

Imperial Buffet

September 4, 2009.

Steven Fish, Administrative Law Judge

On September 4, 2009, workers won a significant court victory in the struggle against the modern-day slave law (aka “employer sanctions”). Judge Steven Fish of the National Labor Relations Board delivered a decision on *Imperial Buffet* to award reinstatement and full backpay for a group of documented and undocumented workers who in 2006 united against their employer’s illegal practices. Judge Fish found that the employer, Imperial Buffet Restaurant, used the Immigration Reform and Control Act (IRCA) against the National Labor Relations Act (NLRA) and vice versa, in order to take advantage of undocumented workers and undermine their ability to organize with their documented coworkers at the restaurant. Furthermore, he found that IRCA and specifically the so-called employer sanctions provisions do not hurt employers but rather inflict most harm to documented workers in general because the law criminalizes some workers and undermines workers’ rights as a whole.

Judge Fish cited numerous opinions and decisions to support his finding that IRCA hurts all workers, especially documented and citizen workers:

1. IRCA creates an underclass of exploited labor, which hurts documented workers. By denying undocumented workers remedy for unfair labor practices, IRCA flouts the rights of all workers.

“If undocumented alien employees were excluded from participation in Union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees...” p. 52, citing Justice O’Connor re: *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984) in Supreme Court.

“It would be anomalous to encourage the honest toil of illegal aliens, accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies. Indeed, the rights of both alien and non-alien employees under the [NLRA] are flouted if employers are free to discriminate against alien employees who exercise their right to form and join unions.” p. 50, citing the Court of Appeals in the case of *Sure-Tan v. NLRB* (1984).

2. Denying workers protection based on status drives up incentives for bosses to hire undocumented workers over documented workers, and drives down conditions for all. This creates a so-called “magnetic force” for undocumented workers to enter into the country. The fact that this growing underclass has no protection effectively “penalizes” documented workers.

“There is likely to be an incentive for employers to hire undocumented aliens if they know that such employees are not subject to the NLRA, and there is no backpay liability should such employees be discriminatorily discharged.” p. 74

“An absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer’s potential liability to its alien workers and make it more financially attractive to hire undocumented aliens...” p. 72, citing the New York Court of Appeals.

“[Justice Breyer] argued that the backpay remedy is necessary to discourage employers from violating the nation’s labor laws and that in the absence of such a remedy, employers could conclude that they can violate labor laws with impunity.” p. 68 from Justice Breyer’s dissenting opinion in *Hoffman*, which denied backpay to undocumented workers fired for organizing.

“To *deny* the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation... It thereby increases the employer’s incentive to find and to hire illegal-alien employees... the Court’s rule offers employers immunity in borderline cases, thereby encouraging them to take risks, i.e., to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court’s views) ultimately will lower the costs of labor law violations.” p. 62, citing Justice Breyer’s dissenting opinion in *Hoffman*.

“To refuse to allow recovery against a person responsible for an illegal alien’s status would provide an incentive for such persons to target illegal aliens with substandard working conditions.” p. 71, citing a New Hampshire Court of Appeals who rejected a *Hoffman*-based challenge to state law allowing recovery of lost earnings.

”If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, an incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.” p. 52, citing Justice O’Connor

But if all workers had equal rights, the demand for undocumented workers would be equalized with that of documented workers.

“The *Felbro* Court concluded further that awarding backpay to undocumented workers who remain in this country, helps to achieve the purpose of the Act to deter unfair labor practices and removing the economic advantages gained by employers that violate the Act. Conversely, the Court reasoned that conditioning backpay for undocumented employees on the demonstration of legal status would, for all practical purposes, deny them an effective remedy. The Court cited *Sure-Tan*’s rationale that such a policy would penalize legal workers because employers would find it financially advantageous to hire undocumented workers, who could be denied normal safeguards... the Court concluded that granting backpay to discriminatees, regardless of immigration status, would equalize an employer’s liability for its unlawful conduct toward undocumented workers with that toward lawfully employed workers entitled to the full range of the Board’s remedies.” p.54 re: *Local 512, Warehouse & Office Workers v. NLRB (Felbro)*

4. Imperial Buffet used the NLRA and IRCA against each other in order to profit from the exploitation of both documented and undocumented workers.

“As the Board correctly observed in *A.P.R.A.* ‘To do otherwise (not award backpay) would increase the incentive for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity.’ ” p.74, citing the Board re: *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995).

“...the employees [of Imperial Buffet] have not violated the statute, as well as being the victims of Respondent Imperial’s violations of the NLRA...” p.77, regarding Imperial’s claims that the workers violated IRCA in order to justify its own violation of NLRA.

In Conclusion:

Judge Fish found that the workers were more credible than their employer, who tried to criminalize the undocumented workers using employer sanctions in order to justify maintaining illegal working conditions at the restaurant. This decision is a major victory for all workers, it points out how IRCA is undermining the rights of all working people and how the Employer Sanctions provision creates and maintains an underclass of labor in this country. Nevertheless, the Fish Decision only addresses the backpay remedy. As long as employer sanctions remains in effect, undocumented workers will be denied the right to reinstatement, and all working people will be denied the right to unionize and organizing will be undermined. The only solution is to abolish this slave law.