howard* a California court held that federal immigration laws preempted section 2805. The California statute, therefore, was unconstitutional. Interpreting *De Canas*, the *Bevles* court held that Congress did not intend to provide exclusive federal regulation over the employment of undocumented aliens through its passage of the INA. The court found, however, that *De Canas* did not finally strike section 2805 as unconstitutional,[70] but rather remanded the case to the California courts for a ruling of constitutionality.[71] In *Bevles* the court finally

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See supra* note 20.
67. 791 F.2d at 1393.
68. Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).
69. *De Canas*, 424 U.S. at 351. *See supra* note 16 and accompanying text.
70. *See supra* note 31.
71. 791 F.2d at 1394. *But see Sudomir*, 767 F.2d at 1466 n.15, in which the majority opinion, written by Judge Sneed, cited *De Canas* as "upholding state law [§ 2805] applying criminal sanctions to employers who knowingly hire illegal aliens against challenge that the law was preempted by federal immigration policy." One should note that the dissenting opinion in the instant opinion was written by Judge Sneed. However, this

stated that because the parties dropped the case on remand, *De Canas* did not repudiate the holding of *Dolores Canning.*[72] In supporting the arbitrator's decision to ignore section 2805, the court also referred to unrefuted evidence that the California Labor commission did not attempt to enforce the statute.[73] Considering the prior cases and present state practice, the court decided that the arbitrator did not act in manifest disregard of the law by determining that section 2805 was dormant.[74]

The dissent primarily contested the majority's determination that the arbitrator's award was not contrary to a clearly defined public policy established in *Sure-Tan.* In his dissent, Judge Sneed stated that the majority, by upholding the arbitrator, failed to follow the *Sure-Tan* Court's clear policy objective to reconcile labor laws with immigration laws.[75] The dissent argued that the court could achieve a reconciliation only if the awards were contingent on the discharged employees' legal entitlement to presence and employment in the United States.[76] The dissent further argued that *Sure-Tan* did not permit reinstatement and backpay once the employee was available to work without regard to his status as an undocumented alien.[77] The dissent argued, therefore, that the fact on which the majority relied to distinguish *Sure-Tan* — the mere presence of Baraza and Dorme in the United States — did not provide the reconciliation envisioned by *Sure-Tan* because the majority ignored the fact that Baraza and Dorme resided in the United States illegally.[78]

Despite these objections, the *Bevles* majority held that an undocumented alien subjected to unfair labor practices is entitled to remedies prescribed by the NLRA as long as he both continues to live in the United States and is not a party to deportation proceedings.

IV. COMMENT

The *Bevles* court determined that *Sure-Tan v. NLRB* was not binding precedent in part because of a procedural distinction: the instant case involved a review of an arbitrator's decision, while in *Sure-Tan* the Court reviewed an NLRB decision. Had the Ninth Circuit relied solely

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dissent did not expressly address the majority's conclusion as to the arbitrator's decision regarding the constitutionality of § 2805. *See infra* notes 76-79 and accompanying text.

72. 791 F.2d at 1394.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* The dissent cited to *Sure-Tan,* 467 U.S. at 903.
77. 791 F.2d at 1394.
78. *Id.*

on this distinction for ignoring the *Sure-Tan* precedent, the *Bevles* decision would have little impact on existing case law. The majority of the *Bevles* court, however, found *Sure-Tan* inapposite to the case at hand for a second reason: the dismissed employees had not left the United States and would not re-enter illegally in order to accept the relief granted by the arbitrator. Relying on this distinguishing factor, the *Bevles* court determined that *Sure-Tan* did not establish a clearly defined public policy "sufficient to override the arbitrator's decision to award reinstatement and backpay."[79] *Sure-Tan* did at least establish a clear policy of denying a remedy for labor law violations to undocumented aliens not lawfully entitled to be present or employed in the United States. The instant court went no further in its narrow interpretation of *Sure-Tan*. It read the Court's opinion as denying traditional labor law remedies under federal labor law only to undocumented aliens subject to deportation. In *Bevles*, the Ninth Circuit declined to acknowledge the Supreme Court's stated policy objective in *Sure-Tan* and its conditional remedy based on continued (rather than interrupted) illegal presence of dismissed alien employees. Because of its narrow reading of *Sure-Tan*, the *Bevles* decision may heighten the flow of illegal immigrants into the United States rather than reverse that trend in accordance with the INA.

Undocumented alien workers do take jobs from native and legal alien workers in the United States.[80] A policy crafted to prevent illegal immigration and protect the employment opportunities of those workers legally entitled to be present in the United States would best serve the public interest. The INA and current legislation reflect this policy preference. The rationale of the dissent would result in a better decision in the instant case. This rationale continues the *Sure-Tan* approach and ties awards for labor law violations to an alien employee's ability to demonstrate a legal entitlement to presence and employment in the United States.[81] The long-awaited reform of the federal immigration

79. 791 F.2d at 1393. The court rejected Bevles' reliance on *Sure-Tan* as prohibiting the arbitrator's remedy, stating "*Sure-Tan* does not establish any 'explicit, well-defined and dominant public policy,' sufficient to override the arbitrator's decision to award reinstatement and backpay" (quoting W. R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983)).

80. GOV'T ACCT. OFF., ILLEGAL ALIENS: LIMITED RESEARCH SUGGESTS ILLEGAL ALIENS MAY DISPLACE NATIVE WORKERS, GAO/PEMD-86-9BR (1986). This GAO Report dealt specifically with the effect of undocumented aliens on the United States labor market. The GAO noted that its conclusion was a qualified one.

81. *See supra* text accompanying note 77. The dissent stated that *Sure-Tan* did not adopt the position that would have permitted reinstatement and backpay "at such time as the employees once more were available to work without regard to their status as illegal

laws indirectly supports the rationale in the dissent by holding employers criminally liable for knowingly employing undocumented aliens. The *Bevles* decision had the immediate effect of providing a remedy to the two undocumented aliens, Baraza and Dorme, and the potential long term effect of exacerbating the problem of illegal immigration. Given the passage of the Immigration Reform Act four months after the instant decision, Justice O'Connor's foresight in *Sure-Tan* is apt. *Bevles*' lasting effect may be limited to Messrs. Baraza and Dorme.

R. Christian Hutson

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aliens." 791 F.2d at 1394.