# SUPREME COURT OF THE UNITED STATES

No. 00–1595

HOFFMAN PLASTIC COMPOUNDS, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 27, 2002]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

I cannot agree that the backpay award before us "runs counter to," or "trenches upon," national immigration policy. *Ante*, at 9, 10 (citing the Immigration Reform and Control Act of 1986 (IRCA). As *all* the relevant agencies (including the Department of Justice) have told us, the National Labor Relations Board's limited backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent. Consequently, the order is lawful. See *ante,* at 4 (recognizing "broad" scope of Board's remedial authority).

* * *

The Court does not deny that the employer in this case dismissed an employee for trying to organize a union—a crude and obvious violation of the labor laws. See 29 U. S. C. §158(a)(3) (1994 ed.); *NLRB* v. *Transportation Management Corp.,* 462 U. S. 393, 398 (1983). And it cannot deny that the Board has especially broad discretion in choosing an appropriate remedy for addressing such violations. *NLRB* v. *Gissel Packing Co.,* 395 U. S. 575, 612, n. 32 (1969) (Board "draws on a fund of knowledge and expertise

all its own, and its choice of remedy must therefore be given special respect by reviewing courts"). Nor can it deny that in such circumstances backpay awards serve critically important remedial purposes. *NLRB* v. *J. H. Rutter-Rex Mfg. Co.,* 396 U. S. 258, 263 (1969). Those purposes involve more than victim compensation; they also include deterrence, *i.e.*, discouraging employers from violating the Nation's labor laws. See *ante*, at 13 (recognizing the deterrent purposes of the NLRA); *Sure-Tan, Inc.* v. *NLRB,* 467 U. S. 883, 904, n. 13 (1984) (same).

Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. *Ante,* at 13. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity. See *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B. 408, 415, n. 38 (1995) (without potential backpay order employer might simply discharge employees who show interest in a union "secure in the knowledge" that only penalties were requirements "to cease and desist and post a notice"); cf. *Golden State Bottling Co.* v. *NLRB,* 414 U. S. 168, 185 (1973); cf. also *EEOC* v. *Waffle House, Inc.,* 534 U. S. ___, ___ (2002) (slip op., at 16 n. 11) (backpay award provides important incentive to report illegal employer conduct); *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 417–418 (1975) ("It is the reasonably certain prospect of a backpay award" that leads employers to "shun practices of dubious legality"). Hence the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.

Where in the immigration laws can the Court find a "policy" that might warrant taking from the Board this critically important remedial power? Certainly not in any statutory language. The immigration statutes say that an employer may not knowingly employ an illegal alien, that

an alien may not submit false documents, and that the employer must verify documentation. See 8 U. S. C. §§1324a(a)(1),1324a(b); 18 U. S. C. §1546(b)(1). They provide specific penalties, including criminal penalties, for violations. *Ibid.*, 8 U. S. C. §§1324a(e)(4), 1324a(f)(1). But the statutes' language itself does not explicitly state how a violation is to effect the enforcement of other laws, such as the labor laws. What is to happen, for example, when an employer hires, or an alien works, in violation of these provisions? Must the alien forfeit all pay earned? May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once—secure in the knowledge that the Board cannot assess a monetary penalty? The immigration statutes' language simply does not say.

Nor can the Court comfortably rest its conclusion upon the immigration laws' purposes. For one thing, the general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a "magnet" pulls illegal immigrants towards the United States. H. R. Rep. No. 99–682, pt. 1, p. 45 (1986). To permit the Board to award backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally. See *A. P. R. A. Fuel Oil Buyers Group, Inc.*, *supra,* at 410–415 (no significant influence from so speculative a factor); *Patel* v. *Quality Inn South*, 846 F. 2d 700, 704 (CA11 1988) (aliens enter the country "in the hope of getting a job," not gaining "the protection of our labor laws"); *Peterson* v. *Neme*, 222 Va. 477, 428, 281 S. E. 2d 869, 872 (1981) (same); *Arteaga* v. *Literski*, 83 Wis. 2d 128, 132, 265 N. W. 2d 148, 150 (1978) (same); H. R. Rep. No. 99–682, *supra,* at 45 (same).

To *deny* the Board the power to award backpay, however, might very well increase the strength of this mag-

netic force. That denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and to hire illegal-alien employees. Were the Board forbidden to assess backpay against a *knowing* employer—a circumstance not before us today, see 237 F. 3d 639, 648 (CADC 2001)—this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious. But even if limited to cases where the employer did not know of the employee's status, the incentive may prove significant—for, as the Board has told us, 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. See Brief for Respondent 30–32; Tr. of Oral Arg. 41, 47; cf. also General Accounting Office, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops 8 (GAO/HEHS-95–29, Nov. 1994) (noting a higher incidence of labor violations in areas with large populations of undocumented aliens). The Court has recognized these considerations in stating that the labor laws must apply to illegal aliens in order to ensure that "there will be no advantage under the NLRA in preferring illegal aliens" and therefore there will be "fewer incentives for aliens themselves to enter." *Sure-Tan*, *supra,* at 893–894. The Court today accomplishes the precise opposite.

The immigration law's specific labor-law-related purposes also favor preservation, not elimination, of the Board's backpay powers. See *A. P. R. A. Fuel Oil Buyers Group, Inc.*, *supra,* at 414 (immigration law seeks to combat the problem of aliens' willingness to "work in substandard conditions and for starvation wages"); cf. also *Sure-Tan*, 467 U. S., at 893 ("[E]nforcement of the NLRA . . . is

compatible with the policies" of the Immigration and Nationality Act). As I just mentioned and as this Court has held, the immigration law foresees application of the Nation's labor laws to protect "workers who are illegal immigrants." *Id.*, at 891–893; H. R. Rep. No. 99–682, *supra,* at 58. And a policy of *applying* the labor laws must encompass a policy of *enforcing* the labor laws effectively. Otherwise, as JUSTICE KENNEDY once put the matter, "we would leave helpless the very persons who most need protection from exploitative employer practices." *NLRB* v. *Apollo Tire Co.*, 604 F. 2d 1180, 1184 (CA9 1979) (concurring opinion). That presumably is why those in Congress who wrote the immigration statute stated explicitly and unequivocally that the immigration statute does *not* take from the Board *any* of its remedial authority. H. R. Rep. No. 99–682, *supra,* at 58 (IRCA does not "undermine or diminish in any way labor protections in existing law, or . . . limit the powers of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees").

Neither does precedent help the Court. Indeed, in *ABF Freight System, Inc.* v. *NLRB,* 510 U. S. 317 (1994), this Court *upheld* an award of backpay to an unlawfully discharged employee guilty of a serious crime, namely perjury committed during the Board's enforcement proceedings. *Id.,* at 323. See also *id.*, at 326–331 (SCALIA, J., concurring in judgment while stressing seriousness of misconduct). The Court unanimously held that the Board retained "broad discretion" to remedy the labor law violation through a backpay award, while leaving enforcement of the criminal law to ordinary perjury-related civil and criminal penalties. See *ABF Freight*, *supra,* at 325; see also 18 U. S. C. §1621 (criminal penalties for perjury).

The Court, trying to distinguish *ABF Freight,* says that the Court there left open "whether the Board could award backpay to an employee who engaged in 'serious miscon-

duct' unrelated to internal Board proceedings." *Ante*, at 7. But the Court does not explain why (assuming misconduct of equivalent seriousness) lack of a relationship to Board proceedings matters, nor why the Board should have to do more than take that misconduct into account—as it did here. 326 N. L. R. B. 1060, 1060–1062 (1998) (thoroughly discussing relevance of immigration policies); see also *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B., at 412–414 (same). The Court adds that the Board order in *ABF Freight* "did not implicate federal statutes or policies administered by other federal agencies." *Ante,* at 7. But it does not explain why this matters when, as here the Attorney General, whose Department—through the Immigration and Naturalization Service—administers the immigration statutes, *supports* the Board's order. Nor does it explain why the perjury statute at issue in *ABF Freight* was not a "statute . . . administered by" another "agenc[y]." See *ABF Freight*, *supra,* at 329 (SCALIA, J., concurring in judgment) (noting Department of Justice officials' responsibility for prosecuting perjury).

The Court concludes that the employee misconduct at issue in *ABF Freight,* "though serious, was not at all analogous to misconduct that renders an underlying employment relationship illegal." *Ante,* at 8. But this conclusion rests upon an implicit assumption—the assumption that the immigration laws' ban on employment is not compatible with a backpay award. And that assumption, as I have tried to explain, is not justified. See, *supra,* at 3–5.

At the same time, the two earlier cases upon which the Court relies, *NLRB* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240 (1939), and *Southern S. S. Co.* v. *NLRB,* 316 U. S. 31, 47 (1942), offer little support for its conclusion. The Court correctly characterizes both cases as ones in which this Court set aside the Board's remedy (more specifically, reinstatement). *Ante*, at 4. But the Court

does not focus upon the underlying circumstances—which in those cases were very different from the circumstances present here. In both earlier cases, the employer had committed an independent unfair labor practice—in the one by creating a company union, *Fansteel*, *supra,* at 250, in the other by refusing to recognize the employees' elected representative, *Southern S. S. Co.*, *supra,* at 32–36, 48–49. In both cases, the employees had responded with unlawful acts of their own—a sit-in and a mutiny. *Fansteel*, *supra,* at 252; *Southern S. S. Co.*, *supra,* at 48. And in both cases, the Court held that the employees' own unlawful conduct provided the employer with "good cause" for discharge, severing any connection to the earlier unfair labor practice that might otherwise have justified reinstatement and backpay. *Fansteel*, *supra,* at 254–259; *Southern S. S. Co.*, *supra,* at 47–49.

By way of contrast, the present case concerns a discharge that was not for "good cause." The discharge did not sever any connection with an unfair labor practice. Indeed, the discharge *was* the unfair labor practice. Hence a determination that backpay was inappropriate in the former circumstances (involving a *justifiable* discharge) tells us next to nothing about the appropriateness as a legal remedy in the latter (involving an *un*justifiable discharge), the circumstances present here.

The Court also refers to the statement in *Sure-Tan, Inc.* v. *NLRB,* 467 U. S., at 903, that "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." The Court, however, does not rely upon this statement as determining its conclusion. See *ante*, 8–9. And it is right not to do so. See *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 341 (1979) ("[L]anguage of an opinion" must be "read in context" and not "parsed" like a statute). *Sure-Tan* involved an order reinstating (with backpay) illegal

aliens who had left the country and returned to Mexico. *Sure-Tan*, 476 U. S., at 888–889. In order to collect the backpay to which the order entitled them, the aliens would have had to reenter the country illegally. Consequently, the order itself could not have been enforced without leading to a violation of criminal law. *Id.*, at 903. Nothing in the Court's opinion suggests that the Court intended its statement to reach to circumstances different from and not at issue in *Sure-Tan,* where an order, such as the order before us, does not require the alien to engage in further illegal behavior.

Finally, the Court cannot reasonably rely upon the award's negative features taken together. The Court summarizes those negative features when it says that the Board "asks that we . . . award backpay to an illegal alien [1] for years of work not performed, [2] for wages that could not lawfully have been earned, and [3] for a job obtained in the first instance by a criminal fraud." *Ante*, at 10. The first of these features has little persuasive force, given the facts that (1) backpay ordinarily and necessarily is awarded to a discharged employee who may not find other work, and (2) the Board is able to tailor an alien's backpay award to avoid rewarding that alien for his legal inability to mitigate damages by obtaining lawful employment elsewhere. See, *e.g., Sure-Tan*, *supra,* at 901–902, n. 11 (basing backpay on "representative employee"); *A. P. R. A. Fuel*, *supra,* at 416 (providing backpay for reasonable period); 326 N. L. R. B., 1062 (cutting off backpay when employer learned of unlawful status).

Neither can the remaining two features—unlawfully earned wages and criminal fraud—prove determinative, for they tell us only a small portion of the relevant story. After all, the same backpay award that compensates an employee in the circumstances the Court describes *also* requires an employer who has violated the labor laws to make a meaningful monetary payment. Considered from

this equally important perspective, the award simply requires that employer to pay an employee whom the employer believed could lawfully have worked in the United States, (1) for years of work that he would have performed, (2) for a portion of the wages that he would have earned, and (3) for a job that the employee would have held—had that employer not unlawfully dismissed the employee for union organizing. In ignoring these latter features of the award, the Court undermines the public policies that underlie the Nation's labor laws.

Of course, the Court believes it is necessary to do so in order to vindicate what it sees as conflicting immigration law policies. I have explained why I believe the latter policies do not conflict. See, *supra,* at 3–5. But even were I wrong, the law requires the Court to respect the Board's conclusion, rather than to substitute its own independent view of the matter for that of the Board. The Board reached its conclusion after carefully considering both labor law and immigration law. 326 N. L. R. B., at 1060–1062; see *A. P. R. A. Fuel Oil Buyers Group, Inc.*, 320 N. L. R. B., at 412–414. In doing so the Board has acted "with a discriminating awareness of the consequences of its action" on the immigration laws. *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 174 (1962). The Attorney General, charged with immigration law enforcement, has told us that the Board is right. See 8 U. S. C. §1324a(e) (Immigration and Naturalization Service placed within the Department of Justice, under authority of Attorney General who is charged with responsibility for immigration law enforcement); cf. *United States* v. *Mead Corp.,* 533 U. S. 218, 258–259, n. 6 (2001) (SCALIA, J., dissenting) (Solicitor General's statements represent agency's position); *Jean* v. *Nelson,* 472 U. S. 846, 856 and n. 3 (1985) (agency's position with respect to its regulation during litigation "arrives with some authority"). And the Board's position is, at the least, a reasonable one. Consequently, it is lawful.

*Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842–843 (1984) (requiring courts to uphold reasonable agency position).

For these reasons, I respectfully dissent.