IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

between

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 2,

and

SAN FRANCISCO CENTRAL TRAVELODGE® JOINT VENTURE.

RE: Remedy Phase of a Grievance Involving Housekeeping Terminations; AAA Case No. 74 300 63 99

SUPPLEMENTARY OPINION AND AWARD

of

LUELLA E. NELSON
Arbitrator

December 27, 2000

Portland, OR

This Arbitration arises pursuant to Agreement between HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 2 ("Union"), and SAN FRANCISCO CENTRAL TRAVELODGE® JOINT VENTURE ("Employer"), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

The Arbitrator issued her Opinion and Award on the merits on May 3, 2000, as follows:.

1. There was not just cause for the termination of the grievants.

2. As a remedy, the grievants shall be reinstated to their prior positions and made whole for the loss of wages and benefits occasioned by their termination, less interim earnings.

3. The Arbitrator retains jurisdiction over the remedy portion of this Award and any disputes arising therefrom.

Thereafter, the parties notified the Arbitrator that they were unable to agree regarding certain aspects of the remedy. Hearing was held on September 12, 2000, in San Francisco, California. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. Both parties filed post-hearing briefs on or about November 14, 2000.

APPEARANCES:

On behalf of the Union:

Kim C. Wirshing, Esquire, Grievant Officer/Attorney, HERE Local 2, 209 Golden Gate Avenue, San Francisco, CA 94102

On behalf of the Employer:

Allison M. Woodall, Esquire, Hanson Bridgett Marcus Vlahos Rudy LLP, 333 Market Street, 23rd Floor, San Francisco, CA 94105-2173

FACTS

The dispute at this point involves whether the reinstatement order should be conditioned on Grievants' submission of proof of their current eligibility to work in this country. Proof of the Employer's post-termination inquiries was excluded during the merits phase of the case and offered in this phase.

On January 11, 2000, ten days before the arbitration hearing on the merits, the Employer's then-General Manager, Jake Johns, took the I-9 forms and supporting documentation submitted by six Grievants to the Immigration and Naturalization Service (INS) offices; he testified he was unable to locate the I-9 for the seventh Grievant, Patricia Rodriquez. He met with Special Agent Timothy Isenhart., explained that the Employer had an arbitration scheduled soon, and asked him to review the I-9 forms for the employees involved. He testified he spent a total of 20 minutes for this purpose with Isenhart.

Johns testified Isenhart went through the documents. His recollection was that Isenhart said "this is fake" a number of times and commented that some of the documents appeared to have the same typeface on the alien registration card and the social security card. On one occasion, Isenhart allegedly said, "This looks like a $20 green card from Mission Street." Johns did not see which employees' documents Isenhart was reviewing when these comments were allegedly made. He did not inquire into Isenhart's experience or qualifications as a documents examiner. No evidence exists that Isenhart compared the numbers on the alien registration cards with INS records to determine whether the numbers were authentic or issued to the persons whose names appeared on the cards.

Johns testified he requested that Isenhart confirm his comments in writing. Isenhart responded he would have to have a written request to do so. Johns left copies of the I-9's and documentation with Isenhart, returned to the hotel, and faxed his request to Isenhart. Two days before the arbitration, when he had not received a response to his request, Johns called Isenhart. He testified Isenhart told him his superiors had advised him not to offer any assistance at that time because an arbitration was pending, but that he could be subpoenaed to testify if needed. Isenhart was not subpoenaed to appear at the hearing on the merits.

Shortly before the hearing on the remedy phase, the Employer subpoenaed Isenhart to testify. On September 9, 2000, the Special Assistant U.S. Attorney sent a letter to counsel for the Employer confirming the following relevant response:

> ... Agent Isenhart may not testify without authorization from the appropriate department officials. Because of the circumstances of this case, a determination has not yet been made whether the regulations will permit authorization of Agent Isenhart to testify. Further discussion is needed, but a decision cannot be made by Tuesday morning. ...

Johns testified that, based on Isenhart's comments, he believed the documents were fake.

POSITION OF EMPLOYER

The Immigration Reform and Control Act (IRCA) makes it unlawful to knowingly employ an unauthorized alien. New hires must provide documentation that reasonably appears genuine. Even if an employee provides what appears to be valid documentation, an employer cannot continue to employ the person if it later learns s/he is not authorized to work. Knowledge that an employee is not authorized to work may be actual or constructive. Facts and circumstances leading to constructive knowledge may come from any source. Once an employer is put on notice from the INS that its employees may not be authorized to work, it has an affirmative duty to investigate, and cannot merely wait for further direction from the INS or rely on employees' representations that they are authorized. A failure to inquire further may lead to liability.

An unconditional order of reinstatement would require the Employer to violate IRCA. Johns' conversation with Isenhart put the Employer on constructive notice that six of the Grievants may not be

authorized to work. If the Employer must reinstate them without obtaining proof of their authorization to work, it faces possible sanctions for knowingly employing unauthorized aliens and participating in document fraud. The Employer cannot rely on the original I-9 documentation and cannot depend on Grievants' mere assurances of authorized status, which have never been given. As to Rodriquez, a conditional order of reinstatement should apply because the Employer is required to keep a completed I-9 form for each employee. Since the Employer does not have such documentation, she must be required to provide it.

The remedial order should be revised to require the Employer to reinstate Grievants provided that they present within a reasonable time proof of their eligibility to work in the United States. Such an order would not require the Employer to violate IRCA, and would tailor the remedy to federal restrictions. It would not require the Arbitrator to determine Grievants' immigration status; it would keep her out of the process and leave compliance with IRCA to the private parties to whom the law applies.

A conditional order of reinstatement would not require the Employer to violate IRCA's verification provisions. An employer is required to ask for verification of work status once it has constructive notice an employee is not authorized to work, even if it previously has inspected and accepted documents during the I-9 process. A request to see more or different documents, or a refusal to honor documents originally tendered, is not unlawful unless it is done with the specific intent of discriminating against an individual on the basis of national origin or citizenship status. If the inquiry is in good faith, it should not constitute unlawful discrimination, particularly when the failure to inquire could lead to a finding of constructive knowledge.

Grievants are not entitled to backpay for any period when they were not lawfully authorized to work. The Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and subsequent enactment of IRCA, support the argument that an undocumented worker is not available for work and therefore not eligible for backpay. *Sure-Tan* was a pre-IRCA case involving aliens who had left the country following their discharge; the Court held reinstatement must be conditioned on their legal reentry and they were not entitled to backpay unless they were "lawfully available for employment during the backpay period."

In *Local 512, Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) ("*Felbro*"), also decided before IRCA, the Ninth Circuit read *Sure-Tan* to turn on the fact that the aliens had left the country, and therefore held that undocumented aliens who remained in the country after termination were entitled to backpay. It noted an award of backpay would not induce an illegal entry. The passage of IRCA altered the premise underlying *Felbro*, and the Ninth Circuit has subsequently acknowledged that IRCA might preclude a backpay award to unauthorized aliens; see *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n. 11 (9th Cir. 1989).

IRCA made employment of an undocumented alien illegal. An undocumented alien is not lawfully available for employment when s/he lacks work authorization. In dicta, the Seventh Circuit stated that IRCA barred the NLRB from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment; see *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 (7th Cir. 1992). It is employees' burden to establish their legal entitlement to work, not the employer's burden to establish they were undocumented.

The Employer presented undisputed evidence that the INS advised it Grievants' work authorization documents were fraudulent. To the extent that they did not have legal authorization to work for any period from their terminations to now, they are not entitled to backpay. Any backpay award should be conditioned on their establishment of lawful entitlement to be present and employed.

The post-termination evidence is relevant to and warrants a modification of the remedial order. In January 2000 the INS confirmed the Employer's belief that Grievants' documentation was fraudulent. Post-termination evidence is a viable basis for limiting the remedy. The Employer should not be required to reinstate Grievants, then terminate them based on the post-termination evidence. Reinstatement is not merely undesirable; a legal impediment exists to reinstatement. It is not practical to require the Employer to reinstate Grievants and thereafter address the issue of their fraudulent documentation. Such an order would constitute an exercise in futility and run counter to national labor policy, which favors quick resolution of labor disputes outside the courtroom.

POSITION OF THE UNION

The Employer admits Rodriquez' I-9 was not examined by Isenhart, yet continues to lump her in with the six Grievants whose forms were provided to the INS. The Employer has no evidence to indicate Rodriquez is not authorized to work or to be reinstated. At a minimum, she should be immediately returned to work and made whole pending the final outcome of this proceeding.

The Employer seeks to win in a remedy hearing what it lost in the underlying arbitration. Although the terminations were not for just cause, the effect would be same as if just cause had been found: Grievants would be denied reinstatement and backpay. The Employer's position is outrageous and contrary to all notions of fairness and justice. The after-acquired evidence is not relevant to this case, but could be relevant if the Employer took some additional action against one or all of the Grievants after their reinstatement.

The Arbitrator has already disposed of the issues raised by the Employer by finding the circumstances that led to the terminations were insufficient indicia of just cause. The same information is now being cited as a justification to bar any remedy pending reverification. The information the Employer had at the time of termination was not enough to give the Employer constructive knowledge that Grievants lacked proper work authorization or to require reverification. The later meeting with the INS has no bearing on the terminations or the award. Any evidence gleaned from the meeting with the INS is tainted. Any questions regarding continuing eligibility to work can only be made under conditions that comply with IRCA. The meeting with the INS only days before the arbitration hearing is not in compliance with IRCA. It could be argued it was retaliatory. Any information obtained should not be considered.

No evidence was introduced having any bearing on Grievants' work authorization status. The INS has declined to make Isenhart available. There is no indication the INS has taken any actions regarding Grievants. There is no evidence the INS has made any administrative inquiry into their status, and there is no reason they should. There has been no finding or conclusion that they are not authorized to work. They should be immediately reinstated and made whole absent such findings.

Reverification is prohibited when an employee is returned to work by an arbitrator. An employer is not deemed to have hired an individual, triggering verification procedures, if the individual is "continuing in his or her employment...." Reinstatement of a wrongfully terminated employee by an arbitrator is deemed to constitute "continuing in employment." Grievants were found to have been wrongfully terminated by the Arbitrator and ordered reinstated. The Employer's request for reverification should be denied.

The Union has seen no evidence that any of the Grievants are not properly documented. The Employer's argument regarding work authorization status continues to be irrelevant. Even if the Employer had shown they were undocumented, they would still be entitled to backpay and reinstatement.

The Employer's reliance on *Sure-Tan* is misplaced. It was decided before IRCA was passed. Both the Second and Ninth Circuits interpreted *Sure-Tan* as addressing only the issue of backpay to undocumented workers who have left the country, and have held that backpay for undocumented workers who remain in the country is appropriate. See *Felbro, supra,* and *Rios v. Enterprise Assn. Steamfitters Local 638*, 860 F.2d 1168 (2d Cir. 1988). Further, this case is distinguishable from *Sure-Tan* because the Employer has not shown these workers are unauthorized.

Had the Employer shown Grievants were unauthorized, the appropriate remedy would be based on the NLRB's remedy enforced by the Second Circuit in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997). There, the Board granted conditional reinstatement, provided that the employees provide work authorization documents within a "reasonable time," and also ordered backpay for the same period. However, in that case, the evidence showed the employer had hired the employees knowing they were not authorized to work, and the discriminatees admitted they were undocumented. Here, such evidence has not been proffered, and Grievants should get unconditional reinstatement and backpay.

As the court found in *A.P.R.A.*, precluding a make-whole remedy would increase the incentive for employers to hire undocumented workers and frustrate the public policy underlying IRCA. The D.C. Circuit's recent decision in *Hoffman Plastics v. NLRB*, 208 F.2d 229 (D.C. Cir. March 17, 2000), although

vacated and awaiting rehearing, is instructive for the way the court indicated backpay should be calculated. The court held that backpay should be calculated from the time of the termination until a time when the employee could have continued working but for the unlawful termination. It noted that in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995), the Supreme Court rejected an absolute rule barring recovery of backpay, but instead held the remedy should be from the time of the unlawful discharge until the time the new information was discovered.

The Arbitrator should uphold her opinion and award. The Employer produced no evidence of the alleged unauthorized status, and therefore should find no solace in the case. Even if the Employer had introduced such evidence, the case law would, at a minimum, require conditional reinstatement and payment of backpay and benefits for the period until the Employer could prove it discovered such evidence.

The hearsay testimony regarding a meeting with the INS provides no specific information about Grievants. Johns could not identify which forms Isenhart was examining when he allegedly made disparaging comments about their authenticity. The INS informed Johns it did not want to offer any assistance to the Employer on this issue because of the arbitration. Although Isenhart generously offered to be subpoenaed, his superiors apparently believed this was not an appropriate forum for the INS. The INS did not pursue this matter on its own. Johns' hearsay testimony about this meeting should be given little weight.

The evidence introduced in this hearing was after-acquired. Johns testified he did not know when he again looked at the I-9 forms. The no-match letters did not provide evidence sufficient for termination; they also did not provide constructive knowledge of defective I-9's. Therefore, when the I-9's were re-visited months after the terminations, this was not continuing discovery based on the Employer's mistaken belief as to the significance of the no-match letters. There was no constructive knowledge of deficiencies in these documents prior to the terminations, and none at all for Rodriquez. Even when Johns went to the INS, he received no authoritative ruling on the authenticity of the documents. The Employer has produced no evidence Grievants should not continue their employment and be reinstated and made whole.

The evidence at hearing shone no new light on this dispute. It was based on hearsay and unsupported by any documented findings by the INS. It was acquired long after the termination. The Arbitrator should affirm her opinion and award without modification or amendment, and order Grievants reinstated and made whole for all losses.

OPINION

The Arbitrator's retention of jurisdiction for purposes of resolving disputes over the remedy does not extend to re-visiting the merits of the decision. Instead, her focus must be on whether a make-whole remedy should be interpreted to permit the restrictions urged by the Employer. In this regard, the burden of proof rests with the Employer to prove the appropriateness of a lesser remedy than that normally available to grievants who have been discharged without just cause. No evidence exists that any of the Grievants in this case engaged in any misconduct after their termination. The sole basis for the requested limitations on the remedy thus is the asserted impact of the immigration laws. The Employer changed the status quo by discharging Grievants without just cause, and without making the inquiries it now seeks to incorporate in the remedy. The benefit of the doubt as to the scope of the remedy must, therefore, go to Grievants.

The Arbitrator draws her authority from the Agreement. She would exceed her authority were she to order a different remedy from that which would otherwise flow from the Agreement simply because of an asserted conflict with the immigration laws. Simply put, the arbitration forum is not the appropriate place for the Employer to seek relief from the collateral consequences of its contractual violation.

In any event, as discussed below, room for doubt exists as to whether the normal remedy is any more likely to violate the immigration laws than would the limitations on the remedy which the Employer seeks. The Arbitrator is the first to admit that she is not expert in immigration law. However, her review of cases and regulations has demonstrated that, in the area of documentation, employers must walk a fine line between inquiring too little (and thus hiring or continuing to employ undocumented workers in circumstances that constitute constructive knowledge of their undocumented status) and inquiring too much (and thus

running afoul of anti-discrimination provisions). An arbitration hearing on the remedy phase of a grievance is not the place to litigate or decide whether discriminatory or retaliatory motives underlie a request to condition reinstatement or backpay on additional documentation.

REINSTATEMENT

The parties' arguments describe an employer's paperwork obligations at the time of hire and upon notice that particular documentation is fraudulent. An employee who is returned to work by an arbitrator is deemed to be "continuing in his or her employment," not a new hire. Thus, unless other circumstances warranted reverification, neither the Agreement nor the law would require Grievants to submit proof of authorization to work before being reinstated.

The decision on the merits discussed the problems with the inferences the Employer drew from the information it had at the time it discharged Grievants. The Employer argues that Johns' later meeting with Isenhart, coupled with the earlier information, gave it constructive knowledge that Grievants' documents were false. If the Employer had constructive knowledge, it would be obligated under the immigration laws to inquire further. The cases cited by the Employer are very instructive regarding the clarity of the information required to show constructive knowledge.

In *Mester Manufacturing Co. v. INS*, 879 F.2d 561 (9th Cir. 1989), INS inspectors informed the employer that particular employees were under suspicion of using false "green cards," and verified that the alien registration numbers on the documents submitted by those employees did not match the INS' records. In *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1990), the INS informed the employer verbally and in writing that the employees' alien registration numbers were either non-existent or belonged to someone else. Another example of constructive knowledge cited in the INS regulations is where later conduct is inconsistent with the employee's purported status, such as a labor certification application.

The cited cases demonstrate that the INS maintains records of alien registration numbers. Yet, no evidence exists that the Employer requested that Isenhart or others at the INS compare Grievants' alien

registration numbers with those records, nor that the INS ever informed the Employer of the results of such a comparison. Indeed, the INS has not even acceded to the Employer's request for written verification of Isenhart's alleged observations about the documents. The INS therefore has not provided the kind of information which led to findings of constructive knowledge in the cited cases. The Employer also has not shown which documents Isenhart asserted were false, nor established a foundation for his assertions.[1] Johns' hearsay testimony regarding Isenhart's comments therefore does not warrant significant weight. On this record, it is doubtful that the information gathered by Johns would have permitted the Employer to require reverification if Grievants had remained in its employ; the fact that it terminated them does not increase the justification for reverification nor warrant the Arbitrator's imposition of that condition on reinstatement.

The situation involving Rodriquez is an interesting one. INS regulations require employers to maintain I-9's for employees hired after May 31, 1987, for three years after the date of hire or one year after the date of termination, whichever is later. They are silent regarding what an employer may or must do to meet this requirement if it has lost or destroyed an I-9, and the answer to that question is far from self-evident. On the one hand, an employer could undermine IRCA's protections against discrimination if it could prompt reverification simply by discarding I-9's. On the other, the risk of liability for not maintaining I-9's continues as long as an employer continues not to have an I-9 for a current employee who was hired after mid-1987. The Arbitrator has found no administrative or court ruling balancing these considerations. It is, however, unnecessary for the Arbitrator to determine in this case where the balance point lies. No evidence exists of the date on which Rodriquez was hired. Thus, on this record, the Employer has not shown that it was required to maintain an I-9 for her. Questions regarding its obligations under immigration law therefore

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[1] In this regard, the Arbitrator is not a qualified documents examiner. However, she notes that even documents examiners who have appeared before her have declined to render opinions regarding authenticity of documents where the original document was not available. The Employer accepted those documents when it hired Grievants, at a time when it had an opportunity to examine and copy the originals.

must be left to the INS and the courts. It is sufficient for these purposes to conclude that the Employer's possible violation of IRCA's paperwork requirements does not warrant a change in its reinstatement obligations under the Agreement.

For all the above reasons, it is concluded that Grievants' reinstatement is not conditioned on submission of additional documentation. In reaching this conclusion, the Arbitrator expresses no opinion regarding what, if any, right or obligation the Employer may have to inquire further into their immigration status once it has reinstated them.

BACKPAY

A make-whole remedy ordinarily includes backpay and benefits from the date of discharge until the date of reinstatement, with a deduction for interim earnings. The burden of showing that backpay should be precluded for any portion of the backpay period falls on the Employer.

Both parties argue by analogy to cases in which backpay has been ordered by the National Labor Relations Board (NLRB) or sought on unlawfully discharged employees' behalf by the Equal Employment Opportunity Commission (EEOC). The NLRB visited the issue of backpay for unlawfully discharged undocumented workers both before and after the passage of IRCA. Initially, it held that such employees were entitled to backpay even if they left the country following their discharge. That position was struck down by the Supreme Court in *Sure-Tan, supra.* In the *Felbro* and *Rios* cases cited by the parties, the Ninth and Second Circuits held that *Sure-Tan* turned on the fact that the employees had left the country. In this regard, they noted that a grant of backpay would not induce an illegal entry if the employee was already in the country, and that backpay furthered other important interests.

The Ninth Circuit later affirmed an award of backpay to undocumented workers as a remedy for a pre-IRCA discharge under challenge by the EEOC. *Hacienda Hotel, supra.* The court dropped a footnote noting it did not have to decide whether a different result would have followed if IRCA had been in effect, and suggesting the subsequent enactment of IRCA "may" have changed the mix of policy considerations

allowing backpay for undocumented workers. However, the Ninth Circuit has not followed up on this suggestion. A suggestive post-IRCA decision out of that circuit is *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999), where it held that undocumented workers were eligible to vote as "employees" under the NLRA.

In the wake of *Sure-Tan* and IRCA, NLRB policy has been that unlawfully discharged undocumented workers are entitled to backpay from the date of discharge to either the date of their reinstatement or the date on which they fail, after a reasonable time, to produce documents permitting the employer to meet IRCA's documentation requirements. The Seventh Circuit has questioned this policy in dicta in *Del Rey*, *supra*. However, the Second Circuit upheld the NLRB's policy in *A.P.R.A.*, *supra*, while questioning the Seventh Circuit's rationale. The District of Columbia Circuit held in *Hoffman, supra,* that the NLRB properly ordered limited backpay to an undocumented worker whose status was established by his admission while testifying in a compliance proceeding. In that case, the NLRB cut off backpay as of the date when the employer learned the employee had misrepresented his status. The majority and dissenting opinions provide a comprehensive review of the views of the various circuit courts on this point.

While the circuits remain in conflict over the precise limits of the backpay entitlement of unlawfully-discharged undocumented workers, they are in agreement that the issue arises only if the employee is proven to be undocumented. In this case, the Employer has not proven that any of the Grievants were undocumented. At most, it has shown that it began to suspect they might be undocumented. However, as discussed above and in the decision on the merits, it took insufficient steps to determine whether its suspicions were founded. It did not request information that the cases suggest is available from the INS, and the INS has declined to confirm Isenhart's alleged conclusions.

For all the above reasons, it is concluded that the Employer has not shown that the make-whole remedy should include less than full backpay for Grievants.

CONCLUSION

No contractual basis has been shown for conditioning either reinstatement or backpay on Grievants' furnishing of additional documentation. While the Arbitrator has no authority to interpret or enforce the immigration laws, the Employer has not shown a substantial likelihood that reinstatement or backpay without additional documentation would violate those laws. Therefore, the remedy shall not be interpreted either to condition reinstatement on the submission of proof of work authorization or to limit or deny the make-whole remedy.

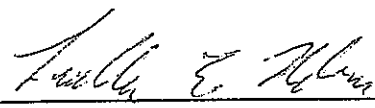
The Arbitrator will continue to retain jurisdiction over any other disputes arising out of the remedy ordered in this matter.

AWARD

1. The remedy ordered by the Arbitrator shall not be interpreted to (a) condition reinstatement on submission of proof of work authorization or (b) limit or deny the make-whole remedy ordered.

2. Accordingly, the grievants shall be reinstated to their prior positions and made whole for the loss of wages and benefits occasioned by their termination, less interim earnings.

3. The Arbitrator retains jurisdiction over the remedy and disputes arising therefrom.



LUELLA E. NELSON - Arbitrator