

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-945

TITLE SURE-TAN, INC., AND SURAK LEATHER COMPANY, Petitioners v.
NATIONAL LABOR RELATIONS BOARD

PLACE Washington, D. C.

DATE December 6, 1983

PAGES 1 thru 55



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SURE-TAN, INC. AND SURAK LEATHER :

4 COMPANY, :

5 Petitioners, :

6 v. : No. 82-945

7 NATIONAL LABOR RELATIONS BOARD :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, December 6, 1983

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 1:59 o'clock p.m.

14 APPEARANCES:

15 MICHAEL R. FLAHERTY, ESQ., Chicago, Illinois; on behalf
16 of the Petitioner.

17 EDWIN S. KNEEDLER, ESQ., Office of the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Sure-Tan and Surak Leather Company against National Labor Relations Board.

Mr. Flaherty, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL R. FLAHERTY, ESQ.,
ON BEHALF OF THE PETITIONER

MR. FLAHERTY: Mr. Chief Justice, and may it please the Court, is it an unfair labor practice for employer to ask the Immigration and Naturalization Service to investigate the immigration status of its employees? That is the first and the most important issue presented in this case.

Can an employer be required to pay illegal aliens a sum of money equal to six months' pay under the National Labor Relations Act covering a period of time when the illegal aliens are not present in this country, when they are in Mexico, and they are not lawfully available for work? That is the second issue presented in this case.

And can the National Labor Relations Board require an employer to write reinstatement offers in Spanish and to leave them open for a period of four years? That is the third issue presented in this case.

1 The operative facts in this case begin on
2 January 20th, 1977, when Mr. John Surak, the president
3 of Sure-Tan, wrote this letter to the Immigration and
4 Naturalization Service. He asked the Immigration and
5 Naturalization Service to investigate the immigration
6 status of his employees.

7 QUESTION: Incidentally, does he know the
8 immigration status of his present employees?

9 MR. FLAHERTY: Your Honor, I don't know. I
10 have not asked Mr. Surak that, and so I just cannot
11 answer that question.

12 In response to this letter, the INS came to
13 Mr. Surak's facility and investigated the immigration
14 status of the employees, and in response to this letter
15 it was discovered that the illegal aliens -- that the
16 employees were illegal aliens, five of the eight of them
17 listed on this letter. They were immediately arrested
18 by the INS, and they were permitted to execute an INS
19 form whereby they acknowledged their illegal presence in
20 this country, and then they voluntary agreed to return
21 to Mexico.

22 The union filed an unfair labor practice
23 charge against the employer, and the Labor Board
24 returned a complaint, charging that Sure-Tan violated
25 Section 883 of the National Labor Relations Act by

1 discharging the employees when it sent this letter to
2 the Immigration and Naturalization Service.

3 In an attempt to resolve this dispute,
4 Sure-Tan sent letters offering reinstatement to the
5 employees. They were written in English, and they were
6 sent on March 29th, 1977. They asked the employees to
7 report to work by May 1st, 1977, if they accepted the
8 offers of reinstatement.

9 In the proceedings below, the Labor Board held
10 that Sure-Tan constructively discharged the employees,
11 in violation of Section 8(a)(3) of the Act by sending
12 this letter to the INS requesting the INS
13 investigation. The Board ordered Sure-Tan to offer
14 unconditional reinstatement to the aliens, and it
15 ordered them to pay them back pay.

16 In response to this order, the board's own
17 general counsel filed a motion for clarification, asking
18 the board just what it meant by this order. The general
19 counsel observed in its motion for clarification that an
20 order that required unconditional reinstatement with
21 back pay, regardless of the aliens' immigration status,
22 created a conflict with the immigration laws and
23 policies. It in effect served as an incentive for these
24 aliens to re-enter the country illegally.

25 Well, the board denied the motion, but in the

1 decision denying the motion, it said that the accrual of
2 back pay should be tolled during the period of time when
3 the illegal aliens were unavailable for lawful
4 employment in this country.

5 The Court of Appeals upheld the order with
6 certain modifications. Under the Court of Appeals'
7 enforcement decree, the illegal aliens would have to be
8 reinstated by Sure-Tan only if they can establish at the
9 time they present themselves for employment that they
10 are lawfully available for work in this country.

11 With respect to the back pay issue, the Court
12 of Appeals went way beyond the board. It invented its
13 own remedy, or so-called remedy. It told Sure-Tan that
14 it would have to pay each of these illegal aliens a
15 minimum of six months' pay, regardless of whether they
16 were lawfully available for work in this country. This
17 was on the theory that the illegal aliens would have
18 remained in this country illegally for some period of
19 time but for this request sent to the Immigration and
20 Naturalization Service.

21 The Court of Appeals also held that Sure-Tan
22 would have to write its own statement letters in
23 Spanish, and it would have to leave them open for a
24 period of four years.

25 The most important issue facing this Court in

1 this case is whether an employer can be held liable
2 under the National Labor Relations Act for reporting a
3 violation of the law to the immigration authorities.
4 This case or this issue has already been decided by this
5 Court six months ago in the Bill Johnson's case.

6 In Bill Johnson's, an employer -- or employees
7 picketed one of Bill Johnson's restaurants. The owner
8 of that one -- of the restaurant told the employees he
9 would get even with them if it was the last thing he
10 did, and he made good on this threat. He filed a civil
11 lawsuit against the employees. This Court held that the
12 filing of a civil lawsuit was protected under the First
13 Amendment right to petition the government, regardless
14 of the employer's motive for filing that lawsuit.

15 That is precisely the issue that is presented
16 in this case. Sure-Tan's request to the Immigration and
17 Naturalization Service was squarely within the First
18 Amendment right to petition the government, just as was
19 the lawsuit filed by Bill Johnson's Restaurants.

20 QUESTION: What if it is found as a matter of
21 fact that the employer acted solely because of his
22 opposition to the union and the employees' desire to
23 have a union? What if it were found that that was the
24 sole reason for his going to the INS?

25 MR. FLAHERTY: If that were found, it would

1 make no difference, Your Honor. The right of a citizen
2 of this country to report a violation of the law is not
3 conditioned upon the person's motive for reporting that
4 violation of the law.

5 QUESTION: Let's assume in the abstract that
6 that's correct. In its interaction with labor
7 relations, isn't the board entitled to draw some
8 inferences from the conduct?

9 MR. FLAHERTY: Certainly, Your Honor, and it
10 does so in every case that involves motive.

11 QUESTION: It did so here.

12 MR. FLAHERTY: Yes, it did so here.

13 QUESTION: The board said, in effect, all
14 right, this is an exercise of your right to petition the
15 government, but in the circumstances in which you
16 exercised that right, it has some other meaning to us.

17 MR. FLAHERTY: In essence --

18 QUESTION: Isn't that what they did?

19 MR. FLAHERTY: That is what they did, Your
20 Honor. They said that, yes, you have a First Amendment
21 -- Well, they did not address this directly, but
22 assuming there is a first amendment right to petition
23 the government, which certainly there is, they said, we
24 are going to condition that right on your motive for
25 exercising that constitutional right, and never before

1 has this Court ever conditioned the right to exercise a
2 constitutional right on a person's motive for doing so.

3 Indeed, if this -- if administrative
4 agencies --

5 QUESTION: So you don't dispute the fact that
6 there was an anti-union motive somewhere in this set of
7 facts?

8 MR. FLAHERTY: I cannot put myself in Mr.
9 Surak's head, but I can certainly tell you there was a
10 dispute between the union and the company, just as there
11 was in Bill Johnson's Restaurant, and the --

12 QUESTION: Now, so there was -- the employer
13 was motivated by an anti-union bias, I take it. I know
14 -- that isn't the end of the case, I know, but --

15 MR. FLAHERTY: Certainly not, and he --

16 QUESTION: But there was that in the case.

17 MR. FLAHERTY: That was found below.

18 QUESTION: Yes, yes.

19 MR. FLAHERTY: And that is not relevant,
20 however, with --

21 QUESTION: And sustained, and enforced.

22 MR. FLAHERTY: That is not relevant, however,
23 with respect to the right to exercise the constitutional
24 right to report a violation of the law.

25 QUESTION: Mr. Flaherty, are you sure that the

1 right to turn in aliens to the -- illegal aliens to the
2 INS can be equated with filing a lawsuit in state court,
3 the way you had in Bill Johnson's, for constitutional
4 purposes?

5 MR. FLAHERTY: Very definitely, Justice
6 Rehnquist. Under the Nor Pennington doctrine, this
7 Court has held repeatedly in many cases that efforts to
8 enforce the law, whether they be through the filing of
9 lawsuits, through petitioning, or through lobbying to
10 seek stricter enforcement of the law by law enforcement
11 agencies, or other petitions to the government, are
12 within the First Amendment right to petition the
13 government, and in the *Foro Precision Metal* case, which
14 is cited in our reply brief, that precise issue was
15 addressed by the Ninth Circuit.

16 It was a petition to the police by IBM for
17 them to enforce the law that led to the indictment of 14
18 people, and the Ninth Circuit held squarely that that
19 was within the First Amendment right to petition the
20 government.

21 QUESTION: But, Mr. Flaherty, isn't there a
22 difference in the facts here? At the time the letter
23 was written that you have exhibited to us two or three
24 times, your client didn't know whether there had been a
25 violation of the law, did he?

1 MR. FLAHERTY: He had had reports several
2 months earlier.

3 QUESTION: He listed other people besides
4 these who were not in fact illegal aliens.

5 MR. FLAHERTY: That is correct, Your Honor.

6 QUESTION: So he really didn't know which were
7 and which were not.

8 MR. FLAHERTY: He had received reports --

9 QUESTION: That what?

10 MR. FLAHERTY: -- that some of these employees
11 were present illegally.

12 QUESTION: Some of them were.

13 MR. FLAHERTY: And also --

14 QUESTION: And he sort of just tossed a bunch
15 over and said, look at all of them.

16 MR. FLAHERTY: He had asked the employees
17 after the election, before this letter was written,
18 whether they were present legally, and a number of them
19 said, no, they weren't, so he did know at that time. At
20 the time he wrote the letter, he did, Your Honor.

21 QUESTION: Does the record show that?

22 MR. FLAHERTY: Yes, it does, Your Honor.

23 QUESTION: Mr. Flaherty, in Bill Johnson's, is
24 it possible it should be distinguished because there the
25 employer was asserting, trying to assert in state court

1 an alleged injury to the employer's own reputation? The
2 employer himself had suffered an injury that otherwise
3 would not be redressed, and perhaps that is not the case
4 here.

5 MR. FLAHERTY: The holding in Bill Johnson's
6 focused on the First Amendment right to petition the
7 government, and it said, for that reason, as well as --

8 QUESTION: Well, I think the opinion also
9 focused on the fact that the employer would have been
10 left with no forum in which to pursue a remedy for an
11 actual injury to the employer. Does that distinguish
12 this case?

13 MR. FLAHERTY: I don't think so, Your Honor.
14 I think the First Amendment right to petition the
15 government stands on its own, and that this Court
16 recognized that in Bill Johnson's. That was another
17 factor that was present, but it was not a necessary
18 factor. It was not necessary to this Court's decision
19 in Bill Johnson's

20 QUESTION: Well, it was certainly discussed by
21 the Court, and apparently relied upon.

22 MR. FLAHERTY: It was discussed. It was
23 relied upon. But either one of those grounds, the First
24 Amendment right to petition the government or the
25 state's compelling interest in the maintenance of public

1 peace were involved, and in fact in this case the
2 reporting of a violation of the law is just as essential
3 to the maintenance of the public peace as the filing of
4 a civil lawsuit was in Bill Johnson's. If anything, the
5 right to report a violation to law enforcement agencies
6 is more important to the public peace.

7 QUESTION: But the complaint was not against
8 these men. It was against the union.

9 MR. FLAHERTY: I am sorry?

10 QUESTION: The complaint was against the
11 union.

12 MR. FLAHERTY: No, the letter, Justice
13 Marshall, was --

14 QUESTION: I am not talking about the letter.
15 I am talking about Sun-Tan's complaint. It only came
16 about when the union tried to organize.

17 MR. FLAHERTY: That --

18 QUESTION: Correct?

19 MR. FLAHERTY: This letter was written after
20 the union won the election. That is correct.

21 QUESTION: And that is what brought it on.

22 MR. FLAHERTY: This petition to the government
23 is what brought on this case. That is correct.

24 QUESTION: Well, was the letter brought on by
25 the election?

1 MR. FLAHERTY: I can -- It was written after
2 the union won the election.

3 QUESTION: And that is what -- it came after
4 the election.

5 MR. FLAHERTY: That's correct, after the union
6 won the election.

7 QUESTION: And before the election, everything
8 was hunky-dory.

9 MR. FLAHERTY: Well, before the election -- it
10 was after the election that he asked the employees
11 whether they were legally present here, and they
12 admitted that they were illegally present here. Once he
13 knew that, then he wrote the letter. That is correct.

14 QUESTION: Well, the board and the lower
15 courts drew the inference from the factual situation,
16 though, that he was animated by antiunion animus in
17 doing this.

18 MR. FLAHERTY: That is --

19 QUESTION: And certainly we don't review that
20 sort of thing now.

21 MR. FLAHERTY: No, we are not reviewing that.
22 We are not asking for that fact determination to be
23 reviewed here. That determination is irrelevant with
24 respect to the right to report a violation of the law.
25 In the Quarles case, this Court observed that a person's

1 right to report a violation of the law to law
2 enforcement agencies was one of the essential privileges
3 and immunities which arises out of the essential
4 character of our form of government, which must be
5 constitutionally protected, regardless of a person's
6 motive for seeking enforcement of the law.

7 QUESTION: What have lower courts done in the
8 labor law area about instances where an employer has
9 reported an employee out of an antiunion animus to law
10 enforcement officers for commission of a crime? Maybe
11 it is theft, or assault, or whatever it is.

12 MR. FLAHERTY: Justice O'Connor, I am not
13 aware of any other cases. This is a case of first
14 impression, to my knowledge, in this situation.

15 QUESTION: I think it may be in this Court,
16 but have there not been some other cases below in the
17 dealing with reporting of criminal violations? You are
18 not aware of any, in any event?

19 MR. FLAHERTY: I am not aware of any, no.

20 QUESTION: What was the issue in Johnson? Was
21 it the issue whether the board could enjoin the holding
22 of the -- the prosecution of the suit, or not?

23 MR. FLAHERTY: That is correct, and it was
24 alleged that the suit was brought in retaliation for the
25 employees exercising their concerted -- their right to

1 engage in concerted protected activities, and in
2 retaliation for their having filed a complaint, and that
3 is precisely what is presented here. It is alleged that
4 Sure-Tan's actions were undertaken in retaliation for
5 these employees having voted in a union. It is
6 precisely the same situation.

7 And the First Amendment right to petition the
8 government that was present in Bill Johnson's is just as
9 present here as well, and drawn from the Nor Pennington
10 line of cases, this Court has held that the right to
11 seek enforcement of the law is privileged under the
12 First Amendment regardless of why the actions were taken
13 to enforce the law, as long as those actions were not a
14 sham.

15 And in Bill Johnson's, this Court held that a
16 sham would mean that there would have to be no
17 reasonable basis for the actions taken.

18 QUESTION: Mr. Flaherty, is it illegal for an
19 employer to hire illegal aliens?

20 MR. FLAHERTY: No, it is not, Justice
21 Blackmun.

22 QUESTION: Well, if you prevail here, then
23 isn't a way to avoid the confines of the Labor Act just
24 to keep hiring illegal aliens, and when one gets into a
25 labor bind, report them to the INS?

1 MR. FLAHERTY: Your Honor, in this case,
2 Sure-Tan is subject to -- they voted in the union. The
3 union stayed recognized. It has to bargain with the
4 union. That was not a way cut of a union recognition
5 situation. The union didn't go away. It stayed there.

6 Furthermore, there is a back pay and
7 reinstatement liability that is faced here.

8 QUESTION: Could you have fired, without
9 committing an unfair labor practice, could you have
10 fired the illegal aliens for the reason that they were
11 illegal aliens?

12 MR. FLAHERTY: For the reason that they were
13 illegal aliens, certainly. Certainly.

14 QUESTION: And that would be a firing for
15 cause under the collective bargaining agreement, if
16 there was one?

17 MR. FLAHERTY: There was not a collective
18 bargaining --

19 QUESTION: I know. I said, if there was one,
20 could an employer fire an employee because he is an
21 illegal?

22 MR. FLAHERTY: That would depend upon the
23 arbitration case law, and I have not read arbitration
24 cases covering that, but I would certainly think that
25 firing an illegal alien because he is an illegal alien

1 would be just cause.

2 QUESTION: Even after the union won an
3 election?

4 MR. FLAHERTY: Yes, it would. Yes, I
5 definitely think it would.

6 QUESTION: So you would say that if one of the
7 reasons for firing a person is that he is an illegal
8 alien, and another reason is because he is a member of
9 the union, that it is not an unfair labor practice?

10 MR. FLAHERTY: Definitely not, in this case.
11 He had a right to --

12 QUESTION: Definitely not what? It is not a --

13 MR. FLAHERTY: It is not an unfair labor
14 practice in this case, because he had a right to report
15 a violation of the law, a First Amendment right.

16 QUESTION: Well, I would think it would be a
17 fortiori in this case if you are right in my example.
18 You say the employer could even fire an illegal alien
19 himself. He doesn't complain to the government at all.
20 He just fires him. He says, you are an illegal alien,
21 you are fired, but by the way, I am also firing you
22 because you are a member of the union. And you say that
23 would not be an unfair labor practice?

24 MR. FLAHERTY: If there is antiunion animus?

25 QUESTION: Yes.

1 MR. FLAHERTY: I would say no, then there
2 would be an unfair labor practice.

3 QUESTION: All right. All right.

4 MR. FLAHERTY: Because in that case you are
5 not reporting a violation of the law. You are not
6 exercising a constitutionally protected right. In this
7 case, you are exercising a --

8 QUESTION: You are sort of -- you are
9 enforcing the law yourself then. That is -- the
10 employer would be expelling the person instead of having
11 the INS do it.

12 MR. FLAHERTY: Well, no, in this case the
13 enforcement of the law came by reporting it properly to
14 the law enforcement agency. If you just fired them, you
15 would not be aiding the INS in the enforcement of the
16 law.

17 QUESTION: Well, I know, but you say you would
18 be privileged to fire them without committing an unfair
19 labor practice, right?

20 MR. FLAHERTY: You did not mention that there
21 was antiunion animus in your hypothetical.

22 QUESTION: Well, let's say there was not an
23 antiunion animus, but there was a collective bargaining
24 agreement that says you can't fire except for just
25 cause, and he fires a bunch of employees because they

1 are illegal aliens. You say he has that privilege under
2 the collective bargaining contract.

3 MR. FLAHERTY: Well, interpretation of a
4 collective bargaining contract depends upon arbitration
5 case law and the past history of the parties and so
6 forth.

7 QUESTION: Well, what is that law, do you
8 think? May you fire?

9 MR. FLAHERTY: I definitely think that they
10 could fire under that circumstance, yes

11 QUESTION: Yes, yes. But you couldn't fire
12 them for that reason, if you also fire them for being a
13 member of the union.

14 MR. FLAHERTY: That would violate the labor
15 laws. But this case is distinguishable, quite
16 distinguishable from that hypothetical, because in our
17 situation there was a report made to the law enforcement
18 agency reporting a violation of the law, and that, as
19 this Court held in the Quarles case, is one of the
20 fundamental privileges and immunities of all citizens.
21 It is clearly within the First Amendment right to --

22 QUESTION: Mr. Flaherty, may I ask you a
23 follow-up on Justice Blackmun's question?

24 MR. FLAHERTY: Sure.

25 QUESTION: You responded by pointing out in

1 this case there was a remedy that was possible, but just
2 as the general problem, would it not be true that if you
3 prevail, an employer would be well advised to hire
4 illegal aliens before they are organized and let them
5 know promptly that if they do organize, they will be
6 reported; if they don't organize, they won't be?
7 Wouldn't that be good -- it seems to me it would make a
8 lot of sense for a businessman who wants to have
9 inexpensive unorganized labor.

10 MR. FLAHERTY: Well --

11 QUESTION: Maybe that's fine. I don't know.
12 But isn't that -- that would be a natural consequence of
13 your position, isn't it?

14 MR. FLAHERTY: Regardless of how this Court
15 holds, Your Honor, it is a possible consequence, yes,
16 but if this Court were to hold that that is an unfair
17 labor practice, to report a crime to the law enforcement
18 agency, that would not end this problem at all. Human
19 nature being what it is, employers would make a
20 telephone call rather than write a letter.

21 QUESTION: But the result for which you are
22 arguing would encourage the employment of illegal aliens
23 by unorganized employers. That much is clear, I guess.

24 MR. FLAHERTY: It is a possible consequence.
25 It is not an essential consequence.

1 Employers -- people --

2 QUESTION: Which in turn might encourage more
3 illegal aliens to come to the country.

4 MR. FLAHERTY: People hire illegal aliens for
5 a number of reasons, whether it be to perform work that
6 other people don't want to do because they work for less
7 money. There are a large number of reasons why people
8 hire illegal aliens.

9 QUESTION: But you think we should encourage
10 the practice?

11 MR. FLAHERTY: Certainly not, and I am not
12 saying that this Court would --

13 QUESTION: But the result for which you are
14 arguing I think you have acknowledged would encourage
15 the practice.

16 MR. FLAHERTY: It is possible. It is
17 possible.

18 With respect to the -- well, there is also a
19 fundamental conflict in this case with the immigration
20 laws presented by the board's order. In effect, the
21 board is holding Sure-Tan liable under the labor laws
22 for assisting in the enforcement of the immigration laws.

23 Now, this just cannot be. You cannot be held
24 liable under one set of laws for helping enforce other
25 laws, and this Court noted in the Southern Steamship

1 case that the labor laws have to be interpreted and
2 enforced in consonance with the immigration laws, and to
3 hold someone liable under one law for enforcing another
4 violates the Southern Steamship mandate.

5 Now, with regard to the back pay award, as we
6 have argued, there was no violation of the National
7 Labor Relations Act by exercising the constitutional
8 right to report a violation of the law. There should be
9 no back pay award. But under any circumstance, the
10 award of back pay, six months' pay to illegal aliens
11 covering a period of time when they are not lawfully
12 available for work in this country is wholly
13 inappropriate.

14 The board itself acknowledged that this was
15 improper. They would have tolled the accrual of back
16 pay during the time that the illegal aliens were not
17 available for employment, because they were in forced
18 absence from this country. Yet the Court of Appeals
19 invented its own remedy. It came up with a six-month
20 back pay -- essentially what was a fine that was imposed
21 on Sure-Tan.

22 There is no reasonable basis for this
23 six-month back pay award. It is based on pure
24 speculation, and as Judge Wood noted in his dissent, the
25 rationale behind this back pay award seems to be to

1 punish Sure-Tan for what it did.

2 QUESTION: What if the only remedy the board
3 imposed was an order to reinstate once the company --
4 once the alien is back in the country legally?

5 MR. FLAHERTY: That would comport with
6 immigration laws, certainly.

7 QUESTION: Well, what about the labor laws?

8 MR. FLAHERTY: That would comport with the
9 labor laws as well.

10 QUESTION: Well, I know, but that would leave
11 a remedy standing, a remedy which is premised on an
12 unfair labor practice. You say there is no unfair labor
13 practice at all.

14 MR. FLAHERTY: Well, assuming, contrary to
15 fact, that there was an unfair labor practice, a remedy
16 that would --

17 QUESTION: Well, I am just saying that in this
18 very case, if the only remedy that had been imposed by
19 the board was an order to reinstate once the -- if and
20 when the alien is back in the country legally. Now, you
21 would still be here, I take it, because that remedy
22 would be -- the predicate for that remedy would be an
23 unfair labor practice, was the fact that there was an
24 unfair labor practice.

25 MR. FLAHERTY: That's right. Certainly we

1 feel that there was not an unfair labor practice, and
2 there should be no remedy. There is no need for a
3 remedy.

4 QUESTION: Well, I know, but the board could
5 have had full regard for the labor board -- for the
6 immigration laws, and you still would be here.

7 MR. FLAHERTY: If they had full regard for the
8 immigration laws, then they would not have -- first of
9 all, they would not have imposed back pay for a period
10 of time when they were not lawfully available for work.

11 QUESTION: I guess what I am asking really is
12 that the Court of Appeals may have been wrong in some of
13 its remedy decisions, but that doesn't mean it was wrong
14 in saying there was an unfair labor practice.

15 MR. FLAHERTY: Oh, I certainly think they were
16 wrong in saying there was an unfair labor practice.

17 QUESTION: But you are making two different
18 arguments.

19 MR. FLAHERTY: Yes, I am making two different
20 arguments.

21 QUESTION: One, that there was no unfair labor
22 practice because of the board's failure to integrate it
23 with the immigration laws, and second, even if there was
24 an unfair labor practice, that the Court of Appeals'
25 substitution of a remedy was improper --

1 MR. FLAHERTY: That's correct.

2 QUESTION: -- even if there was a violation.

3 MR. FLAHERTY: That's correct. Assuming
4 agueno there was a violation, then the remedy was
5 clearly erroneous. There should not have been an
6 imposition of an arbitrary six-month back pay award
7 during a period of time when the illegal aliens weren't
8 available for work, because the board under its normal
9 procedures would toll back pay. Indeed, that's what it
10 wanted to do in its decision denying the motion for
11 clarification. It said back pay should be tolled when
12 the illegal aliens are not available for work, and
13 certainly the illegal aliens should not be --

14 QUESTION: Yes, but the board, under the
15 board's order, wouldn't the tolling of back pay be ended
16 if the alien came back to the country illegally, and was
17 available for work?

18 MR. FLAHERTY: I would certainly hope so.

19 QUESTION: Well, I know, but under the terms
20 of its order, the alien wouldn't have to be back here
21 legally.

22 MR. FLAHERTY: Well, I think if they are not
23 lawfully available for work is how I interpret that.

24 QUESTION: I see.

25 MR. FLAHERTY: But I think certainly if there

1 is any ambiguity in what they advised, it should be
2 construed that way. Otherwise, they would have an
3 incentive to come here illegally in order to prevent the
4 tolling of back pay, so they could keep the meter
5 running by being here illegally, and that certainly
6 would conflict with the immigration laws.

7 QUESTION: Of course, you object to the ALJ's
8 four weeks back pay as much as you do to the Seventh
9 Circuit's longer period, don't you?

10 MR. FLAHERTY: Definitely. Definitely. In
11 essence, what it does it, is conflicts with immigration
12 laws. It treats them as though they had a legal right
13 to remain here for four weeks or six months even though
14 they were not lawfully here to begin with, and they were
15 returned to Mexico.

16 In essence, any back pay covering a period of
17 time when they were not available for work treats the
18 immigration laws as if they were of no consequence, and
19 that type of a conflict with the immigration laws
20 violates this Court's mandate in Southern Steamship that
21 the remedies of the board have to comport with other
22 fundamental Congressional objectives, those in the
23 immigration laws.

24 With respect to the reinstatement offers,
25 never before has the board required an employer to

1 communicate with its employees in a foreign language,
2 and yet in this case it tells Sure-Tan that it has to
3 communicate in writing with these employees in Spanish.
4 It has to hire an interpreter to talk to these people.

5 The government is not even required to
6 communicate with its citizens in a foreign language. It
7 is just fundamentally unfair and wrong to require a
8 private employer to communicate with employees in
9 Spanish when the government isn't even required to do
10 so. In fact, there are board cases --

11 QUESTION: How did the employer communicate
12 with them on the job?

13 MR. FLAHERTY: By attempts to -- a combination
14 of, I believe, English and Spanish.

15 QUESTION: At least he got the message across.

16 MR. FLAHERTY: He got the message across.
17 Pointing, and I really can't say, because I wasn't
18 there, but it was a rather primitive communication, I
19 would imagine.

20 With respect to the four-year reinstatement
21 offer, never before has the board required that
22 reinstatement offers be left open for a period of four
23 years. Traditionally the board has upheld reinstatement
24 offers that have been held open for --

25 QUESTION: On this question about the Spanish

1 letter, there were about a dozen employees, right?

2 MR. FLAHERTY: There were eleven employees,
3 five of whom were --

4 QUESTION: How much would it cost to translate
5 eleven -- translate one letter to eleven people?

6 MR. FLAHERTY: I couldn't speak to that.

7 QUESTION: About \$1.25, I guess, something
8 like that. We are talking about de minimis.

9 MR. FLAHERTY: The courts have held and our
10 brief points out cases to the effect that the government
11 is not required to communicate in a foreign language
12 with its citizens, and yet the board would require --
13 impose that upon Sure-Tan, contrary to its prior cases.
14 It changes its own precedent, without any warning. And
15 with regard to the four-year reinstatement, that also is
16 contrary to established precedent.

17 In conclusion, this case presents the exact
18 same issue that was presented to this Court in Bill
19 Johnson's Restaurant. As this Court decided in Bill
20 Johnson's restaurant, it should hold that Sure-Tan had a
21 constitutional right to report a violation of the law,
22 and that it did not commit an unfair labor practice by
23 doing so.

24 CHIEF JUSTICE BURGER: Your time has expired,
25 Mr. Flaherty.

1 MR. FLAHERTY: Thank you.

2 CHIEF JUSTICE BURGER: Mr. Kneedler.

3 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

4 ON BEHALF OF THE RESPONDENT

5 MR. KNEEDLER: Thank you, Mr. Chief Justice,
6 and may it please the Court, before beginning, I would
7 like to emphasize two points. One, in response to Mr.
8 Justice White's question, this was a case in which the
9 board held that the employer was motivated solely by
10 antiunion animus. We don't view that as an essential
11 attribute of the violation. Under Transportation
12 Management the test would be whether the employer would
13 have done it even in the absence of the antiunion
14 animus, but here the court found that aggravated
15 circumstance.

16 And secondly, in petitioner's brief on the
17 merits, they acknowledge that they were not challenging
18 the board's finding of antiunion animus in the
19 circumstances of this case.

20 Now, this Court recognized in Plyler versus
21 Doe and in United States versus Brignoni-Ponce that
22 illegal aliens are especially vulnerable to exploitation
23 by employers, and in De Canas, the Court recognized that
24 the acceptance by illegal aliens of jobs on substandard
25 conditions has the effect of depressing the wages and

1 working conditions of lawfully resident American
2 workers, and also undermines the effectiveness of labor
3 unions.

4 We submit that the appropriate accommodation
5 of the National Labor Relations Act and the immigration
6 laws in the circumstances of this case requires a
7 recognition of those realities.

8 QUESTION: Well, Mr. Kneedler --

9 MR. KNEEDLER: Yes.

10 QUESTION: -- I am interested to know whether
11 the government takes the position that the board's
12 result here can be defended only in the circumstances of
13 the immigration laws. Let's suppose that I am Mr.
14 Surak, and I have this outfit in Chicago, and an effort
15 is made to unionize my employees, and I hire a private
16 investigator to find out what I can get on the people
17 who are leading the union investigation move. I find
18 that one of them, who is an employee, is a fugitive from
19 Indiana, he has escaped from prison in Indiana, not
20 under any immigration charge, you know, on an armed
21 robbery charge.

22 Now, the reason I made the investigation in
23 the first place is, I want to hurt the union if I can.
24 I am an employer, and I don't want to be unionized. Is
25 it an unfair labor practice for me at that point to turn

1 him in to Illinois authorities to be extradited to
2 Indiana?

3 MR. KNEEDLER: That would present much
4 different considerations. Our position here depends not
5 just on a construction of the National Labor Relations
6 Act, but also the policies with respect to employment
7 that are reflected in the other federal statute, the
8 immigration laws.

9 The proper accommodation would have to look to
10 the other statute that the employer was seeking to
11 assist in the enforcement of, and for instance the fact
12 that it was a felony, a serious crime, a fugitive, and
13 also that the -- I think it is appropriate to consider
14 the particular utility of this device to employers, as
15 Mr. Justice Stevens was pointing out, the utility of
16 this device to employers to avoid the policies of the
17 Labor Act, I think that those same policies would not be
18 present with respect to --

19 QUESTION: Well, but the obligation of the
20 employer at least by statute and case law is much the
21 same. The Ninth Circuit has held, hasn't it, that the
22 employer has an obligation to notify the INS in these
23 circumstances?

24 MR. KNEEDLER: Well, what the Ninth Circuit
25 suggested in the passage that has been quoted by

1 petitioners is really that it is not the board's
2 function to enforce the immigration laws by excluding
3 illegal aliens or determining the documentation of
4 illegal aliens and excluding them from board protection,
5 that the employer should take that problem to the
6 Immigration Service if that is his point, that he wants
7 to help enforce the immigration laws.

8 I don't think the Ninth Circuit purported to
9 suggest that the employer should have an absolute
10 immunity from his obligations under the Labor Act to do
11 so for antiunion reasons, if that was the motivation. I
12 think the Ninth Circuit was making a much different
13 point, that the enforcement of the immigration laws is
14 essentially the responsibility of INS.

15 QUESTION: Well, in Mr. Justice Rehnquist's
16 example of the felon, the fugitive, would all the board
17 have to do is find that the employer wouldn't have fired
18 him except for an antiunion animus, and wouldn't have
19 turned him in except for that? Is that all they have to
20 find to find an unfair labor practice?

21 MR. KNEEDLER: Well, that is ordinarily what
22 is --

23 QUESTION: He gets on the stand and he
24 testifies. Well, why did you turn him in? I turned him
25 in because he was a ringleader in this movement towards

1 the union, but of course, and when I found out he was a
2 felon, I could easily get rid of him, so I turned him
3 in. Is that all the board would have to find?

4 MR. KNEEDLER: Again, I think that because of
5 this --

6 QUESTION: Well, that is all there is.

7 MR. KNEEDLER: Well, yes, in finding the
8 normal unfair labor practice, that is true, but my
9 question or my point is that there may be --

10 QUESTION: What is abnormal about that?

11 MR. KNEEDLER: Well, nothing, if one looks
12 only to the purposes of the immigration laws. My only
13 point was that as in Bill Johnson's, the Court sometimes
14 feels that it must look outside the immigration -- or
15 outside the Labor Act to see whether there are
16 countervailing considerations, what the Court said in
17 Bill Johnson's. It might preclude the board from
18 finding an unfair labor practice, even when the other --

19 QUESTION: So the policy of enforcing the laws
20 against murder or something are stronger than enforcing
21 the immigration laws. Is that any critical part of your
22 submission, that the interest in enforcing the
23 immigration laws just isn't that strong?

24 MR. KNEEDLER: No, certainly the Department of
25 Justice is --

1 QUESTION: One crime is different than
2 another?

3 MR. KNEEDLER: No, but there are other --

4 QUESTION: The board is entitled to weigh each
5 crime and make final decisions for the whole country as
6 to what laws ought to be --

7 MR. KNEEDLER: No, what we are suggesting is
8 with particular reference to the National Labor
9 Relations Act. The board has never found an unfair
10 labor practice in any other circumstances insofar as I
11 am aware, where an employer has reported --

12 QUESTION: So your answer is yes, it does make
13 a -- the board does sit to decide which laws are to be
14 ignored and which are not.

15 MR. KNEEDLER: No, I --

16 QUESTION: Or it can pick out the immigration
17 laws at least, you say.

18 MR. KNEEDLER: Well, it is not the board's own
19 assessment of that. This is the position of the United
20 States in this case, that there are countervailing
21 policies reflected in the Immigration Act that reinforce
22 the board's construction of the Labor Act in these
23 circumstances.

24 QUESTION: You mean sometimes it is all right
25 not to report illegal aliens?

1 MR. KNEEDLER: Well, absent an antiunion
2 animus, and really, in a sense, an abuse of the
3 reporting process, it would ordinarily be entirely
4 appropriate and the responsibility of an employer or any
5 other citizen to report. What we are suggesting is that
6 the policies of the immigration laws are designed to
7 protect --

8 QUESTION: Well, he has to be able to prove he
9 loves the union before he can turn an illegal alien in?

10 MR. KNEEDLER: No, the initial burden is on
11 the board to establish an antiunion animus.

12 QUESTION: Let's try another one. He knew all
13 along, for 20 years, that this man was a felon. And
14 when the man joined the union, he blew the whistle on
15 him.

16 MR. KNEEDLER: Well, another -- again, it
17 might depend on the application of misprision of felony
18 statutes, which is another consideration that would
19 apply in the area of murder or any other felony. It is
20 a federal crime, and it is, I would assume, a crime
21 under the law of most states not to report a felony.
22 So, if we are talking about an employer who has
23 knowledge of a felon in his employ, that countervailing
24 policy and the legislative judgment reflected in the
25 statutes about reporting a felony I think might well

1 override the finding of an unfair labor practice in
2 those circumstances.

3 QUESTION: Do you think you could support your
4 position by saying that of course there is a duty to
5 report illegal activity, there is a civic duty, and
6 there is a First Amendment right to do it on the edges
7 of that, but the National Labor Relations Board isn't
8 concerned about civic duty or other factors. If there
9 is an antiunion animus, that supports their position no
10 matter what the other considerations are. Would that
11 take care of it?

12 MR. KNEEDLER: Well, that would obviously -- I
13 mean, that would control this case, yes.

14 QUESTION: Even where --

15 QUESTION: -- right across the board.

16 QUESTION: -- Indiana felon, too.

17 MR. KNEEDLER: That's right. So we are not
18 urging the Court to adopt a broad rule like that. We
19 are narrowly -- we are eliminating felonies here. The
20 only crime that an alien who enters the United States
21 illegally in the vast majority of cases commits is a
22 misdemeanor. I don't want to denigrate the fact it is a
23 misdemeanor, but Congress has ranked the offenses, and
24 the board can take some guidance from that.

25 QUESTION: Mr. Kneedler?

1 MR. KNEEDLER: Yes.

2 QUESTION: In the example you have been
3 discussing for the last five minutes, let's assume that
4 the felon who escaped from Illinois or wherever it was
5 was sent back and put in prison for four years. Would
6 the board have had authority to demand that he be
7 reinstated at the end of the four years?

8 MR. KNEEDLER: Well, we would first have to
9 determine whether the board could find an unfair labor
10 practice.

11 QUESTION: Well, let's assume, as I think
12 Justice Rehnquist said, in reporting this fellow, the
13 employer said quite candidly he was a leader of this
14 antiunion movement, so I thought I had better report
15 him, get him off my back.

16 MR. KNEEDLER: Well, I have suggested that in
17 the case of a felony or a murder, a crime like that,
18 that the board, although it hasn't addressed it --

19 QUESTION: The board would have to reinstate
20 him after?

21 MR. KNEEDLER: No, I am suggesting there may
22 not be a violation in those circumstances, so the
23 question of reinstatement would never be reached, but --

24 QUESTION: If -- I don't quite see the
25 distinction. Why wouldn't the board not only require

1 the re-employment at the end of four years, but also
2 compel an employer to send him six months' back pay to
3 the prison?

4 MR. KNEEDLER: Well, the board does not reach
5 the question of remedy, either reinstatement or back
6 pay, until it has first found that the employer has
7 violated the Act, and in the situation of a felon and
8 the employer's reporting of a felon, if the board did
9 not find for the reasons that I have suggested that the
10 employer had violated the Labor Act, then there would be
11 no occasion to impose a remedy, but in the situation
12 where the board does find a violation of the Act, as
13 here, because of the appropriate accommodation of the
14 two statutes leads to that result, then it is
15 appropriate for the board to consider the normal
16 remedies, which are under 10(c) of the Act reinstatement
17 with or without back pay, and then at that point the
18 board would determine whether reinstatement and back pay
19 were appropriate in light of the policies of the statute
20 that the employers relied upon.

21 QUESTION: That wouldn't encourage people to
22 report crime, would it? They might be caught in the
23 middle between a legal obligation to report it, quite
24 apart from the First Amendment, and what you say the
25 board might feel free to do.

1 MR. KNEEDLER: Well, in this circumstance, I
2 think it is important to stress the narrowness of the
3 rule we are suggesting.

4 QUESTION: Are you saying that the only crime
5 to which your argument applies is where one employs an
6 illegal alien and then discharges him?

7 MR. KNEEDLER: That is all that is presented
8 here, and that is all we are submitting here. I don't
9 want --

10 QUESTION: I understand that, but it seems to
11 me the principle that you advocate is not going to be
12 easy to carry.

13 MR. KNEEDLER: Well, there are affirmative
14 indications in the purposes and background of the
15 immigration laws to reinforce that conclusion here,
16 purposes that I would think would be absent under most
17 state criminal codes in the commission of a murder or
18 something like that, and Congress has enacted two
19 statutes here that have to be given due consideration by
20 the board and the Court.

21 And Congress fashioned an express exemption
22 for employment of illegal aliens insofar as employers
23 are concerned. It did that at the same time it was
24 strengthening, it said, the laws against illegal
25 immigration into the United States by enacting a

1 prohibition against harboring, but Congress carved out
2 employers from that prohibition.

3 Now, obviously, Congress did not expect that
4 the very employers who would take advantage of that
5 immunity would turn around and report the employers
6 immediately upon doing so and thereby sacrifice whatever
7 advantage they had acquired by hiring the illegal
8 aliens.

9 QUESTION: I am not so sure that it is just
10 the immigration law. I think it is the whole Title 18.

11 MR. KNEEDLER: Well, but in the immigration
12 laws, there is the affirmative -- there is the
13 affirmative support for the decision of the Court of
14 Appeals in this case, and in the typical Title 18
15 offense, I would think you could not find that support.

16 QUESTION: Well, maybe you will tell me
17 exactly what was the violation of the labor law.

18 MR. KNEEDLER: In this case.

19 QUESTION: In this case.

20 MR. KNEEDLER: Yes, sir. In this case, the
21 violation of the labor law was the reporting of the
22 illegal aliens to the INS in retaliation for the union
23 activities.

24 QUESTION: Well, why wouldn't that apply to
25 the report of spitting on the sidewalk?

1 MR. KNEEDLER: Well, if I could go back, in a
2 case like -- Let me go back to Bill Johnson's, and
3 really, what petitioner is really arguing here is that
4 there is an implied exception from the labor laws for
5 his conduct because of the policy favoring reporting of
6 crimes and the policy of enforcing the immigration laws,
7 and the question is whether the Court should recognize
8 an implied exception for retaliatory conduct that would
9 otherwise be a violation of the Act, and that requires
10 looking to the competing statute, and here it is a
11 violation because the policies of the competing -- of
12 the other statute, the immigration laws, are --

13 QUESTION: Or the Constitution. Or the
14 Constitution.

15 MR. KNEEDLER: Well, petitioners do rely on
16 the Constitution. I --

17 QUESTION: What about that?

18 MR. KNEEDLER: Well --

19 QUESTION: First Amendment.

20 MR. KNEEDLER: -- I would note in the first
21 instance that they did not raise that before the board,
22 before the Court of Appeals, or in the petition for
23 certiorari here. Putting that objection to one side, I
24 think again, going back to Bill Johnson's, the
25 distinctions between that case and this are instructive.

1 QUESTION: What about the Nor Pennington line
2 of cases generally? Certainly there have been other
3 competing laws involved such as the antitrust laws, and
4 it has been claimed that companies or a litigant has
5 resorted to the courts deliberately to discourage
6 competition or to get them out of business, and it has
7 been held that the resort -- their utilization of the
8 legal processes is constitutionally guaranteed.

9 MR. KNEEDLER: Well, in those cases, those
10 cases have involved, as in Nor itself, political
11 activity, which is at the core of the right of petition,
12 political activity --

13 QUESTION: What about California Transport, or
14 whatever that was?

15 MR. KNEEDLER: Yes, that was an invocation of
16 the adjudicative process before an administrative
17 agency, and what the companies were doing in those
18 circumstances fits within the language of the First
19 Amendment and fits within this Court's decision in Bill
20 Johnson. They were petitioning for a redress of their
21 grievances, and as Justice O'Connor pointed out, a
22 grievance that was in a sense redress of a legal injury
23 to themselves.

24 QUESTION: So your answer to the
25 constitutional claim is there is just no constitutional

1 right, protected constitutional right to report a crime?

2 MR. KNEEDLER: No, our submission does not go
3 that far. Our submission is --

4 QUESTION: Well, what is it?

5 MR. KNEEDLER: -- that it is not an absolute
6 right, and where the employer does it in retaliation for
7 other protected activities by the person who is being
8 reported, that there is not an absolute right to do so.
9 It must be remembered that the employees' activities
10 here, even while protected by the National Labor
11 Relations Act, also have constitutional overtones. The
12 right of association and to organize in the area of
13 employment are also constitutionally protected. So the
14 employer's reporting of the violation was in response to
15 activities that also have constitutional overtones.

16 QUESTION: Well, but certainly it wasn't --
17 the employer's reporting may have had an indirect effect
18 on those activities, but since the people -- the
19 activities were being conducted by people who had no
20 business being in the country, I don't see how you can
21 fault the employer on that account. And it was the
22 government that expelled the people. The employer
23 didn't.

24 MR. KNEEDLER: But the employer brought it
25 about, and concededly in this Court did so for -- solely

1 for antiunion reasons, and in terms of the
2 constitutional right, in re Quarles and Butler, which
3 opposing counsel has cited, the Court did not suggest
4 that a right to inform about violations of the law
5 derives from the First Amendment.

6 In fact, Quarles was a prosecution under
7 Section 241 of Title 18 for a conspiracy to interfere
8 with rights protected by the Constitution or laws of the
9 United States, and what was involved in that case was
10 whether the federal government could protect its own
11 processes by prosecuting people who in that case
12 murdered someone who informed on a violation of federal
13 law.

14 And so the very essence of federal sovereignty
15 was involved to recognize that the constitutional -- the
16 Constitution required the federal government to protect
17 informants.

18 QUESTION: Mr. Kneedler, may I ask another
19 question? Am I correct in understanding that the Court
20 of Appeals ordered the company to pay six months' back
21 pay regardless of whether or not the former employee
22 returned legally to the United States?

23 MR. KNEEDLER: That's correct. The Court of
24 Appeals ordered a minimum six-month back pay.

25 QUESTION: Right. Well, let's assume, for

1 example, that one of these employees called up the
2 employer and said, I am now back in the United States.
3 I have got a good job down in St. Louis. Will you send
4 me that six months' pay, please? And the employer said,
5 well, look, are you lawfully in the United States at
6 this time? And the fellow said, no. He said, I don't
7 have to be lawfully here to get my money. Could the
8 employer report him then? And not pay the money? I
9 guess he would have to pay it under the Court of Appeals
10 order.

11 MR. KNEEDLER: Unless it were shown that the
12 employer was acting for some antiunion reason under the
13 Court's decision, he could, and I am not sure what the
14 antiunion reason would be after the employee had long
15 since left.

16 QUESTION: Did the board suggest this remedy,
17 or was it -- did the court come up with it by itself?

18 MR. KNEEDLER: The board has not --

19 QUESTION: The six months.

20 MR. KNEEDLER: The board had not ordered it in
21 its decision. The ALJ had recommended that the board
22 consider some minimum award of back pay.

23 QUESTION: Who brought it up in the Court of
24 Appeals, anybody?

25 MR. KNEEDLER: I think it was sua sponte.

1 QUESTION: Sua sponte? And are you defending
2 that here?

3 MR. KNEEDLER: Yes, we are in this case. The
4 board did not purport to adopt a general policy to
5 govern all such cases, but it did accept the --

6 QUESTION: Ordinarily isn't it the board's
7 job, not the courts, to specify a remedy?

8 MR. KNEEDLER: That's correct, and as we point
9 out --

10 QUESTION: And why is it all right for the
11 Court of Appeals here to do something that the board
12 hadn't done?

13 MR. KNEEDLER: Well, we don't suggest that it
14 is. In fact, we --

15 QUESTION: Well, you are defending it, you
16 said.

17 QUESTION: Yes.

18 MR. KNEEDLER: Well, the board was -- in this
19 particular case, the board was willing to accept the
20 suggestion on remand, and to adopt that, so as far as
21 the six-month back pay, that is the board's position in
22 this case.

23 QUESTION: That is the order finally entered
24 by the board?

25 MR. KNEEDLER: That is -- well, the board

1 proposed a judgment to the Court of Appeals, and that
2 was the Court of Appeals' judgment in the particular
3 case. Not that that is a new proceeding.

4 QUESTION: Is that often done?

5 MR. KNEEDLER: I think it is quite unusual.

6 QUESTION: They don't order back pay to
7 someone who isn't available for work, do they?

8 MR. KNEEDLER: No, it --

9 QUESTION: Here is somebody out of the country
10 who can't legally enter. It is an extraordinary thing
11 to order. How can you defend that?

12 MR. KNEEDLER: The employee's unavailability
13 for work is directly attributable to the employer's
14 unfair labor practice, and under the board's policies
15 where the employer has caused the employee's
16 unavailability for work because of injury, because of --

17 QUESTION: But the remedies are not supposed
18 to be punitive. They are supposed to help the employee,
19 but they are not normally extended when the employee is
20 unavailable for work. It just seems like a most unusual
21 requirement.

22 MR. KNEEDLER: What I am suggesting, though,
23 is that even where the employee is unavailable, if the
24 employer is responsible for causing the unavailability,
25 the board has in the past approved the award of back

1 pay, and here the employer is responsible for the
2 employee's unavailability. Now, to be sure, the alien
3 is, too.

4 QUESTION: Doesn't that encourage, as Justice
5 Powell suggested, another illegal entry to come and see
6 about the money, and doesn't that fly right in the face
7 of our immigration policies?

8 MR. KNEEDLER: No, the award of the back pay
9 in this case is not contingent upon the alien's
10 re-entering the country. The back pay award would be
11 paid to the alien even if he remained in Mexico.

12 QUESTION: You is supposed to just mail it to
13 him, if you've got his address?

14 QUESTION: In pesos?

15 MR. KNEEDLER: That's correct. That's
16 correct.

17 QUESTION: That's just a fine, then, for
18 violating the law, I guess.

19 MR. KNEEDLER: It is not a fine --

20 QUESTION: Close to it, isn't it?

21 MR. KNEEDLER: No, I don't -- I think it's
22 quite different from a fine, because the ordinary remedy
23 in an unfair labor practice, discriminatory discharge
24 case is reinstatement and back pay. The employment
25 relationship between the employer, and the employer here

1 was not unlawful insofar as federal law is concerned.
2 The alien had an illegal status, but the employment
3 relationship was not unlawful. Because it was not, then
4 it is not contrary to the immigration laws to recognize
5 that employment relationship and apply the normal back
6 pay remedy in those circumstances.

7 QUESTION: So the employer ought to just feel
8 lucky that it was confined to six months.

9 MR. KNEEDLER: Well --

10 QUESTION: Because the employment relation
11 hasn't been legally terminated yet. And back pay ought
12 to run forever.

13 MR. KNEEDLER: Well, we certainly don't
14 suggest back pay should run forever, and the six-month
15 figure --

16 QUESTION: Well, there is just as much reason
17 for running it a year as six months on your theory.

18 MR. KNEEDLER: Well, at some point the amount
19 of the back pay might become so substantial that
20 concerns about its being punitive rather than simply
21 remedial might be raised, and indeed six months may be
22 toward the outer limit of the amount of back pay that
23 should be awarded. Maybe the ALJ's decision as a
24 general rule would be more appropriate. But if there is
25 no back pay awarded, then the employer has really no

1 financial disincentive to evade the purposes of the
2 immigration laws in these circumstances.

3 QUESTION: Hasn't the Court -- hasn't this
4 Court over the years said that we pay great deference to
5 the Labor Board provisions for remedy and things of that
6 kind because they are dealing with it all the time, and
7 they develop what we call expertise? What expertise
8 does the Court of Appeals have in these areas?

9 MR. KNEEDLER: Well, generally none, and as I
10 suggested --

11 QUESTION: About the same as ours, wouldn't it
12 be?

13 MR. KNEEDLER: Well --

14 QUESTION: Not that bad.

15 (General laughter.)

16 MR. KNEEDLER: The board is the expert agency,
17 and as a rule the matter ought to be remanded to the
18 board.

19 QUESTION: And the Courts of Appeals, all
20 appellate courts ought to leave remedies, the devising
21 of remedies to the agency that is very experienced and
22 can understand its impact on the whole system rather
23 than just one aberration of this kind?

24 MR. KNEEDLER: That's correct, but a remedy
25 such as this we think is entirely appropriate, because,

1 again, deferring to the board's expertise, the normal
2 rule is that unless there is some effort to make the
3 employee whole, the purposes of the Act will not be
4 effecuated, which Section 10(c) requires.

5 QUESTION: There is legislation pending in
6 Congress to make it illegal, to make it an unlawful act,
7 a crime to hire an undocumented alien. Suppose that
8 legislation passed. Would the board or anybody else be
9 entitled to make a remedy that would give back pay?

10 MR. KNEEDLER: Oh, I would certainly think
11 not.

12 QUESTION: Not if they pass that legislation.

13 MR. KNEEDLER: No, if the employment -- in no
14 circumstances. The employment relationship would then
15 become illegal, and for the board to order the
16 reinstatement of the employee to an illegal relationship
17 and to pay him inconsistent with such a statute would
18 clearly be improper, but as I said, the employment
19 relationship is not illegal under the immigration laws.

20 QUESTION: Let me go back to this dichotomy
21 that seems to be interesting everyone about the employer
22 doing the noble, patriotic, and altruistic thing in
23 reporting these illegal aliens. The Labor Board
24 historically has penalized employers or unions for dcing
25 good things if they were in violation of the Act.

1 Hasn't that been so?

2 MR. KNEEDLER: That's correct.

3 QUESTION: In other words, suppose the
4 employer on the day before Christmas, and there is an
5 election coming up, sends a caterer out with a complete
6 Christmas dinner for every employee and maybe a case of
7 scotch along with it. Presumably he is doing a good
8 Christian thing.

9 MR. KNEEDLER: Right.

10 QUESTION: But he might get in trouble with
11 the Labor Board for doing that, might he not?

12 MR. KNEEDLER: That's right. That's correct.
13 The Labor Act does attach consequences to things that
14 would otherwise be entirely lawful.

15 QUESTION: So when he reports the criminal
16 conduct of these employees being here illegally, he is
17 doing his patriotic and civic duty, but he might get
18 penalized for that properly, too. Is that not so?

19 MR. KNEEDLER: That's correct, and we suggest
20 that --

21 QUESTION: But you aren't asking for all --
22 that is more than you ask for.

23 MR. KNEEDLER: Yes, we are not saying
24 everything that he -- every report he makes, but in the
25 circumstances of this case, we think that that -- we

1 believe that that is entirely appropriate.

2 I would like to address Bill Johnson's and the
3 First Amendment issue for just a moment, if I could.

4 The First Amendment by its terms refers to petitioning
5 for redress of grievances. That is what was going on in
6 Bill Johnson's, because the employer went to court to
7 try to get a remedy for a legal injury. That is not
8 this case. There was no legal injury suffered by the
9 employer here.

10 The other distinguishing factor,
11 countervailing consideration in Bill Johnson's was the
12 deeply rooted interest of the states in providing a
13 remedy for wrongs. That is not -- that federalism
14 question is not presented here.

15 A last distinguishing factor is that the
16 employer himself knowingly facilitated the employment of
17 the illegal aliens in this case. It does not come with
18 good grace, I submit, for the employer to then turn
19 around and rely on the immigration laws, whose violation
20 is encouraged as a basis for avoiding liability under
21 the labor laws.

22 This is not the first occasion in which these
23 concerns have been raised, even with this employer.
24 This employer was the subject of prior unfair labor
25 practice proceedings in 1973 in which the board then

1 found that except for a few senior employees, all of the
2 employer's employees were Mexican nationals, and on that
3 occasion the employer again had intimidated his Mexican
4 employees by making it clear that they would be fired
5 and he would hire another one if they supported the
6 union.

7 So this case highlights very strongly the
8 concerns that underlie our submission here, and that is
9 that if, as Justice Stevens pointed out, that an
10 employer would have a powerful incentive and weapon to
11 hire aliens in violation of the immigration laws if the
12 decision of the Court of Appeals were reversed in these
13 circumstances, and that would subvert the purposes of
14 both the labor laws and of the immigration statutes.

15 QUESTION: Well, it might depend on what the
16 Court said if it reversed, might it not?

17 MR. KNEEDLER: I was referring to if the Court
18 were to find that this was not an unfair labor practice
19 in this case.

20 QUESTION: Thank you, gentlemen. The case is
21 submitted.

22 (Whereupon, at 2:59 o'clock p.m., the case in
23 the above-entitled matter was submitted.)

24

25

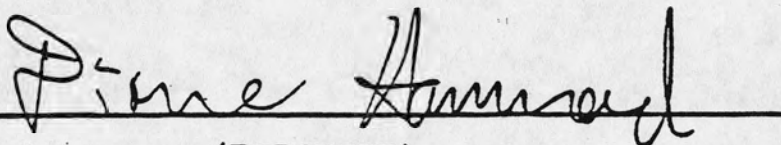
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-945 - SURE-TAN, INC., AND SURAK LEATHER COMPANY, Petitioners v. NATIONAL
LABOR RELATIONS BOARD

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", written over a horizontal line.

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