Napa, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RIGI AGRICULTURAL SERVICES, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-167-SAL 81-CE-175-SAL 82-CE-6-SAL 82-CE-9-SAL 82-CE-10-SAL 82-CE-22-SAL 11 ALRB No. 27 (9 ALRB No. 31)

DECISION ON AVAILABILITY OF REMEDIAL PROVISIONS TO PERSONS COVERED BY THE AGRICULTURAL LABOR RELATIONS ACT

On October 19, 1984, Respondent Rigi Agricultural Services, Inc., (Rigi) filed a motion requesting the Agricultural Labor Relations Board (Board or ALRB) to issue an interim decision in this matter. Rigi argued that it would be contrary to both federal and state law for the ALRB to order Rigi to reinstate or pay back wages to discriminatees who are ineligible for employment in this country because of their status as undocumented aliens.[1/]

[1/] We assume, without deciding, that such terms as "illegal aliens" and "undocumented aliens" have no particular meaning, either in fact or in law. We note that the United States Supreme Court has employed those as well as additional variations of the terms including but not limited to: "Mexican Nationals present illegally in the United States without visas or immigration papers authorizing them to work," "undocumented alien employees," "illegal entrants," and "immigrant aliens." (Sure-Tan, Inc. v. National Labor Relations Board (1984)_____ U.S. ____ [104 S.Ct. 2803] (hereinafter Sure-Tan).) For present purposes, we interpret all such references to denote aliens who are subject to deportation under the federal

(Fn. 1 cont. on p. 2.)

Because of the importance and general interest of the issue presented, we scheduled the matter for oral argument and invited numerous interested parties to present their views both in writing and orally. Supplemental briefing on certain questions raised at oral argument was also invited and received. Upon consideration of all arguments presented, and for the reasons stated below, we have decided that the U.S. Supreme Court's limitation of remedies for departed undocumented aliens announced in Sure-Tan Inc. v. NLRB, supra, __ U.S. __ [104 S.Ct. 2803] is not "applicable precedent" under section 1148[2/] of the Agricultural Labor Relations Act (ALRA or Act). Moreoever, we have considered and rejected the contention of Respondent and some amici that the ALRB should or could condition reinstatement and backpay awards on a discriminatee's immigration status in order to avoid preemption by federal immigration laws.[3/]

(Fn. 2 cont.)

Immigration and Naturalization Act (INA) 8 U.S.C, section 1101 et seq., because they fail to qualify for an exemption under that statute which would legally entitle them to work in this country. Wherever any of the foregoing terms are utilized herein, they are used advisedly.

[2/] All section references herein are to the California Labor Code unless otherwise specified.

[3/] As we find independent grounds for declining to condition reinstatement and backpay on a discriminatee's immigration status, it is not necessary for us to reach the question of our authority under Article III, section 3.5 of the California Constitution which prohibits an administrative agency from:

> ...refus[ing] to enforce a statute on the basis that federal law or federal regulations prohibits the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Introduction

In Rigi Agricultural Services, Inc. (1983) 9 ALRB No. 31, three of Respondent's employees were discharged, ostensibly because they were illegal aliens. We concluded that they had actually been dismissed because of activities protected by section 1152 of the Act.[4/] We therefore ordered Rigi to reinstate those farmworkers and to make them whole by paying them for any lost wages, plus interest. Rigi sought delay of our decision on the basis that Sure-Tan was then pending before the U.S. Supreme Court. In refusing Rigi's request, we stated:

> Subsequent to the issuance of the Administrative Law Judge's (ALJ) Decision, Respondent moved this Board to defer ruling on the issue of reinstatement of undocumented workers, as an appropriate remedy under the Agricultural Labor Relations Act (Act), until the United States Supreme Court decides Sure-Tan, Inc. v. NLRB (7th Cir. 1982) 672 F.2d 592 [109 LRRM 2995]; cert. granted, S.Ct. Case No. 82-945, 51 U.S.L.W. 3646 (March 8, 1983). We are not persuaded that the Sure-Tan case is sufficiently related to the instant case to justify deviation from our usual practice of treating all agricultural employees alike, regardless of their immigration status. (See Mini Ranch Farms (1981) 7 ALRB No. 48.)
> (Rigi, supra, 9 ALRB No. 31 at p. 2, n. 4.)

[4/] Section 1152 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.

This section is substantially identical to section 7 of the NLRA, (See 29 U.S.C. § 157.)

Pursuant to section 1160.8 of the Act, Rigi petitioned the California Court of Appeal, First Appellate District, Division Two for a writ of review of our Decision, arguing in part that our Order requiring reinstatement of aliens in California without documentation was in violation of federal and state law. Following the denial of the petition for a writ of review on March 28, 1984., Rigi sought hearing before the California Supreme Court. In its brief in support of its request for hearing, Rigi again argued that our Order in this case required it to encourage undocumented discriminatees to violate federal law. Hearing was denied on June 13, 1984, by the California Supreme Court.

On June 25, 1984, the U.S. Supreme Court issued its decision in Sure-Tan. Thereafter, Rigi filed the instant motion for an interim ruling on the appropriateness of our Order in the underlying case. On November 28, 1983, we notified the parties and interested persons of the scheduling of oral argument on the above request for an interim ruling. Specifically, we sought argument on the following issues:

> Whether and to what extent the decision of the United States Supreme Court in Sure-Tan v. NLRB (1984.)___U.S.___[104. S.Ct. 2803], operates to limit the power of the Agricultural Labor Relations Board to remedy unfair labor practices committed against or otherwise involving undocumented workers, such as, for example, those employees who are members of a bargaining unit entitled to be made whole for their loss of pay and benefits resulting from their employer's refusal to bargain.

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Following oral argument,[5/] briefs were also permitted on issues raised during that argument. The Board has considered Rigi's motion for an interim ruling and the response thereto, the opening and supplemental briefs received from the parties and amici curiae, and the presentation of the representatives at the oral argument.

The Sure-Tan Holding

In Sure-Tan, the Supreme Court reviewed a decision of the National Labor Relations Board (NLRB) which found that two small leather processing firms, constituting a single integrated employer, violated section 8(a)(l) and (3)[6/] of the NLRA by informing the Immigration and Naturalization Service (INS) of the presence of undocumented aliens in its work force in retaliation for its employees' union and protected concerted activities.

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[5/] On February 28, 1985, the UFW filed a motion to expedite this Decision, joined in by the General Counsel. In our consideration of this matter, we have taken into account the motion of the UFW and General Counsel.

[6/] Section 8(a)(3) of the National Labor Relations Act (NLRA) provides, in part:

> It shall be an unfair labor practice for an employer
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> * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.
> (29 U.S.C. § 158(a)(3), identical to § 1153(c) of the ALRA.)

In part IIB of its decision,[7/] the Court stated that "counterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the [INA]." The Court found that "enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA." The Court reasoned:

> If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. The Board's enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws as presently written. (104 S.Ct. at 2810.) (Emphasis added.)

However, the Court ordered the case remanded to the NLRB to recraft its remedial provisions, finding that awards of backpay and reinstatement to deported undocumented discriminatees posed a "potential conflict" with the INA goal of deterring admission of undocumented aliens in the U.S. The court held that "implementation of the Board's traditional [backpay and reinstatement] remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States" because of the NLRB's obligation to accomodate

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[7/] Respondent does not argue that undocumented aliens should not be entitled to the protections of the Act or that reporting agricultural employees to the INS in retaliation for their protected activity does not constitute an unfair labor practice. Nothing in the U.S. Supreme Court's decision in Sure-Tan requires us to reconsider our holding in Mini Ranch Farms, supra, 7 ALRB No. 48, that undocumented agricultural employees are entitled to the protections of the ALRA.

the equally important congressional objective of the INA to deter unauthorized immigration.

Preliminarily, we note that the discriminatees in Sure-Tan, unlike the discriminatees in the instant case, had accepted voluntary departure from the U.S. following investigation of their immigration status. (Id. at 90-4 S.Ct. 2806-2807.) The record before the Supreme Court did not indicate whether they had returned to the U.S. from Mexico, leading to the Court's concern that a backpay and/or reinstatement order could induce them to reenter the country in violation of the INA. It is therefore unclear whether the Sure-Tan decision can be read to apply to all "undocumented" discriminatees or only those who could be lured across the border by a remedial order.

Regardless of whether the Sure-Tan decision is read broadly or narrowly, however, it is apparent to us that the conditions placed on reinstatement and backpay do not constitute applicable NLRA precedent under section 1148 of the Act. The Sure-Tan Court's accomodation analysis was grounded in the case of Southern S.S. Co. v. NLRB (1942) 316 U.S. 31 [62 S.Ct. 886], the seminal case on federal agency comity. Southern S.S. and its progeny[8/] set forth a clear mandate for federal agencies to accomodate the interpretation and enforcement of their statutes with any other congressional enactments with which they might

[8/]See, e.g., with respect to the NLRB, Laborers International Union of North America v. NLRB (D.C. Cir. 1974) 503 F.2d 192 [86 LRRM 2929]; Schmerler Ford, Inc. v. NLRB (7th Cir. 1970) 424 F.2d 1335 [73 LRRM 2345J.With respect to other federal agencies, see, e.g., McLean Trucking Company v. U.S. (1944) 321 U.S. 67 [64 S.Ct. 370].

even "potentially" conflict.

The issue before us, however, is quite different. Any obligation on the part of the ALRB, a state agency enforcing a state statute, to restrict its remedies in order to accomodate the congressional objectives embodied in the INA or any other federal law raises principles of federalism[9/] which must be analyzed under an entirely separate set of precedent. As the Sure-Tan court noted, in another context, "federalism concerns are simply not at stake [in the Sure-Tan case]."

(104 S.Ct. at 2812.)

History of the ALRA

In considering the paramount interest of the State of California in regulating labor relations in California agriculture, we note that Congress specifically excluded "agricultural laborers" from the coverage of the NLRA, presumably

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[9/] Alexander Hamilton set forth the principles of federalism which the courts have followed in construing state power:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in two cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. (The Federalist No. 32, p. 241 (B. Wright ed. 1961); see Cooley v. Board of Wardens, 12 How. 299, 318-319, 13 L.Ed. 996 (1851).) (Emphasis in original.)

as a result of intense pressure from agricultural employer groups and, in recognition that migrant and seasonal labor patterns made many of the NLRA's provisions inappropriate. (See German, Labor Law, West Publishing Co.,. 1976, p. 31.) The California Legislature's momentous decision to fill the vacuum left by Congress by enactment of the ALRA, when viewed in the historical context of California agriculture, emerges as a significant assertion of "local responsibility" worthy of deference as a compelling state interest. (See e.g., Bill Johnson's Restaurants v. NLRB (1983) 461 U.S. 731 [103 S.Ct. 2161]; San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236 [79 S.Ct. 773].)

California agriculture has long benefitted from the use of alien labor.

> The roots of twentieth-century Mexican migration to the United States, characterized chiefly as a mass movement of rural laborers from specific regions in north-central Mexico to the U.S. southwest and midwest can be found in late nineteenth-century Porfirian Mexico. It is during those two decades that the mass of the rural population became landless as a result of Porfirio Diaz's policies; it is also during this period that most of the current north-south railroad grid was constructed and the internal migration of temporary agricultural laborers, especially young adult males, became noticeable. By 1900, therefore, Mexico's economy and society had evolved in a manner which met the preconditions for mass labor migration to the United States.
> (Manuel Garcia y Griego, The Importation of Mexican Contract Laborers to the United States, 1942-1964: Antecedents, Operation and Legacy,(1980)University of California, San Diego, p~.2-3, fn. omitted.)

During periods of economic crisis in this country, particularly the recession of 1921 and the Great Depression, there were official efforts to return immigrants to Mexico since they were

perceived as a burden on the local community and undesirable competitors in the work place. (Ibid., p. 9-10.) In many cases, however, employers continued to make use of alien labor. With the advent of the Second World War and the availability of new domestic employment opportunities for American workers, the United States and Mexican governments agreed on an unprecedented program of recruitment and contracting of migrant labor primarily for agricultural and railroad work. The initial phase of the "bracero" system saw the development of huge clandestine migratory patterns existing side-by-side with the program of contract labor. Following the war, domestic reaction to this invasion of foreign labor caused the two governments to agree to regulate much of this network by issuing bracero contracts. By and large, the post-war illegal immigration problem was solved by transforming illegal aliens into contract laborers under the bracero program. Although the bracero program was finally ended in 1964, the use of alien labor in agriculture did not stop: "abundant evidence suggests that California agribusiness in the early 1970's regularly reaped the benefits of a virtually unlimited supply of commuters and undocumented workers from Mexico." (Kitty Calavita, California's "Employer Sanctions", University of California, San Diego, 1982, pp. 16-17.) Testimony during hearings on the "Simpson-Mazzoli" Immigration Reform bill reveals that this situation has continued into the 1980's. (See Hearings Before the Subcommittee on Immigration, Refugees and International Law of the House Committee on the Judiciary, on HR No. 1510, 98th Cong. 1st Sess., p. 1128. See also

HR Rep. No. 98-115, p. 11.)

In light of this history, it becomes clear that, when the Legislature extended the rights in the ALRA to all agricultural employees, it did so with full awareness of this state's historical reliance on undocumented agricultural laborers.[10/]

The ALRA specifically provides, at section 1160.3, that upon the finding of an unfair labor practice, the Board is to order appropriate remedies -- including reinstatement and backpay. The Legislature made no distinctions between the relief to be provided documented and undocumented aliens. Rather, the Legislature stated in the preamble to the Act that, as a matter of policy, "the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural employees ...." (Emphasis added.)

As the U.S. Supreme Court stated in San Diego Bldg. Trades Council v. Garmon, supra, 79 S.Ct. at 781-782, "The compelling state interest in the scheme of our federalism in the maintenance of domestic peace is not overridden in the absence of a clearly expressed congressional directive."

Nonetheless, Respondent and several amici argue that awards of backpay and reinstatement to undocumented aliens

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[10/]The fact that the California Legislature's earlier imposition of sanctions against employers for hiring undocumented employees was declared unconstitutional by the California Court of Appeal the year before the ALRA was passed (see Dolores Canning Co. v. Howard (1974) 40 Cal.App.3d 673 [115 Cal.Rptr. 435]) indicates all the more forcefully that the subsequent express legislative guarantee of ALRA protections for "all" agricultural employees was intended to include the undocumented.

conflict with the INA's policy of deterring illegal immigration and are therefore invalid by virtue of the Supremacy Clause of the U.S. Constitution. This requires the Board to evaluate its remedial orders in light of well-established principles of preemption.

Preemption

Absent evidence of an intent by Congress to occupy a field of regulation exclusively, conflicting state laws:

> "...should be preempted ... 'only to the extent necessary to protect the achievement of the aims of'" the federal law, since "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" (De Canas v. Bica (1976) 424 U.S. 351, 357, fn. 5 L96 S.Ct. 933, 937, fn. 5]. Quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127, 94 S.Ct. 383, 389, 38 L.Ed.2d 348 (1973), quoting Silver v. New York Stock Exchange, 373 U.S. 341, 361, 357, 83 S.Ct. 1246, 1259, 1257, 10 L.Ed.2d 389 (1963).)

In this regard, in order for congressional enactments to preempt state authority, one of the following conditions must exist: either (1) Congress expressly indicates its intention to preempt, or (2) Congress' intention to preempt may be inferred from "a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplant it," or (3) the state law or regulation actually conflicts with federal law, or (4) the state law or regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (PG&E v. State Energy Resources and Development Commission (1983) 461 U.S. 190 [103 S.Ct. 1713, 1714]; Fidelity Federal Savings & Loan v. de la Cuesta (1982) 458 U.S. 141

[102 S.Ct. 3014, 3022]; Jones v. Rath Packing (1977) 430 U.S. 519, [97 S.Ct. 1305, 1309-10].)

No Express or Implied Intent of Congress to Occupy Field

In De Canas v. Bica, supra, 96 S.Ct. 933, 937, the U.S. Supreme Court noted the "... States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." The Court noted that, similar to child labor laws, minimum and other wage laws, laws affecting health and safety, and workers' compensation laws, California's attempt, by means of Labor Code section 2805(a), to prohibit the knowing employment by California employers of undocumented aliens in times of high unemployment was "certainly within the mainstream of such police power regulation." (96 S.Ct. at 937.) Through enactment of the ALRA, California has exercised its police power to regulate the employment relationship between agricultural employers and employees so as to protect workers and bring peace and stability to the State's fields. (See Preamble to ALRA.) Thus, the U.S. Supreme Court has often stated where the challenged state law or regulation involves exercise of a state's police power, "[w]e start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of the Act." (Rice v. Sante Fe Elevator Corporation (1977) 331 U.S. 218, 230 [67 S.Ct. 1146], See also Jones v. Rath Packing Co., supra, 97 S.Ct. 1305, 1309; and Bill Johnson's Restaurants, Inc. v. NLRB, supra, 103 S.Ct. 2161.)

In De Canas v. Bica, supra, 96 S.Ct. 933, 937-38, the

Court held that California's law regulating the agricultural employment of illegal aliens by imposing criminal sanctions on their employers was not necessarily preempted by the INA since "[t]he central concern of the INA is with the terms and conditions of admission to the country and subsequent treatment of aliens lawfully in the country." Therefore, the Court held that there was neither an express nor an implied Congressional intent to prevent states from regulating employment of undocumented aliens, although the Court recognized the inherent potential for conflict should the state law operate to burden the rights of legally admitted workers.[11/] (96 S.Ct. at 938, n. 6.) The Supreme Court has more recently reiterated that it rejected the preemption claim in De Canas "not because of an absence of congressional intent to preempt but because Congress intended that the States be allowed 'to the extent consistent with federal law, [to] regulate the employment of illegal aliens. [Citation omitted.]'" (Toll v. Moreno (1982) 458 U.S. 1, 14, fn. 18 [102 S.Ct. 2977, 2984, fn. 18].)

[11/]The Supreme Court noted that 8 U.S.C. section 1324(a)(4) of the INA, which provides that employment shall not be deemed to constitute unlawful "harboring" of illegal entrants, indicates "at best evidence of a peripheral concern with employment of illegal entrants." (De Canas v. Bica, supra, 96 S.Ct. at 938.) The Court stated further that San Diego Bldg. Trades Council v. Garmon, supra, 359 U.S. at 243:

> ...admonished that 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrainaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of [federal regulation].' (96 S.Ct. at 939.)

Accordingly, because the ALRA's remedial orders are an exercise of California's historic police power to protect its workers, and because Congress has neither expressly nor impliedly sought 'through the INA to occupy the field of regulation concerning the employment of undocumented workers, there is no basis for concluding that the Board's remedial orders are precluded by the mere existence of the INA.

No Actual Conflict

Even absent a Congressional intent to preempt a State's authority to regulate in a certain field, a State's law is necessarily preempted if it actually conflicts with federal law. As the Supreme Court warned in Goldstein v. California (1973) 412 U.S. 546, 556 [93 S.Ct. 2303, 2309]:

> We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone may possibly lead to conflicts and those situations where conflicts will necessarily arise. It is not ... a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty.' (The Federalist No. 32, p. 243.) (B. Wright ed. 1961).

In both Florida Lime and Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132 [83 S.Ct. 1210] and Fidelity Federal Savings & Loan v. de la Cuesta, supra, 102 S.Ct. 3014 at 3022, no actual conflict was found because even though both state laws involved specific requirements different from parallel federal regulations, it was possible to comply with the state laws without triggering

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federal enforcement action.[12/] On the other hand, proclaimed the Court, "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal law and state regulations is a physical impossibility ...." (Id.)

An ALRB remedial order of reinstatement and backpay poses no actual conflict with an INA law or regulation. Under federal law, employers are not prohibited from employing undocumented aliens, even those subject to a final order of deportation (FOD). Thus, an agricultural employer can comply with an ALRB order of reinstatement and backpay without violating the INA.

The De Canas decision does not require that in regulating the employment relationship of undocumented aliens, a state must discriminate against undocumented workers. It only

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[12/] In Sure-Tan, supra, the U.S. Supreme Court, following general principles of federal comity, held that the NLRB's remedial orders had to be reconciled with the INA's goal of deterring illegal immigration so as to avoid a "potential conflict" between the two federal laws. (Id., 104. S.Ct. at 2815.) However, as noted before, absent a congressional intent to preclude state regulation in a specific area, state laws regulating in areas traditionally within the mainstream of their police powers are analyzed not under principles of federal comity but under principles of federal preemption where the state's ability to regulate is not restricted unless an actual conflict exists. Thus, whereas a potential conflict suffices to require an accommodation of the NLRB's remedial authority to INA policies, the same potential conflict would not require a similar accommodation of the ALRA's remedial authority. An actual conflict would present itself only if it is impossible to comply with both the ALRB's remedial order and INA regulation.

stresses that if a state decides to do so,[13] it must demonstrate some legitimate state interest and its purpose must be consistent with federal objectives.[14]

Does Not Stand as an Obstacle

Where no actual conflict exists betwen a state and federal law or regulation, a state law can still be preempted if it "stands as an obstacle to the accomplishment and execution

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[13] We also note that the challenged law in De Canas, supra, like the proposed restrictions on ALRA remedies, discriminated against a class of undocumented alien workers, raising issues of equal protection under the U.S. and State Constitutions. In Plyler v. Doe (1982) -457 U.S. 202 at 225 [102 S.Ct. 2382 at 2399], the Supreme Court further explained its decision in De Canas as standing for the proposition that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." The court in Plyler described California's prohibition on hiring illegal aliens, at issue in De Canas, as reflecting "Congress[1] intention to bar from employment all aliens except those possessing a grant of permission to work in this country." (Ibid.) However, the Plyler court cautioned that while "undocumented status, coupled with some articulable federal policy might enhance State authority with respect to treatment of undocumented aliens ...," where the state borrows the federal classification as a criterion to discriminate, "the State must demonstrate that the classification is reasonably adapted to 'the purposes for which the State desires to use it.'" (Cite omitted). Thus, were California's ALRB remedial orders restricted to citizens or documented aliens only, California would have to justify its e17xclusion of undocumented workers with some legitimate state interest. However, California has articulated its interest in treating all workers, whether documented or not, the same for purposes of granting remedial relief.

[14] In De Canas, supra, the Supreme Court stated repeatedly that states could regulate the employment relationship of illegal aliens where the regulation was "consistent with pertinent federal laws" (96 S.Ct. at 937), where the regulation was a "harmonious state regulation touching on aliens in general or the employment of illegal aliens in particular ..." (96 S.Ct. at 937), or where the regulation was "fashioned to remedy local problems and operates only on local employers, and only with respect to individuals whom the federal government has already declared cannot work in this country."

of the full purposes and objectives of Congress." (Hines v. Davidowitz (1941) 321 U.S. 52, 67 [61 S.Ct. 399, 404].) "This inquiry requires the courts to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written ..." (Jones v. Rath Packing Co., supra, 97 S.Ct. at 1310.)

In Sure-Tan the Court stated that one of the purposes of the INA was to deter illegal immigration. (104 S.Ct. at 2810.) Therefore we must consider whether the ALRB's grant of reinstatement and backpay to undocumented workers stands as an obstacle to accomplishment of the INA's goal of deterring illegal immigration.[15/]

We note that the question assumes that the Board can determine who is an undocumented worker. While Respondent and some amici argue that the Board can make such determinations, we are persuaded by the arguments of General Counsel and the National Immigration Rights Project, et al., that in fact we do not possess either the capacity or expertise to make such determinations. As the Supreme Court noted in Plyler v. Doe, supra, 102 S.Ct. at p. 2399:

> ...in light of the discretionary federal power to grant relief from deportation, a state cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed.

Indeed, for the Board to attempt to determine an individual's

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[15/]The question is a hypothetical one because, unlike in Sure-Tan, there is no evidence that the discriminatees whose backpay and reinstatement are at issue herein have returned to Mexico since being discharged by Respondent.

immigration status would invade the exclusive domain of the federal government to determine who has a lawful right to be or work in this country. (See, e.g., Mines v. Davidowitz, supra, 61 S.Ct. 399; and Takahashi v. Fish & Game Comm'n (1948) 334 U.S. 410 [68 S.Ct. 1138, 1142].) Therefore, except, perhaps, where there is a nonreviewable final order of deportation, there is no basis upon which the ALRB could make a determination as to what ±s a particular worker's immigration status.

The General Counsel's model would allow only FODs to be introduced as evidence of an employee's illegal status for purposes of conditioning ALRB remedial orders. This, it is proposed, would avoid the difficulty of the ALRB usurping the authority of the INS and federal courts to adjudicate a person's immigration status.[16/]

However, the Supreme Court has stated that a state's

[16/]Member Carrillo believes it can be legitimately and persuasively argued that as to individuals subject to FODs, an ALRB reinstatement order would stand as an obstacle to deterring their illegal immigration because the ALRB order could provide the deportable alien with the financial means to avoid complying with the INS directive that he or she leave the country or could even lure him or her back into the country, thus frustrating compliance with INS orders. Thus in theory, he agrees with the position of the dissent. However, as noted by the majority, because FODs are rare, it is illusory to believe that ALRB reinstatement orders would have anything other than a speculative and indirect impact on the INS' ability to accomplish its goal of deterring illegal immigration. It is also illusory to believe that employers will ever be able to introduce an FOD at an ALRB compliance hearing in order to condition an ALRB reinstatement or backpay order. Thus in terms of limiting a reinstatement or backpay order for an undocumented employee, Member Carrillo sees no practical difference between the majority's or the dissent's positions, except that the dissent's position would require an employer to report its employees to the INS in a most likely 'vain attempt to secure an FOD.

regulation of undocumented workers will not be preempted where the state regulation has "some purely speculative and indirect impact on immigration." (De Canas v. Bica, supra, 96 S.Ct. at 936.) Apparently, most persons unlawfully in this country who are apprehended by the INS leave by "voluntary departure" which, while not conclusive of their immigration status, avoids the need for an FDD.[17/] Due to the apparent infrequent use of an FOD to effectuate deportation, ALRB remedial orders will likewise rarely, if ever, impact or burden the INS in any appreciable way from accomplishing its goal of deterring illegal immigration.[18/] Even in the isolated instance where an individual might be subject to an FOD, the INS is not restrained or limited in its ability to enforce its FOD. Thus, the ALRB's remedial orders would have nothing more than "some purely speculative and indirect impact upon immigration" -- insufficient to invoke

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[17/] We note that the FOD model proposed by the General Counsel seems inordinately abstruse. For example, in some contexts, a denial of a motion to stay deportation may be an FOD, but not in others. (Cheng Fan Kwok v. INS (1968) 392 U.S. 206 [88 S.Ct. 1970]; Foti v. INS (1963) 375 U.S. 217 [84 S.Ct. 306.) Further, orders of special inquiry officers may become FODs merely by the passage of time, creating the possibility of manipulation of ALRB proceedings that should not be allowed. (See Kladis v. INS (7th Cir. 1965) 343 F. 2d 513.) Finally, since the validity of an FOD depends on an assessment of the total circumstances of the case and is not limited to determinations actually made at deportation hearings (INS v. Chadha (1983) 462 U.S. 919 [103 S.Ct. 2764]), adoption of the General Counsel's "simple" model would inexorably draw the Board into areas far beyond our expertise. (See, e.g., Fuentes v. INS (9th Cir. 1985) 765 F.2d 886, 890, suggesting that deportation decisions, including FODs, involving persons subject to retaliatory action for enforcing state labor laws are a matter for the discretion of the Attorney General of the U.S.)

[18/] (See generally, Annotation, Final Deportation Order (1983) 65 ALR Fed. 742-765.)

preemption. Therefore, we conclude that our remedial orders do not in fact stand as an obstacle to the accomplishment of the general INA goal of deterring illegal immigration.

Moreover, to adopt the General Counsel's model, we would essentially be compelling an employer accused by suspected undocumented workers of unfair labor practice violations to report them to INS immediately in order to perfect the employer's defense to a reinstatement and backpay order. If an employer reports suspected undocumented employees as soon as they file unfair labor practice charges, it may be possible for the INS to obtain an FOD before the ALRB adjudicates the unfair labor practice and enforces a remedial order. Thus, the very practice which the Sure-Tan Court found constituted a violation of the NLRA -- namely, the reporting of undocumented workers by respondents in retaliation for the workers' exercise of their section 1152 rights -- would become indistinguishable from the pursuit of a recognized defense. Again, given the few FODs which might arguably be involved in ALRB proceedings, the purely speculative and indirect impact the ALRB orders could have on the ability of the INA to achieve its goals or to enforce those few FODs they do issue, and the adverse impact the General Counsel's model would have on the administration of the ALRB, we decline to restrict our remedial orders as proposed.

Conclusion

We find in our enabling legislation the expression of a compelling state interest in providing domestic tranquility through comprehensive and effective regulation of agricultural

labor relations in California. We shall therefore continue to provide full and effective remedies for all California agricultural employees found to be victims of unfair labor practices, as directed by section 1160.3 of the Act.

Dated: October 28, 1985

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CHAIRPERSON JAMES-MASSENGALE and MEMBER McCARTHY; Dissenting in Part:

The United States Supreme Court has ruled that when issuing certain remedies otherwise permissible under the provisions of the National Labor Relations Act, the federal labor board "is obliged to take into account another 'equally important Congressional objectiv[e]'." (Sure-Tan, Inc. v. NLRB (1984) __ U.S. __ [104 S.Ct. 2803].) The court, in that case, referred specifically to the objective of deterring unauthorized immigration which is embodied in the Immigration and Naturalization Act on the basis of principles of federal comity applicable to federal agencies and tribunals. We believe that analogous principles of preemption which govern the relationships between state and federal systems require a similar, albeit a somewhat more limited, accommodation by the states. We therefore decline to join in our colleagues' conclusion that Sure-Tan has no application whatsoever to the remedial authority of this state's Agricultural Labor Relations Board

(Board).

As the majority correctly observes, in order for Congressional enactments to preempt state authority, one of the following conditions must exist: (1) Congress expressly indicates its intention to preempt, (2) Congress' intention to preempt may be inferred from "a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplant it," (3) the state law or regulation actually conflicts with federal law, or (4) the state law or regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission (1983) 461 U.S. 190 [103 S.Ct. 1713, 1721]; Fidelity Federal Savings & Loan v. de la Cuesta (1982) 458 U.S. 141 [102 S.Ct. 3014, 3022]; Jones v. Rath Packing (1977) 430 U.S. 541 [97 S.Ct. 1305, 1309-1310].)

We agree with the majority that the first three conditions are absent here. However, based upon the reasoning in Sure-Tan, we believe that a remedial order issued under the auspices of the Agricultural Labor Relations Act (Act), which requires an offer of reinstatement with backpay to an employee who has been found, pursuant to Immigration and Naturalization Service (INS) proceedings, not lawfully entitled to be present and employed in the United States, would stand as an obstacle to a Congressional policy which has been clearly identified by the Supreme Court. Such orders, when issued under the color of law, provide a strong incentive for illegal reentry or continued illegal presence. That they constitute an impermissible obstacle to federal policy is premised on the state

action inherent in the initial issuance of the order and the potential for state sanctions in the event of noncompliance.[1/]

When the Board's orders do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, our obligation to accommodate federal policy is discretionary. (Plyler v. Doe (1982) 457 U.S. 202 [102 S.Ct. 2382]; DeCanas v. Bica (1976) 424 U.S. 351 [96 S.Ct. 933].) For the reasons which follow, we would not grant accommodation to federal immigration policy to the extent which the United States Supreme Court has deemed appropriate for the National Labor Relations Board. First, only involuntary departures, pursuant to binding INS adjudications, are conclusive on the question of whether an alien is legally entitled to be present and working in the United States. (See Plyler v. Doe, supra, 102 S.Ct. 2382, 2390, fn. 6, conc. opn. by Justice Powell, 2407, fn. 6.) Second, California's compelling interest in remedying unfair labor practices must be balanced against the harm of achieving a result which is contrary to our statutory prerogative, by permitting deference to a conflicting federal policy only where there is in fact a conflict. Were we to espouse a less stringent standard, we would risk denying remedial relief to aggrieved employees on the basis of inconclusive or circumstantial evidence or because of our lack of expertise or sophistication in those matters which are uniquely within the province of immigration authorities. "Principles of federalism

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[1/] The fact that an employer may not violate any law in employing an illegal alien is totally irrelevant to the limitation imposed upon the state by principles of federalism.

present problems of adjustment and accommodation because of the interdependence of federal and state interests and of the interaction of federal and state powers." (DeVeau v. Braisted (1960) 363 U.S. 144 [46 LRRM 2304].)

Therefore, in accordance with our position, we believe that compliance proceedings under our Act should adhere to the following order of presumptions and standard of proof. A discriminatee who is the beneficiary of a reinstatement and backpay order would be presumptively entitled to that remedy. Thereafter, a respondent may rebut the presumption by demonstrating that the discriminatee is the subject of a final order of deportation issued by the United States Immigration and Naturalization Service. In that event, the discriminatee would be presumed both unavailable for work and not entitled to reinstatement or backpay from the date of issuance of such order, unless the discriminatee can demonstrate that, prior to the compliance hearing, he or she gained a lawful right to work in the United States.

We believe the approach which we would adopt accords the relevant federal authority the fullest necessary considerations of comity. Any further accommodation is appropriately left to the discretion of the California Legislature.

Dated: October 28, 1985

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

CASE SUMMARY

RIGI AGRICULTURAL SERVICES, INC. 11 ALRB No. 27
Case No. 81-CE-167-SAL, et al.

Supplemental Board Decision

In this Supplemental Decision, the Board noted that its prior Decision and Order need not be modified to condition remedial provisions on a showing that discriminatees, some of whom were undocumented aliens, are lawfully in the country and entitled to employment. In so ruling, the Board found that a U.S. Supreme Court decision, Sure-Tan, Inc. v. NLRB (1984)___U.S. __ [104 S.Ct. 2803], was not applicable precedent to the California Agricultural Labor Relations Act due to principles of federalism. The Board held that it was not preempted by federal law from continued enforcement of remedial provisions requiring reinstatement and backpay for undocumented aliens because they created no actual conflict with federal law nor obstacle to the full effectuation of federal policies. California's compelling state interest in remedying unfair labor practices in agricultural employment and the complexity and exclusivity of federal procedures for determining immigration status militate in favor of continued ALRB remedial practices.

Finally, the Board rejected the General Counsel's suggestion that would permit introduction of final orders of deportation into Board compliance, proceedings to establish a defense to Board ordered reinstatement or backpay provisions. The Board found the General Counsel's suggestion unworkable due to the vagaries of immigration law and practice. The Board found that making alienage relevant to Board compliance hearings would have a chilling effect on persons who might be tempted to assert the protection of the Act and would encourage respondents to retaliate against undocumented employees who file unfair labor practice charges against them.

Dissenting Opinion

Chairperson James-Massengale and Member McCarthy dissented from the majority opinion insofar as they believe that general principles of federal preemption obligate the ALRB, as a state agency, to recognize, although not to the extent required of federal agencies, limitations on its remedial authority arising from the United States Supreme Court's decision in Sure-Tan, Inc. v. NLRB (1984) __ U.S. __ [104 S.Ct. 2803]. It is their view that where the INS has found that an employee is not lawfully entitled to be present and employed in the United States, a remedial order issued under color of law, which requires an offer of reinstatement with backpay, could provide a strong incentive for illegal reentry or continued illegal presence. Under such circumstances, the order stands as an impermissible obstacle to federal immigration laws and policies. Accordingly, they

would hold that an employee who is the beneficiary of an ALRB reinstatement with backpay order would not be entitled to that remedy where the employer can demonstrate that the employee is the subject of a final INS order of deportation. If, however, an employee can demonstrate, prior to conclusion of the Board's proceedings, that he or she gained the lawful right to be employed in the United States, he or she would be entitled to the remedies from the date of such entitlement.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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