326 NLRB No. 86 (N.L.R.B.), 326 NLRB 1060, 159 L.R.R.M. (BNA) 1322, 136 Lab.Cas. P 16628, 1998 WL 663933

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

Hoffman Plastic Compounds, Inc.
and
Casimiro Arauz

Case 21-CA-26630
September 23, 1998

Summary

Citing A.P.R.A. Fuel Oil Buyers Group, 320 NLRB 408 (1995), affd. 134 F.3d 50 (2d Cir. 1997), Members Fox and Liebman found that undocumented worker Jose Castro is entitled to limited backpay in the amount of $66,951. The Respondent argued that the Supreme Court's decision in Sure-Tan Inc. v. NLRB, 467 U.S. 883 (1984), and the later enactment of the Immigration Reform and Control Act of 1986 (IRCA) preclude reinstatement and backpay to Castro because he disclosed at the compliance proceeding that at no time has he been lawfully authorized to work in the United States. Members Fox and Liebman found that the Respondent's arguments are virtually identical to those that the Board rejected in A.P.R.A. Fuel, and they adhered to that precedent. Members Fox and Liebman found merit in the Respondent's defense based on the after-acquired knowledge rule referred to in A.P.R.A. Fuel and determined that Castro is not entitled to reinstatement and that his backpay should terminate on June 14, 1993, the date that the Respondent learned that Castro used fraudulent identification to gain employment.

Member Hurtgen, dissenting, would not award backpay to Castro for the reasons set forth in the dissent in A.P.R.A. Fuel and because Castro is not lawfully entitled to work in the U.S. and it would be unlawful for the Respondent to employ him.

(Members Fox, Liebman, and Hurtgen participated.)

Hearing at Los Angeles, March 4-5, 1993. Adm. Law Judge Jay R. Pollack issued his supplemental decision Nov. 12, 1993.

SECOND SUPPLEMENTAL DECISION AND ORDER

****1** BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 12, 1993, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Second Supplemental Decision and Order.

The issue presented in this case is the effect of the status of discriminatee Jose Castro as an undocumented worker on the extent of the make-whole remedies available to him. In *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), affd. 134 F.3d 50 (2d Cir. 1997), the Board concluded that the most effective way to accommodate and further the immigration policies embodied in the Immigration Reform and Control Act of 1986[1] is to provide the protections and remedies of the National Labor Relations Act (NLRA) to undocumented workers in the same manner as to other employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or individuals. Applying that principle to the facts of this case, we find that discriminatee Jose Castro is entitled to limited backpay, as provided below.

I. BACKGROUND

A. The Respondent Unlawfully Laid Off Jose Castro

On January 31, 1989, the Respondent laid off Jose Castro, Moises Gonzalez, and several other employees. The Board thereafter found that the Respondent had unlawfully laid off Castro, Gonzalez, and other employees. The Board ordered the

Respondent, inter alia, to offer these individuals reinstatement to their former positions and to make them whole for any losses they may have suffered because of the unlawful layoffs. *Hoffman Plastic Compounds*, 306 NLRB 100 (1992). A controversy thereafter arose over compliance with the terms of the Board's Order, and the Board accordingly conducted a compliance proceeding.[2]

B. The Board's Compliance Proceeding

On June 14, 1993, Castro testified at the Board's compliance proceeding that he is not a citizen of the United States. The Respondent's counsel thereafter posed the following question to Castro: "What kind of documents do you have that authorize you to work in the United States?" The judge sustained the General Counsel's objection to that question. The judge nevertheless permitted the Respondent's counsel to further question Castro, by way of an offer of proof, as to whether he was authorized to work legally in the United States. Castro responded that he works in the U.S. based on a birth certificate that is not his own. Castro stated that he was born in Mexico, while the birth certificate is for an individual born in El Paso, Texas. Castro testified that "[t]he birth certificate was loaned to me so that I can secure a job because I have no work." Castro additionally testified that he presented this birth certificate to the Respondent in order to obtain employment.

****2** It was further disclosed at the compliance proceeding that the Respondent sent Castro a recall letter by certified mail on March 10, 1989. The letter stated:
Please contact [Plant Manager] Robert Wilkerson as to your availability for work no later than 4:00 P.M., Monday, March 13, 1989.

It looks like we'll need a few men soon.

The letter was sent to the home of Castro's niece, a location which he used as his mailing address. Castro did not respond to the letter. He testified that he never received the letter and that his niece never told him about it.

The judge, who issued his supplemental decision in this case before the Board issued its decision in *A.P.R.A. Fuel*, supra, concluded that Castro was not entitled to either reinstatement or backpay. The judge reached this decision in light of his reading of *Sure Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and his findings that Castro lacked legal authorization to work in the United States at any time and that it would be unlawful under the Immigration Reform and Control Act of 1986 (IRCA), for the Respondent to employ him without such authorization. The judge also relied on his finding that Castro had gained employment with the Respondent by proffering fraudulent documentation and that it had not been shown that he had applied for authorization to work in this country.

In light of the judge's finding that Castro was ineligible for reinstatement and backpay, the judge found it unnecessary to determine whether the Respondent satisfied its obligation to offer reinstatement to Castro and thereby tolled its remedial obligation. We commence our analysis by addressing this question.

***1061** II. DISCUSSION

A. The Respondent Did Not Make a Valid Offer of Reinstatement to Castro

It is well established that an offer of employment must be specific, unequivocal, and unconditional in order to toll backpay and satisfy a respondent's remedial obligation.[3] We cannot conclude that the Respondent's letter dated March 10, 1989, offering reinstatement to Castro satisfied these requirements. The Respondent's offer letter, which we have set forth above, does not designate a specific job or even a job classification. Further, the Respondent's letter does not unequivocally make an express offer of a job to Castro, but rather vaguely provides that "it looks like we'll need a few men soon." In these circumstances, we must find that the Respondent's offer of reinstatement was neither specific nor unequivocal, and we accordingly conclude that the Respondent did not make a valid offer of reinstatement to Castro in its letter of March 10, 1989. *Holo-Krome Co.*, supra at 454.

In the absence of a valid offer, the Respondent's remedial obligation to reinstate Castro remains, and backpay has not been tolled. The Respondent argues and the judge found, however, that the Respondent's remedial obligation has been extinguished in light of Castro's immigration status as adduced at the compliance proceeding. We accordingly turn to consideration of this issue.

B. Remedial Obligations Under the NLRA in Light of U.S. Immigration Law

**3 In *A.P.R.A. Fuel*, supra at 408, the Board considered the effect of discriminatees' alleged status as undocumented workers on the extent of the make-whole remedies available to them in light of the enactment of IRCA, which, for the first time, established sanctions for employer conduct, prohibiting employers from knowingly hiring or continuing to employ undocumented aliens.[4] That statute lists categories of documents that may be used to establish an employee's identity and eligibility to work. In order to meet its IRCA obligations, an employer must examine the documents presented by a newly hired employee to establish his identity and work eligibility and must attest that it has done so and that the documents appear to be genuine and relate to that employee.[5] Further investigation of the matter is warranted only when an employer has reason to know that an applicant is not authorized to work for it.[6]

In *A.P.R.A. Fuel*, after reviewing the objectives of IRCA and the National Labor Relations Act, the Board concluded, for the reasons there set forth, that the most appropriate way to harmonize the statutes was to apply the following rules to make-whole relief for employees who have been discharged for reasons unlawful under the Act and who had not previously provided valid documents establishing that they may lawfully work in the United States. The Board held that, in such a case, it would issue an order requiring reinstatement and backpay, but the respondent employer's obligation to reinstate would be conditioned on the discriminatees' production, within a reasonable time, of documents enabling the respondent to meet its obligation under IRCA to verify the discriminatees' eligibility for employment in the United States. Id. at 415. The Board further held that backpay should be tolled either as of the date the discriminatees are reinstated subject to compliance with the respondent employer's obligations under IRCA or when, after a reasonable period of time, they fail to produce the documents required by IRCA.[7]

In *A.P.R.A. Fuel*, the Board stated in dictum that it would extend its after-acquired knowledge rule to discharge cases concerning undocumented workers. Under this rule, "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct."[8] The employer in *A.P.R.A. Fuel*, however, had known, when it hired the employees it later unlawfully discharged, that they were not legally entitled to work in the United States. Therefore, it was precluded from asserting that it would have terminated the discriminatees on the basis of their immigration status.

C. The Remedial Obligation Owed to Discriminatee Jose Castro

4 The Respondent contends that Castro is not entitled to reinstatement and backpay because he disclosed at the compliance proceeding that at no time has he been lawfully authorized to work in the United States.[9] It contends **1062 that the Supreme Court's decision in *Sure-Tan* and the later enactment of IRCA preclude any such remedy. The Respondent's arguments in this regard are virtually identical to the arguments that the Board rejected in *A.P.R.A. Fuel*, and we adhere to that precedent.

However, we find merit in the Respondent's defense based on the after-acquired knowledge rule referred to in *A.P.R.A. Fuel*, as noted above. Specifically, the record supports the Respondent's contention that it would not have offered Castro initial employment had it known of his unauthorized immigration status. In this connection, the record shows, and the judge found, that the Respondent attempted to comply with IRCA when it hired Castro, and that the Respondent did not learn until the backpay hearing that Castro used fraudulent identification in applying for employment. In this respect, the instant case is distinguishable from *A.P.R.A. Fuel*, in which the employer was on notice from the outset of the employees' ineligibility for employment and was therefore precluded from raising an after-acquired knowledge defense. In addition, the record shows that the Respondent's policy of compliance with IRCA is evidenced in its employment application, which poses the following question to applicants: "Are you prevented from lawfully becoming employed in this country because of Visa or Immigration Status?"[10] Finally, there is no evidence that the Respondent knowingly hired any employee in violation of IRCA. Accordingly, under *Marshall Durbin*, supra, and *John Cuneo*, supra, Castro is not entitled to reinstatement, and backpay shall terminate on June 14, 1993, the date that the Respondent learned that Castro used fraudulent identification to gain employment.

ORDER

The National Labor Relations Board orders that the Respondent, Hoffman Plastic Compounds, Inc., Paramount, California, its officers, agents, successors, and assigns, shall

(a) Pay to Jose Castro backpay in the amount set forth opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less tax withholdings required by Federal and state laws, as required by the Board's Order of January 22, 1992:

Jose Castro	$66,951[11]

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

****5** MEMBER HURTGEN, dissenting.

My colleagues award backpay (albeit tolled) to discriminatee Castro. I would not do so.

In *Sure-Tan, Inc. v. NLRB*, the Supreme Court declared that backpay was inappropriate "during any period when [employees] were not lawfully entitled to be present and employed in the United States."[1] In addition, since *Sure-Tan*, Congress passed the Immigration Reform and Control Act of 1986 (IRCA) which made it unlawful for an employer to employ persons who lack appropriate authorization to work in the U.S.

I now apply these principles to the instant case. The case involves an employee who is not lawfully entitled to work in the U.S., and it would be unlawful for the Respondent to employ him. For these reasons, and those set forth in the dissent in *A.P.R.A. Fuel Oil Buyers Group*,[2] I would not award backpay to Castro.

***1063** *Peter Tovar, Esq.*, for the General Counsel.
Ryan McCortney, Esq. (Sheppard, Mullin, Richter & Hampton), of Los Angeles, California, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge.

I heard this case in trial at Los Angeles, California, on March 4 and 5 and June 14, 1993. On January 22, 1992, the Board issued its Decision and Order (306 NLRB 100) finding that the Respondent, Hoffman Plastic Compounds, Inc., had violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Board ordered, inter alia, that the Respondent offer Casimiro Arauz, Jose Castro, and Moises Gonzalez full reinstatement to their former positions and that the Respondent make whole Mauricio Mejia, Arauz, Castro, and Gonzalez for any loss of earnings they may have suffered because of their unlawful layoffs. On April 10, 1992, the Respondent and the General Counsel entered into a stipulation whereby the Respondent waived its right under Section 10(e) and (f) of the Act to contest the propriety of the Board's Order issued on January 22, 1992, or the findings of fact and conclusions of law underlying that Order. A controversy having arisen over the amount of backpay due and the terms of the Board's Order, on September 30, 1992, the Regional Director for Region 21 of the Board issued a compliance specification and notice of hearing. On October 4, 1993, the Respondent and the General Counsel reached agreement on the backpay for Mejia and that settlement has been satisfied. On October 27, 1993, the Respondent and Arauz reached settlement on Arauz' claims. Counsel for the General Counsel approved the settlements on October 29, 1993. I approved the settlement on November 3, 1993, and issued an order granting the parties' joint motion to withdraw the allegations of the compliance specification concerning Arauz and Mejia.

****6** The issues remaining for decision are (1) whether the Respondent made valid offers of reinstatement to Castro and Gonzalez in March 1989; (2) whether Gonzalez voluntarily quit his employment in March 1989; and (3) whether the Respondent should be ordered to offer Castro, an undocumented worker, reinstatement to his former job. After resolution of these principal issues, there remains the computation of backpay and the resolution of some subsidiary issues necessary thereto.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties,[1] I make the following

Findings and Conclusions

In the underlying case, on January 31, 1989, the Respondent laid off nine employees. The Board found that the layoff was for economic reasons and would have occurred regardless of the union organizing activities. However, the Board agreed with Administrative Law Judge Gordan J. Myatt that the Respondent in order to rid itself of known union supporters, discriminatorily selected union adherents for layoff. The Board and the judge found that Maurico Mejia was recalled in March 1989 and found it unnecessary to order reinstatement.

Although the record indicated that the Respondent sent recall letters to Casimiro Arauz, Moises, Gonzalez, and Jose Castro, the effect of the recall letters was left to the compliance stage of the proceeding.

On March 10, 1989, the Respondent sent recall letters to the laid off employees including the two discriminatees at issue, Castro and Gonzalez. The letters stated:
Please contact Robert Wilkerson as to your availability for work no later than 4:00 P.M., Monday, March 13, 1989.

It looks like we'll need a few men soon.

Moises Gonzalez testified that he met with Wilkerson on March 13 with his supervisor Ramon Rosas acting as interpreter. According to Gonzalez he was told he could come back to work if he dropped his claim (the instant charge) against the Respondent. Gonzalez agreed to begin working on the grave-yard shift that evening. Gonzalez did not show up for work. He testified that his daughter was ill and that he had to take her to the hospital.[2] Gonzalez testified that on Monday, Wilkerson called him and said that the owner did not want Gonzalez and that there was no job for him.

Wilkerson testified that he offered Gonzalez work on the graveyard shift and that Gonzalez accepted the offer. Gonzalez was scheduled to work that Saturday and Sunday evenings. According to Wilkerson, Gonzalez did not show up for work or call in. On the following Monday, after Gonzalez did not call in, Wilkerson discharged Gonzalez for abandoning his job. Wilkerson denied ever telling Gonzalez not to come to work. Wilkerson had a position open for Gonzalez. Both Wilkerson and Rosas denied that there was any mention of dropping the claim or charge. I credit their denials. First, Gonzalez made no mention of this condition on the recall to work in his 1990 testimony. Second, Wilkerson's testimony was corroborated by his notes and business records. Third Wilkerson's testimony was corroborated by that given by Rosas. I found Rosas to be a very credible witness. Thus I credit Wilkerson's and Rosas' testimony over that of Gonzalez.

****7** Rosas testified that Gonzalez came and asked for work and that the two of them went to speak with Wilkerson. Wilkerson told Gonzalez that he could work on the graveyard shift and Gonzalez agreed to work that evening. Gonzalez did not show up for work on either Saturday or Sunday evening. Rosas reported these facts to Wilkerson on Monday morning. Rosas further testified that shortly thereafter he saw Gonzalez and asked what had happened. Gonzalez answered that he had "messed up."

I find that backpay for Gonzalez was terminated as of March 13, 1989, when he failed to return to work. The credible testimony of Rosas and Wilkerson shows that Gonzalez, after agreeing to work, did not show up for work or call in to explain his absences. After 3 days, Wilkerson could, in accordance with his past practice as to consecutive absences, lawfully assume that Gonzalez had abandoned his employment. The fact that the Respondent was presented with the opportunity to terminate its backpay liability and/or the opportunity to discharge Gonzalez is of no legal consequence. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966); and *P. G. Berland Paint City, Inc.*, 199 NLRB 927, 927-928 (1972).

***1064** The General Counsel argues that Gonzalez was not fully reinstated and, therefore, could turn down this job. I find no evidence to support that allegation. The evidence indicates that Gonzalez was offered the same job he had before the layoffs and that he told Rosas that he was "happy" with the offer. Although no mention was made to Gonzalez that he would return to work without prejudice to his seniority, the failure to do so does not invalidate the offer and acceptance. *National Screen Products Co.*, 147 NLRB 746, 747 (1964).

Gonzalez would have been discharged for this conduct regardless of the prior union activity. The Respondent treated the unexplained failure to report for work as grounds for immediate termination. The evidence shows that the Respondent would have discharged any employee based on the unexplained failure to report to work for 3 days. No other employees known to have engaged in similar conduct were retained. *Animal Humane Society*, 287 NLRB 50 (1987).

The compliance specification, as amended, assumes that Gonzalez would have received raises every 6 months. However, I

find that his backpay period terminated prior to the time he would have received a raise.

The record reveals that Castro was sent a recall letter on March 10, 1989. The letter was sent by certified mail to the address he had given the employer and was signed for by his niece. Castro has used his niece's home as his mailing address for many years and continues to do so. Castro did not respond to the letter. He testified that he never received the letter and that his niece never told him about the letter.

****8** According to Castro, 2 years after his discharge he returned to the Respondent's plant and asked for work. Castro testified that Wilkerson turned him down because he did not speak English. Wilkerson credibly denied this incident. Wilkerson testified that he never saw or spoke with Castro after the layoff of January 1989. According to Wilkerson, one half of the employees do not speak English. He hired Castro in 1988 even though the employee spoke no English.

The Respondent discovered at the backpay hearing that Castro used fraudulent identification in applying for work with the Respondent. Castro used a fraudulent birth certificate as identification for immigration purposes.[3] Castro testified that he used a friend's birth certificate and that he uses that certificate to work in the United States. Castro also had a California driver's license and a social security card evidently obtained by use of the fraudulent birth certificate. He testified that he uses the false identification in order to work in this country. Castro is not authorized to work in this country. The Respondent contends that since it did not know that Castro was not authorized to work it cannot be now ordered to employ him in contradiction of the immigration laws.

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court held that undocumented workers are employees within the meaning of the Act. However, discriminatees will be deemed unavailable for work during any period in which they are not lawfully entitled to be present and employed in the United States. Backpay is, therefore, tolled during any period when a discriminatee is not lawfully authorized to work in this country. Subsequent to *Sure-Tan* Congress passed the Immigration Reform and Control Act of 1986 (IRCA) making the employment of unauthorized aliens unlawful and imposing sanctions on employers who knowingly hire them.

In the instant case, Castro was hired subsequent to the effective date of IRCA (November 6, 1986) by using false identification. The record shows that the Respondent attempted to comply with IRCA. Castro admitted that at no time was he lawfully entitled to work in this country. Thus, I find that under the Supreme Court's ruling in *Sure-Tan* Castro is not entitled to backpay as of the date of the hearing. However, as noted above, the Respondent has not yet offered reinstatement to Castro. The issue is whether the Respondent should be ordered to reinstate Castro conditioned on his obtaining lawful authorization to work in this country.

The Respondent argues that it attempted to comply with IRCA and only hired Castro based on the false information and identification supplied to it. Thus, the Respondent contends that it never would have hired Castro had the facts been known and that Castro should not be entitled to any remedy.

In *Fiber Glass Systems*, 298 NLRB 504, 506 (1990), the Board followed the Circuit Court of Appeals for the Fifth Circuit and ruled that the employer could show in the compliance stage of the proceedings that the discriminatee never would have been hired. However, the Board indicated that it was following the court's remand as the law of the case and was making no determination on the issue.[4] The Board has not since addressed this issue.

****9** Since the Respondent did not knowingly hire Castro in violation of IRCA, it appears that the best result would be not to order the Respondent to make an offer of reinstatement. Castro was not lawfully authorized to work in the United States at the time of his hire, his termination, the unfair labor practice hearing, nor the backpay hearing. Castro and the General Counsel had the opportunity to show that Castro was now authorized to work in this country but did not do so. Further, there is no evidence that Castro has made application for authorization to work in this country. The presumption is that Castro will continue to lack authority to work lawfully in this country. Thus, a reinstatement order, even conditioned on Castro obtaining authorization to work in this country, would be putting form over substance. A proper remedy should not order actions that would be futile.

I find the cases cited by the General Counsel to be inapposite. In *A.P.R.A. Fuel Oil Buyers Group*, 309 NLRB 480 (1992), cited by the General Counsel, the Board ordered reinstatement of two employees who were not authorized to work in this country. However, in each instance the employer knew at the time of hire that the employee was not authorized to work and had hired him in violation of IRCA. In *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit ordered backpay for undocumented workers whose claims arose prior to the effective date of IRCA. In *Del Rey Tortilleria. Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), the Seventh Circuit Court of Appeals held that undocumented

workers were not entitled to backpay and reinstatement. The workers there had also been hired prior to the effective date of IRCA.

In the instant case, there is nothing to suggest that the Respondent hired any employee in violation of IRCA. With respect ***1065** to Castro, the employee was required to file an I-9 form and submit proper identification. The fraudulent identification was not apparent and there is nothing to suggest that the Respondent knew of Castro's status until the last day of the hearing. The Respondent raised Castro's status as an undocumented worker after Castro's admissions at the hearing. Finally, in the above-cited cases the Board left the remedy issues to the compliance stage of the proceedings. Here we are at the compliance stage and Castro is still not authorized to work in the United States. Under these circumstances, I believe the litigation should come to an end and will not order a futile reinstatement remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

SUPPLEMENTAL ORDER

It is ordered that the Respondent, Hoffman Plastic Compounds, Inc., forthwith pay to each of the following persons backpay in the amounts set opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of January 22, 1992:

Jose Castro	$ 0.00
Moises Gonzalez	1638.50

Footnotes

1 8 U.S.C. § 1324a et seq.

2 On July 29, 1994, the Board issued a Supplemental Decision and Order adopting the judge's recommended Order in the compliance proceeding with respect to discriminatee Moises Gonzalez. *Hoffman Plastic Compounds*, 314 NLRB 683 (1994). The Board further ordered that the portion of the judge's supplemental decision relating to discriminatee Jose Castro be severed and subject to further consideration.

3 See, e.g., *Hoffman Plastic Compounds*, supra at 683; *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992).

4 8 U.S.C. § 1324a(a).

5 8 U.S.C. § 1324a(b).

6 See *Collins Food International, Inc. v. U.S. Immigration & Naturalization Service*, 948 F.2d 549, 553-555 (9th Cir. 1991); and *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 566-567 (9th Cir. 1989).

7 The Board noted that its reasons for concluding that this remedy represented an appropriate accommodation of the purposes of the Act with the purposes of IRCA reflected the rationale in the Ninth Circuit's opinion in *Garment Workers Local 512 (Felbro) v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

8 320 NLRB at 416 fn. 44, citing *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994), and *John Cuneo, Inc.*, 298 NLRB 856, 856-857 (1990).

9 As set forth in sec. I,B, supra, this information was elicited in a series of questions to which counsel for the General Counsel objected at the outset. The judge indicated he agreed with that objection, but then permitted the Respondent's counsel to ask the questions as part of an "offer of proof." At the end of the questioning, the judge stated he was sustaining the objection. Nonetheless, in his written decision, he made factual findings based on Castro's admission. No exception has been filed to the receipt of that evidence into the record or to the judge's factual finding that Castro obtained employment by using a fraudulent birth certificate. Therefore there is no issue before us as to whether the judge should have barred the Respondent from questioning

Castro about his eligibility for employment.

[10] In his exceptions, the General Counsel points out that Castro answered this question on his application in the affirmative and argues that the Respondent was therefore aware of Castro's unauthorized immigration status at the time it hired him. We find no merit in this contention, because the record clearly shows that the Respondent only hired Castro after he had supplied, as the Respondent required, documents that appeared to be genuine and relate to the person presenting them.

[11] The amount we have ordered to be paid to Castro, with interest, is that set forth in the March 4, 1993 second amended compliance specification, computing backpay due to Castro through the last quarter of 1992. We note that the Respondent in its answer and first amended answer to the compliance specification and first amended compliance specification did not dispute the General Counsel's method of calculation of backpay benefits owed to Castro. At the compliance hearing held on March 4, 1993, however, the Respondent's counsel "dispute[d] the backpay calculations and the backpay periods specified in the second amendment to the compliance specification." We find, based on our review of the record, that the General Counsel's method of calculation of backpay owed to Castro is valid and reasonable. See *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1290 (10th Cir. 1982). Thus, the General Counsel computed gross backpay by multiplying Castro's hourly rate of pay by the average hours per week and overtime that Castro would have worked during the backpay period in light of his previous work schedule, and factored in wage rate increases based on those received by an employee, Carlos Montalvo, who worked in Castro's job classification during the backpay period.

We additionally have considered and rejected the Respondent's argument that Castro is not entitled to backpay because he cannot, according to the Respondent, make reasonable efforts to find interim work in light of his undocumented status. The record shows that Castro worked as a carpenter's helper, gardener, day laborer, and mechanic's assistant following his unlawful layoff, and in addition unsuccessfully applied for work at certain factories. Thus, we find that Castro satisfied his obligation to make reasonable efforts to find interim work following his unlawful layoff by the Respondent.

As set forth above, we have ordered payment of backpay due Castro through the last quarter of 1992. The backpay specification, as amended, alleges that the Respondent's backpay liability owed to Castro is continuing since he has not been tendered a valid offer of reinstatement. However, we have found, supra, that Castro is not entitled to an offer of reinstatement and that the backpay period terminates on June 14, 1993. Therefore, the only remaining backpay due Castro is for the period of January 1 through June 14, 1993.

[1] 467 U.S. 883, 903 (1984).

2 320 NLRB 408, 419 (1995).

[1] Briefs were filed by the Respondent and the General Counsel on November 1, 1993.

2 In the underlying case, Gonzalez testified that he took his son to the hospital.

3 Castro was born in Mexico and the birth certificate is for someone born in El Paso, Texas.

4 See *W. Kelly Gregory*, 207 NLRB 654 (1973); *National Packing Co.*, 147 NLRB 446 (1964); and *Southern Airways*, 124 NLRB 749 (1959).

5 All motions inconsistent with this recommended supplemental order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

326 NLRB No. 86 (N.L.R.B.), 326 NLRB 1060, 159 L.R.R.M. (BNA) 1322, 136 Lab.Cas. P 16628, 1998 WL 663933