

County Window Cleaning Company and Window Cleaners Local No. 2, Service Employees International Union, AFL-CIO. Cases 2-CA-29418 and 2-RC-21690

April 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 16, 1997, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order, as modified and set forth below.³

¹ The judge found that the Respondent's owner, Anthony Silvestri, knew "in 1996" that employee Duvan Arteaga had fabricated a social security number. The record shows that Silvestri learned about this in 1994. We correct the judge's inadvertent error.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In ordering the Respondent to reinstate Duvan Arteaga upon condition and to make him whole, we rely on the Board's decision in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), enf'd. 134 F.3d 50 (2d Cir. 1997). In *A.P.R.A.*, the Board carefully considered the meaning of the language "lawfully entitled to be present and employed" used in *Sure-Tan v. NLRB*, 467 U.S. 883, 903 (1984), on which our dissenting colleague relies, and the legislative history of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 132a et seq., and concluded that discriminatees such as Arteaga are entitled to backpay. It is clear that undocumented aliens are employees under Sec. 2(3) of the Act and, thus, are entitled to the protections and remedies of the Act. We note that the Respondent employed Arteaga with knowledge of his undocumented status. It discharged Arteaga, not because of that status, but because of his protected activities. Arteaga would have remained employed but for the unlawful discharge. Thus, as we held in *A.P.R.A.*, a backpay award is appropriate, despite Arteaga's immigration status.

We also adopt the judge's recommendation to overrule the challenge to Arteaga's ballot in the election. See *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999). In this connection, we would not impose new voter eligibility criteria on an undocumented alien who is the victim of an unfair labor practice that results in a loss of employment, as our colleague does in his concurrence. Quite unlike an employee whose community of interest becomes an issue as a result of a lawful layoff, Arteaga would have been otherwise employed at the time of the election but for the unlawful conduct perpetrated against him.

³ We shall modify the recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

ORDER

The Respondent, County Window Cleaning Company, White Plains, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their membership in, support for, or activities on behalf of Window Cleaners Local No. 2, Service Employees International Union, AFL-CIO (the Union).

(b) Promising its employees pay raises, insurance, or other improvements in their terms and conditions of employment in order to persuade them to abandon their support for the Union.

(c) Conditioning its employees' employment upon their abandoning their support for the Union.

(d) Soliciting its employees to sign a letter withdrawing their previous authorization of the Union to represent them.

(e) Discharging, or otherwise discriminating against its employees, because of their membership in, support for, or activities on behalf of the Union.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Duvan Arteaga full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, provided that he completes, within a reasonable period of time, INS Form I-9, including the presentation of the appropriate documents, in order to allow the Respondent to meet its obligations under the Immigration Reform and Control Act (IRCA) of 1986.

(b) Make Giovanni Valencia and Duvan Arteaga whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the decision, with backpay tolled for Arteaga as of the date he is reinstated subject to compliance with the Respondent's normal obligations under IRCA or when, after a reasonable period of time, Arteaga is unable to produce the documents enabling the Respondent to meet its obligations under IRCA to verify his eligibility for employment in the United States.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Arteaga and Valencia, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all

other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its place of business in White Plains, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 1996.

(f) 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.

IT IS FURTHER ORDERED that Case 2-RC-21690 is severed and remanded to the Regional Director for Region 2, who shall open and count the ballot of Duvan Arteaga, serve on the parties a revised tally of ballots, and issue an appropriate certification.

MEMBER HURTGEN, concurring and dissenting in part.

I agree that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Duvan Arteaga. I further agree that Arteaga is entitled to reinstatement, conditioned on his ability, within a reasonable time, to verify his eligibility under IRCA. Unlike my colleagues, however, I find it inappropriate to award backpay to Arteaga for periods when he cannot establish his lawful entitlement to be present and employed in the United States.

On a different point, I agree with my colleagues that Arteaga is eligible to vote in the election. However, as explained below, I do not apply a blanket rule permitting unlawfully discharged undocumented aliens to vote.

Backpay

Contrary to my colleagues, I conclude that discriminatees are not eligible for backpay during periods when they are not entitled to be present and employed in the U.S. In this regard, I adopt the view set forth in Member Cohen's dissenting opinion in *A.P.R.A. Fuel Buyers Group*, 320 NLRB 408 (1995).

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The guiding principle is clearly set forth in *Sure-Tan v. NLRB*, supra. The Court said that there could be no backpay for discriminatees "during any period when they were not lawfully entitled to be present and employed in the United States." Id at 903.

I recognize that the undocumented aliens in *Sure-Tan* had left the U.S., while the one involved herein is still here. However, the Supreme Court principle set forth above does not create an exception for undocumented aliens who are still here. Further, for the reasons set forth in the dissent in *A.P.R.A.*, there is no reason for drawing a distinction between an undocumented alien who is present and one who has departed. Both of them are legally unavailable for work and thus should not earn backpay. Finally, the Seventh Circuit has applied the "no backpay" principle in a case where the undocumented alien was still in the United States. See *Del Rey Tortilleria*, 976 F.2d 1115 (1992). That court specifically rejected the Board's contention that the *Sure-Tan* principle did not apply to undocumented aliens who were still in the U.S. The Seventh Circuit expressly agreed with the following view of Judge Beezer in his dissent in *Garment Workers Local 512*, 795 F.2d 705 (9th Cir. 1986):

An alien who had no right to be present in this country at all, and consequently had no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he had no entitlement. It may promote the purpose of the NLRB to guarantee the collective bargaining rights of the NLRA to every employee, regardless of immigration status. But the award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to those individuals who have suffered harm.

Thus, the court held in *Del Rey* that the discriminatees could not receive backpay for any period when they were not lawfully entitled to be present and employed in the United States. 976 F.2d at 1121. The court further held that IRCA, which makes it unlawful for an employer to hire an undocumented alien, clearly bars the Board from awarding backpay to undocumented aliens. Id. at 1122. The court placed upon aliens seeking backpay under the NLRA the burden of coming forward with documents establishing their lawful entitlement to be present in the United States. Id. at 1122-1123.¹

Arteaga has not satisfied that burden. Thus, he is not entitled to backpay. Further, my colleagues' award of backpay to Arteaga is inconsistent with the condition that the Board has rightfully placed on his reinstatement, i.e., proof that he has become eligible for lawful employment.

¹ I recognize that other courts have reached a contrary conclusion. See, e.g., *Garment Workers Local 512 v. NLRB*, supra; *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d 50 (2d Cir. 1997). I find the language of *Sure-Tan* and the holding of *Del Rey* to be more persuasive

In my view, there is no reasonable basis for awarding backpay to Arteaga for periods prior to the fulfillment of the condition. Accordingly, he is not entitled to a backpay remedy.

That does not mean that the Respondent's unlawful conduct will go unremedied. I have joined my colleagues in ordering the Respondent conditionally to reinstate Arteaga and to cease and desist from engaging in unfair labor practices. That order is enforceable by court decree and by contempt sanctions.

Voting Eligibility

I would not apply a blanket rule that all undocumented aliens who are unlawfully discharged are eligible to vote in representation elections. In my view, the fact that such undocumented aliens retain the status of statutory employee, standing alone, does not dispose of the question of whether they have a community of interest with the unit employees. That determination depends upon whether the undocumented alien has a reasonable expectation of working in the unit. As discussed above, the issue turns on whether he will likely achieve, within a reasonable period of time, the legal status necessary for lawful employment in the United States.

This approach is consistent with the "reasonable expectation of reemployment" test which the Board traditionally has applied in other contexts to determine voting eligibility.² That test is no less appropriate here. In each instance, the test furthers the policy of the Act to ensure that the choice of collective-bargaining representative is made by those employees who work in the unit or will likely resume such work in the foreseeable future.

My colleagues treat Arteaga as an ordinary discriminatee, and say that he is per se eligible to vote. They ignore their own holding that Arteaga, unlike an ordinary discriminatee, is not to be offered unconditional reinstatement. Rather, his reinstatement will be dependent upon his ability to achieve lawful status. Accordingly, I would conclude that Arteaga's eligibility to vote in the unit is dependent upon the reasonable likelihood that he will return to the unit.³

Applying these principles here, I find that Arteaga has demonstrated a reasonable expectation of obtaining legal status within a reasonable period of time, and he is eligible to vote in the representation election. Arteaga's immigration attorney, Christopher Greene, testified without contradiction that, based on Arteaga's immigration classification and preference, as set by the INS and the U. S. State Department, Arteaga could expect to finalize his legal status "[i]n the latter part of 1997." Thus, it appears that Arteaga's legal status will be resolved favora-

² See, e.g., *Madison Industries*, 311 NLRB 865 (1993) (laid-off employees).

³ Compare *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999), where the undocumented employee was actually working on the date of the election, and was therefore eligible.

bly in the near future, if it has not already been finally established.

In light of the above, I join my colleagues in remanding the representation proceedings to the Regional Director with instructions to open and count Arteaga's ballot.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you concerning your membership in, support for, or activities on behalf of Window Cleaners Local No. 2, Service Employees International Union, AFL-CIO.

WE WILL NOT promise you pay raises, insurance or other improvements in your terms and conditions of employment in order to persuade you to abandon your support for the Union.

WE WILL NOT condition your employment with us upon your abandoning your support for the Union.

WE WILL NOT solicit you to sign a letter withdrawing your previous authorization of the Union to represent you.

WE WILL NOT discharge, or otherwise discriminate against you, because of your membership in, support for, or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer Duvan Arteaga immediate and full reinstatement to his former job, or if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed provided that he completes, within a reasonable period of time, INS Form I-9, including the presentation of the appropriate documents, in order to allow us to meet our obligations under the Immigration Reform and Control Act of 1986.

WE WILL make Arteaga and Giovanni Valencia whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL remove from our files any reference to the discharges of Arteaga and Valencia and notify them in

writing that this has been done and that evidence of the discharges will not be used as a basis for any future personnel actions against them.

COUNTY WINDOW CLEANING COMPANY

Olga Torres, Esq. and Jeff Dunham, Esq., for the General Counsel.
Edward F. Beane, Esq. (Keane & Beane), of White Plains, New York, for the Respondent.
Ira A. Sturm, Esq. and Brendan E. Eagan, Esq. (Manning, Raab, Dealy, & Sturm), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges in Case 2-CA-29418 filed by Window Cleaners Local No. 2, Service Employees International Union, AFL-CIO (the Union or Charging Party, or Local 2), the Acting Regional Director for Region 2 issued a complaint and notice of hearing on August 20, 1996,¹ alleging that County Window Cleaning Company, the Respondent, violated Section 8(a)(1) and (3) of the Act.

Pursuant to a Decision and Direction issued by the Acting Regional Director in Case 2-RC-21690, an election by secret ballot was conducted on July 18, in a unit of the Respondent's full-time and regular part-time window cleaners. The tally of ballots showed the following results:

Approximate number of eligible voters	3
Void ballots	0
Votes cast for Petitioner	1
Votes cast against participating labor organization	1
Valid votes counted	2
Challenge ballots	1
Valid votes counted plus challenged ballots	3
Challenges are sufficient in number to affect the results of the election.	

The Board agent conducting the election challenged the ballot of Duvan Arteaga because his name was not on the list of eligible voters.

Inasmuch as the complaint issued by the Acting Regional Director on August 20, alleged in part that the discharge of Arteaga was in violation of Section 8(a)(1) and (3) of the Act, the Acting Regional Director issued an order consolidating the representation and unfair labor practice cases, on September 4.

The trial with respect to the issues raised by the above pleadings was held before me on November 4, in New York, New York.

Briefs have been filed by the parties and have been carefully considered. Based on the entire record,² including my observation of the demeanor of the witnesses, I make the following

¹ All dates herein are in 1996, unless otherwise indicated.
² While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the realibility of their testimony. Therefore, any testimony in the record which is inconsistent with my findings is discredited.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent, with an office and place of business in White Plains, New York, is engaged in the business of commercial window cleaning. Annually, the Respondent provides services valued in excess of \$50,000 to the GAP, Bath and Beyond, and J. C. Penney, enterprises which are directly engaged in interstate commerce.

The Respondent admits, and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Respondent, as noted, is in the business of providing window cleaning services to commercial customers. Its president, sole shareholder and chief operating officer is Anthony Silvestri who has operated the business for 21 years, and who works on jobs along with his crew of three employees.

Duvan Arteaga was hired by the Respondent in February 1992. He was interviewed by Silvestri, during which Silvestri asked him about the status of his "papers." Arteaga replied that they were in process. This response apparently satisfied Silvestri who informed Arteaga that he could start work on the following Monday.

For the first 6 months of his employment, Arteaga worked for the Respondent, was paid in cash, and no deductions were taken from his check. Sometime in August 1992, Silvestri asked Arteaga for his social security number. Arteaga made up a number and furnished it to Respondent without informing the Respondent that the number was false.

Thereafter, the Respondent began to make deductions from Arteaga's pay, while continuing to pay him in cash as well as submitting the appropriate W-2 forms for his wages using the social security number provided it by Arteaga.

Sometime in 1994, Silvestri showed Arteaga a letter that he had received from the Government,³ indicating that the social security number submitted for Arteaga was invalid. Silvestri asked Arteaga for an explanation, and was told that he (Arteaga) had been using the number for 5 years. After further probing by Silvestri, Arteaga admitted that he had made up the social security number. Silvestri asked Arteaga when he would be getting a valid social security number, and Arteaga replied that his papers were in process and his lawyer tells him that he would be getting a number soon.

The Respondent thereafter continued to employ Arteaga, but since he did not leave a valid social security number, no further deductions were made from his salary. Further, no W-2 forms were issued to Arteaga by the Respondent for the years 1995 and 1996.

Silvestri conceded, that although he knew in 1996 that Arteaga had made up a social security number, and that taxes were no longer being deducted from his salary as required by law, he decided not to terminate Arteaga. According to Silvestri, since he was told that Arteaga's papers were in progress, and that Arteaga was a family man and a good worker, and he

³ The record is unclear whether the letter was from the IRS or the Social Security Administration.

needed someone to do the work, he decided to “take a chance,” and continue to employ Arteaga.

Over the next year-and-a-half Arteaga continued to be employed by the Respondent, although he had not obtained a social security number. On occasion Silvestri would ask Arteaga the status of his papers and was told that they were in “progress.” Finally in November 1995, Silvestri asked Arteaga if he had anything in writing in regard to his application. Arteaga submitted to Silvestri a copy of a document from the INS dated March 20, 1992, which indicated that his petition had been approved and sent on to the Department of State for further processing. The back of the form states clearly that the approval of the petition does not give any status or right and does not allow a person to enter or remain in the United States. The approval merely certifies that the applicant is eligible for the requested classification, but further processing will be required before any change in status can be effectuated.

Testimony was offered concerning this document, as well as other documents pertaining to Arteaga’s immigration papers from Christopher Greene, Arteaga’s immigration attorney. Greene explained that the 1992 form that was approved, certified that Arteaga was eligible for permanent resident status based on his being the son of a lawful permanent resident, his mother, Maria Sanchez.

However, because of the backlog of these applications, further processing of the application is dependent upon what category of preference is applicable to Arteaga. Greene predicted based on his experience, that Arteaga would be interviewed sometime in November or December 1997 by the U.S. Consulate. Thereafter, it normally takes 90 days for the Consulate to issue a visa, so sometime in early 1998, Greene expects that Arteaga will be a lawful permanent resident, eligible to work in the United States.

Greene also conceded that under Section 1324 a(4) of IRCA, it is illegal for the Respondent to employ Arteaga, since he is not presently eligible to work in this country.

In April 1996, the Respondent employed in addition to Arteaga, Giovanni Valencia, who is also Arteaga’s brother, and Mustaf Kabashi. All three employees began discussing the possibility of union representation in late April. In that regard Valencia set up a meeting for the employees with John Stager, a business agent for the Union on May 3 at a diner in White Plains. At that meeting all three employees signed authorization cards for the Union and turned them over to Stager.

On May 10 or 11, after work was completed on a job, Silvestri was in the process of driving Arteaga and Valencia back to White Plains in Respondent’s vehicle. Silvestri showed the employees a letter that he had received from the Union concerning the Respondent’s employees interest in being represented by the Union. Silvestri asked what the letter was all about and if what the letter said was true. He also asked Arteaga if he had spoken to any of the union delegates. The employees replied that what the letter said was true and that Arteaga had spoken to the union delegates. Silvestri responded that he was not interested in joining the Union and he would not allow the employees to join either. Silvestri added that he could not afford to pay union benefits since he is a small operation. Silvestri then asked the employees whether they were “definite” and whether they had “made up their mind” about the Union. The employees replied that they were expecting to receive more information from the Union, and they were still thinking about it.

On May 13, Silvestri again in the Respondent’s vehicle, asked Valencia what decision he had made about joining the Union. Valencia replied that he was going to go with the Union. Silvestri answered that the expenses of the Local 2 contract are too high and if he wanted to go with Local 2, he can no longer work for the Respondent. Silvestri suggested that maybe Local 2 could get him another job.

Silvestri then returned to the jobsite and informed Arteaga and Kabashi that Valencia wants to go with the Union, and that Valencia had been fired. Arteaga then stated that he too was a member of the Union and added that if the Respondent had fired Valencia, he would quit. Thus, both Arteaga and Kabashi walked away. Silvestri tried to persuade them to come back but they would not talk to him.

After leaving Silvestri, Arteaga and Kabashi went to the union office where they met Valencia and Business Agent John Stager. Stager advised the three of them to report back to work the following day and ask Silvestri if he had work for them.

Therefore, on May 14, Arteaga, Kabashi, and Valencia reported to work at 6 a.m. at a diner in Scarsdale, New York. Arteaga asked Silvestri if he had any work for the men. Silvestri replied that he did have work for all the men, but without the Union, because he couldn’t afford to join the Union. The employees replied that they wanted to continue with the Union because they wanted better benefits and a better future for themselves and their families. Silvestri responded that if it was just a few dollars more or 50 cents per hour they could sit down and talk. He added that he was looking into insurance for the employees. Silvestri told the employees to think about their decision “really well.” Silvestri added that he could not wait around all morning for their decision because he had work to do. Silvestri waited a minute or so, put his tools in his car and left. None of the three employees worked that morning.

However, in the afternoon on May 14, Kabashi after discussing the matter with his wife, decided to return to work. He found Silvestri at a jobsite and said he was ready to go to work. There was no discussion about the Union between them, and Kabashi resumed work at that time.

The next day, May 15, Kabashi and Arteaga reported to a delicatessen in White Plains where the Respondent had a job. Kabashi spoke to Silvestri about allowing Arteaga to work. Silvestri informed Arteaga that he could return to work and that he (Silvestri) was going to find a way to resolve the situation. Silvestri also informed Arteaga that it was important for him to obtain a social security number. Arteaga answered that it was still in progress and his lawyer was working on it.

Kabashi and Arteaga continued to work for the Respondent for the rest of the week. Valencia did not attempt to work nor make any contact with the Respondent.

On May 16, Silvestri asked Kabashi why he had changed his mind about the Union. Kabashi replied that he was going to work to keep his family, and that he had a car accident in 1990 and injured his spine, which forces him to miss work from time-to-time. Thus, Kabashi stated that nobody else would hire him and allow him to work with such a condition.

On May 20, Silvestri asked his wife to prepare a document which was addressed to the law firm that represents the Union. The document on the Respondent’s stationary states, “[T]his is to inform you. I have reconsidered not to join Window Cleaners Local #2. Consider this your authorization to disregard letter signed by me.” On May 21, Silvestri gave a copy of this document to both Kabashi and Arteaga. Silvestri informed the

employees that he had made up the letter asking them if they would reconsider going with the Union. He added that the employees should read the letter and sign it if they wanted. Kabashi told Silvestri that he intended to sign, but he wanted to take it home to his wife to look at it first.⁴ Arteaga told Silvestri that he was not going to sign anything. Arteaga informed Silvestri that the next day, May 22, there was going to be a hearing at the National Labor Relations Board that he planned to attend, and that afterward he would call Silvestri and give Silvestri his decision. Silvestri instructed Arteaga to think it over real carefully, because he was paying Arteaga really well, and if Arteaga did join the Union, there would be no more work for him.

On May 22, both Valencia and Arteaga attended a hearing at the Board. Later that evening, Arteaga and Silvestri spoke by telephone. Arteaga informed Silvestri that he had thought it over and decided to go with the Union. Silvestri asked if Arteaga knew what he was doing. Silvestri added that now he had no choice and he had to let Arteaga go now because everything had to be legal. Silvestri explained that now that Arteaga had brought the Union in everything had to be legal, and he couldn't work for the Respondent without a social security number. Silvestri also stated, "[W]hat I was doing before was up to myself. I took a chance." Now that he brought the Union in, Arteaga could no longer work for the Respondent without a number. When asked at the trial why that was so, Silvestri explained that the Union would want him to furnish it with Arteaga's social security number and everything is going to be recorded and "I can't fudge as I was doing before, because I wasn't accountable for anybody."

Arteaga asked Silvestri about his pay for May 20 and 21, the 2 days that he worked that week. Silvestri replied he would send Arteaga some sort of a letter to sign stating that Arteaga would not sue the Respondent. No such letter was ever sent to Arteaga. Nor was he ever paid by the Respondent for these 2 days of work.

Silvestri testified further that he had given the two employees the letter to sign in order to find out where the employees stood as far as the Union was concerned. He added that if the employees had decided that they did not want the Union, he intended to inform the Board and "stop the process." In fact he added that he was going to send in the letter that Kabashi signed, but did not do so when he received legal advice.

Silvestri was asked whether if the employees had "reconsidered" the Union, and he had been able to "stop the process" at the Board, he would have continued to employ Arteaga even without a social security number. Silvestri was uncertain in his response to this question, but finally admitted that, "I may have reconsidered."

On May 31, Silvestri (after consulting with an attorney), sent identical letters to both Valencia and Arteaga advising them to return to work on Monday, June 3, at the White Plains Mall. On Sunday June 2, Silvestri called Arteaga on the phone and asked if he had received the letter. Arteaga replied that he had received the letter and Silvestri stated, "[T]here's no hard feelings." Silvestri added however, that Arteaga needed to have a social security number to report. Arteaga answered that he did not have a number. Silvestri responded that he would give Arteaga until Monday June 3 to obtain a social security

number and if he is successful, Silvestri would pay him for the day. Arteaga answered that he would try.

Arteaga then called Stager and informed him of Silvestri's offer and demand that Arteaga obtain a social security number. Stager told Arteaga to inform Silvestri that he could work with his pending number that was on his immigration letter. Consequently, Arteaga called Silvestri back and told him what Stager had suggested. Silvestri responded that he could not accept that social security number because both he and Arteaga could be fined. Silvestri added that Arteaga had done something really stupid to have called the Union knowing that he did not have any papers. Silvestri also told Arteaga to call him when he obtained a social security number and he could then return to work.

Valencia returned to work on June 3, as per the Respondent's letter and has continued to be employed since that date. Valencia was paid backpay of \$952 for the weeks that he was out based on a 40-hour week. However, Valencia testified that he regularly worked more than 40 hours a week, averaging 10-15 hours of overtime, prior to his termination. He also testified that he was not paid for May 31, a holiday for which in previous years, he had received payment.

Silvestri conceded that his termination of Valencia was partially motivated by Valencia's union activities, but disputed that he had previously paid employees for Memorial Day as a holiday.⁵

III. ANALYSIS

A. *The Alleged Violations of Section 8(a)(1) of the Act*

The complaint alleges, the General Counsel argues, and the record fully supports that the Respondent has violated Section 8(a)(1) of the Act in several respects.

In that regard, on or about May 10 or 11, while driving with two employees in the Respondent's vehicle, Silvestri showed them a letter that he had just received from the Union. He asked the employees what the letter was all about, if what the letter said was true and whether Arteaga had spoken to any union delegates. After receiving positive answers from the employees, Silvestri informed them that he was not interested in joining the Union, that he couldn't afford to pay union benefits, and he would not allow the employees to join either. Silvestri then asked if the employees were "definite" and whether they had made up their minds about the Union.

Silvestri's questioning of the two employees as described above concerning their knowledge of and support for the Union is clearly coercive under the standards of *Rossmore House*, 269 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 1760 F.2d 1006 (9th Cir. 1985). Thus, the employees questioned were not known union adherents; *Wellstream Corp.*, 313 NLRB 698, 702 (1994); *Capitol EMI Music*, 311 NLRB 997, 1006 (1993), the questioning was conducted by the highest ranking official of the Respondent, *Stoody Co.*, 320 NLRB 18 (1995); *Structural Composites Industries*, 304 NLRB 729 (1991), in an enclosed moving company vehicle which is considered to be the equivalent of a supervisor's office, *Advance Waste Systems*, 306 NLRB 1020 (1992), was conducted

⁴ After showing the letter to his wife, Kabashi signed it and returned it to Silvestri the next day.

⁵ The facts as detailed above are based on a compilation of the credited portions of the testimony of Arteaga, Valencia, Kabashi, Silvestri, and Greene.

in a persistent manner;⁶ *Crown Cork & Seal Co.*, 308 NLRB 445, 451 (1992); *Resolute Realty Co.*, 297 NLRB 679, 685 (1990); *Camvac International*, 288 NLRB 816, 819 (1988); and was accompanied by expressions of hostility, anger and disapproval of the employees decision to support the Union. *Advance Waste*, supra, *Liberty Natural Products*, 314 NLRB 630, 640 (1994); *Garney Morris, Inc.*, 313 NLRB 101, 115 (1993); *Kroger Co.*, 311 NLRB 1187, 1199 (1993).

Accordingly, I conclude that the Respondent has violated Section 8(a)(1) by such coercive interrogation.

I have also found that on May 13, immediately prior to terminating Valencia, Silvestri asked Valencia what decision he had made about joining the Union. This is another instance of a coercive interrogation, particularly since it was immediately followed by an unlawful discharge of Valencia.⁷

On May 14, Valencia who had been unlawfully terminated, and Kabashi and Arteaga who had quit the day before in protest of Respondent's actions, reported for work, pursuant to instructions from the Union. They asked Silvestri if he had any work for them. Silvestri responded that he did have work for the men, but without the Union, because he couldn't afford to join the Union. After the employees responded that they wanted to continue with the Union because they wanted better benefits, Silvestri stated that if it was just a few dollars more or 50 cents per hour, they could sit down and talk, and added that he was looking into insurance for the employees. Silvestri then urged the employees to think about their decision "really well."

The above facts demonstrate that the Respondent has unlawfully conditioned employment of the three employees upon their abandoning of the Union, when Silvestri told the employees he had work for them, but without the Union. *Cofab, Inc.*, 322 NLRB 162, 174 (1996); *Eddy Leon Chocolate Co.*, 301 NLRB 887 (1991).

The Respondent argues that this allegation cannot be sustained, because Kabashi and Arteaga returned to work on their own without rescinding their support for the Union. I disagree. Regardless of why Arteaga and Kabashi decided to return to work, Silvestri's statement to employees as described above, is a clear violation of Section 8(a)(1) of the Act. Nor is it relevant that Silvestri subsequently allowed them to return to work without a clear renunciation of the Union by either of them. I do note, however, that Silvestri did subsequently ask Kabashi after his return to work, why he had changed his mind about the Union, suggesting that Silvestri believed that Kabashi had complied with his request to renounce his support for the Union. In any event the test for a violation of Section 8(a)(1) of the Act is whether the statement tends to coerce employees in the exercise of their Section 7 rights,⁸ which is clearly met by Silvestri's remarks.

I also conclude that the Respondent violated Section 8(a)(1) of the Act during the above conversation by promising employees benefits if they withdrew their support for the Union. Thus when the employees stated that they wanted the Union in order to obtain better benefits, Silvestri replied that they could sit

down and talk about a small raise and that he was looking into insurance for the employees. Those remarks constitute implied promises of benefits to employees if they abandon their support for the Union. *Bakersfield Memorial Hospital*, 315 NLRB 596, 600-601 (1994); *Western Health Clinics*, 305 NLRB 400, 407 (1991); *Pennsy Supply*, 295 NLRB 324, 325 (1991); *Gregory Chevrolet*, 258 NLRB 233, 237 (1981); *Windsor Industries*, 265 NLRB 1009, 1016-1017 (1982), enfd. in pertinent part 730 F.2d 861, 864 (2d Cir. 1984).

The Respondent's citation of *Alterman Transportation Lines*, 308 NLRB 1282 (1992), is not dispositive. There the Board upheld an administrative law judge's dismissal of an alleged unlawful implied promise of benefit where an employer said with regard to employees' problems, "we can get together and work them out." Here unlike in *Alterman*, supra, Silvestri made specific reference to particular benefits sought by employees such as a pay raise and insurance. Moreover, Silvestri had immediately prior to the discussion about benefits, unlawfully conditioned employment on employees abandoning their support for the Union, and concluded the discussion by urging employees to think out their decision, "really well." Thus, the implication that employees would receive a small raise and insurance if they complied with Silvestri's request to abandon the Union is much more prominent than in *Alterman*, supra, and more akin to the authorities that I have cited above.

Accordingly, I conclude that the Respondent has further violated Section 8(a)(1) of the Act by promising benefits to employees to induce them to abandon support for the Union.

Finally, I have found above that on May 21, Silvestri gave copies of a letter that he had caused to be prepared to employees Kabashi and Arteaga, and informed them that the letter was a request that they reconsider going with the Union. He asked the employees to read it and sign it if they want. Arteaga replied that he was not going to sign anything at that time, but after attending a conference at the Board the next day, he would call Silvestri and make his decision with regard to the letter. Silvestri answered that Arteaga think it over real carefully because the Respondent was paying him "really well," and if Arteaga did join the Union, there would be no more work for him.

There can be little doubt that in these circumstances that Silvestri's solicitation of employees to sign the letter purporting to revoke their previous union authorization was coercive and violative of Section 8(a)(1) of the Act. *Frank Leta Honda*, 321 NLRB 482, 490 (1996); *Manna Pro Partners*, 304 NLRB 782, 790 (1991); *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991); *Adair Standish Corp.*, 290 NLRB 317, 318 (1990), enfd. 912 F.2d 854, 860 (6th Cir. 1990).

The Respondent's citation of *NLRB v. Monroe Tube Co.*, 545 F.2d 1320 (2d Cir. 1976), with respect to this issue is clearly inapposite. There the court in refusing to enforce a Board order that an employer unlawfully encouraged and assisted employees to withdraw their authorization cards, observed that it is not a "per se" violation of the Act for an employer to suggest that it is possible for employees to withdraw authorization cards, or to assist employees in the preparation of withdrawal letters. The court concluded that in light of the circumstances therein, the solicitation was unaccompanied by other illegal conduct, and did not "indicate a realistic possibility employee coercion is likely to result." Id. at 1327.

Here, on the other hand, although as the Respondent points out, Silvestri informed the employees that they could sign it "if

⁶ Thus after initially obtaining information that the employees supported the Union, Silvestri persisted by asking if they were "definite" and whether they had "made up their mind."

⁷ Indeed the Respondent concedes that its discharge of Valencia was violative of the Act.

⁸ *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 559 (7th Cir. 1993).

they want,” the Respondent conveniently ignores the fact that the solicitation was preceded and accompanied by unlawful coercive statements by Silvestri. Thus, I have found that within 10 days prior to the Respondent’s solicitation, the Respondent unlawfully interrogated employees concerning their union activities, conditioned their employment on abandoning the Union, and promised them benefits, in order to induce them to withdraw their support from the Union. Additionally, as noted above and below, the Respondent had unlawfully discharged Valencia because of his union activities, and had not as yet reinstated him. Thus, these prior and contemporaneous actions of the Respondent makes Silvestri’s solicitation on May 21 coercive. *Frank Leta*, supra, *Escada*, supra; *Adair*, supra. Moreover, this conclusion is further reinforced by Silvestri’s response to Arteaga’s reply to the Respondent’s request, that he would not sign anything at the time but would decide after attending the hearing at the Board the next day. Silvestri informed Arteaga with respect to his “decision” that he should think about it “really well,” and if he joined the Union, there would be no more work for him. This comment by Silvestri is a clearly coercive statement,⁹ and significantly transforms Silvestri’s request that employees sign the letter to a coercive demand that they do so on penalty of discharge.

Last, unlike *Monroe*, supra, where the court observed that employees “were never put on the spot by being called into the office and asked to sign prepared letters of withdrawal,” *Id.* at 1327, Silvestri did in fact “put employees on the spot,” by asking them to sign a prepared letter revoking their prior designation of the Union. This conduct further reinforces the coercive nature of the Respondent’s solicitation. *Adair*, supra.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has further violated Section 8(a)(1) of the Act.

B. The Discharge of Giovanni Valencia

The Respondent admits, as well it should, based on the testimony of its president, Silvestri, that it discharged Valencia because of his activities and support for the Union. Respondent does not dispute that such conduct is violative of Section 8(a)(1) and (3) of the Act. However, the Respondent argues that since it reinstated Valencia with backpay effective June 3, that issue was now moot, and that in effect no remedial order is required. I do not agree.

First of all an issue does exist whether Valencia received full backpay, since there is a dispute whether he received overtime or holiday pay as he asserts was due to him. These issues shall be resolved in the compliance phase of this case.

Moreover, even if Valencia has been fully compensated, the matter is still not moot, and a remedial order is appropriate. In *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978), the Board set forth its standards for relieving an employer of liability by repudiating unlawful conduct. To be effective, the repudiation must be timely, unambiguous, free from other proscribed illegal conduct, and adequately publicized to the employees involved, including assurances that in the future the employer will not interfere with their Section 7 rights. It is clear that by merely reinstating Valencia, even with full back-

pay, the Respondent has fallen far short of meeting the *Passavant* standards described above. Therefore, I conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Valencia on May 13 and that a remedial order is appropriate for this violation.

C. The Discharge of Duvan Arteaga

A strong prima facie case has been established that the Respondent terminated the employment of Arteaga on May 22 because of his union activities. The record establishes as set forth above, that the Respondent unlawfully discharged Valencia (Arteaga’s brother) shortly before it terminated Arteaga, and that it committed several serious violations of Section 8(a)(1) of the Act, including conditioning employment upon employees abandoning the Union.

Moreover, on May 21, the day before the discharge, Silvestri unlawfully solicited Arteaga to sign a letter revoking his prior union support, and Arteaga refused to sign, while informing Silvestri that he would attend the Board’s hearing the next day and then let Silvestri know his decision. (Whether he would abandon the Union.) Silvestri then warned Arteaga to think it over really well, and informed him that if he did join the Union, there would be no work for him.

Then when on May 22, Arteaga notified Silvestri that he had thought it over and decided to go with the Union, Silvestri as promised, terminated Arteaga at that time.

The Respondent as a result of this strong prima facie showing, has the burden to establish that it would have taken the same action against Arteaga, absent his union activities. *Wright Line*, 251 NLRB 1083 (1980); *Transportation Management Corp.*, 462 U.S. 393 (1983). Indeed in light of the strong prima facie case established by the General Counsel, the Respondent’s burden of proof is substantial. *American Wire Products*, 313 NLRB 887, 890 (1991).

The Respondent has fallen far short of meeting its burden in this regard. The Respondent contends that it has met its *Wright Line* burden by the testimony of Silvestri which it contends establishes that Arteaga was terminated because he was an illegal alien not authorized to work in this country, and inferentially that it would have terminated Arteaga for this reason, regardless of his union activities.

According to the Respondent, once it found out that it was violating the law by continuing to employ Arteaga it was obligated to terminate him at that time, and that by conditioning his continued employment on satisfaction of IRCA requirements, it has not violated the Act. *Bloom Art Textiles, Inc.*, 225 NLRB 766 (1976).

However, the Respondent’s defense fails to withstand scrutiny. The facts establish conclusively that the Respondent was well aware of Arteaga’s illegal status at the time of hire, as well as at various other times throughout his employment. Indeed it continued to employ Arteaga initially, without a social security number, and without making required deductions for the first 6 months of his employment. Then, after Arteaga furnished the Respondent with a social security number, the Respondent made the proper deductions, and may have for a time believed that Arteaga was legally employed. In 1994 though, the Respondent became aware that Arteaga had made up his social security number and was not legally entitled to work, but it continued to employ him. As Silvestri candidly testified, Arteaga was a family man and a good worker, and the Respondent needed him. Therefore, Silvestri decided to “take a

⁹ Indeed this remark could be construed as an independent unlawful threat of discharge in retaliation for union activities of employees, but I shall not make such a finding inasmuch as the complaint does not make such an allegation, and no request to amend the complaint to add such an allegation was made.

chance,” and continue to employ Arteaga, notwithstanding his knowledge that Arteaga was not lawfully entitled to work, and that he was clearly violating the law by failing to make appropriate deductions from Arteaga’s salary. Indeed, the Respondent even permitted Arteaga to return to work, after he had quit in protest of Valencia’s discharge with full knowledge of his illegal status.

Finally the Respondent’s motivation is most clearly established by the fact that on May 21, when Arteaga refused to sign the letter withdrawing his union support as requested by Silvestri, it was made clear by Silvestri that unless he did so, there would be no work for him. Significantly, there was no mention by Silvestri in this conversation about a social security card or Arteaga’s legal status. Thus it is clear, and I find that had Arteaga agreed to sign the letter withdrawing his union support, as Kabashi had done, Silvestri would have continued to employ him, notwithstanding his status as a legal alien, and would have continued to “take a chance.” Indeed, Silvestri conceded that his intention in obtaining the signatures on the letters from employees was to in effect terminate the Board’s proceeding and the Union’s representation efforts. In such case, Silvestri admitted that he “may have reconsidered” whether or not to employ Arteaga. I find, on the contrary, that he clearly would have continued to employ Arteaga, and that he used Arteaga’s immigration status to discriminate against him because of his union activities, in violation of Section 8(a)(1) and (3) of the Act. *Victor’s Cafe* 52, 321 NLRB 504, 514 (1996).

The Respondent’s reliance on *Bloom Art*, supra, is misplaced. There the Board upheld an administrative law judge’s dismissal of an alleged discriminatory discharge, on the grounds that the employer had discharged the employee therein, because he had just found out that California law provided for criminal sanctions against an employer for knowingly employing an illegal alien. The judge credited the testimony of the employer in this respect, and concluded, particularly in the absence of any evidence of antiunion animus, that the discharge was lawful.

Here however, the facts are quite different. The record is replete with substantial evidence of antiunion animus, including the unlawful discharge of Arteaga’s brother, and I do not find that the Respondent acted because of any recently acquired knowledge of illegality, as did the administrative law judge in *Bloom Art*. In fact Silvestri furnished no testimony as to precisely when, how, or even if he was ever informed by counsel or anyone else that the Respondent would be subject to criminal sanctions (under IRCA or otherwise) if it continued to employ Arteaga. Thus the factor that the administrative law judge found critical in *Bloom Art* is not present here. I have concluded that Silvestri knew for most of the period of Arteaga’s employment that it was illegal for Arteaga to work, and that the Respondent was acting illegally by employing him without proper papers, and without making appropriate deductions. Silvestri decided to “take a chance,” and continue to employ Arteaga notwithstanding his illegal status, and it was only after Arteaga decided to continue his support for the Union, that Silvestri decided that he was no longer willing to “take a chance,” and employ an illegal alien. Indeed Silvestri’s own testimony in effect admits the violation here, since he testified that once the Union comes in, the Union would require the Respondent to furnish it with a valid social security number, and he “couldn’t fudge as I was doing before.” There is of course no evidence that the presence of the Union would in any

way affect the Respondent’s obligation to comply with IRCA. However, even if Silvestri believed that to be so, it does not provide the Respondent with a defense, since it admits that it was the Union’s potential presence that motivated the Respondent’s decision, and that the Respondent cannot demonstrate that it would have taken the same action against Arteaga, absent his union activities.

Therefore, based on the foregoing, I conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Arteaga.

The Respondent argues alternatively that even if a finding is made that the discharge of Arteaga was violative of the Act, Respondent has satisfied its reinstatement obligations to Arteaga, when it afforded him reinstatement by letter dated May 31, conditioned on Arteaga establishing his legal status under IRCA. *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995).

In *A.P.R.A.*, supra, the Board reviewed the relevant statutes, IRCA and the NLRA, as well as the relevant authorities¹⁰ with respect to the issue of how to properly balance these two statutes. In that connection, the Board ordered the employer therein to reinstate the discriminatees even though they were undocumented aliens, but conditioned their reinstatement upon the employees providing within a reasonable time, INS Form I-9 and the appropriate supporting documents, in order to allow the Respondent to meet its obligations under IRCA. *Id.* at 415. Additionally, the Board also ordered that the employer “pay the employees backpay from the dates of their discharge to the earliest of the following: their reinstatement by the Respondent, subject to compliance with the Respondent’s normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States.” *Id.* at 416.

In cases that were decided subsequent to *A.P.R.A.*, the Board has decided to issue the normal backpay and reinstatement remedies where undocumented aliens are found to be discriminatees, while leaving to the compliance stages of the case a determination of reinstatement and backpay for these employees in accordance with its *A.P.R.A.* decision. *Victor’s Cafe*, supra, 504 at fn. 3; *Intersweet, Inc.*, 321 NLRB 1 fn. 2 (1996). I shall follow that procedure and recommend a similar order, leaving the issue of reinstatement and backpay for Arteaga to be decided in the compliance stage in accordance with *A.P.R.A.*

In this connection, the Charging Party requests that I set a specific time period herein of 4 years as the reasonable time for Arteaga to obtain legal status. *Sure-Tan, Inc.*, 277 NLRB 302, 303 (1985). However, while the Board in *Sure-Tan* did find that a 4-year period (as previously found by the circuit court), in that case was a reasonable time to keep reinstatement offers open, since the employees involved were in Mexico, I do not believe that such a holding necessarily applies here. I note that Arteaga is not in Mexico, and that his papers are already in progress. In any event I believe it appropriate to leave the setting of a reasonable time for Arteaga obtaining a determination of eligibility to work, as well as other issues concerning his reinstatement and backpay to the compliance stage of this proceeding. *Victor’s Cafe*, supra; *Intersweet*, supra.

¹⁰ *Sure-Tan v. NLRB*, 467 U.S. 883 (1994); *Garment Workers Local 512*, 795 F.2d 705 (9th Cir. 1986); *Del Rey Tortilleria v. NLRB*, 976 F.2d 1115 (1992); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

The Respondent argues that no order of backpay is warranted, since under IRCA it is illegal for an employer to employ undocumented aliens. Thus it is contended that such a decision could award backpay to Arteaga for periods of time when he was not eligible to work in this country. The Respondent cites in this regard an EEOC policy statement issued on April 26, 1989, which supports that view in Title VII cases.

However, the Board is not bound by a mere policy statement of another agency, and is not required to mechanically accept standards elaborated by another agency under a different statute. *Carpenters Local 1975 v. NLRB*, 357 U.S. 93, 111 (1958). The Board should conduct an independent inquiry into the requirements of its own statute, but it must also consider the conflicting terms of other statutes to see if its decision wholly ignores equally important Congressional objectives. *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994).

Here the Board has not “wholly ignored important Congressional objectives” and has carefully considered the conflicting terms of IRCA in fashioning its remedy in *A.P.R.A.*, supra. Therefore under *NLRB v. Lee Hotel*, supra, the Board has reconciled the two statutes in a reasonable way, and would not be bound by a contrary EEOC policy statement. Moreover, I would note that case law under Title VII supports the Board’s view and permits the ordering of backpay for undocumented aliens. *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516–1517 (9th Cir. 1989). See also *E.E.O.C. v. Tortilleria LA Mejor*, 585 F. Supp. 586, 590–594 (E.D. Cal. 1991) (Title VII applies to undocumented aliens, notwithstanding passage of IRCA).

Moreover, while the Respondent’s view is supported by the seventh circuit in *Del Rey*, supra, as well as by dissenting Member Cohen in *A.P.R.A.*, the majority opinion in *A.P.R.A.* is determinative of my decision.

Accordingly, I shall recommend as noted above the traditional reinstatement and backpay remedies for Arteaga, subject to a determination under *A.P.R.A.* standards in the compliance state of this proceeding.

IV. THE REPRESENTATION CASE

As detailed above, the ballot of Arteaga was challenged in the representation election held on July 18. His name was not on the eligibility list, since he was not employed by the Respondent either on the payroll eligibility date of June 10 or the date of the election, July 18.

The Respondent, cites the Board’s general rule that in order to be eligible to vote, an employee must be employed on the payroll eligibility date and the date of election, or if the employee has a reasonable expectation of returning to work prior to the eligibility date. *Apex Paper Box Co.*, 302 NLRB 67 (1991). The Respondent then argues that since IRCA precludes Arteaga’s reinstatement unless and until he obtains proper immigration status, and he did not have such status at either the payroll eligibility date or date of the election, his vote should not be counted. I do not agree.

The Respondent’s citation of *Apex Paper*, supra, and other related cases are not dispositive, since they deal with situations of temporary versus permanent layoff and reasonable expectation of return that do not involve an employee as here, who has been discriminatorily discharged. It is clear that ordinarily, once it is concluded, as I have done, that the challenged employee was discharged in violation of the Act prior to the relevant eligibility dates, the employee is considered to have been on the payroll at such dates, and an eligible voter. The question

is whether Arteaga’s status as an undocumented alien at the time of the discharge, changes this normal rule. I do not believe that it does.

Initially, I note that the Board has long held, supported by the courts that undocumented aliens are eligible voters in NLRB elections. *Buckhorn, Inc.*, 266 NLRB 968, 969 fn. 3 (1983); *Arday’s Bakery & Noodle Co.*, 227 NLRB 214 (1976), and cases cited therein at fn. 3; *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 358–361 (7th Cir. 1978). Moreover, the Supreme Court in *Sure-Tan*, supra, specifically upheld the Board’s prior finding that undocumented aliens are employees within the meaning of Section 2(3) of the Act. 467 U.S. at 891.

The Respondent however, observes correctly that *Sure-Tan* was decided prior to the enactment of IRCA, and argues that since it is now per se illegal to employ or continue to employ an undocumented alien, that prior law is no longer applicable, and Arteaga should not be considered an employee unless and until he satisfies the requirements of IRCA.

While the Board in *A.P.R.A.* did not discuss the issue of voter eligibility with respect to undocumented aliens, a close reading of the decision and an analysis of its reasoning leads me to conclude that IRCA does not change prior law concerning this issue. Thus the Board in *A.P.R.A.* made several references to *Sure-Tan*, and its agreement with the Board’s view that undocumented aliens are employees under Section 2(3) of the Act, 320 NLRB at 411 and 414, and significantly, cited legislative history of IRCA which states, “[T]he employer sanctions provisions are not intended to limit in any way the scope of the term ‘employee’ in Section 2(3) of the National Labor Relations Act,” 320 NLRB 414, citing the House Committee Report on IRCA.

Moreover, in *Intersweet*, supra, the Board upheld an administrative law judge’s finding that authorization cards signed by undocumented aliens can be counted in determining majority status, as well as the judge’s finding that IRCA does not change the well-established Board rule that undocumented aliens are eligible to vote in NLRB elections. 321 NLRB at 17 fn. 10. Initially, the Respondent asserts that it has complied with its obligations under *A.P.R.A.* to offer conditional reinstatement to Arteaga, prior to both the eligibility date and election, and Arteaga has still not satisfied IRCA requirements as of the date of the trial. It contends that permitting his vote to determine the bargaining representative for the Respondent’s employees would be contrary to the purposes of the Act, since according to this record the earliest time that he might meet IRCA eligibility requirements is early 1998. The answer to this concern is simply that had the Respondent not discriminatorily discharged Arteaga he would have voted and his ballot would have been counted. Thus it was the Respondent’s unlawful conduct that precipitated this problem and a finding that Arteaga was not eligible to vote, would “increase incentives for unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity.” *A.P.R.A.*, supra at 415.

Moreover, I note that the *A.P.R.A.* conditional reinstatement remedy requires that employees be afforded a reasonable time to produce valid immigration documents. It is not clear from this record whether or not the Respondent’s offer to Arteaga can be construed as meeting that requirement, particularly in the absence of any evidence that the Respondent intended to keep its offer open for such a period or that it so informed

Arteaga. I need not and do not make a finding on that question, since I have left the resolution of reinstatement and backpay issues for Arteaga to compliance in accord with *A.P.R.A.* However, I do deem it appropriate to conclude, which I do, that as of June 10 (the payroll eligibility date) which was 19 days after the unlawful discharge or July 18 (the date of the election), 57 days after the termination, a reasonable time for Arteaga to obtain proper immigration documents herein had not expired. Thus Arteaga was still an employee under Section 2(3) of the Act on both of these dates, and was eligible to vote in the election.

Such a finding is clearly consistent with *A.P.R.A.*, since Arteaga is entitled to backpay for both of these days, even though ultimately it may be determined that Arteaga is unable to establish his eligibility to work within a reasonable time. Since Arteaga is eligible for backpay for these days, it follows that he was an employee and eligible to vote in the election.

Accordingly, based on the foregoing, I conclude that Arteaga was an employee of the Respondent on both the eligibility and election days, and that he was eligible to vote. Therefore the challenge to his ballot should be overruled and his ballot opened and counted.

CONCLUSIONS OF LAW

1. The Respondent, County Window Cleaning Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Window Cleaners Local No. 2, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating its employees concerning their activities on behalf of or support for the Union, promising its employees a pay raise, insurance, and other benefits in order to induce them to abandon their support for the Union, conditioning its employees employment with Respondent upon their abandoning their support for the Union, and soliciting its employees to sign a letter withdrawing their previous authorizations of the Union to represent them, the Respondent has violated Section 8(a)(1) of the Act.

4. By discharging its employees Giovanni Valencia and Duvan Arteaga because of their activities on behalf of and support for the Union, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Since I have found Duvan Arteaga to have been discriminatorily discharged, the challenge to his ballot is overruled.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes and policies of the Act.

Having found that Respondent discriminatorily discharged Giovanni Valencia and Duvan Arteaga, I shall recommend that Respondent offer Arteaga immediate and full reinstatement to his former job, or a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make Arteaga and Valencia whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed with interest on a quarterly basis, in the manner described by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).¹¹

Additionally, I shall recommend that the Respondent remove from its files any reference to the discharges of Valencia and Arteaga, and to notify them in writing that this has been done and that evidence of same will not be used as a basis for future actions against them.

[Recommended Order omitted from publication.]

¹¹ No reinstatement order is required for Valencia since he has already been reinstated. As for Arteaga, as noted his entitlement to reinstatement and backpay shall be determined in the compliance stage of this proceeding. Additionally, his backpay shall include pay for May 20 and 21, days that he worked but for which he was not paid. Indeed the Respondent concedes that it is obligated to pay Arteaga for these 2 days of work.