



July 27, 2010

VIA E-MAIL

Arvind Ganesan
Director
Business and Human Rights Division
Human Rights Watch
1630 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20009

Dear Mr. Ganesan:

This letter is in response to your July 9, 2010 letter to Pierre-André de Chalendar concerning a report that is being drafted by Human Rights Watch. We understand your report will address alleged violations of workers' freedom of association in the United States by European-based multinational firms. In your letter, you reference several cases concerning Saint-Gobain relating to its Worcester and Niagara Falls facilities that are under consideration by Human Rights Watch to be included in its report.

As I informed you in my March 17, 2009 letter, we believe that Saint-Gobain's actions in these cases were appropriate and entirely consistent with Saint-Gobain's membership in the UN Global Compact, our endorsement of the OECD Guidelines and the UDHR, and our Principles of Conduct and Action. We also believe that Saint-Gobain's actions in no way demonstrate any violations of workers' freedom of association under international principles or U.S. labor law. Rather, these cases contain examples of workers' freedom of association rights being respected and recognized. In both cases, the workers at these Saint-Gobain facilities voluntarily chose, by free and fair elections, that they no longer wished to be represented by their respective unions. In response to your letter, we provide some additional information concerning those cases below. We also bring several additional matters to your attention that are relevant to your report.

First, in your letter, you noted that Human Rights Watch takes "as its point of reference international standards on freedom of association," including the "OECD Guidelines." In looking at this question, you should be aware of the fact that the UAW (the union involved at Saint-Gobain's Worcester facility) brought a complaint alleging violations of the OECD Guidelines against Saint-Gobain that included allegations relating to the same cases that you reference in your letter and that, after a lengthy investigation, the United States National Contact Point ("USNCP") to the OECD ultimately decided not to take any action with respect to this complaint. Indeed, the USNCP made no statements critical of Saint-Gobain's actions when it

issued its final statement concerning this complaint in January 2007. (I have attached a copy of the USNCP's final statement for your reference).

The UAW submitted a letter in June 2003 to the USNCP for the OECD alleging violations by Saint-Gobain of the Employment and Industrial Relations chapter of the OECD Guidelines for Multinational Enterprises in connection with the Worcester facility. These allegations were the subject of a multi-year investigation and assessment by the USNCP, during which time the USNCP met with the parties concerned, exchanged letters and telephone calls, and consulted with the National Labor Relations Board ("NLRB") and the Federal Mediation and Conciliation Service. Among the evidence that was submitted to the USNCP by the union were the same cases that you have referenced in your letter. After engaging in this process, the USNCP decided not to take any action and decided that it would instead continue to monitor the developments of the dispute between the parties.

On January 5, 2007, the USNCP issued a final statement concerning the matter. The USNCP noted that, as a result of a decertification petition filed by several Saint-Gobain bargaining unit employees, Saint-Gobain employees voted to decertify the union by a vote of 350-309 during an election held in January 2005, and that the results of that election were certified by an NLRB administrative law judge on March 24, 2006. The USNCP further noted that the union issued a statement on April 28, 2006, in which it acknowledged that its efforts to win majority support for union representation had not been successful, that it no longer represented Saint-Gobain employees, and that it had decided to close its Worcester office.

The USNCP concluded its statement by stating that "[a]s a result of these developments, the USNCP decided to discontinue its monitoring of the dispute and to prepare this final report concluding its involvement in the matter." (Statement by the United States NCP, January 5, 2007). It bears noting that at no time during its investigation of the union's allegations did the USNCP ever issue any statement concluding or in any way suggesting that Saint-Gobain had violated the freedom of association of any of its employees.

Second, you reference case 1-RD-2003 in your letter, but do not mention the seminal NLRB decision in that case that directly involved employees' freedom of association. Case 1-RD-2003 involved a decertification petition that had been filed by Saint-Gobain employee Wayne Gregoire on February 3, 2003. The Regional Director of Region One of the NLRB dismissed Gregoire's petition in October 2003, finding, without holding a hearing, that an unfair labor practice charge concerning interim health care filed against Saint-Gobain by the union had tainted the petition, warranting its dismissal. Gregoire appealed this decision to the NLRB, arguing that the rights of employees under U.S. labor law to democratically choose their bargaining representatives should be respected and his petition should be allowed to move forward to an election. The NLRB agreed with Gregoire, overturning the Regional Director's dismissal of his petition and ordering its reinstatement. *Saint-Gobain Abrasives*, 342 NLRB 434 (2004). The NLRB concluded that it was an error for the Regional Director to dismiss the decertification petition without first holding a hearing, because otherwise "the result is that the employees are deprived, at least for now, of their Section 7 rights on the question of union representation." This decision therefore concretely established, for the first time in NLRB history, that factual causation hearings needed to be conducted prior to the dismissal of decertification

petitions in order to ensure that the representation rights of employees are adequately protected.

As a result of the NLRB's decision, the rights of Saint-Gobain employees to determine their own bargaining representative were respected. The parties took part in the first decertification causation hearing in the NLRB's history in the fall of 2004. After the hearing was concluded, the NLRB issued its decision in case no. 343 NLRB No. 68 (2004), dismissing the interim health care unfair labor charge against Saint-Gobain upon which the Regional Director had initially relied in dismissing the petition. As a result, Gregoire's decertification petition was able to move forward, culminating with the decertification election that occurred in January 2005. Rather than any example of "violations" of freedom of association, Case 1-RD-2003 and its progeny instead demonstrate broad support for the principle of employee freedom of association, which we submit should be included in any final report that your organization develops concerning these matters.

You reference case no. 343 NLRB No. 68, which involved a technical violation relating to a change in hours of work of a small number of employees as a result of a downturn in business. The change in question occurred *before* Saint-Gobain had received notification from the NLRB of the final certification of the union. After Saint-Gobain received a copy of the Board's decision certifying the UAW as employee bargaining representative on January 7, 2002, no further reduction of employee hours ever occurred. Indeed, as noted by the NLRB, when the Regional Director initially dismissed the employee decertification petition in October 2003 based on the allegations in case no. 343 NLRB No. 68, she did not conclude that this change in the hours of work was significant enough to warrant dismissal of the decertification petition. *See Saint-Gobain Abrasives*, 342 NLRB 434, 435 (2004).

Third, you state that you will address the ALJ's findings in case no. 1-CA-41623 concerning the company's use of temporary employees. In that decision, despite ruling against the company with respect to its use of temporary employees, the ALJ still affirmed the results of the decertification election where Saint-Gobain employees voted to decertify the union. Saint-Gobain very strongly disagreed with the ALJ's decision concerning its use of temporary employees, which it believed was contrary to both the factual record and the proper legal precedent. However, the Company chose not to appeal the decision because, by affirming the result of the decertification election, the ALJ's decision ended five years of labor unrest that had significantly disrupted not only the company, but also the local community. The ALJ's findings therefore were never tested on appeal.

Fourth, you reference allegations of objectionable conduct in connection with the decertification election, none of which were deemed to be significant enough by the ALJ to overturn the results of the decertification election. The t-shirt incident that you reference was a single, isolated incident involving one employee and low-level supervisor, who was immediately reprimanded by management for his actions. Moreover, with respect to the incident where temporary employees were placed in jobs after a voluntary separation, the ALJ noted in his decision that this violation was "inadvertent" based on a miscommunication, and the ALJ explicitly stated in the decision that he had no doubt the violation would not have occurred if the accidental miscommunication had not occurred.

With respect to the Niagara Falls case you reference, 334 NLRB No. 60, the election in question was determined by a single vote, 18-17, with serious questions surrounding the voting eligibility of one employee who had accepted a job with another employer, but still voted in the election. In order to ensure that the election was decided properly, given the close election margin and the legitimate questions raised about this one voter, Saint-Gobain chose to exercise its legal right to challenge the NLRB certification of the union so that the NLRB and, ultimately, the U.S. Court of Appeals for the District of Columbia, could weigh in on the matter.

On August 28, 2000, an objection to the election was filed by the Company with the NLRB's Regional Director because an individual who voted in the election had begun working a full-time position two days earlier with another employer. The individual had been on an approved vacation leave for that week. He resigned two days after the election. Under an established policy he had been obligated to report his outside employment. If the Company had known about the outside employment, it would have removed him from the payroll and challenged his right to vote in the election. The Company was advised by two employees after the election that the union had urged this individual not to resign until August 30, 2000 when the Company would no longer be able to file objections to the election.

In ruling on these objections to the election results, the NLRB's Regional Director found that individual who had cast the contested vote had been on Company approved vacation leave during the week of the election, was still employed in the unit during the payroll eligibility period and thus had worked for the Company through the election date, and he had voted without challenge. The Regional Director recommended to the Board that the objection be overruled and the union certified.

It is important to note that decisions in representation proceedings are not directly appealable to the Court of Appeals. The only method for an employer to challenge a certification of an election is to engage in the procedural mechanism utilized by Saint-Gobain in this case, which requires an employer to initially refuse to bargain with the union and wait for the NLRB to issue a decision finding a violation of section 8(a)(5) of the National Labor Relations Act, which then can be appealed by the employer to the Court of Appeals, where the employer may finally challenge the previous decision that there had been a valid election. These types of cases are referred to as "certification test" or "technical Section 8(a)(5)" cases, and do not suggest that an employer is engaging in any improper or illegal activity. *See How to Take A Case Before the NLRB*, Ch. 10, Section VII.A, at 430 (BNA 2008).

After the D.C. Circuit upheld the findings of the Regional Director, the Company thereafter commenced contract negotiations in good faith with the Steelworkers, engaging in some 33 sessions over the ensuing year but not making substantial progress towards a collective bargaining agreement. During the second half of 2003 a group of bargaining unit employees became disenchanted with their representation with the union, and hired their own attorney to assist in the NLRB process to decertify this union.

On March 18, 2004, 18 bargaining unit employees filed a petition for a decertification election with the NLRB. The NLRB scheduled a representation case hearing for March 29, 2004, but no hearing was held because, prior to the hearing, the parties stipulated to the election and the Acting Regional Director approved the

Stipulation of Election. On April 28, 2010, an overwhelming majority of Saint-Gobain employees in Niagara Falls voluntarily chose to decertify the union in 2004 by a vote of 21-9. Indeed, the fact that these employees decided to decertify the union further legitimizes the reasonableness of Saint-Gobain's initial challenge.

It is important to note that the Steelworkers never filed any unfair labor practice charges during the year when bargaining took place, nor did it file any objections to the decertification election or otherwise contest the results. The rights of the workers to disassociate themselves from a union which they believed no longer adequately represented their interests was thus exercised in accordance with applicable law, a process which conforms with the standards you have referenced in your letter.

We trust that this information is helpful to you as you finalize your report. [Given the complexity of these cases, we would also be happy to meet with you to discuss these matters further before you complete your report.] Please contact us if you have any questions or need any further information.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Colas', with a stylized flourish at the end.

Gilles Colas

Saint-Gobain General Delegate, North America

cc: M. Pierre-André de Chalendar
Mme. Dominique Elineau