



A Strange Case

**Violations of Workers' Freedom of Association in the United States
by European Multinational Corporations**

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I. Summary

This letter is to inform you of our intent to begin accepting applications to hire permanent replacement workers on December 21, 2005, to fill our open New Richmond production positions.... If you are interested in returning to work please contact [the company] by December 19, 2005.¹

On December 12, 2005, management at the Bosch Doboy packaging equipment factory in New Richmond, Wisconsin, sent this letter to workers giving them one week to return to work or see the company hire strikebreakers to permanently replace them. Bosch workers had exercised the right to strike on November 1, 2005. Threatened with permanent replacement, employees returned to work on December 19.²

While using the threat of hiring permanent replacement workers to break a strike is legal in the United States, the International Labor Organization (ILO) Committee on Freedom of Association, the authoritative interpreter of applicable international law, has made clear that the practice is incompatible with workers' freedom of association. As the Committee framed the issue, "The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests.... [T]his basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker ..."³

The New Richmond plant is owned by the German multinational firm Robert Bosch GmbH, which has more than 270,000 employees in 60 countries. With US\$50 billion in 2010 revenues, Robert Bosch was ranked number 129 on the most recent Fortune Global 500 list.⁴ Robert Bosch has emphasized its adherence to international labor standards, which include ILO rulings on freedom of association and the use of permanent replacement workers such as the one above. Bosch has made this commitment clear in writing:

¹ Letter from plant manager Mark Hanson to Bosch Doboy employees, December 12, 2005 (copy on file with Human Rights Watch).

² John Brewer, "Strike ends at Bosch Doboy; 90-plus workers agree to concessions," *Saint Paul Pioneer Press*, December 20, 2005, p. 1B.

³ International Labor Organization, Committee on Freedom of Association, *Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, para. 92, Report No. 278, Case No. 1543 (1991).

⁴ Fortune, "Global 500," at <http://money.cnn.com/magazines/fortune/global500/2010/index.html> (accessed August 27, 2010).

Relations with associate representatives and their institutions

Within the framework of respective legal regulations - insofar as these are in harmony with the ILO Convention no. 98 - we respect the right to collective bargaining for the settlement of disputes pertaining to working conditions, and endeavor together with our partners to work together in a constructive manner marked by mutual confidence and respect.

The **UN Global Compact's** ten principles provide additional guidelines. We joined the initiative in 2004 ...

Bosch will not work with any suppliers who have demonstrably and repeatedly failed to comply with basic ILO labor standards.⁵

The decision of Bosch management to threaten to hire permanent replacement workers in Wisconsin directly violated this commitment to abide by ILO standards and runs counter to the company's practice at home in Germany.

As this report shows, the Robert Bosch example is not an isolated one. Europe-based companies that proclaim their adherence to international labor law and standards that are embodied in their home countries' domestic laws, and largely complied with, too often fail to live up to such commitments when they begin or take over operations in the United States, where the law is less protective of workers' freedom of association.

In some cases the European companies act directly contrary to ILO conventions and other international instruments, adopting practices common in the United States but anathema in Europe. In other cases they engage in threats and forms of intimidation and coercion that violate US labor law as well as international standards.

Nothing in the US labor law system prevents European corporations from complying with international norms that surpass American standards or from complying with US laws that meet international standards. Nothing prevents them from implementing voluntary corporate codes of conduct with "best practices" set higher than minimum legal standards, or from simply treating workers and their unions in the United States as respectfully as they do at

⁵ See Bosch "Corporate Social Responsibility" page at <http://www.bosch.com/content/language2/html/2275.htm> (accessed September 9, 2009). The UN Global Compact's Principle 3 states: "Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining."

home. Put another way, nothing in US labor law requires employers to aggressively campaign against workers' organizing efforts, break strikes with permanent replacements, or otherwise fail to meet international labor standards and their own proclaimed values and codes of behavior.

European companies have a choice as to how they will conduct labor relations policy in the United States. They can implement their home-based values and practices of respect for workers' organizing rights and acceptance of collective bargaining as a normal way of engaging with employees in their US operations, or they can convert to forms of management interference with workers' organizing and bargaining efforts that are all too common in the United States but almost unheard of in Europe.

As demonstrated in the cases detailed in this report, some of the largest and best-known European employers in the United States have too often chosen the second option. They seem to forget their sensitivity to social responsibility concerns and much-touted public commitments to workers' rights. They break with home-based policies that are relatively respectful of workers' organizing efforts and collective bargaining, and that view "social dialogue" as a core element of industrial relations. Instead, they exploit the loopholes and shortcomings in US labor law that violate international human rights standards or violate US law that comports with international standards to frustrate workers' exercise of their right to freedom of association. The European Dr. Jekyll becomes an American Mr. Hyde.⁶

Many European multinational corporations embrace the Universal Declaration of Human Rights and United Nations human rights covenants. They declare support for declarations and conventions of the International Labor Organization, labor guidelines of the Organization for Economic Cooperation and Development, principles of the United Nations Global Compact, the Charter of Fundamental Rights of the European Union and other international labor rights documents.

In similar measure, many European firms active on a global scale adopt corporate social responsibility principles, policies, programs, and codes of conduct on workers' rights. They join the United Nations Global Compact, the Global Reporting Initiative, Corporate Social Responsibility (CSR) Europe, and CSR forums in their own countries. They deal forthrightly with workers' representatives in European trade unions and works councils, often celebrating the "social dialogue" that marks labor relations in Europe.

⁶ Robert Louis Stevenson's novella *The Strange Case of Doctor Jekyll and Mr. Hyde* is the source of the title of this report.

In all these instruments and settings, workers' freedom of association—the right to organize trade unions and to bargain collectively—is a centerpiece of human rights and corporate social responsibility pledges. European companies appear to hold a deep commitment to workers' human rights through their publicly declared statements and promises.

Foreign direct investment by European firms in the United States has multiplied in the past decade. It is driven not only by the exchange rate differential between the US dollar and the Euro and other European currencies, which makes US-based assets a bargain for European investors. It is also fueled by the productive American workforce, huge US industrial and consumer markets, and by a legal system that enforces property rights and commercial contracts, the same reasons that Europe is still the biggest target of investment by American companies.

From a human rights standpoint, other features of the US legal system offer a more sinister incentive. US labor law falls short of international standards in many important respects, often failing to protect workers' right to organize and to bargain collectively.

Some provisions of American labor law violate international human rights standards on their face. As noted above in the Bosch example, US law allows employers to permanently replace workers who exercise the right to strike over economic issues, such as wages and benefits. US law also allows employers to mount one-sided, aggressive workplace pressure campaigns against workers' organizing efforts, marked by mandatory "captive-audience" meetings and one-on-one supervisor-employee meetings scripted by anti-union consultants, without comparable opportunities at the workplace for employees to hear from union representatives or for pro-union workers to convey their views to fellow workers.

Contrary to international standards, US law excludes millions of workers from labor law protection: farm workers, household domestic workers, low-level supervisors, so-called "independent contractors" who are actually dependent on a single employer for their livelihood, and many more. The ILO's Committee on Freedom of Association has found further violations in weak and unavailable remedies for workers and unbalanced remedies favoring employers in the US labor law system.

Other US legal provisions comply on their face with international standards but fail in application. For example, it is unlawful to threaten or to discharge workers covered by labor laws for trying to form a union. It is unlawful to engage in "bad faith" collective bargaining. But as noted above, these provisions are not adequately enforced in a remedial scheme

marked by delays and slap-on-the-wrist penalties that fail to deter or punish violators, another breach of international labor rights.

In large part as a result of the weaknesses in US law and practice, many US employers respond to workers' organizing and bargaining efforts with aggressive, even ruthless campaigns of interference, intimidation, and coercion to break them, practices that violate international standards and often even US law itself. Such campaigns are commonplace among US companies that operate in a corporate culture imbued with strong anti-union beliefs and practices. This report finds otherwise respected European multinational firms at times joining their ranks.

We do not suggest in this report that all European companies violate workers' rights in their American operations, nor that the cases in this report reflect across-the-board behavior by the relevant firms. Some of the cases do indicate a general policy of resistance to workers' organizing efforts in US workplaces, and call into question companies' public commitment to freedom of association. Others recount failures to meet international standards or US labor law violations by firms at specific locations, which may not be reflective of practices at other locations.⁷

We also do not argue for any specific outcome in the organizing, bargaining, or strike disputes detailed in this report. The rights to organize, bargain collectively, and strike unfold seamlessly from the basic right to freedom of association. But they should not be equated with outcomes for the exercise of these rights. Workers do not have a right to win a union election. They do not have a right to win their collective bargaining demands. They do not have a right to win a strike on their terms. Nothing in this report should be seen as implying otherwise. However, we do argue that employers must respect and the government must protect workers' rights as set forth in domestic law and international standards.

A central conclusion of this report is that firms' voluntary principles and policies are not enough to safeguard workers' freedom of association. They can be important initiatives, but only when they contain effective due diligence, oversight, and control mechanisms. Otherwise, as shown here, shortcomings in US labor law create enormous temptation—especially among US managers not sufficiently overseen by European parent company

⁷ The US non-governmental organization American Rights at Work issues an annual "Labor Day List" of companies with good records of respecting workers' organizing and collective bargaining rights in the United States. Among them in recent years are Spain-based Gamesa Technology International, a manufacturer of wind energy systems, and SCA Tissue North America, owned by Sweden's Svenska Cellulosa Aktiebolaget. See American Rights at Work, "Labor Day List," <http://www.americanrightsatwork.org/labor-day-list/> (accessed August 27, 2010).

officials—to take advantage of them by acts inconsistent with international norms. The pattern that emerges in the examples presented here suggests inadequate due diligence and internal performance controls to prevent and correct US management actions that run afoul of international standards.

Building on prior research by Human Rights Watch and others, this report also gives additional examples of flaws in US labor law that give management the power, in a context of severe disparity in workers' access to information and the power imbalance inherent in the employment relationship, to use captive-audience meetings, one-on-one anti-union meetings between supervisors and employees, threats of permanent replacement, and other methods permitted by US law to thwart workers' organizing efforts. In many cases studied here, moreover, the European firms *did* violate US law. But even if employers cross the line and commit unfair labor practices, US labor law does not provide for penalties or other sanctions sufficient to dissuade repeat violations.

At the end of this report, we offer recommendations to European companies to improve their monitoring of US operations to ensure respect for labor rights, to European governments and institutions to improve their oversight of European company labor practices in the United States, and to US lawmakers to bring US law into closer conformity with international freedom of association standards.

After conducting preliminary research for this report and again shortly before publication, Human Rights Watch invited all companies mentioned in the report to present their position on events recounted in the case studies. Some companies said they believed that their actions were consistent with US law and international standards. Others companies said that actions found to be unlawful were isolated instances and pointed to a larger record of respecting workers' freedom of association in other US facilities. Others pointed to developments since the events as indication of progress in respect for workers' freedom of association. Key points of the companies' responses are included in the report, and full texts of the letters are available at the Human Rights Watch website, www.hrw.org.

II. Freedom of Association under International Law

Freedom of association is well-established in international law, and its ramifications for workers' rights to organize and to bargain collectively are elaborated by a series of ILO conventions and decisions of ILO oversight bodies.⁸ Under ILO Convention 87, "Workers ... without distinction whatsoever, shall have the right to establish and ... to join organizations of their own choosing without previous authorization."⁹ ILO Convention 98 says, "Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.... Such protection shall apply more particularly in respect of acts calculated to ... [c]ause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities."¹⁰ Convention 98 further provides, "[W]orkers' ... organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration."¹¹

The United States has not ratified either of these core ILO conventions. However, the ILO Declaration states that "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions."¹²

The ILO Committee on Freedom of Association (CFA), which examines complaints from workers' and employers' organizations against ILO members and whose jurisdiction the United States has recognized, has stated, "When a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and

⁸ ILO standards are the main but not the sole source of international labor norms. United Nations declarations and covenants, UN resolutions on business and human rights, the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises, European human rights instruments and European Union directives on freedom of association, corporate social responsibility initiatives, and other instruments and mechanisms set out a broader context of international standards on freedom of association. They fall at various points on a continuum between binding obligations and non-binding expectations.

⁹ ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, adopted July 9, 1948, 68 U.N.T.S. 17, entered into force July 4, 1950, art. 2.

¹⁰ ILO Convention No. 98 concerning the Right to Organise and Collective Bargaining, adopted July 1, 1949, 96 U.N.T.S. 257, entered into force July 18, 1951, art. 1.

¹¹ *Ibid.*, art. 2(1).

¹² *Ibid.*

the Declaration of Philadelphia, including the principles of freedom of association.”¹³ The CFA has also declared that ILO members, by virtue of their membership, are “bound to respect a certain number of general rules which have been established for the common good.... Among these principles, freedom of association has become a customary rule above the Conventions.”¹⁴

Acts of Interference

The Committee on Freedom of Association has repeatedly underscored the importance of adequate laws banning interference with workers’ organizing and bargaining rights and adequate penalties and mechanisms to ensure compliance. The CFA has noted:

The basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed.... Legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98.¹⁵

The CFA has identified such “acts of interference” in its handling of thousands of complaints submitted under Conventions 87 and 98 in the past half-century. The following are some of the CFA’s examples of employer conduct constituting prohibited interference with workers’ organizing and bargaining rights:

¹³ ILO Committee on Freedom of Association, *Digest of Decisions: Fundamental obligations of member States in respect of human and trade union rights (Procedure in respect of the Committee on Freedom of Association and the social partners: Function of the ILO and mandate of the Committee on Freedom of Association)*, 1996, para. 10. The ILO Committee on Freedom of Association reviews the complaints, all of which must allege violation of the right to freedom of association, and makes determinations based on the facts and applicable legal standards and recommends measures to resolve the disputes.

¹⁴ ILO Committee on Freedom of Association, *Fact-Finding and Conciliation Commission Report: Chile*, 1975, para. 466.

¹⁵ ILO Committee on Freedom of Association, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifteenth (Revised) edition (2006), paras. 818, 822. The CFA’s specialized mandate covers violations of Conventions 87 and 98 on freedom of association, the right to organize, and the right to bargain collectively; complaints may be filed against any member country whether or not it has ratified the conventions. The United States has not ratified either convention.

Engaging in violence, imposing pressure, instilling fear, and making threats of any kind that undermine workers' right to freedom of association, including by:

- creating an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities;
- pressuring or threatening retaliatory measures against workers for union membership or for engaging in legitimate union activities, including to cause withdrawal from union membership;
- attempting to persuade employees to withdraw authorizations given to a trade union to unduly influence the choice of workers and undermine the union;
- harassing and intimidating workers by reason of trade union membership or legitimate union activities, including to prevent the free exercise of trade union functions; and
- offering bribes to union members to encourage their withdrawal from the union.

Discriminating against or otherwise prejudicing workers with regard to their employment because of legitimate trade union activities or union membership, including by:

- committing acts calculated to cause the dismissal of or directly dismissing a worker by reason of union membership or legitimate union activities, including by invoking “neglect of duty” when the real motive for dismissal is a worker’s trade union activities;
- transferring or downgrading a worker as a result of legitimate union activities or union membership;
- granting bonuses to some or all non-union member staff and excluding union members from such bonuses;
- blacklisting trade union officials or members; and
- artificially promoting workers to positions of authority or management to reduce the number of workers eligible to join a certain trade union and undermine that workers’ organization.¹⁶

The CFA’s list is long but not exhaustive. As detailed in this report, employers and anti-union consultants in the United States have engaged in many of these practices and devised still

¹⁶ ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition* (2006), paras. 35, 67, 514, 638, 682, 772, 780, 781, 786, 787, 803, 810, 837, 839, 858, 863, 864, 865.

others to disrupt workers' organizing and bargaining efforts, not all of which the ILO's Committee on Freedom of Association has had an opportunity to examine.¹⁷

Other international instruments and mechanisms incorporate ILO Conventions 87 and 98 by reference to the 1998 Declaration on Fundamental Principles and Rights at Work. The ILO declaration sets out freedom of association and the effective recognition of the right to collective bargaining as the first among these fundamental principles and rights.¹⁸

The UN Global Compact, the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, United Nations (UN) resolutions on business and human rights, and many companies' own codes of behavior incorporate, directly or indirectly, ILO standards on freedom of association. The Global Compact's Principle 3 states, "Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining."¹⁹ The Global Compact calls on companies to "ensure that all workers are able to form and join a trade union of their choice without fear of intimidation or reprisal" and to "ensure union-neutral policies and procedures that do not discriminate against individuals because of their views on trade unions or for their trade union activities."²⁰

The OECD Guidelines incorporate the ILO core labor standards and call on multinational companies to "respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations ... with such representatives with a view to reaching agreements on employment conditions." As will be seen, most of the companies in case studies here have made social responsibility commitments also invoking ILO standards.

¹⁷ More examples of tactics that interfere with workers' freedom of association are found in John Logan, "The Union Avoidance Industry in the United States," 44 *British Journal of Industrial Relations* 651 (2007); see also Martin Jay Levitt, *Confessions of a Union Buster* (New York: Crown Publishers, Inc., 1993).

¹⁸ International Labor Organization, *Declaration on Fundamental Principles and Rights at Work, 1998*, <https://www.ilo.org/declaration/thedeclaration/lang--eng/index.htm> (accessed August 27, 2010).

¹⁹ *Ibid.*, Principle Three.

²⁰ UN Global Compact Office, "Principle Three," updated December 18, 2008, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle3.html> (accessed August 27, 2010).

III. Freedom of Association under US Law

The Law and Its Application

American labor law contains a ringing affirmation of workers' freedom of association. In the key statement in US labor law, often called "Section 7 rights," the National Labor Relations Act (NLRA) declares that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.²¹

Section 8(a) of the NLRA sets out "unfair labor practices" that are unlawful, including interference, restraint or coercion of employees in the exercise of Section 7 rights, discrimination against workers who exercise those rights, and refusal to bargain with workers' chosen representative. The National Labor Relations Board (NLRB) is empowered to investigate unfair labor practice charges and to take remedial action when violations are determined.

Unfortunately, many features of labor law and practice in the United States betray this promise. In a 2000 book-length report titled *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, Human Rights Watch showed how US labor law fails in practice to vindicate Section 7 rights and to provide effective Section 8(a) protections for those rights.

US law fails to uphold international freedom of association standards in a number of respects. Examples include:

- Allowing employers to mount one-sided, aggressive workplace pressure campaigns against workers' organizing efforts, marked by mandatory "captive-audience" meetings filled with predictions of dire consequences if workers organize, without providing workers similar access to information supporting union organizing;²²

²¹ National Labor Relations Act, Section 7.

²² The only limitation on captive-audience meetings is that they may not be held within 24 hours of an NLRB representation election. See *Peerless Plywood Co.*, 107 NLRB 427 (1953) Management can require employees to attend these meetings, and can further require employees not to leave the meeting, not to ask questions, and not to espouse pro-union views, under pain

- Allowing employers to deny workers the right to meet union representatives at the workplace to discuss forming a union;²³
- Denying a legal remedy to undocumented immigrant workers fired for trying to form a union;²⁴
- Enabling employers to rely on delay-ridden, ineffectual administrative and judicial procedures and remedies in cases of labor law violations;²⁵
- Allowing employers to permanently replace workers who exercise the right to strike over wages and working conditions (workers who strike over employers' unfair labor practices may not be permanently replaced);²⁶ and
- Mandating the NLRB to seek court injunctions when "secondary boycott" allegations are lodged against unions, but leaving to NLRB discretion—which it rarely exercises—whether to seek injunctions against employers' unfair labor practices.²⁷

The ILO has found these and other features of US labor law in violation of international standards.²⁸ The result is that even those workers covered by US labor

of discharge for insubordination. See *NLRB v. Prescott Industrial Products Co.*, 500 F.2d 6 (8th Cir. 1974); *Litton Systems, Inc.*, 173 NLRB 1024 (1968). Employers can also exclude employees known to be union supporters from captive-audience meetings. See *F.W. Woolworth Co.*, 251 NLRB 1111 (1980). In 1951, the NLRB adopted an "equal opportunity" doctrine by which employers who held captive-audience meetings should allow union representatives to present their views at the employer's facility, noting that this placed no limit on what the employer could lawfully say. See *Bonwit-Teller, Inc.*, 96 NLRB 608 (1951). However, the Board (with new appointees) repudiated this doctrine just two years later, citing employers' property rights to exclude unwanted persons from the premises. See *Livingston Shirt Co.*, 107 NLRB 400 (1953). The *Livingston Shirt* "unequal opportunity" rule has prevailed since then.

²³ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

²⁴ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

²⁵ Cynthia L. Estlund, "The Ossification of American Labor Law," 102 *Columbia Law Review* 1527 (2002).

²⁶ The permanent replacement doctrine is not found in labor law statutes. It was created by the Supreme Court in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The problem in practice is that whether a strike is an "economic strike" or an "unfair labor practice strike" it is subject to litigation, and it often takes years of administrative and judicial hearings and appeals before a final decision is reached and workers learn whether they are entitled to reinstatement. By then, even with a decision in favor of the workers, it is often the case that the strike is long broken and the workers scattered to other jobs. As the ILO Committee on Freedom of Association noted in considering the US permanent replacement doctrine, "that distinction [between economic strikes and unfair labor practice strikes] obfuscates the real issue ... whether United States labor law and jurisprudence (the so-called Mackay doctrine) are in conformity with the freedom of association principles." See ILO CFA, United States, Case No. 1543, Report No. 278, para. 89 (1991).

²⁷ Section 10(j) of the NLRA is the discretionary injunction clause in cases involving employers' unfair labor practices. Section 10(l) is the mandatory injunction clause in cases involving secondary union action. For more discussion, see George Schatzki, "Some Observations About the Standards Applied to Labor Injunction Litigation Under Sections 10(j) and 10(l) of the National Labor Relations Act," 59 *Indiana Law Journal* 565 (Fall 1983), noting "As for section 10(l), which is aimed almost entirely at unions, federal courts are inclined virtually to rubber-stamp National Labor Relations Board requests for injunctions. However, in considering applications for section 10(j) injunctions, which are primarily aimed at employers, the courts are inclined—especially when employers are the respondents—to be more critical of the Board's petition and, as a result, often deny or significantly qualify the requested relief."

²⁸ For ILO decisions on these topics, see ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 2524, Report No. 349 (March 2008) (exclusion of low-level supervisors); ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 2227, Report No. 332 (2003) (denial of remedies to immigrant workers); ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1543, Report No. 278 (1991) (permanent

law face an uphill battle to exercise their right to freedom of association. They are impeded by rules that are unfairly slanted against union supporters, allowing employers to use myriad tactics to prevent workers from freely choosing whether to organize.

Choosing Representation

US labor law provides that, before recognizing their workers' collective bargaining rights, employers may demand secret-ballot elections in which employees in a defined bargaining unit vote for or against union representation. In form, such elections are proper. In substance, however, because of employers' one-sided control of the workplace, wide latitude to mount aggressive "Vote No" campaigns without adequate opportunity for union advocates to respond, and weak remedies when employers engage in unlawful behavior, the NLRB election system has been twisted away from its aim of determining employee choice under "laboratory conditions."²⁹

Employers often force workers under pain of discipline into mandatory captive-audience meetings to sit through diatribes against unions with scripts written by specialized anti-union consultants or internal anti-union experts. In many instances, management warns of loss of business and layoffs should workers succeed in forming a union. Under US labor law, such statements are legal if they are framed as "predictions" based on objective facts rather than "threats" that management can arbitrarily exercise. Anti-union lawyers and consultants have refined such statements to pass muster legally but still thwart workers' organizing initiatives. The prediction-threat distinction pleases lawyers and judges, but it is not at all clear to workers, who often hear "predictions" by managers with superior power in the employment relationship as warnings of reprisals for union support.³⁰

Employers frequently also require supervisors to hold pressure-filled one-on-one meetings with their employees, again scripted by consultants or internal experts, to strike fear of unions into subordinate employees. Supervisors who would rather not apply such pressure are in many cases subject to immediate dismissal, and their dismissal is allowed under US

striker replacement); ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1523, Report No. 284 (1992) (union representatives' access to the workplace); ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1523, Report No. 284 (1992) (secondary boycott strictures).

²⁹ The "laboratory conditions" doctrine was enunciated in *General Shoe Corp.*, 77 NLRB 124 (1948), in which the NLRB likened the conditions for a fair election to those of an untainted scientific laboratory experiment.

³⁰ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). For example, an employer cannot say, "If you bring in the union, I will close the workplace." But the employer could say, "If you bring in the union and the contract makes us uncompetitive, I might have to close the workplace." Leaving aside the fact that it is unlikely the employer would ever agree to such a contract, the message is still that union formation equals workplace closure.

labor law.³¹ Such tactics conflict with international principles against employer interference with workers' exercise of rights of association.

This points to the importance of examining surrounding events and conditions when considering whether a given statement has a coercive or threatening impact. Dire predictions or anti-union invective may take on a threatening or coercive character when delivered in captive-audience settings where pro-union responses are banned, and even open discussions carry a different meaning when they take place against a backdrop of surveillance or reprisals against union supporters. Similarly, written statements of harsh opposition to unions which may, in isolation, not contain an explicit threat of reprisal or promise of benefit, can have coercive effect in a broader context in which management is also committing unfair labor practices. This is why the NLRB and federal courts have adopted a "totality of the circumstances" test in which statements facially lawful in isolation can be found to be unlawfully coercive when the test is applied.³²

It should be noted that elections are not a required method of securing majority status and collective bargaining rights. US law requires employers to bargain with unions "designated or selected" by employees, not "elected."³³ Many unions and employers agree on alternative methods of establishing majority sentiment, most commonly a "majority sign-up" or "card check" procedure in which workers signal their choice by signing cards designating the union as their bargaining representative. Under such plans, employers and unions usually agree not to mount aggressive anti-union or anti-management campaigns against one another or to pressure employees to sign or not to sign union authorization cards. These

³¹ See, for example, *Parker-Robb Chevrolet, Inc. v. Automobile Salesmen's Union*, 262 NLRB 402 (1982), petition for review denied sub. nom *Automobile Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (DC Cir. 1983), where a supervisor who protested management's order to fire workers for union activity because he felt they were his best employees was himself fired. The NLRB upheld the firing on the grounds that supervisors are excluded from protection of the NLRA. The appeals court upheld the Board's ruling.

³² In *NLRB v. Kropp Forge Co.*, 178 F.2d 822 (7th Cir. 1949, cert. denied, 340 U.S. 810 (1950)), the court stated: "A statement ... might seem ... perfectly innocent... including neither a threat nor a promise but, when the same statement is made by an employer to his employees, and we consider the relation of the parties, the surrounding circumstances, related statements and events and the background of the employer's actions, we may find that the statement is a part of a general pattern which discloses action by the employer so coercive as to entirely destroy his employees' freedom of choice and action.... If, when so considered, such statements form a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for finding an unfair labor practice." The Supreme Court approved the "totality of the circumstances" approach in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), saying: "Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." See also, for example, *NLRB v. Brookwood Furniture, Division of US Industries*, 701 F.2d 452 (5th Cir.1983); *Brown & Root, Inc. v. NLRB*, 333 F.3d 628 (5th Cir. 2003).

³³ National Labor Relations Act, Section 9(a).

procedures also normally contain “rapid arbitration” clauses by which mutually-agreed upon arbitrators quickly decide disputes arising under the procedure, in contrast to months-long and often years-long delays common with NLRB election appeals.

Enforcement Failures

Other provisions of US labor law comply on their face with international standards. For example, it is unlawful to threaten or to discharge workers who try to form a union. But enforcement and remedies are ineffective, violating US international obligations to ensure “effective protection” when workers’ right to freedom of association is violated and “sufficiently dissuasive sanctions” to deter such violations.³⁴

US labor law does not permit fines or other penalties against employers for violating the NLRA. For example, if a worker is unlawfully fired for union activity, the employer is ordered to post a workplace notice promising not to repeat such illegal conduct and to reinstate the worker with back pay, but the employer can deduct from his back pay obligation any other income the worker earned in the interim.³⁵ It can take years for such cases to be decided. In most cases, the fired worker declines reinstatement because she has moved on in her life and is not interested in returning to the workplace where the violation occurred. As a result, employers can engage in calculated lawbreaking to defeat workers’ organizing efforts, including decapitating union drives by firing pro-union leaders, fearing nothing more than a rap across the knuckles several years later.

In its 2000 report, *Unfair Advantage*, Human Rights Watch concluded that “workers’ freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers’ rights.”³⁶ The report detailed how many workers who try to form and join unions are spied upon, harassed, pressured, threatened, suspended, fired, deported, or otherwise targeted in reprisal for their efforts, mainly by private employers. The report concluded:

[I]nternational human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. In the United States, labor law enforcement efforts often fail to deter

³⁴ILO Committee on Freedom of Association, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006, paras. 818, 822.

³⁵In the classic formulation, the NLRA is “remedial, not punitive.” See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).

³⁶Ibid.

unlawful conduct. When the law is applied, enervating delays and weak remedies invite continued violations.³⁷

Unfair Advantage was a general examination of workers' rights violations with case studies drawn from a dozen sectors. Human Rights Watch followed that report with a 2005 study titled *Blood, Sweat, and Fear* on violations of workers' rights by major companies in the US meatpacking industry,³⁸ and in 2007 with *Discounting Rights*, a report on Wal-Mart's interference with employees' freedom of association at its US stores.³⁹ The meatpacking and Wal-Mart reports documented continuing violations of workers' rights in the United States, particularly the right to freedom of association.

³⁷ Ibid.

³⁸ Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants* (2004), <http://www.hrw.org/reports/2005/usao105/>.

³⁹ Human Rights Watch, *Discounting Rights: Wal-Mart's Violation of US Workers' Right to Freedom of Association* (2007), <http://hrw.org/reports/2007/us0507/>.

IV. A Note on Methodology

This reports documents violations of internationally recognized workers' rights by major European-based multinational corporations in their US operations. Almost all companies reviewed are among Fortune magazine's 2010 listing of Global 500 corporations or its listing of Europe's largest companies; several are among the top 100 firms on such lists.⁴⁰

We documented the corporations' public commitments on freedom of association by taking information from the companies' own websites and from websites of corporate social responsibility evaluation and rating organizations.

It should be noted that a company's obligations to honor international labor standards do not arise only upon its formal issuance of a corporate social responsibility (CSR) policy or endorsement of international instruments. The basic principle that companies have a responsibility under international human rights law to respect human rights, including workers' rights, has achieved wide international recognition.⁴¹ More generally, an international consensus has taken shape that corporations at least have a responsibility to respect human rights, to act with due diligence to prevent violations of human rights, and to contribute to effective remedies when rights violations occur.⁴²

European companies have operated for decades in their home countries in a milieu of respect for workers' freedom of association expressed in European human rights conventions and EU directives and shaped by a European social model that values trade unions and collective bargaining. These European standards are informed by ILO Conventions 87 and 98 and freedom of association guarantees in the Universal Declaration

⁴⁰ See Fortune, "Global 500," <http://money.cnn.com/magazines/fortune/global500/2010/> (accessed August 27, 2010).

⁴¹ The preambles to key human rights treaties recognize that ensuring respect for human rights is a shared responsibility that goes beyond that of states, and the preamble of the Universal Declaration of Human Rights (UDHR) explicitly states that the responsibility is one for "every organ of society." This principle is also reflected in the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, among other international instruments. For a discussion, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), especially at chapter 6.

⁴² The UN and other international organizations have developed various norms and guidelines, which draw from international human rights and labor laws, that are intended to guide businesses in their operations and projects. These include, for example, the ILO Tripartite Declaration of Principles, the UN Global Compact, the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (addressed further below), and the reports of the UN Special Representative on Business and Human Rights under mandates from the United Nations Human Rights Council and its precursor, the Commission on Human Rights. Regarding the last item, see in particular John Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights," Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Human Rights Council, Eighth Session, April 7, 2008, <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed August 27, 2010).

of Human Rights in place since the late 1940s. Companies are also cognizant of freedom of association provisions in the ILO Tripartite Declaration and the OECD Guidelines that took effect in the 1970s. Thus, while some of the examples in this report include events in the early 2000s that pre-date company adoption of CSR policies (all include events *after* such adoption), they are no less relevant in contrasting behavior at home with behavior in the United States.

In each case where events we describe predate the companies' public declarations, Human Rights Watch asked the firms for information about any policy statement, participation in any social responsibility grouping, or other expression of the companies' positions on workers' freedom of association in effect at the time of such events. The responses are appended to this report.

Our research into the specific cases and practices detailed in this report draws on three main sources: 1) legal records such as NLRB decisions, court decisions, and employees' affidavits in unfair labor practice cases involving the case study companies; 2) Human Rights Watch interviews with workers who sought to exercise organizing and bargaining rights at these companies' US operations; 3) newspaper accounts and other published reports relating to the cases; and 4) direct employer responses to Human Rights Watch inquiries on the cases.

No Human Rights Watch assertion in this report is based on unfair labor practice *charges* against employers. Workers can file such charges with the NLRB claiming a violation of their rights, but the charges by themselves are allegations. All of the cases here included at minimum a determination by the NLRB general counsel that the unfair labor practice charges have merit. After finding merit in the charges, the NLRB makes intensive efforts to settle the cases, and Human Rights Watch refers to such settlements in this report.

Settlement agreements customarily include a non-admission clause in which the charged party does not admit that it has engaged in conduct violative of the NLRA. Accordingly, their use here is not intended to characterize conduct cited in the settlements as unlawful under the NLRA. However, the settlements are relevant to Human Rights Watch's analysis insofar as they obligate employers to take certain remedial action based on merit findings by the NLRB. Remedial actions include such measures as posting workplace notices promising not to commit the specific acts that are the subject of unfair labor practice charges found to have merit (in posted statements headed "WE WILL NOT ..."), and affirmative remedies such as reinstating fired workers, paying back pay, rescinding other disciplinary measures, and the like (in posted statements headed WE WILL ...).

The NLRB is careful in evaluating unfair labor practice charges to determine their merit. Findings of merit are based on detailed investigations of charges by regional agents of the NLRB and evaluations by experienced labor law attorneys in the regional offices. These investigations include interviewing and taking affidavits from workers who filed charges and from potential witnesses. They also involve consulting extensively with employers and offering them opportunities to rebut any charges through written position statements and dialogue with the NLRB regional officials. Based on these investigations and evaluations of the evidence, labor law enforcement officials decide whether charges have merit.

NLRB records over the past decade show that usually 40 percent of unfair labor practice charges are deemed meritorious following investigations. In the NLRB Annual Report for fiscal year 2009, 36.6 percent of 22,943 unfair labor practice cases filed during the year were found to have merit.⁴³ This 36.6 percent “merit-finding” rate suggests that the NLRB takes its job seriously and is not a rubberstamp for the claims of either employers or employees.

Most of the cases involved workers and their unions charging employers with firing or otherwise discriminating against workers because of their union activity and with refusal to bargain in good faith with workers’ chosen representatives.⁴⁴ Where the Board issued complaints, nearly 90 percent were against employers for violating workers’ rights.⁴⁵

During the period covered in the most recent annual report, 14,554 workers received a total of \$76.4 million in back pay from employers because of employer unfair labor practices.⁴⁶ During the same year, 6,700 cases were settled with equitable remedies such as reinstatement and back pay for affected employees, along with posting by employers of notices in their workplaces stating that they would not engage in the conduct cited in the settled charges.⁴⁷

Where employers refuse to settle meritorious charges, the NLRB general counsel issues a complaint and sets it for trial before an administrative law judge (ALJ), normally several

⁴³ National Labor Relations Board, “74th Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2009” (2010), http://www.nlr.gov/publications/reports/annual_reports.aspx, (accessed August 27, 2010), p. 7. It should be noted that a single case usually contains allegations of multiple violations, so the total number of discrete unfair labor practices is significantly higher.

⁴⁴ *Ibid.*, p. 5.

⁴⁵ *Ibid.*, p. 8.

⁴⁶ *Ibid.*, p. 10; Appendix Table 4, pp. 99-100.

⁴⁷ *Ibid.*, p. 7. Many of these cases were filed in prior years so they do not all reflect action on unfair labor practice (ULP) charges filed during the fiscal year of the most recent annual report.

months in the future. Only the employer in such cases can refuse to settle; charging parties—workers and unions—have no say in whether the NLRB regional office settles the case with the employer. The general counsel issued complaints in 1,166 cases during the fiscal year covered by the annual report; as noted earlier, almost 90 percent of complaints were issued against employers.⁴⁸

Administrative law judges' decisions are based on testimony and documents subject to the rules of evidence and related examination and cross-examination of witnesses.⁴⁹ Decisions normally are issued several months after hearings are concluded.

ALJ decisions are appealable to the NLRB's five-member Board in Washington. The NLRB can take from one to three years to issue its decisions in such appeals, which generally uphold ALJ findings. In some of the cases studied here, the findings of administrative law judges have been appealed and are still pending.

Where we use NLRB and federal court records in our analysis, we use the “last best” documented evidence and determinations available. In ALJ cases that are not yet decided as this report goes to press but for which hearing testimony transcripts are available, we use testimony from the transcripts in our analysis. Where written decisions of administrative law judges are available, we use them and not prior testimony from transcripts or complaints. In those cases in which the NLRB has ruled on appeals from administrative law judges' decisions, we use the Board's rulings as the basis of our analysis. However, Board rulings are themselves subject to appeals to federal circuit courts. In some cases in the report, such appeals are pending, but where decisions of federal appeals courts are available, we use them. Circuit court rulings can also be appealed to the US Supreme Court, although such appeals are rare and none of the cases studied in this report is before the Supreme Court.

Finally, Human Rights Watch sent letters to each of the companies examined in this report in early 2009, and again shortly before publication, describing our treatment of the cases discussed in this report and seeking the companies' responses.

⁴⁸ Ibid., pp. 7-8.

⁴⁹ While the proceeding before an administrative law judge is a trial in the normal sense of the word, with presentation of evidence and examination and cross-examination of witnesses, it is usually called a “hearing” in US labor law parlance. Further references to this stage of US labor law procedures will use the term “hearing,” but it should be understood that it involves a formal legal proceeding with compulsory process, sworn testimony, and examination and cross-examination of witnesses under rules of evidence, not an informal proceeding more often associated with the term “hearing.”

V. Violations of International Freedom of Association Standards by European Companies in the United States

Deutsche Telekom and T-Mobile

Headquartered in Bonn, Deutsche Telekom (DT) is a German multinational telecommunications giant with US\$90 billion in annual revenues and 260,000 employees in 50 countries around the world. It is number 59 on the Fortune Global 500 list.⁵⁰

More than half of the company's revenues come from outside Germany. DT's largest single foreign operation is T-Mobile USA (T-Mobile), the fourth-largest wireless communications company in the United States. Based in Bellevue, Washington, T-Mobile USA employs 36,000 US workers and has almost 30 million American subscribers to its mobile phone system.⁵¹ In 2008, T-Mobile became the single-source supplier of service for the Google phone.⁵²

Public Commitments on Freedom of Association and Corporate Social Responsibility

On its website, Deutsche Telekom proudly presents its "good scores in sustainability ratings," saying, "Deutsche Telekom continuously scores at the top of international sustainability ratings, based on its environmental and social performance,"⁵³ and adding:

For many years, Deutsche Telekom has offered its sustainability performance for external assessment, and has repeatedly achieved top ratings. Sustainable Asset Management (SAM), INVERA (Investment Ethics Research & Advisory), Ethical Investment Research (EIRIS), Vigeo and other European-based social performance rating agencies routinely give high marks to DT.⁵⁴

⁵⁰ For these and other company data, see the Deutsche Telekom Website at www.deutschetelekom.com; see Fortune, "Global 500," <http://money.cnn.com/magazines/fortune/global500/2010/index.html>.

⁵¹ See information at the Deutsche Telekom Website, www.deutschetelekom.com.

⁵² Edward C. Baig, "T-Mobile's Google phone heralds Android invasion," *USA Today*, October 16, 2008, p. 1B.

⁵³ See the Deutsche Telekom site, "Sustainability," <http://www.deutschetelekom.com/dtag/cms/content/dt/en/32840> (accessed July 31, 2008).

⁵⁴ Ibid; See websites at, respectively, Sustainable Asset Management, www.sam-group.com/html/main.cfm; Investment Ethics Research and Advisory, www.invera.ch/html/e-index.htm; Vigeo, www.eiris.org; www.vigeo.com/csr-rating-agency. Most of these rating bodies include employment practices in their assessment systems, but they do not account for the US labor law system that allows employers to aggressively campaign against workers' organizing efforts in violation of international standards.

In its 2007 *Corporate Responsibility* report, Deutsche Telekom declared:

CR as a management concept is already an integral part of Deutsche Telekom's responsible corporate policy.... We have been leveraging our financial strength and innovativeness to develop a more sustainable, fairer society....

Social and environmental minimum standards for staff and suppliers were already enshrined in Deutsche Telekom's Social Charter back in 2003. This voluntary commitment is based not only on the values of the Global Compact but on the internationally recognized conventions, guidelines and standards of the International Labor Organization (ILO) and the Organization for Economic Cooperation and Development (OECD). Our Social Charter therefore governs how we deal with issues such as human rights, equal opportunities, health and safety at work as well as cooperation with unions.⁵⁵

T-Mobile USA's harsh opposition to workers' freedom of association in the United States betrays Deutsche Telekom's purported commitment to social responsibility, impedes constructive dialogue with employee representatives, and in several cases, has violated ILO and OECD labor and human rights standards. At one point, T-Mobile's supervisors' training manual contained a section titled "Union Awareness" that declares, "We want to stay Union-free," and adds, "[S]upervision is the key."⁵⁶

To help remain "union-free," T-Mobile in 2003 enlisted a prominent labor relations consulting firm that specializes in breaking workers' organizing efforts to prepare a guide and provide related management training.⁵⁷ Specially "Prepared for T-Mobile," the firm's 150-

⁵⁵ Deutsche Telekom, "Corporate Responsibility," (2007) <http://www.deutschetelekom.com/dtag/cms/content/dt/en/32840> (accessed March 8, 2008).

⁵⁶ Deutsche Telekom, "Human Resources Training for Coaches" (undated, copy on file with Human Rights Watch). Supervisors are called "coaches" within T-Mobile. In a 2009 letter to Senator John Kerry, the company's senior vice president, human resources, stated, "T-Mobile USA is not currently using that document and has not for several years." Letter of Larry L. Myers, senior vice-president, T-Mobile to Senator John Kerry, March 20, 2009 (copy on file with Human Rights Watch). In a letter to Human Rights Watch, Deutsche Telekom's member of the Board of Management for Human Resources said that the document has not been used since 2006. Human Rights Watch also asked if the company had issued any communication instructing management to discontinue its use; the company said it "has not been able to locate any communications to managers halting the use of the document in question." Letter of Thomas Sattelberger to Human Rights Watch, July 29, 2010 (copy on file with Human Rights Watch).

⁵⁷ Adams, Nash, Haskell & Sheridan, "For Your Information: The Union Free Privilege, Prepared for T-Mobile" (2003). Based in Fort Wright, Kentucky, the firm tells employers on its website, "Preserving the union free privilege is an honor.... Adams, Nash, Haskell & Sheridan knows unions. We know why employees turn to unions, how unions organize employees, and how to minimize the threat of union interference.... We can help you preserve The Union Free Privilege™ for your organization.... You

page guide declares at the outset, “Preserving the union free privilege is an honor.”⁵⁸ The guide goes on to recommend that T-Mobile should resist employees’ efforts to form unions to “protect them from themselves.”⁵⁹

Statements by the consulting group engaged by T-Mobile cannot be imputed to T-Mobile itself. But here is an example of the approach taken by the firm engaged by T-Mobile in a separate “Manager’s Guide to Labor Relations Terminology” published by the firm:

Using *conditional words* in discussing union issues with employees can be helpful in avoiding claims by a union that the employer committed unfair labor practices or objectionable conduct. Words such as “may,” “might,” and “could” are preferred to “will.” For example, say, “The plant *could* shut down” rather than, “The plant will shut down if the union gets in.”⁶⁰

Such clever wordplay highlights flaws in US labor law under which, taken alone, “the plant *will* shut down” is unlawful while “the plant *could* shut down” is lawful. Workers who hear the latter statement are unlikely to differentiate it from the former statement, especially in captive-audience meetings where they are allowed to hear only the voices of management representatives and anti-union consultants.

The anti-union consulting firm’s manual for T-Mobile concludes, “The Price of Freedom is Constant Vigilance” and refers cryptically to “Hiring the Union Free Employee.”⁶¹ This last statement is necessarily cryptic because “hiring the union free employee” skirts the unfair labor practice of discriminating against applicants because of their union activities, beliefs, or sympathies. Employers have developed proxy interviewing techniques to identify potential union sympathizers, for example, asking, “What clubs do you belong to?” to identify “joiners.”⁶²

can play offense too: If you have a union you can create an environment to make it become unnecessary.” The site lists among ANH&S’ “Urgent Services” “Counter Union Campaigns” and “Union Avoidance.” See ANH&S website at www.anh.com.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ William R. Adams, Adams, Nash, Haskell & Sheridan, “A Manager’s Guide to Labor Relations Terminology,” (second edition, 2003; emphasis in original).

⁶¹ Ibid.

⁶² See, for example, Michael J. Zickar, “Using Personality Inventories to Identify Thugs and Agitators: Applied Psychology’s Contribution to the War against Labor,” 59 *Journal of Vocational Behavior* 149 (August 2001). T-Mobile’s consulting firm’s “hiring the union free employee” advice is not cited to imply that T-Mobile engaged in such discrimination in its own hiring practices, absent evidence on this point.

In letters to Human Rights Watch, Deutsche Telekom maintained “it has never been suggested that any T-Mobile manual or memorandum was in any way in violation of the NLRA.”⁶³ The company adds that “the ILO has made it clear that the principle of freedom of association does not mean an employer must remain silent when its employees are making a decision about whether to associate with a labor organization” and “[n]ational companies, like Deutsche Telekom, who comply with National law as it now exists, should not be criticized for their compliant behavior.”⁶⁴

Human Rights Watch does not take the position that employer silence is required under international standards. Rather, non-interference is required by international standards. As seen in the following reactions of T-Mobile workers interviewed by Human Rights Watch in Allentown, Pennsylvania, T-Mobile’s lawful statements under US labor law can have an interfering, chilling effect on employees, especially without a balanced opportunity for workers to receive information from union representatives at the workplace, also required by international standards.

Allentown, Pennsylvania

T-Mobile’s major Northeast call center occupies one of many one-story office and distribution centers in the Lehigh Valley Industrial Park near the airport in Allentown, Pennsylvania. Tucked along the industrial park’s main road with Warner Stained Glass, ChemLawn, Day-Timers catalogues, Julabo heating circulators, and other companies leasing buildings in the Park, T-Mobile’s call center employs almost 1,000 workers. It is one of the largest among the company’s 35 call centers around the United States.⁶⁵

T-Mobile took over the Allentown facility in its VoiceStream acquisition in 2001. A majority of employees there are women staffing telephones as customer service representatives. In early 2006, concerned about issues of pay, arbitrary treatment, and physical conditions in the facility, workers sought help from the Communications Workers of America.⁶⁶

T-Mobile had signaled its state of mind about workers’ organizing in a recruiting advertisement for a human resource generalist at the Allentown location. The ad listed

⁶³ Letter from Larry L. Myers, senior vice president, Human Resources, T-Mobile USA, to Human Rights Watch, February 23, 2009 (copy on file with Human Rights Watch).

⁶⁴ Letter from Thomas Sattelberger, member of the Board of Management, Human Resources, Deutsche Telekom AG, to Human Rights Watch, July 29, 2010 (copy on file with Human Rights Watch).

⁶⁵ Sam Kennedy, “T-Mobile call center to add 450 jobs; Cell phone company will be 16th-largest employer in Lehigh and Northampton,” *Allentown Morning Call*, September 15, 2005, p. A1.

⁶⁶ Human Rights Watch interview with Tammy Todora, Allentown, Pennsylvania, February 29, 2008.

among “essential duties and responsibilities” assisting on “appropriate interventions for the purpose of maintaining a productive and union-free environment” and “developing and providing continuous training on ... union avoidance.” The recruiting ad further requires knowledge of “principles of preventive labor relations.”⁶⁷

Together with CWA staff organizers, T-Mobile employees began holding pro-union signs at the point where cars exit the company’s parking lot onto the public roadway and distributing pro-union flyers to co-workers driving away from work. They stood on public property, on their own time, without interfering with entry into or exit from the parking lot. All this is a normal and perfectly legal means under US law for workers to exercise freedom of association by communicating with one another about terms and conditions of employment. Such activity is within international standards, although US law does not protect the full scope of activity allowed under international standards, which would also allow workers to hear from union representatives in the workplace (with safeguards assuring no effect on work procedures).⁶⁸

Outside: An Anti-Union Show of Force

T-Mobile management responded with surveillance and attempts to interfere with the workers’ activities. Tammy Todora, a T-Mobile employee active in the flyer distribution to co-workers, recounted what happened:

The CWA organizers explained that we had a right to do what we were doing. But then management told the company security guards to come out and watch us. If somebody slowed down to take a flyer, the guards told them to keep moving, not to slow down. If people stopped anyway and took a flyer, the guards wrote down their license number. When people saw this, they were afraid to stop for our flyers.⁶⁹

According to Tammy Todora, T-Mobile management did not stop there. “They called the Pennsylvania state troopers on us,” she said. “The troopers told us we were right, that we

⁶⁷ See “Human Resource Generalist, T-Mobile, Allentown, PA (submitted 10/17/05),” at <http://www.hrforhire.com>, accessed September 25, 2009 (copy on file with Human Rights Watch). “Preventive labor relations” is a term of art in American management discourse that means preventing workers from forming unions.

⁶⁸ ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1523, Report No. 284 (1992), para. 195 (“The Committee requests the Government to guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionisation”).

⁶⁹ Human Rights Watch interview with Tammy Todora, Allentown, Pennsylvania, February 29, 2008.

could do what we were doing. But just having them show up put more fright into people, that somehow the union meant trouble with the law. It was very intimidating for a lot of people.”⁷⁰

In a letter to Human Rights Watch, T-Mobile said that union representatives “repeatedly prevented T-Mobile employees from entering the premises and leaving work, and annoyed employees by physically striking employees’ automobile windows as they entered and left.”⁷¹ T-Mobile did not provide evidence of such conduct beyond this assertion, and the NLRB regional director, in finding the company’s conduct unlawful, made no mention of such conduct on the part of union representatives.⁷²

A videotape of the guard’s activity shows the union supporters peacefully seeking to distribute flyers to employees exiting the parking lot, not interfering with them in any way. The videotape shows the arrival of a law enforcement officer, and the guard conversing with the officer while the officer remained in his vehicle. The law enforcement officer then drives away with no further action taken. The videotape shows clearly the security guard inserting himself between the union supporters and exiting automobiles telling drivers “keep on driving, keep on driving” and “don’t take one, don’t take one.”⁷³

The CWA filed an unfair labor practice charge against T-Mobile with the regional office of the NLRB. The regional director found that the T-Mobile guards’ activity:

violated Section 8(a)(1) of the Act by interfering with the rights of employees to communicate with the Union representatives by telling individual employees who stopped their vehicles not to take the Union handbill.... [A]lso in violation of Section 8(a)(1) ... a guard stationed near the main entrance ... recorded the license plate numbers of vehicles driven by individuals who stopped to take the leaflets.⁷⁴

⁷⁰ Ibid.

⁷¹ Letter from Myers, to Human Rights Watch, February 23, 2009.

⁷² Letter to CWA counsel of Dorothy L. Moore-Duncan, Regional Director, NLRB Region 4, *T-Mobile*, Case No. 4-CA 34590, June 30, 2006 (copy on file with Human Rights Watch).

⁷³ See Communications Workers of America, “T-Mobile Leafleting,” Videotape, February 2, 2006 (on file with Human Rights Watch).

⁷⁴ Letter to CWA counsel of Dorothy L. Moore-Duncan, Regional Director, NLRB Region 4, *T-Mobile*, Case No. 4-CA 34590, June 30, 2006 (copy on file with Human Rights Watch).

Responding to the NLRB's admonition, T-Mobile halted the guards' activity. The regional director held the case in abeyance to be dismissed if the unlawful conduct was not repeated during the following six months. As T-Mobile noted in its letter to Human Rights Watch, the conditional dismissal was executed on January 4, 2007.⁷⁵

But Tammy Todora recounted how the company adjusted to the change. "They installed new cameras showing people coming and going from the parking lot," she explained. "They could still see who stopped for leaflets. And the monitors were inside the employees' entrance, so everybody could see that the company recorded whatever happened. A lot of people were still scared to take the leaflets."⁷⁶

A Security Guard's View

A company security guard interviewed by Human Rights Watch recounted his view of management's response to workers' union activity. Dennis Adkins worked as a security guard at T-Mobile's Allentown facility from September 2004 to October 2008. "I saw what went on every time the union people came to T-Mobile and what T-Mobile's actions were when they came," he told Human Rights Watch.⁷⁷

When union supporters began leafleting outside the T-Mobile facility, the company "increased the shift to 3 guards per shift around the clock," Adkins said. "We were told that as soon as we saw on the cameras that the union people had shown up, we had to immediately notify the general manager. We had to tell them how many union people were out there, and we had to tell them how many people took flyers."⁷⁸

"Everything that happened out there was filmed by the cameras and all this film was on tapes," Adkins explained. "When the union first came, we fixed the cameras on every entrance where the union people were. We fixed the cameras so they would zoom in on the union people. We could also see who was taking flyers. T-Mobile kept all these tapes."⁷⁹

"Every time the union people came, we had to write up a union incident report, what time they came, what time they left, how many union people were out there," said Adkins. "We

⁷⁵ Letter from Myers to Human Rights Watch, February 23, 2009.

⁷⁶ Human Rights Watch interview with Tammy Todora, Allentown, Pennsylvania, February 29, 2008.

⁷⁷ Human Rights Watch telephone interview with Dennis Adkins, Allentown, Pennsylvania, November 23, 2008.

⁷⁸ Ibid.

⁷⁹ Ibid.

didn't include on the report how many people took flyers. We had to tell that in person to the general manager."⁸⁰

Inside the Facility

Tammy Todora told Human Rights Watch what happened inside the workplace, too, describing typical American-style, hard-hitting, anti-union captive-audience meetings filled with dire predictions about the consequences of union organizing. T-Mobile told Human Rights Watch that it met with employees to discuss "the company's perspectives about unionization" but emphasized that all of its communications were lawful under the NLRA.

Todora described the climate inside the facility:

The big guy [the general manager] called everybody into focus groups, about 15 or 20 people at a time, usually the day after we passed out leaflets. He was putting the fear into everyone's head about the union, that the union would create problems, that he had an open door policy, that we didn't need a union, that kind of thing.⁸¹

Todora added that "it looked like they trained the supervisors on going against the union. My supervisor told me, 'Watch what you're doing, they're watching you.'"⁸²

Angela Joseph, another T-Mobile employee, confirmed Todora's account of focus group meetings. "It was like this big scare thing," she told Human Rights Watch. "The general manager made it like the union was a big bugaboo going to take our money. It was brought to us as something bad, with no benefits for us."⁸³

Joseph said that the general manager used an overhead projection to show anti-union messages while he talked to employees in the focus group.

It was like, "Think about your paycheck. They can charge you anything they want in dues. What you have now, you could lose it all. The union will defend bad performers. Do you want the union running the company?"

⁸⁰ Ibid.

⁸¹ Human Rights Watch interview with Tammy Todora, Allentown, Pennsylvania, February 29, 2008.

⁸² Ibid.

⁸³ Human Rights Watch interview with Angela Joseph, Allentown, Pennsylvania, April 2, 2008.

“He asked if there were any questions, but people were too scared to ask questions, like he would think they were against him. People knew they were watching who talked to the union, that everything got reported back, that management knew. We were afraid to even learn about the union.”⁸⁴

Another T-Mobile employee at the time, Shawna Knipper, said, “When the union people started handing out flyers, suddenly we had all these mandatory meetings. Management called in ten or 20 people at a time and went on about how bad the union is and how the company is going to take away things if the union comes in. Now people are scared about their jobs, scared that they’ll get in trouble if they show any union thinking.”⁸⁵

Another T-Mobile USA worker provided a similar account of the company’s response to the union handbilling. This employee recounted how management responded when union supporters began handing out flyers outside the company parking lot:

About a year after I started, the union began handing out flyers at the parking lot. Management sent out security guards and threw them out. Over the next few days, the call center manager pulled everyone into focus meetings on the union. They had us in groups of about 20 people for an hour at a time. It had to be serious, something really important for them to take 20 people off the phones for an hour. That seriously impacts performance.⁸⁶

The employee said “The manager told us he moved the union people off the property and basically told us not to get involved with the union. I specifically remember him saying, ‘If a union comes in, nothing is preventing T-Mobile from taking our business elsewhere.’ It was pretty clear that he was warning us what could happen.”⁸⁷

“A few months later,” the employee went on to say, “there was some publicity about the union lawsuit [unfair labor practice charge], so the manager called us into more focus meetings. He used the meetings to slam the union for just being moneymakers who couldn’t

⁸⁴ Ibid.

⁸⁵ Human Rights Watch interview with Shawna Knipper, Allentown, Pennsylvania, April 2, 2008.

⁸⁶ Human Rights Watch interview, Allentown, Pennsylvania, October 1, 2008. This employee asked not to be identified for fear of management reprisals.

⁸⁷ Ibid.

do anything for us. They had a very obstructionist view toward the union, and they kept emphasizing it to us. They don't want any sort of collective bargaining.”⁸⁸

The employee concluded:

I researched CWA because there's a lot of favoritism and cronyism at the company. A union contract would help correct that. Right now our jobs are made or broken by our direct supervisor, what they call our coach. You don't want to get on the wrong side of the coach or you are in trouble. But the message from management is that if you try to join the union, you will get fired. Most people are afraid to bring it up now.⁸⁹

Result: An Organizing Drive Aborted

T-Mobile's pressure tactics derailed the nascent organizing effort among Allentown call center employees. An August 2008 message to CWA organizer Pam Tronsor by a T-Mobile Allentown worker who wishes to remain anonymous for fear of management reprisal describes the continued climate of fear at the facility, over two years after workers' 2006 attempt to exercise their right to freedom of association:

Hello Pam,

I am really interested in getting a union in at T-Mobile. I may have seen you outside when I may have been coming into work. We are not permitted to talk to the union workers when coming in or out of the building. They don't say that we can't talk to you, but in not so many words they do. People who have been caught talking to union workers have lost their jobs not for talking to a union worker but finding another reason for minor things.

[Here the employee recounted a very detailed complaint about management practices at the Allentown call center that is omitted here because it might identify the employee].

I am ready to quit working for this company and go to a lower paying job instead of dealing with the headache. I don't know what to do anymore to be

⁸⁸ Ibid.

⁸⁹ Ibid.

really honest with you. I really would like a union in the company and at the same time afraid to speak up due to afraid of losing my current job. If that was to happen I just want to make sure I have another job lined up first. Could you please give me some insight?⁹⁰

T-Mobile's 2008 Anti-Union Documents

The lengths Deutsche Telekom was willing to go to combat workers' organizing effort in this case was also reflected starkly in two T-Mobile memoranda issued in 2008, some provisions of which infringed on both international standards and US law. In its letter to Human Rights Watch, T-Mobile says that "it has never been suggested that any T-Mobile manual or memorandum was in any way in violation of the NLRA." However, as detailed below, a settlement agreement with the NLRB on January 5, 2009 addressed a memorandum that the union alleged violated the NLRA by requiring employees to act as informants on other employees' pro-union activities. The memo on its face appeared to be contrary to NLRB rulings and, pursuant to the settlement agreement, T-Mobile posted a notice in its stores committing not to ask or require employees to report on others.

The Nationwide Memorandum

In May 2008, T-Mobile's Human Resources department distributed a memorandum to "front-line managers only" across the country contrasting employees' "direct, one-to-one communication" with supervisors and workers to "third party" communication with a workers' organization, and urging managers to immediately launch concerted anti-union campaigns whenever CWA organizers attempted to communicate with T-Mobile employees.⁹¹ The memorandum was accompanied by an instruction that had ominous implications for workers' freedom of association. Among the "Signs of Union Activity" that managers should watch for, the instruction cites:

- Unusual groupings or newly developing social relationships among our employees;
- Rumors, changes in attitudes, changes in behavior;
- A great deal of "busyness" before and after work;
- New employees "trying too hard" to express enthusiasm for the company;
- Unionization activity going on among employees in nearby companies;

⁹⁰ See e-mail message from T-Mobile employee to Pam Tronsor, August 3, 2008 (copy on file with Human Rights Watch).

⁹¹ Memorandum from T-Mobile's Human Resources Department to frontline managers, "For Front-line managers only. Please do not print, post or distribute," undated (copy on file with Human Rights Watch).

- Restrooms suddenly become a very popular place;
- Some employees give you the impression that they know something you would like to know;
- Employee reports of union activity (a “condition red” indicator of problems);
- Employees engaging in group behavior;
- Employees talk a lot about “rights.”⁹²

The instruction concludes, “When these problems appear, notify your Human Resources Manager immediately.... Stay alert and if union activity is confirmed, maintain a daily diary of all related activities.”⁹³

T-Mobile’s characterization of “newly developing social relationships” and “employees talk a lot about ‘rights’” as “problems” requiring immediate reporting to human resources management borders on parody. However, it is a serious reflection of management’s determination to thwart union organizing by its employees in the United States.

The Northwest Regional Memorandum

In the wake of the “For front-line managers” memorandum and instruction, T-Mobile management for the Pacific Northwest and Southwest Retail Divisions sent a follow-up memo instructing store managers to “cascade to your team” [for example, tell your employees] that:

- Any Union activity must be reported to HR and the MM the same day as the activity including evening activity; and
- In the absence of the RSM, the RSR must notify the MM and copy either [names of Human Resources managers] the same day of the activity, including activity in the evening.⁹⁴

This instruction requires employees to act as informants on associational activities that are supposed to be protected under US law and under international labor law principles of non-

⁹²T-Mobile memorandum, “Signs of Union Activity” (undated, copy on file with Human Rights Watch).

⁹³ Ibid.

⁹⁴ E-mail memorandum from Divisional Human Resources Manager, Pacific Northwest and Southwest Retail Divisions, to T-Mobile managers, May 30, 2008 (copy on file with Human Rights Watch). HR means Human Resources, MM means Market Manager, RSM means Retail Store Manager, RSR means Retail Store Representative. Deutsche Telekom told Human Rights Watch that the memorandum was sent to retail managers in one local market comprised of 11 stores. The Pacific Northwest and Southwest Retail Divisions cover 8 states with 480 stores. Letter from Thomas Sattelberger, member of the Board of Management, Human Resources, Deutsche Telekom AG, to Human Rights Watch, July 29, 2010 (copy on file with Human Rights Watch).

interference in legitimate organizing activity. The NLRB has long held that such activity interferes with, restrains, and coerces employees in the exercise of Section 7 rights in violation of workers' right to freedom of association.⁹⁵

On July 1, 2008, Senior Director Ed Sabol of the CWA sent a letter to T-Mobile saying, "Normally we would address such an issue by filing an unfair labor practice charge with the National Labor Relations Board. In an effort to foster a more positive relationship I am writing to you to give you the opportunity to correct this situation."⁹⁶

T-Mobile's reply of July 24, 2008, stated:

It [the instruction] was intended to request employees to report violations of T-Mobile USA's blanket policy prohibiting solicitation by any third party in retail areas during store hours.... In this case, it so happened that it was union solicitors who were violating this policy, and for that reason the communication addressed union solicitation.... The communication was not intended to ask employees to report on lawfully protected activity by their coworkers.... To clarify the communication that was sent, T-Mobile will inform those RSRs who received it that the message was intended simply to convey management's lawful expectation that they should continue to report violations of the no-solicitation policy by non-employees.⁹⁷

CWA did not receive any word of such a clarifying notification from management to employees along the lines indicated in management's July 24 letter. CWA filed an unfair labor practice charge over the instruction in October 2008. On November 11, 2008, nearly four months after promising to "clarify" the instruction, T-Mobile management sent a letter to employees stating:

Some time ago, you may have received an e-mail from me concerning non-solicitation in our stores. In order to ensure that there is no misunderstanding about what was meant, I want to clarify that the intent of that e-mail was simply to remind employees of management's expectation

⁹⁵ See, for example, *Arcata Graphics*, 304 NLRB 541 (1991); *Nashville Plastic Products*, 313 NLRB 462 (1993); *Ryder Truck Rental, Inc.*, 341 NLRB No. 109 (2004).

⁹⁶ Letter of CWA Senior Director Ed Sabol to David Miller, senior vice president, T-Mobile USA, July 1, 2008 (copy on file with Human Rights Watch).

⁹⁷ Letter of Larry Myers, chief people officer, T-Mobile USA, to Ed Sabol, senior director, CWA, July 24, 2008 (copy on file with Human Rights Watch).

that they should report violations of our no-solicitation policy by non-employee third parties.⁹⁸

In January 2009, the NLRB reached a settlement agreement with T-Mobile resolving the unfair labor practice charge. Under the agreement, T-Mobile posted a “Notice to Employees” in its stores that said:

WE WILL NOT promulgate, maintain, or enforce rules that ask or require you to report to us about your co-workers’ support for, or activities on behalf of, the Communications Workers of America, AFL-CIO or any other labor organization.⁹⁹

The point here is not to parse the language of the memorandum or of T-Mobile’s strained explanation and four-months-delayed “clarification” of its directive that employees immediately report all union activity to Human Resources, but to see how it reflects the company’s attitude toward workers’ organizing efforts and the length to which it goes to stifle such efforts in the United States.

T-Mobile emphasized to Human Rights Watch that it “has and will abide by both the letter and spirit of the U.S. National Labor Relations Act.”¹⁰⁰

In response to Human Rights Watch’s inquiry about these events, Deutsche Telekom provided a list of “best place to work” awards from business magazines and other sources,¹⁰¹ and brief reports from a German law professor¹⁰² and from the former General Counsel of the NLRB¹⁰³ stating that T-Mobile has faced relatively few unfair labor practice charges for a company its size. Volume of NLRB cases is not the measure of compliance with international labor standards. A company can implement union-avoidance policies that comply with US law but cross a line to interference under international standards. This is the

⁹⁸ Letter from T-Mobile management to T-Mobile employees of November 11, 2008 (copy on file with Human Rights Watch).

⁹⁹ NLRB, “In the Matter of T-Mobile USA, Inc.,” Settlement Agreement, Case No. 36-CA 10359 (January 5, 2009) (copy on file with Human Rights Watch). The settlement agreement contains a clause stating “The signing of this agreement does not constitute an admission by the Charged Party that it has violated the National Labor Relations Act.”

¹⁰⁰ Letter from Myers to Human Rights Watch, February 23, 2009.

¹⁰¹ “T-Mobile Workplace Recognition; National and Local Best Place to Work Awards” (copy on file with Human Rights Watch).

¹⁰² Memorandum from Prof. Dr. Gregor Thüsing to Deutsche Telekom, “Neutrality of Employers and Union Organizing: Memorandum at the Request of Deutsche Telekom AG (April 12, 2010)(copy on file with Human Rights Watch).

¹⁰³ Arthur F. Rosenfeld, “Analysis of T-Mobile USA, Inc. NLRA Compliance Programs” (March 12, 2010) (copy on file with Human Rights Watch).

case when employees' reaction is, as Shawna Knipper put it, "we were afraid to even learn about the union," and no unfair labor practice cases ensue.

The Rosenfeld analysis supplied by Deutsche Telekom concluded, based on confidential telephone interviews with T-Mobile managers from locations around the United States, that "T-Mobile's overarching policy is to treat employees in a manner so that they would not need, nor seek, the involvement of outside third parties."¹⁰⁴ Deutsche Telekom specifically contrasted "inflammatory" union rhetoric in the United States with a "more respectful and constructive approach by union representatives" in Germany.¹⁰⁵

The experience of T-Mobile workers in Allentown indicates that, in this location at least, company policy has translated into practices that leave the workforce fearful about even seeking union representation. T-Mobile's one-sided captive-audience meetings, and the issuance of the Northwest regional memorandum and its response to union complaints about the memorandum, do not reflect the attitude of a company that holds up a Social Charter claiming to be "based not only on the values of the Global Compact but on the internationally recognized conventions, guidelines and standards of the International Labor Organization (ILO) and the Organization for Economic Cooperation and Development (OECD)."

Deutsche Post and DHL Express

The German firm Deutsche Post World Net (DPWN) is a \$69 billion annual revenue mail, express delivery, logistics, and financial services global company with 425,000 employees in 200 countries. It is one of the world's 10 largest employers and is number 86 on the Fortune Global 500 list.¹⁰⁶

In 2003 Deutsche Post paid more than \$1 billion to acquire Airborne Express and expand its American operations under the name DHL Express. Headquartered in Plantation, Florida, DHL Express became the third-largest private express delivery service in the United States. When this report was researched, more than 40,000 workers were employed across the country at

¹⁰⁴ Ibid.

¹⁰⁵ Letter from Thomas Sattelberger, member of the Board of Management, Human Resources, Deutsche Telekom AG, to Human Rights Watch, July 29, 2010 (copy on file with Human Rights Watch).

¹⁰⁶ For these and other company data, see DPWN website at www.dpwn.com (accessed July 1, 2008); see Fortune, "Global 500," <http://money.cnn.com/magazines/fortune/global500/2010/index.html>.

DHL's network of sorting stations, delivery hubs, and other air and ground transport facilities.¹⁰⁷

In November 2008, DHL announced that it would substantially shrink its US operations and halt domestic-only air and ground service. The company said it was contracting its domestic delivery to United Parcel Service and concentrating instead on international receiving and shipping. The company said that nearly 10,000 of its US employees would be laid off. DHL's facility in Allentown, Pennsylvania, the site of the labor rights violations detailed here, was among those slated for sharp cutbacks in operations and job losses.¹⁰⁸ The company closed the Allentown, Pennsylvania, facility in January 2009.¹⁰⁹

Public Commitments on Freedom of Association and Corporate Social Responsibility

Deutsche Post adopts a public posture of deep commitment to corporate social responsibility. On its website, the company declares:

Our Corporate Values are a challenge and a guide for us.... The Code of Conduct is based on international agreements and guidelines, including the Universal Declaration of Human Rights (UDHR), the conventions of the International Labor Organization (ILO) and the Global Compact of the United Nations.... The Code of Conduct has been in effect in all Group regions and divisions since the middle of 2006.¹¹⁰

DPWN signed the UN Global Compact in 2006. Earlier, its DHL division had signed the Global Compact when it was first established in 2001. Deutsche Post declared, "We are happy to take up this challenge and demonstrate our commitment to supporting these universal principles together with the UN system ... Deutsche Post World Net acts in accordance with the principles of the Global Compact in its day-to-day business."¹¹¹

¹⁰⁷ See DHL Express website at <http://www.dhl-usa.com/home/home.asp> (accessed July 1, 2008).

¹⁰⁸ Bob Driehaus, "DHL Cuts 9,500 Jobs in US, and an Ohio Town Takes the Brunt," *The New York Times*, November 11, 2008, p. B3; Daniel Patrick Sheehan, "DHL to ditch its US market; Closing of its Upper Macungie site means loss of 375 jobs," *Allentown Morning Call*, November 11, 2008, p. A12.

¹⁰⁹ E-mail from American Postal Workers Union representative Mark Dimondstein to Human Rights Watch, January 12, 2009 (on file with Human Rights Watch).

¹¹⁰ See Deutsche Post World Net website at www.dpwn.com.

¹¹¹ See "Deutsche Post World Net joining U.N. Global Compact," DPWN Press release, July 11 2006.

Allentown, Pennsylvania

DHL began operations at its new Allentown, Pennsylvania, sorting and shipping facility in early 2007 and employed 400-450 workers at the plant through 2008. Workers from the Allentown plant recounted to Human Rights Watch the concerns that motivated them to try, futilely, to exercise their right to form and join a union.

Nilsa Rodríguez from the packing/pallets department explained that she became active in the organizing effort because “employees don’t have any rights. They can be fired any time. If people get hurt, they are afraid to file injury reports because they’re afraid they’ll get fired. A lot of supervisors insult people, treat them badly. I respect the company; they should respect me.”¹¹²

Elisa Alonso, an immigrant worker from Guatemala, similarly noted “lack of respect” as her chief motivation for becoming a union supporter.¹¹³ Mayra Caravasi, a DHL worker who came to the United States from Peru, also complained of management disrespect, noting that one of the supervisors “spits on the floor when he’s around Latino workers.”¹¹⁴ Caravasi added, though, that like many co-workers, she was also concerned about safety conditions. “It’s a lot of heavy lifting,” she said, “like boxes of televisions and small refrigerators.”

Juan Llor, an immigrant worker from Ecuador, likewise explained that he became active in the organizing efforts because of safety conditions. “Conditions were dangerous,” he said. “Driving a fork lift was very dangerous. There were lots of accidents. Things would spill containing gases or broken glass. People got hurt a lot. We really needed a union.”¹¹⁵

Motivated by these and other concerns, workers at the Allentown sorting facility began an organizing drive with assistance from the American Postal Workers Union (APWU). Belying its claims about respect for workers’ freedom of association, DHL management aggressively countered workers’ organizing efforts at the new sorting facility in 2007. The company began issuing flyers and holding captive-audience meetings even before employees sought an NLRB election. Management began issuing materials in English and Spanish and brought in Spanish-speaking anti-union consultants to hold captive-audience meetings along with DHL managers. Latino workers made up about 40 percent of the hourly workforce in DHL’s

¹¹² Human Rights Watch interview with Nilsa Rodríguez, Allentown, Pennsylvania, December 3, 2007.

¹¹³ Human Rights Watch interview with Elisa Alonso, Allentown, Pennsylvania, December 3, 2007.

¹¹⁴ Human Rights Watch interview with Mayra Caravasi, Allentown, Pennsylvania, December 3, 2007. Caravasi identified the supervisor, and other workers said they saw the supervisor spitting in the presence of Latino employees.

¹¹⁵ Human Rights Watch interview with Juan Llor, Allentown, Pennsylvania, December 3, 2007.

Allentown plant.¹¹⁶ Latino workers interviewed for this report told Human Rights Watch that these were the first instances in which company management addressed them in Spanish.¹¹⁷

Written Materials

DHL management sent extensive anti-union literature to employees. Such written statements, even if stringently anti-union, are lawful under the NLRA, as long as they contain no threats of reprisal against workers who support organizing or promise of benefits for workers if they oppose organizing. But if the distribution of such statements takes place as part of one-sided, unrelenting campaigns against workers' organizing in which employees are denied comparable opportunity to hear other views, the use of such materials warrants consideration, together with other employer acts, in determining whether there has been interference with workers' freedom of association.

One DHL missive, for example, declared:

THE APWU WANTS TO TAKE AWAY YOUR VOICE! ... [T]he APWU does NOT care about your best interests.... Don't be fooled by the APWU's empty promises! ... Respect and dignity come from communication and cooperation among all of us ... not from a union contract!¹¹⁸

With an election scheduled for September 12-13, 2007, DHL increased its efforts to frustrate workers' organizing. A flurry of letters and leaflets to workers included the following statements:¹¹⁹

- **DO YOU REALLY WANT TO SHARE YOUR PAYCHECK ... WITH THE UNION? ... Right now, without representation, your hard-earned money goes into YOUR pocket for you and your family.... [T]he APWU is here so it can TAKE AWAY part of YOUR PAYCHECK every single month ... [T]hat's what UNION DUES are all about—you give and the APWU takes!**

¹¹⁶ Human Rights Watch interview with APWU representative Mark Dimondstein, Allentown, Pennsylvania, December 3, 2007.

¹¹⁷ Human Rights Watch interviews with DHL Allentown workers, Allentown, Pennsylvania, December 3, 2007.

¹¹⁸ See undated DHL flyer to Allentown employees, copy on file with Human Rights Watch (all emphases in original).

¹¹⁹ See undated DHL flyers distributed August-September 2007, copies on file with Human Rights Watch (all emphases in original).

- **DON'T SETTLE FOR THE APWU'S FAIRY TALES....** Union organizers will say anything to get your vote.... [T]he APWU cannot guarantee that you won't lose in contract negotiations what you already have.... **TELL THE UNION THAT YOUR JOB IS TOO IMPORTANT FOR FAIRY TALES.**
- Mark an "X" in the box of your choice. (*An "X" in the NO box is a vote against the APWU and a vote against paying union dues and against letting this Union gamble with your future.*)

Workers told Human Rights Watch that Allentown DHL management also launched aggressive, anti-union captive-audience meetings without any comparable opportunity for employees to receive information from union representatives inside the workplace during breaks or other times when such communication would not affect operations.

DHL worker Mayra Caravasi recounted her impression of the captive-audience meeting she attended in June 2007, saying:

The manager showed us a union card and said that giving the union our name and address meant the union was violating our privacy. She made it sound like it was illegal, what the union was doing. She told us the union was just a business trying to get our money, that the union would make everybody be part-timers paying full-time dues so that the union could get more money. She said that negotiations could last for years. People lost spirit because of what she was saying.¹²⁰

DHL worker Nilsa Rodríguez added, "They [captive-audience meetings] were horrible, horrible. It was all against us who wanted the union. They said we wouldn't get any raises because of the union. They didn't allow time for questions. They said come up and talk to us [the managers] personally."¹²¹

Greg Eshbach, another DHL worker, similarly described captive-audience meetings at the new sorting facility in 2007, specifically recounting his impressions of a specialized anti-union consultant coming to speak to workers. "They made us go sit down and listen to him," he said. "He put up half-truths and misleading PowerPoint slides.... He would read off the law and then give his interpretation to make it sound very bad for us, very ominous, very

¹²⁰ Human Rights Watch interview with Mayra Caravasi, December 3, 2007.

¹²¹ Human Rights Watch interview with Nilsa Rodríguez, December 3, 2007.

threatening, like the law will prevent us from getting raises if the union comes in. He would use implications to take you right up to a threat.”¹²² Eshbach added that, gradually, “The meetings became more and more structured. They didn’t allow any dissent or discussion. A lot of people were afraid after going through this grind. We definitely had a big majority in favor of the union, but these meetings destroyed it.”¹²³

DHL worker Juan Loor confirmed his co-workers’ accounts of DHL’s captive-audience meetings. “They made us go,” he said. “I remember when [DHL’s anti-union consultant] said that the Postal Workers is mainly a post office union and that workers in Allentown would be ‘an ant in the shit in the elephant’s asshole.’”¹²⁴

Elisa Alonso told Human Rights Watch that what she remembered most from the captive-audience meetings was DHL management’s threats about strikes. “They said the union would pull us out on strike and that if they did, the company would permanently replace us.”¹²⁵ Alonso said that the day before the NLRB election, her supervisor took her aside and told her not to vote for the union, that it was very risky, and that it would just bring trouble. “He went around to everybody one-on-one and said the same thing,” she added.¹²⁶

Violations of US Labor Law

DHL management did not merely portray unionization in ominous tones, conducting captive-audience meetings and distributing alarmist announcements all but unheard of in Europe. It also engaged in interference, restraint, and coercion in violation of both international standards and US law.

¹²² Human Rights Watch Interview with Greg Eshbach, Allentown, Pennsylvania, December 3, 2007.

¹²³ Ibid.

¹²⁴ Human Rights Watch Interview with Juan Loor, December 3, 2007.

¹²⁵ Permanent striker replacement also runs counter to German companies’ practice at home. Permanent striker replacement is unheard of in Germany, so unheard of that there is no law or legal commentary on the subject. A law review article comparing US and German labor law on strikes discusses the US doctrine allowing employers to permanently replace workers who strike, but does not mention anything in this regard for German labor law. David Westfall and Gregor Thusing, “Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis,” 22 *Boston College International & Comparative Law Review* 29 (Winter 1999). Queried on this point, a leading American scholar of German labor law says, “I once plowed through all the major German commentaries and could find nothing on the topic of permanent replacements.” E-mail from Professor Thomas C. Kohler, Boston College Law School, to Human Rights Watch, March 14, 2010 (on file with Human Rights Watch). Another leading US comparative labor law expert writes, “Most other industrial democracies have forbidden the hiring of permanent replacements. France does so. Germany as well, and [Germany] allows nonstriking employees to refuse to do struck work. Italy forbids the hiring of even temporary replacements.” Matthew W. Finkin, “Labor Policy and the Evisceration of the Economic Strike,” 1990 *University of Illinois Law Review* 547 (1990).

¹²⁶ Human Rights Watch Interview with Elisa Alonso, December 3, 2007.

Interference with Union Handbilling

“The company called the police when I was handing out union leaflets in the company parking lot,” William Molina told Human Rights Watch.¹²⁷ An immigrant from El Salvador, Molina held a “floor work” job at the DHL facility moving packages. Molina became active in the organizing effort, speaking with co-workers and handing out leaflets in non-work areas on non-work time, including company parking lots, as allowed under US labor law.¹²⁸

“When we started passing out the leaflets on April 30, [2007] around 6:30 when people were coming to work, first the company security guards came out and told us we had to leave,” said Molina. “We said no, that the union explained to us that as DHL employees we could do this. The guard told us the police would be called.”¹²⁹

At that point, said Molina, three more guards and two DHL managers came out and observed him attempting to distribute leaflets. “Two policemen came in five minutes,” he said. “They talked with managers, and then they talked with the union representative who was outside the fence on public property. Then they left, because we were right to stand our ground.”¹³⁰

“The real problem,” explained Molina, “was that the company did this to intimidate us and the other people, so they would think doing union stuff was reason to call the police. A lot of the employees are immigrants like me from Central America, where calling the police is very threatening. They did it again when we were out there leafleting. They just want to intimidate people. It had a big effect. A lot of people were frightened, especially the first time.”¹³¹

The NLRB administrative law judge ruling on this incident found that:

[DHL] unlawfully interfered with protected concerted activity when, on April 30, its agents told handbillers they could not handbill on the sidewalk leading to the plant entrance, threatened to call, and actually called, the police. [Management] ... transmitted these messages to the handbillers and ... was responsible for setting these events in motion. Such conduct

¹²⁷ Human Rights Watch interview with William Molina, Allentown, Pennsylvania, December 3, 2007.

¹²⁸ See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹²⁹ Human Rights Watch interview with William Molina, December 3, 2007.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

amounted to surveillance and more. [DHL's] conduct was coercive and unlawfully interfered with protected union activity.¹³²

Molina told Human Rights Watch about another incident of management interference in workers' associational activities:

When we passed out union leaflets on May 14, [2007,] a manager came out with a box full of water bottles. Every time a worker stopped and we tried to hand out a leaflet, he would give them a water bottle. The workers acted like they were intimidated by him. They didn't know if they should take a leaflet or not. A lot of them didn't take a leaflet. They didn't talk to us the way they usually do because he was there.¹³³

The ALJ rejected the manager's testimony that he "was motivated by a desire to simply meet and greet employees and give out water bottles."¹³⁴ He found that:

[managers] deliberately injected themselves in and around the handbillers to interfere with the handbillers and to intercept employees before they approached the handbillers.... I find ... that some employees did in fact avoid accepting handbills because of [management's] presence.... It is clear that [the manager] deliberately injected himself and his assistant into the handbilling activity ... in a childish effort to interfere with the handbilling.¹³⁵

An Unlawful Threat

Elisa Alonso testified at the unfair labor practice hearing that her manager told her during one of the "captive-audience" meetings that if the union came in, supervisors would not be able to help employees. The ALJ found that the manager's statement to Alonso was "an unlawful threat that, if the Union were voted in, employees would be subject to stricter and more onerous working conditions," thus interfering with and coercing employees in the exercise of their rights.¹³⁶

¹³² Decision of ALJ Robert A. Giannasi, *DHL Express and American Postal Workers Union; the Crossroads Group Labor Relations Consultants and American Postal Workers Union*, Cases Nos. 4-CA-35417 et.al.; Case No. 4-CA-35685, June 5, 2008.

¹³³ Human Rights Watch interview with William Molina, December 3, 2007.

¹³⁴ ALJ Giannasi decision, June 5, 2008.

¹³⁵ Ibid.

¹³⁶ Ibid.

Retaliation against a Union Leader

Elias Sleiman started working at the Allentown facility in January 2006. Along with William Molina, he was among the employees at the new sorting facility handing out union leaflets in the company parking lot on April 30, 2007, when DHL management called the police.

“Since I started working for DHL I have worked as a quality control person,” Sleiman said in a written statement. “My job is to repack damaged boxes, find routing for boxes that have lost their address label, and deliver boxes from the central QC location to where they belong.... My immediate supervisor has always been happy with my work and we’ve never had a problem.”¹³⁷

Sleiman went on to recount what happened next:

On May 3 [three days after the leafleting event,] [a manager] said he needed to train more people to do different jobs.... Since that night I’ve had a different job. I now unload trucks. This is a much harder job, probably the hardest job in the plant.... I was replaced in my old job by [another employee] and I now do his old job. [The other employee] is not a union supporter.... Now my hours have been cut to 3 per day. Meanwhile, at least 2 other people in my area are working 7-8 hours every day. They are both part-timers, just like me.¹³⁸

Sleiman told of receiving a negative evaluation from a supervisor on July 9, 2007:

[The supervisor] walked up to me around 9:30 p.m. and told me he had to do my evaluation. He asked me to look him in the eyes and said, “I f*cking hate to do this. Did you hear me? I f*cking hate to do this, but I have to.” Then he showed me the letter. I told him he knew I did my job much better than was written up. He said, “Elias, I just told you this is what I have to do, and I f*cking hate it.... Please sign it and let me go” ... I signed it.¹³⁹

The ALJ ruled that DHL management cut Sleiman’s hours, issued him a warning notice, and gave him a negative evaluation because of his union activity, unlawfully discriminating

¹³⁷ See statements of Elias Sleiman submitted to NLRB, July-September 2007 (copy on file with Human Rights Watch).

¹³⁸ Ibid.

¹³⁹ Ibid.

against him. The ALJ noted that “the reduction of Sleiman’s hours was discriminatory ... the June 27 warning was issued because of Sleiman’s union activities ... Sleiman’s July 2007 evaluation was negative because of his union activities.... the July evaluation was so out of character that it cannot be explained by anything other than continued discrimination against Sleiman.”¹⁴⁰

The Vote and Its Aftermath

Union supporters lost the September 12-13, 2007, NLRB election 217-135. In a letter to Human Rights Watch, DHL characterized the vote as “the choice made by DHL workers at the ballot box.”¹⁴¹ But an NLRB administrative law judge determined that workers’ free choice was destroyed by DHL’s interference, restraint, and coercion, and ordered a new election. As DHL noted in its letter to Human Rights Watch, the case is still pending final disposition with the National Labor Relations Board.

The union charged that DHL’s unfair labor practices and other pre-election conduct destroyed conditions for a fair election. The Board’s regional director issued a series of complaints, finding merit in the union’s allegations and objections to the election. DHL contested the findings, forcing the case to trial six months later before an administrative law judge (ALJ) in March 2008.

The ALJ’s findings underscore the extent of DHL’s interference with workers’ freedom of association and the effects of the company’s conduct on the NLRB election. The judge ruled that:

1. By directing employees to leave the premises where they were properly engaged in protected handbilling activity, threatening to call the police if they did not leave and by actually calling the police, and by engaging in surveillance of the protected union activity of employees, Respondent has violated Section 8(a)(1) of the Act.
2. By threatening employees with reprisals, including more onerous working conditions and discharge, for engaging in union activities, Respondent has violated Section 8(a)(1) of the Act.

¹⁴⁰ ALJ Giannasi decision, June 5, 2008.

¹⁴¹ Letter from Patricia Burke, Labor Relations, DHL, to Human Rights Watch, February 16, 2009 (copy on file with Human Rights Watch).

3. By reducing the work hours of, and issuing warnings and negative performance evaluations to, employees for engaging in union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The above violations are unfair labor practices within the meaning of the Act.

By engaging in some of the unfair labor practices set forth above, those occurring after the petition was filed in this case, the Respondent has interfered with the holding of a free and fair election on September 12 and 13, 2007. That election is set aside and the Regional Director must hold a new election.¹⁴²

DHL appealed the judge's decision and his order for a new election to the NLRB in Washington, DC. This meant that DHL workers were facing delays measured in years while their freedom of association was effectively suspended. DHL's closure of the Allentown facility in January 2009 stripped away any possibility of vindicating these particular workers' rights. At this writing, the case remains on appeal at the NLRB in Washington, DC.

In a letter to Human Rights Watch, DHL cited "positive labor relations" at other locations in the United States and characterized events in Allentown as the union's "effort ... to circumvent the choice made by DHL workers at the ballot box." The company further emphasized that in other union organizing efforts in various parts of the country "there were no allegations against the company such as those made by the APWU."¹⁴³ DHL reiterated this point in a later letter, noting successful union organizing at a Miami, Florida location and successful contract negotiations at five other locations, all involving another union, not the APWU. The company also maintained that Human Rights Watch should not cite cases that have not reached their final disposition in appeals processes available in the US labor law system.

Compliance with international standards at some locations does not excuse violations at other locations. This is especially the case when the violations are as serious as those here, where the ALJ invalidated the election results and ordered that "a new election must be held that properly reflects the will of the employees free from unfair labor practices or other

¹⁴² Ibid.

¹⁴³ Ibid.

objectionable conduct.”¹⁴⁴ In keeping with the methodology for this report, Human Rights Watch relies on these latest findings by US labor law authorities of unlawful conduct by the employer as those findings stood on the date of publication of this report—not on union allegations against the company.

Saint-Gobain

The Saint-Gobain Group is a French multinational manufacturing firm specializing in construction and automotive products: ceiling, insulation, wallboard, ceramics, pipes, plastics, insulation, reinforcements, packaging, glass, and abrasives. The company employs more than 190,000 workers in over 40 countries, including some 20,000 in the United States. With \$52 billion in annual revenues, it is number 132 on the Fortune Global 500 list. Saint-Gobain’s operations in the United States are directed from its US headquarters in Valley Forge, Pennsylvania.¹⁴⁵

Public Commitments on Freedom of Association and Corporate Social Responsibility

Saint-Gobain takes pride in its sustainability and corporate social responsibility initiatives. Saint-Gobain is a member of the board of Vigeo, a French environmental and social ratings agency. In July 2003 Saint-Gobain joined the UN Global Compact, thereby committing itself to the instrument’s principles of human rights and labor rights, among them Principle 3: “Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.”

Announcing its support for the Global Compact, Saint-Gobain described its own internal Principles of Conduct and Action of the Group adopted a few months earlier, stating:

[T]he Principles of Conduct and Action of the Group are a clear frame of reference, widely diffused throughout the Group and individually conveyed to each member of the managerial and supervisory staff, thus clearly respecting the philosophy and spirit of the Global Compact. In essence, they consist of five Principles of individual conduct (professional commitment; respect for human beings; integrity; loyalty and solidarity) and of four Principles of professional action (respect for the law; respect for the environment; respect for health and safety at work and respect for rights of employees). The

¹⁴⁴ ALJ Giannasi decision, June 5, 2008.

¹⁴⁵ For these and other company data, see Saint-Gobain website at www.saint-gobain.com; see Fortune, “Global 500” at <http://money.cnn.com/magazines/fortune/global500/2010/index.html>.

Principles are fully applied to all the companies in the Group, in whatever country they may be situated.¹⁴⁶

In its announcement, Saint-Gobain also noted that “the Principles of [Conduct and] Action make reference to the OECD guidelines for multinational enterprises (June 2000).”¹⁴⁷ Those guidelines set forth a number of recommendations to multinational firms, including to “respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers’ associations, with such representatives with a view to reaching agreements on employment conditions.”¹⁴⁸ Saint-Gobain also declared its commitment to “social dialogue” with employees, saying, “The Group gives great importance to the quality of social dialogue. In every geographical area, General Delegations, which are responsible for carrying out Group Policy in the area, coordinate the labor relations, in order to take local specificities into consideration.”¹⁴⁹

In December 2008, Pierre-André de Chalendar, chief operating officer of the Saint-Gobain Group, signed the declaration of management support for human rights to coincide with the 60th anniversary of the Universal Declaration of Human Rights.¹⁵⁰

In so doing, Saint-Gobain supported this statement:

On the occasion of the 60th anniversary of the Universal Declaration of Human Rights, we, business leaders from all corners of the world, call on governments to implement fully their human rights obligations. We also reiterate our own commitment to respect and support human rights within our sphere of influence. Human rights are universal and are an important business concern all over the globe.¹⁵¹

¹⁴⁶ See “The Saint-Gobain Group supports the Principles of the Global Compact,” at www.saint-gobain.com/en/html/presse/pdf/GlobalCompact.pdf (accessed February 10, 2008).

¹⁴⁷ Ibid.

¹⁴⁸ Organization for Economic Cooperation and Development, “Guidelines for Multinational Enterprises,” (2000), Sec. IV, Employment and Industrial Relations.

¹⁴⁹ See “The Saint-Gobain Group supports the Principles of the Global Compact,” at www.saint-gobain.com/en/html/presse/pdf/GlobalCompact.pdf (accessed February 10, 2008).

¹⁵⁰ See Saint-Gobain, “Saint-Gobain reiterates its support for human rights,” <http://www.saint-gobain.com/en/press/news/support-human-rights> (accessed January 15, 2009).

¹⁵¹ UN Global Compact, “CEO Statement on the 60th Anniversary of the Universal Declaration of Human Rights,” at http://www.unglobalcompact.org/Issues/human_rights/CEO_Statement.html (accessed January 15, 2009).

Worcester, Massachusetts

Despite its professed commitment to social responsibility, social dialogue, and respect for workers' organizing and bargaining rights, Saint-Gobain for years worked to frustrate employees' efforts to organize and bargain collectively at its industrial abrasives manufacturing plant in Worcester, Massachusetts.¹⁵²

Workers launched an organizing effort with the United Auto Workers (UAW) in 2000. Instead of "social dialogue" and recognition of the right to collective bargaining, Saint-Gobain management responded with an aggressive campaign against union representation and, as detailed below, with violations of employees' rights to organize and bargain collectively.

Management engaged a prominent anti-union law firm to direct its campaign against workers' organizing. The firm launched a systematic program of captive-audience meetings, one-on-one meetings between supervisors and individual employees, and volleys of letters and flyers warning of potentially dire consequences should workers choose union representation.¹⁵³

Despite the campaign, a majority of Saint-Gobain's 800 workers voted in favor of collective bargaining in an NLRB election in August 2001. But instead of accepting the results and entering into bargaining, management filed objections to the election, alleging that statements of support for workers' organizing by the US congressman representing the district had "upset the laboratory conditions for a fair election." The NLRB dismissed these objections and ordered the company to bargain with the workers' union.¹⁵⁴

In January 2002, shortly after bargaining began, management unilaterally cut more than 100 employees' work days from 8 hours to 7.5 hours, correspondingly reducing their pay. Under US labor law, reduction of hours is "precisely the type of action over which an employer must bargain with a newly certified Union."¹⁵⁵ More than two years later, an administrative law

¹⁵² For a history of labor-management relations at the Worcester abrasives plant, see Bruce Cohen, "From Norton to Saint-Gobain, 1885-2006: Grinding Labor Down," *Historical Journal of Massachusetts* (Summer 2006).

¹⁵³ Ibid. Unless it crosses a line to become interference, restraint, and coercion as determined by the NLRB (and the courts in appealed cases), such activity is permissible under US labor law. See website of Jackson Lewis (the law firm engaged by Saint-Gobain) <http://www.jacksonlewis.com> (accessed August 27, 2010) (stating "Labor Relations, including Preventive Practices: Committed to the practice of preventive labor relations through issue assessment, supervisory training, policy development, and positive communications, Jackson Lewis has assisted many employers in winning NLRB elections or in avoiding union elections altogether. The preservation of management rights is our goal, whether prior to a union offensive, during a union-organizing campaign or in collective bargaining negotiations.").

¹⁵⁴ *Saint-Gobain Abrasives, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, Region 9A*, Case No. 01-RC-21388, 337 NLRB No. 8 (2001).

¹⁵⁵ *NLRB v. Katz*, 369 U.S. 736 (1962).

judge found that Saint-Gobain's unilateral move was an unfair labor practice that unlawfully interfered with, restrained, and coerced employees in the exercise of their organizing and bargaining rights.¹⁵⁶ In October 2004, the NLRB upheld the ALJ's decision and ordered the company to reinstate the 8-hour day, grant back pay to employees who suffered wage losses, and to bargain with the union over working hours of affected employees.¹⁵⁷

Saint-Gobain defied the NLRB's remedial orders. The Board had to go to federal court to seek enforcement of its decision. In October 2005, almost three years after the company's unlawful conduct, the First Circuit court of appeals upheld the Board and instructed Saint-Gobain to comply with the remedial orders.¹⁵⁸

By this time it was too late for the Board and court orders to have any real effect: nine months earlier workers had voted to decertify the union. The campaign to decertify the union had been launched with involvement of the National Right to Work Committee (NRTWC). The NRTWC opposes "union shop" or "agency shop" contractual provisions in which the employer and the union agree that all employees represented by the union will pay union dues (or an amount equal to union dues for represented employees who choose not to become union members. Compulsory union membership is unlawful in the United States). Under such "union security" agreements, employees who choose not to join the union can receive a rebate for the percentage of such amounts used for nonrepresentational purposes, such as political advocacy.¹⁵⁹

The NRTWC describes its "one belief" mission as "No one should be forced to pay tribute to a union in order to get or keep a job."¹⁶⁰ At Saint-Gobain, however, the NRTWC characterized

¹⁵⁶ Decision of ALJ David L. Evans, *Saint-Gobain Abrasives, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, Region 9A*, April 27, 2004. In the same case, the ALJ found that the company did not commit an unfair labor practice by unilaterally changing employees' health insurance.

¹⁵⁷ *Saint-Gobain Abrasives, Inc. and International Union of Automobile, Aerospace & Agricultural Implement Workers of America*, Case No. 01-CA-39789, 343 NLRB No. 68 (2004).

¹⁵⁸ *National Labor Relations Board, Petitioner and International Union of Automobile, Aerospace & Agricultural Implement Workers of America v. Saint-Gobain Abrasives, Inc.*, 426 F. 3d 455 (October 19, 2005).

¹⁵⁹ *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

¹⁶⁰ See the mission statement and related material at the website of the National Right to Work Committee, <http://www.nrtwc.org/>. In the case of represented employees who choose not to join the union, the phrase "union dues" here means an amount equal to dues. Strictly speaking, only union members pay union dues. Under US labor law no worker can be required to join a union. See *International Association of Machinists v. Street*, 367 U.S. 740 (1961). A "union shop" or "agency shop" requiring dues payments by non-members is a subject of bargaining between the employer and the union. Dues payments by non-members can be required only if management agrees to such a provision in the collective bargaining agreement, except in states that prohibit such agreements pursuant to Section 14(b) of the NLRA, otherwise known as the "right-to-work" provision of the Act. In states where such agreements are permitted (including Massachusetts), unions normally propose it; management is free to agree to the proposal, to reject the proposal, or to counter-propose a different arrangement. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Counter-proposals can include "modified union shop" (under which only workers hired after the date of the contract can be obligated to pay dues), "maintenance of membership shop"

its role in the decertification move not as one addressing mandatory dues payments—management had not agreed to such a provision—but as one by which “employees will be free from union monopoly control over terms and conditions of employment.”¹⁶¹ It focused its efforts on attacking the idea that workers would be well served by collective bargaining.

The Decertification Move at Saint-Gobain

The roots of the decertification effort at Saint-Gobain began in 2003. Shortly after workers began a strike in November of that year, the company advertised for replacement workers and began hiring them, effectively breaking the strike.¹⁶² Assisted by the National Right to Work Committee, a group of employees opposed to the union began issuing flyers among workers suggesting that Saint-Gobain would shut the workplace and move jobs abroad if workers did not decertify the union.¹⁶³

The ALJ who oversaw hearings on the decertification petition and related unfair labor practice charges noted that the anti-union group “obtained literature and advice from the Foundation in [the] effort to decertify the union.” He found that all the material distributed by the anti-union group before the decertification election closed with the tagline “Save Our Jobs – Vote No!” and cited other UAW organized facilities that had closed. The ALJ noted that the material “strongly suggested that if the employees at Saint-Gobain did not vote to decertify the UAW, that Respondent [Saint-Gobain] would close the Worcester facility.”¹⁶⁴ He further found that the group’s “threats” were obviously very serious, affected the entire bargaining unit, and were widely disseminated and repeated throughout the weeks just prior to the decertification election.¹⁶⁵ However, he concluded that, coming from NRTWC-supported group, these did not run afoul of legal constraints on such threats that would be applicable to the employer.¹⁶⁶

(under which only workers who are union members on the effective date of the contract can be obligated to pay dues), and others.

¹⁶¹ National Right to Work Foundation, “Saint-Gobain Workers Throw Out Unwanted UAW Union: Foundation attorneys successfully aid workers in high-profile decertification battle,” *Foundation Action*, March/April 2005, p. 4.

¹⁶² Lisa Eckelbecker, “Saint-Gobain workers go on strike,” *Worcester Telegram & Gazette*, November 6, 2003, p. A1; Lisa Eckelbecker, “Picket line tally varies; St-Gobain strike goes on,” *Worcester Telegram & Gazette*, November 11, 2003, p. E1; Bob Kievra, “UAW ends Saint-Gobain Strike,” *Worcester Telegram & Gazette*, November 14, 2003, p. E1.

¹⁶³ The ALJ who oversaw hearings on the decertification petition and related unfair labor practice charges noted that the anti-union group “obtained literature and advice from the Foundation in [the] effort to decertify the union.” Decision of ALJ Arthur J. Amchan, *Saint-Gobain Abrasives, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, Region 9A*, Case No. 01-CA-41623 (2006).

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ Imputing liability to Saint-Gobain would require proof that the National Right to Work Committee was acting as an agent of Saint-Gobain management. See *Mercy Healthcare Sacramento*, 334 NLRB No. 13 (2001). The union alleged such an agency

The anti-union group cited articles in local and national newspapers backing up the plant closing danger with quotes from company officials hinting at job losses. The following appeared in a local Worcester paper:

Ever since the United Auto Workers won a narrow victory to represent about 800 workers at Saint-Gobain abrasives operations in Greendale [a suburb of Worcester where the plant is located], tension has been mounting between management, the union, the political establishment and segments of the community.

There has been talk about Saint-Gobain closing shop and leaving Worcester altogether. “No decision has been made yet (about future plans) but if things keep going wrong, sooner or later the company's patience will run out,” said Dennis Baker, senior adviser, during a series of interviews with company officials, city and political leaders.¹⁶⁷

A *Wall Street Journal* editorial criticized Massachusetts politicians for publicly backing the UAW in the dispute and implied a loss of jobs because of workers’ organizing efforts:

It is increasingly difficult to keep manufacturing jobs in those parts of the US where unions and government impose high costs that make operations uncompetitive....

Saint-Gobain is one of central Massachusetts's largest property-tax payers. The company buys \$50 million worth of goods each year from in-state vendors, and it has spent tens of millions of dollars on capital improvements. Last year it added 50 new jobs. Nonetheless, Saint-Gobain finds itself in the middle of a prolonged labor dispute....

[Saint-Gobain official] Dennis Baker notes that the steel industry, a big customer for abrasives, is moving offshore and he says the challenge is to “sustain jobs where the product is a commodity-type product and there's a high-cost labor aspect” to making it. “When you're faced with the prospect of

relationship, but the ALJ ruled that the NRTWF did not act as the employer's agent in threatening employees with plant closure because “there is no evidence that Saint-Gobain solicited or authorized [the anti-union group's] recurring communications to employees that voting for decertification was essential to saving their jobs.” Ibid.

¹⁶⁷ Robert Nemeth, “Saint-Gobain cites lack of support,” *Worcester Telegram & Gazette*, July 25, 2004, p. C2.

better costs in places like Texas, Mexico, China,” says Mr. Baker, “it makes doing business in a place like Massachusetts even more difficult ... ”

Instead of adding costs to US companies, American politicians ought to be looking for ways to reduce government burdens ... so businesses don't feel obliged to flee offshore. At least Worcester residents will know whom to blame if the 1,700 jobs at Saint-Gobain up and quit the area.¹⁶⁸

In January 2005, 53 percent of Saint-Gobain's 700 workers—including replacement workers—voted to decertify the UAW as bargaining representative at the facility. The vote took place after the NLRB reversed the regional director's dismissal of the decertification petition because of pending unfair labor practice charges. The Board instructed the regional director to hold a hearing on whether unfair labor practices “caused” the decertification petition.¹⁶⁹ The regional director did not find such causation, and the decertification petition advanced to a vote. In the view of Saint-Gobain, communicated to Human Rights Watch, this case demonstrates “broad support for the principle of employee freedom of choice.”¹⁷⁰

However, the vote did not put an end to unfair labor practice proceedings related to the decertification vote. Over a year later, in March 2006, an NLRB administrative law judge ruled that Saint-Gobain had unlawfully hired temporary employees to perform bargaining unit work over a two-year period in which the union represented employees and Saint-Gobain had an obligation to bargain in good faith with the union over this issue.¹⁷¹ The ALJ said:

At no time during this time period did Respondent [Saint-Gobain] give the Union advance notice of its intent to hire additional temporaries. It merely informed the Union that it hired additional temps, on numerous occasions, after the fact. Thus, Respondent presented the Union with a “fait accompli.”

¹⁶⁸ See “A Jobs Story,” *The Wall Street Journal*, September 3, 2004, p. A10.

¹⁶⁹ NLRB, Decision on Review and Order Remanding, *Saint Gobain Abrasives, Inc. and Wayne Gregoire and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, Region 9A*, Case No. 1-RD-2003, 342 NLRB 434 (July 8, 2004).

¹⁷⁰ Letter of Gilles Colas, Saint-Gobain general delegate, North America, to Human Rights Watch, July 27, 2010 (copy on file with Human Rights Watch).

¹⁷¹ Decision of ALJ Arthur J. Amchan, *Saint-Gobain Abrasives, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, Region 9A*, Case No. 01-CA-41623 (2006). The temporary workers at issue in this case were not just those hired during the strike, but throughout 2003 and 2004. As discussed, US labor law allows employers to hire replacement workers during an economic strike.

An employer cannot implement a change and then claim that a union waived its right to bargain [over that change] by failing to do so retroactively.¹⁷²

The ALJ found additional management unfair labor practices during the year prior to the decertification election. In September 2004, a supervisor told an employee wearing a pro-union T-shirt that he would never become a group leader again and that “management sees red when they see a union shirt.”¹⁷³ This action, said the ALJ, “violated Section 8(a)(1) of the Act in interfering with, restraining, and coercing [the employee] in the exercise of his Section 7 rights.”¹⁷⁴

The ALJ cited other instances in which management unlawfully refused to bargain with the union over unilateral changes in one job and over the elimination of another job, as well as an unlawful refusal to bargain over another instance in which management eliminated jobs held by union-represented workers and hired temporary agency employees to fill the jobs.¹⁷⁵

In addition to pursuing these unfair labor practice complaints, the union sought to have the decertification election overturned. The ALJ stated unequivocally in his decision that “the company did violate labor laws” and tellingly noted that the decertification election “may not reflect an uncoerced majority of the ballots.” However, the judge refused to order a new election because the UAW went ahead with the January 2005 election instead of choosing to delay the election until a final ruling on the unfair labor practice charges, a ruling that would likely have taken years more to resolve if the company pursued appeals to the full Board and to the courts. The judge said:

Traditional Board law generally would necessitate an order requiring Respondent to bargain with the Union and another election based upon a finding that Respondent violated Section 8(a)(5) by hiring numerous temporary employees during the critical period between ... early 2003 and the January decertification election.... A violation of Section 8(a)(1) during the critical period will necessitate setting aside the election unless it is “virtually impossible” to conclude that the employer’s conduct affected the outcome.... An employer who violates Section 8(a)(5) derivatively violates Section 8(a)(1).... Given the number of violations (each time Respondent hired

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

additional agency temporaries), their severity, its obviousness to members of the bargaining unit and the Union's margin of defeat, one cannot conclude that it was virtually impossible that Saint Gobain's unfair labor practices affected the outcome of the January decertification election.

However, I conclude the [sic] in the instant case, the traditional rule should not apply [because] ... [i]n December 2004, the Union decided to go forward to an election.¹⁷⁶

In short, the ALJ found that Saint-Gobain's "severe" violations could have made the election that narrowly decertified the union an unfair one, normally requiring a new election. However, he allowed the company to reap the harvest of its unlawful conduct, refusing to order a new election free of management coercion. Both the UAW and the NLRB General Counsel had sought a new election.¹⁷⁷

The Saint-Gobain OECD Complaint

In June 2003 the UAW, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the chemical and energy global union ICEM filed a complaint with the United States National Contact Point (NCP) under the OECD Guidelines for Multinational Enterprises. Chapter IV of the OECD Guidelines covers labor concerns, beginning with multinational corporate investors' respect for ILO core labor standards. The unions' complaint asked the US NCP to take action under OECD procedures to help resolve the dispute at Saint-Gobain's Worcester facility.

Each OECD country has a National Contact Point to receive and handle complaints under the Guidelines. The NCP is usually a single government official in a relevant department or ministry, though in some countries NCP duties are shared by more than one person or one department. In the United States, the NCP is located an office housed in the State Department's Bureau of Economic, Energy and Business Affairs. The Bureau is part of the International Finance and Development unit in the State Department's Office of Investment Affairs.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid. See also Bob Kievra, "Judge rejects St-Gobain election bid," *Worcester Telegram & Gazette*, March 29, 2006 (stating "A second decertification election should not be held at Saint-Gobain Abrasives Inc., even though the company violated federal labor laws by hiring temporary employees without providing notice to the United Auto Workers union, an administrative law judge has ruled.... Administrative Law Judge Arthur J. Amchan rejected a request by the UAW and the Boston office of the National Labor Relations Board for a second election.").

The Guidelines' procedures give wide latitude to NCPs on how to handle complaints. NCPs "contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances." They "offer a forum for discussion ... to deal with the issues raised." They "offer good offices to help the parties involved to resolve the issues."

NCPs may "facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues." Finally, if the parties involved do not reach agreement, NCPs can "issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines."¹⁷⁸

The US NCP is known for its passivity compared with European counterparts. In 21 cases between 2000 and 2009—most of them involving labor complaints—the US NCP issued a final statement in just one, the Saint-Gobain case. The Dutch NCP handled 23 cases and issued 6 final statements; the UK NCP handled 15 cases and issued 8 final statements. In many cases, they arranged conciliation or mediation to assist parties in resolving a dispute.¹⁷⁹

Notwithstanding the fact that the Saint-Gobain case gave rise to the only final statement emitted by the US NCP in this 10-year period, the final statement itself reflects the limits of the OECD process as administered by the US NCP. The final statement was a single page in length. It stated that the NCP, on April 14, 2005 "offered its good offices and encouraged the parties to consider the possibility of reengaging the FMCS [Federal Mediation and Conciliation Service] mediation process that they had pursued previously."¹⁸⁰ The final statement noted that "[t]he union responded favorably to this suggestion. However, the company reiterated the view, which it has maintained throughout the USNCP's involvement, that it preferred to pursue the issues exclusively through the NLRB...."¹⁸¹

The NCP conceded that it took no action but would "continue monitoring developments."¹⁸² The report concluded with a brief account of the decertification election results and the

¹⁷⁸ OECD, "Guidelines for Multinational Enterprises, Procedural Guidance," at http://www.oecd.org/document/39/0,3343,en_2649_34889_1933095_1_1_1_1,00.html (accessed August 27, 2010).

¹⁷⁹ OECD, Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises, Draft Report by the Chair of the 2009 Annual Meeting, DAF/INV/NCP(2002)1, May 29, 2009.

¹⁸⁰ US Department of State, US National Contact Point, "Final Statement on the Saint-Gobain-United Autoworkers Specific Instance," January 5, 2007 (copy on file with Human Rights Watch).

¹⁸¹ Ibid.

¹⁸² Ibid.

conclusion that “the USNCP decided to discontinue its monitoring of the dispute and to prepare this final report.”¹⁸³

In a letter to Human Rights Watch, Saint-Gobain said that the unions’ complaint was “the subject of a multi-year investigation and assessment by the USNCP” and that “the USNCP decided not to take any action.” The company added 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.”¹⁸⁴

A union representative involved in the OECD case told Human Rights Watch that “the company just stonewalled the NCP, and the NCP rolled over for them.”¹⁸⁵ However, Saint-Gobain’s rejection of NCP overtures and insistence that it would only use the NLRB process resulted in the NCP’s own characterization of its role as one in which it would only “continue monitoring developments.”

Niagara Falls, New York

Saint-Gobain’s resistance to workers’ freedom of association has not been limited to organizing and bargaining at the Worcester abrasives plant. At Saint-Gobain’s industrial ceramics plant in Niagara Falls, New York, a majority of production and maintenance workers and labor technicians voted in favor of trade union representation by the United Steelworkers of America in an NLRB election held on August 23, 2000. Saint-Gobain refused to accept the results, filing an objection to the election.¹⁸⁶

The NLRB regional director ruled that Saint-Gobain’s objection had no merit. But again, instead of accepting this decision, the company refused the director’s order to bargain with the union. This prompted the Steelworkers’ union to file an unfair labor practice case against the company for unlawfully refusing to bargain with the union chosen by a majority of employees.¹⁸⁷

¹⁸³ Ibid.

¹⁸⁴ Letter of Gilles Colas, Saint-Gobain general delegate, North America, to Human Rights Watch, July 27, 2010 (copy on file with Human Rights Watch).

¹⁸⁵ Human Rights Watch interview with former UAW representative Steve Beckman, Washington, DC, August 5, 2009.

¹⁸⁶ *Saint-Gobain Industrial Ceramics, Inc. v. United Steelworkers of America, Local Union 9436, AFL-CIO*, Case 03-CA-22879, 334 NLRB No. 60 (July 3, 2001).

¹⁸⁷ Ibid.

Nearly one year after the election—a year during which Saint-Gobain’s maneuver thwarted employees’ choice of union representation and collective bargaining—the NLRB in Washington found that the company’s refusal to bargain was an unlawful interference, restraint, and coercion of employees in the exercise of their organizing and bargaining rights. The Board ordered Saint-Gobain to bargain with the workers’ union.¹⁸⁸

Saint-Gobain again refused to accept the NLRB’s decision. It forced the Board to go to federal court to have its order enforced.¹⁸⁹ It took almost another year and a half for a court to decide the case, again in favor of the workers and their union. In November 2002, two years and three months after a majority of workers chose union representation, a federal circuit court of appeals upheld the Board. The court found that Saint-Gobain had unlawfully refused to bargain and that “the Board acted reasonably in overruling Saint-Gobain’s objection to the election as an impermissible post-election challenge.”¹⁹⁰

The chief union negotiator told Human Rights Watch, “That two-year delay had a tremendous effect on people. The interest was dropping off all that time that nothing was happening. Even some of the leaders lost heart. Dragging it out that long was too tough for the [plant leadership] committee to hold together.”¹⁹¹ In 2003 employees decertified the Steelworkers’ union.

In its letter to Human Rights Watch, Saint-Gobain emphasized that “[t]here have been many cases in the United States where our employees have elected to be represented by a union. We respect and observe these outcomes. We work cooperatively with those unions and bargain with them in good faith.”¹⁹² It also said, “We believe that Saint-Gobain’s actions in the two cases under consideration were appropriate and entirely consistent with our membership in the UN Global Compact, our endorsement of the OECD Guidelines and the UDHR, and our Principles of Conduct and Action.... [O]ur policy is to enable our employees to make an informed choice about union representation without fear of reprisals or

¹⁸⁸ Ibid.

¹⁸⁹ Saint-Gobain told Human Rights Watch, “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 ... 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 can then be appealed by the employer to the Court of Appeals ... 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.” Letter of Gilles Colas, Saint-Gobain general delegate, North America, to Human Rights Watch, July 27, 2010 (copy on file with Human Rights Watch).

¹⁹⁰ *Saint-Gobain Industrial Ceramics, Inc. v. National Labor Relations Board*, 310 F. 3d 778 (2002).

¹⁹¹ Human Rights Watch interview with United Steelworkers representative Dan Dunlap, Buffalo, New York, January 14, 2009.

¹⁹² Letter from Gilles Colas, president and chief executive officer, Saint-Gobain, to Human Rights Watch, March 17, 2009 (copy on file with Human Rights Watch).

recrimination from either the union or the employer. We wish to ensure that our employees consent willingly to being represented by a union that seeks to organize in one of our plants.¹⁹³

However, the company's unlawful conduct as found in NLRB proceedings (marked by "severity" in some instances, as one judge put it), combined with its response to the NLRB rulings against it, suggest a failure to comport with international norms and a failure to maintain due diligence in Saint-Gobain's multinational management system to respect freedom of association standards. The fact that the company has a better record at some other US locations does not exempt it from ensuring that company-wide due diligence systems are working to identify problems when they occur, allowing company officials to take action to better protect workers' human rights.

Sodexo

Sodexo is a France-based Global 500 multinational corporation that specializes in food services and facilities management and employs nearly 380,000 people in 80 countries.¹⁹⁴ Of these, over 100,000 work in North America at more than 6,000 locations. Sodexo's 2009 revenues of US\$20 billion put it in the Fortune Global 500 list at number 437. The firm's operations in the United States are run from its headquarters in Gaithersburg, Maryland, under the name Sodexo USA.¹⁹⁵

Public Commitments on Freedom of Association and Corporate Social Responsibility

In January 2002, Sodexo endorsed the Global Sullivan Principles of Social Responsibility, which include the commitment to "[r]espect ... employees' voluntary freedom of association."¹⁹⁶ In 2003, Sodexo joined the UN Global Compact, committing itself under Principle 3 to uphold workers' rights to freedom of association and collective bargaining. The company asserts that it was the "first in industry to be a signatory" to the Sullivan Principles

¹⁹³ Ibid.

¹⁹⁴ Formerly the Sodexho Alliance, the company dropped the "h" and changed its name to Sodexo in January 2008. See Sodexo website at www.sodexo.com. To avoid confusion, we refer to the company throughout this report as "Sodexo."

¹⁹⁵ For these and other company data, see the Sodexo website at www.sodexo.com; see Fortune, "Global 500" at <http://money.cnn.com/magazines/fortune/global500/2010/index.html>.

¹⁹⁶ Hospital Employees' Union, the BC Health Services Division of the Canadian Union of Public Employees, "Privateer Watch: Who is Sodexho?" May 1, 2002, <http://www.labournet.net/world/0209/sodprofile.pdf> (accessed November 25, 2008); Global Sullivan Principles of Social Responsibility, "The Global Sullivan Principles of Social Responsibility," undated, <http://www.globalsullivanprinciples.org/principles.htm> (accessed November 25, 2008).

and the Global Compact.¹⁹⁷ In 2005, Sodexo began publishing an annual corporate citizenship report describing its initiatives on social responsibility matters. In a recent report, the company avers, “It is important to listen to people’s needs, to establish constructive dialogue in a spirit of trust, and to give each person a sense of dignity in the workplace.... Since its creation, Sodexo has always recognized and respected trade unions.”¹⁹⁸ The report adds that, “[s]ince 2003, in **North America**, our suppliers have agreed to comply with a formal **Code of Conduct** based on **ILO (International Labor Organization)** standards ... including ... Freedom Of Association.”¹⁹⁹

Sodexo CEO Michel Landel declares that the company has “continued to implement our wide range of policies and programs that take into account environmental and social criteria.”²⁰⁰ In material aimed at a university student audience, Sodexo elaborated on its commitment to social responsibility, stating:

Sodexo is a socially responsible company that is helping to create the type of world we want for today and tomorrow. As a leading provider of outsourced food and facilities management services throughout North America, we’re committed to continuing to lead our industry in helping to address the challenges that are impacting our communities. Sodexo is pleased to provide this overview of our business values and strong corporate responsibility initiatives.

Specifically addressing workers’ right to freedom of association, Sodexo added:

Sodexo respects the rights of all employees and is committed to treating workers with appreciation and fairness. We work positively and collaboratively with nearly 400 unions, respecting the rights of our employees to choose if they wish to participate in organizing activities.²⁰¹

¹⁹⁷ See Sodexo, “Sodexho at Guilford College: Corporate and Social Responsibility Overview,” undated, www.guilford.edu/assets/pdf/newsEvents/SodexhoSocialResponsibilityStatement.pdf (accessed February 17, 2008).

¹⁹⁸ See Sodexo, “2007 Corporate Citizenship Report,” www.sodexo.com/group_en/the-group/corporate-citizenship/ethical-principles/philosophy/philosophy.asp, p. 28.

¹⁹⁹ *Ibid.*, p. 35 (emphasis in original).

²⁰⁰ See Sodexo, “2007 Corporate Citizenship Report,” p. 2.

²⁰¹ See Sodexo, “Sodexho at Guilford College: Corporate and Social Responsibility Overview.”

In 2009, Sodexo adopted a Group Human Rights Policy in which it “commits to respect the principles of” the Universal Declaration of Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the UN Global Compact.²⁰² Each contains strong affirmation of workers’ freedom of association. The Human Rights Policy states, “Sodexo recognizes and respects the rights of our employees to unionize, or not to unionize, as they choose.”²⁰³

In a letter to Human Rights Watch, Sodexo said “we have over 330 collective bargaining agreements in the United States over 18,000 employees” and notes that “Sodexo’s rate of unionization (18%) is therefore substantially greater than the average rate of unionization (7.2%) for private industry in the United States.”²⁰⁴

Forging stable collective bargaining after workers have established their union is good policy and practice for employers. But highlighting relations after workers have succeeded in organizing jumps past the stage most fraught with obstacles, where workers first seek to form a union in their workplace.

Despite claims of adherence to international standards on workers’ freedom of association, Sodexo has launched aggressive campaigns against some of its US employees’ efforts to form unions and bargain collectively. Sodexo managers have used many of the tactics described above that, while legal under US law, violate international standards requiring non-interference with workers’ organizing rights. These have included: holding captive-audience meetings in which workers must sit through managers’ diatribes against trade unions without being able to hear from union representatives in the workplace at any time, including during breaks or lunch periods; requiring front-line supervisors to carry management’s anti-union message into one-on-one conversations with employees; and threatening workers that they can be permanently replaced if they exercise the right to strike for improved wages and conditions. But in some instances, Sodexo has crossed the line to anti-union behavior unlawful under both US law and international standards.

²⁰² Sodexo “Group Policy on Human Rights,” February 2009, http://www.sodexo.com/group_en/corporate-citizenship/commitments/human-rights/business-ethics.asp (accessed on August 27, 2010).

²⁰³ Ibid.

²⁰⁴ Letter of Michel Landel, chief executive officer, Sodexo, to Human Rights Watch, July 27, 2010 (copy on file with Human Rights Watch).

Phoenix, Arizona

Contrary to its social responsibility promises, Sodexo committed serious violations of workers' freedom of association at its commercial laundry facility in Phoenix, Arizona. Industrial laundry jobs like those at the Phoenix facility involve hot, heavy, and dangerous physical labor. Laundry workers face many potential hazards: toxic, caustic chemicals; heavy machinery; electricity; moving parts; heat; pinch points; wet floors; hazardous materials found in soiled linen; and more.²⁰⁵

Employees at Sodexo's commercial laundry facility in Phoenix began an organizing effort, based on such health, safety, and other concerns, with the Union of Needletrades, Industrial and Textile Employees (UNITE) in April 2003. They held meetings and lawfully distributed flyers and other information to coworkers. Volunteer employee leaders came forward to engage in such legal activities. By May 1, 107 workers, a "clear majority," had signed cards joining the union and authorizing the union to bargain on their behalf.²⁰⁶

In the one-month period between a majority of workers joining the union and the NLRB election, Sodexo management reacted forcefully and unlawfully to break the organizing drive with attacks that undermined workers' majority sentiment in favor of the union. In an NLRB election held May 29, 2003, 117 of 206 eligible employees voted against union representation.²⁰⁷ But in the weeks before the election, Sodexo had held threat-filled captive-audience meetings and fired workers for union activity, practices that the NLRB's administrative law judge subsequently ruled unlawful in overturning the election results.

A Union Demonstration

On May 1, a group of workers who had ended their shift demonstrated support for the union with signs and placards in the reception area of management offices expressing support for organizing, an act of "protected concerted activity" for which, under US labor law, employers cannot legally retaliate against workers.

The workers presented management with a flyer stating:

²⁰⁵ For a general description of industrial laundry labor, see Brennan Center for Justice, "Unregulated Work in the Laundry and Dry Cleaning Industry," in *Unregulated Work in the Global City* (2007).

²⁰⁶ Decision of Administrative Law Judge Lana H. Parke, *The Commercial Linen Exchange, a Division of the Sodexo Corporation, and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE)*, Case Nos. 28-CA-18708, 28-CA-18807, 28-CA-18948, 28-RC-6175 (March 3, 2004) (hereafter ALJ Parke decision).

²⁰⁷ *Ibid.*

We, the Sodexo (Commercial Linen Exchange) workers, demand of our Employer:

- **Respect on the Job!**
- **A More Just Salary!**
- **Affordable Family Health Insurance!**
- **Safer Working Conditions!**
- **An End to Production Pressure!**
- **An End to Favoritism!**²⁰⁸

In anti-union captive-audience meetings that followed the demonstration, Sodexo's plant manager told workers that he was "personally offended" by the demonstration, and he repeatedly informed employees he had taken affront.²⁰⁹

An NLRB administrative law judge presided over an 18-day long unfair labor practice trial in October and November 2003 over events surrounding workers' organizing at Sodexo. The judge ruled that "[e]mployee involvement in the demonstration was protected under Section 7 of the Act. By his communication of surprise and hurt at employees' pronoun display, [the Sodexo manager] implicitly equated engaging in protected activity with disloyalty to him and, concomitantly, the company. Respondent thereby violated Section 8(a)(1) of the Act."²¹⁰ Section 8(a)(1) makes it unlawful "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."²¹¹

Firing Union Supporters

Four workers briefly left their work stations to join the May 1 union demonstration. When these workers sought to return to their jobs less than 15 minutes later, the manager told them they had lost their jobs because, in those few minutes, he had hired replacement workers.

When workers continued asking to return to their jobs, Sodexo management wrote them a letter stating, "We write about the status of your position with Commercial Linen Exchange....

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ National Labor Relations Act, Sec. 7 (guaranteeing the right to self-organization and collective bargaining); Sec. 8(a) (specifying prohibited employer unfair labor practices).

As you know, by the time you offered to return to work, the Company had hired another individual to fill your former position.”²¹²

In March 2004, the ALJ presiding over the case involving the unfair labor practice charges of discriminatory discharge of these employees found:

When the four sorting employees left the sorting line at about 2:00 p.m., May 1, and joined the demonstration to protest working conditions and to signify their support of the Union, they were engaged in protected activity. When they returned to the plant and, without setting any conditions, told [the manager] they wanted to go back into work, they made unconditional offers to return to work.... [T]hey were entitled to reinstatement to their former jobs when they unconditionally applied to return to work unless those positions had been filled by permanent replacements prior to their offers to return to work....

After a careful review of the evidence, I conclude the sorting employees offered to return to work before Respondent replaced them with new employees....

It is highly improbable, indeed logistically impossible, for [the manager] to have accomplished his asserted tasks and employed ... new workers in so short a time.... I conclude therefore that Sodexo unlawfully refused to reinstate the four sorting employees to their former positions upon their unconditional request offers to return to work and discharged [them] in violation of Section 8(a)(3) and (1) of the Act.²¹³

A favorable ruling for workers months after Sodexo’s violations came too late to undo the effect of the unlawful firings on the workers’ organizing effort. In the last week of April, a majority of workers had signed union membership cards authorizing UNITE to represent them in collective bargaining. In the weeks that followed the May 1 firings, only four more employees signed cards and others who had signed began to have doubts.

The judge found that the firings had “pernicious” effects on workers’ organizing rights:

²¹² Letter of June 2, 2003 from Sodexo to the dismissed employees, contained in ALJ Parke decision.

²¹³ ALJ Parke decision (March 3, 2004).

Sodexo refused to return [the fired employees] to work and discharged them for engaging in a protected work stoppage during the course of a protected employee demonstration. Sodexo did so in such open and loudly conspicuous circumstances that only singularly reticent and reclusive unit employees could have remained unaware of Sodexo's actions. The discharge of visibly active union adherents has an especially pernicious effect on other employees. Awareness of Sodexo's motivation in refusing employment to [the fired employees] was general, and many employees discussed with union representatives their concern over coworkers having been "fired." The evidence thus establishes pervasive impact or dissemination of the unlawful conduct, and it is reasonable to infer the dramatic decline in employees' signing authorization cards thereafter was an immediate consequence of Sodexo's overt unfair labor practices.²¹⁴

Captive-Audience Meetings and More Threats

The firings were the most effective tactic Sodexo used to undermine workers' organizing efforts, but Sodexo management also held a series of captive-audience meetings with anti-union videos. In these meetings, managers told workers that wages would be frozen if they voted for the union and pressured workers to revoke the union authorization cards they had signed.

The ALJ in the case ruled, "Respondent's union campaign statement that wages would be frozen during contract negotiations is unlawful under 8(a)(1) of the Act." The ALJ noted in a footnote that "The General Counsel does not allege the video showings to have violated the Act."²¹⁵ While acceptable under US law, forcing workers into mandatory captive-audience meetings to watch anti-union videos and listen to anti-union speeches, without opportunity for workers to hear from union representatives at the workplace, runs counter to international standards on freedom of association.

On the card revocation complaint, the judge found:

Here, [the Sodexo manager] did not merely advise employees of their rights, she encouraged them to contact her to find out how to get their cards back and when they did so, collected their revocations.... [T]he procedure

²¹⁴ Ibid.

²¹⁵ Ibid., n. 7, p. 6.

permitted Respondent to observe whether employees availed themselves of the opportunity to revoke their cards. Moreover, because the invitation to revoke authorization cards came almost immediately after Respondent's refusal to return prounion demonstrators to work, employees would reasonably feel imperiled if they did not revoke. Accordingly, I find Respondent independently violated Section 8(a)(1) by its solicitation of employees to revoke authorization cards.²¹⁶

Post-Election "Celebrations" and Yet More Threats

On May 30, the day following the election, Sodexo hosted a series of celebrations in its cafeteria, taking workers off their jobs and providing food and drink for all employees during extended paid break periods. During the parties, a top Sodexo manager told employees, according to the judge who heard evidence in the case, that "they would have to work together as a team, and employees unwilling to do so or who would not be happy doing so should leave Respondent's employment." The ALJ further noted, "In safety meetings conducted thereafter, [another Sodexo manager] voiced similar sentiments when she told employees they should put whatever went on before the election behind them, and if they could not work together, they should look for other work."²¹⁷

Ruling that "both [managers] implicitly threatened employees with reprisals if they continued to engage in union activities," the ALJ found:

By telling employees that those unwilling to work as a "team" should explore other employment opportunities, Sodexo framed the none-too-subtle equation that union support plus attendant employee division and unhappiness equaled tenuous job security. [The manager's] later statements even more strongly associated employee dissatisfaction with union support when she told employees they should put preelection feelings behind them and work together. In the absence of Section 7 assurances, [the manager's] call for employee unification could reasonably be seen as an admonition that prounion activity, which had formerly divided employees and caused dissension, must be abandoned if employment were to continue. Employees would be even more likely to draw such an inference because of the unfair

²¹⁶ Ibid.

²¹⁷ Ibid.

labor practices committed by Respondent in its campaign against the Union.²¹⁸

Sodexo management continued its anti-union campaign even after the post-election celebrations. In mid-June, a Sodexo manager warned one worker not to complain about working conditions or to talk with co-workers about the union. The ALJ in the case found that Sodexo “directly coerced and restrained two employees from engaging in lawful union discussion with other employees” and acted illegally “by reprimanding or cautioning [the employees] for engaging in protected activity.”²¹⁹

Destroying the Union’s Majority

Sodexo’s conduct was so destructive of employees’ organizing and bargaining rights that the ALJ imposed the extraordinary remedy called a “*Gissel*/bargaining order.” This rarely-used remedy was devised by the US Supreme Court in a landmark 1969 decision condemning “unfair labor practices that ... have a tendency to undermine majority support and impede the election process.” These unfair labor practices are so egregious as to make a fair election impossible, and as a result, “employee sentiment once expressed through cards would ... be better protected by a bargaining order.”²²⁰

The ALJ heard detailed evidence about workers’ card-signing endeavors before the May 1 firings of pro-union demonstrators and concluded, “As of May 1, the Union represented a majority of Respondent’s employees in the appropriate unit for purposes of collective bargaining.” The ALJ then reviewed, in detail, Sodexo’s anti-union conduct and held, “In these circumstances, Sodexo’s unfair labor practices are unremedied, their consequences are ongoing, the possibility of erasing their effects is slight, and the holding of a fair election is improbable.”²²¹

As a result, the ALJ ordered Sodexo to cease and desist from the illegal conduct that it had used to undermine its workers’ right to organize, including:

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

²²¹ ALJ Parke decision (March 3, 2004).

- (a) Refusing to reinstate or discharging any employee for striking in support of the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE), and to discourage employees from engaging in protected activities.
- (b) Telling employees they have been permanently replaced when they have not been.
- (c) Equating engaging in protected activity with disloyalty to Respondent.
- (d) Informing employees wages will be frozen during any contract negotiations.
- (e) Soliciting employees to revoke union authorization cards.
- (f) Issuing a written warning notice to any employee for conduct during the course of protected activity.
- (g) Suggesting employees quit their jobs or seek other employment or otherwise impliedly threatening employees with reprisals if they continued to engage in union or other protected activities.
- (h) Orally reprimanding or caution[ing] employees for discussing the union or otherwise engaging in protected activity.
- (i) Telling employees not to talk to other employees about the Union or working conditions while permitting them to talk about other non-work related matters.
- (j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The ALJ also ordered Sodexo to take the “affirmative action necessary to effectuate the policies of the Act,” requiring the company to:

offer them [the illegally fired workers] reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits ... less any net interim earnings; ... [and]

On request, bargain with Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE) as the exclusive representative of the

employees ... concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.²²²

Rather than accept the ALJ's decision, Sodexo appealed it to the NLRB. But as Sodexo explained in a letter to Human Rights Watch, "While the appeal was pending ... Sodexo had a dialogue with the Union and reached an agreement about a manner that was mutually satisfactory to both the Union and the Company to provide assurances that Sodexo would recognize the Union based upon a fair process and a valid determination of what the majority of employees wanted."²²³

Sodexo told Human Rights Watch that the ALJ's findings in any case "were based upon actions by supervisory personnel at a single Sodexo unit." Sodexo officials also implied they had taken disciplinary action: "Two of the managers involved in the allegations are no longer with Sodexo. The remaining two managers have gone through substantial subsequent training and coaching, and have in fact worked constructively with the Union over the last several years."

In April 2005—nearly one year after the ALJ's decision and two years after a majority of workers joined the union and requested bargaining—the NLRB approved a settlement agreement between Sodexo and UNITE.²²⁴ Under the agreement, Sodexo reinstated three employees and paid them nearly \$8,000 in back pay. The fourth employee chose not to return to work and received \$12,000 in back pay. Sodexo also agreed to have a neutral third party verify whether a majority of workers had voluntarily signed cards joining UNITE and authorizing the union to bargain on their behalf.²²⁵ On that basis, the third party determined that a majority of workers had chosen representation, and the company and union proceeded to reach a collective bargaining agreement.

The settlement in Phoenix took shape in the context of a broader agreement between Sodexo and two unions, the UNITE HERE union, and the Service Employees International

²²² Ibid.

²²³ Letter from Landel, Human Rights Watch, July 27, 2010.

²²⁴ NLRB, *Supplemental Order, The Commercial Linen Exchange, a Division of the Sodexho Corporation, and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE)*, Case Nos. 28-CA-18708 et al., April 7, 2005.

²²⁵ NLRB, *Joint Motion to Vacate ALJ's Decision and to Remand to the Regional Director and Exhibit A, Settlement Stipulation, The Commercial Linen Exchange, a Division of the Sodexho Corporation, and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE)*, Case Nos. 28-CA-18708, March 22, 2005. The settlement agreement contained a non-admission clause (not admitting liability under the NLRA); the parties noted that "the facts surrounding these cases arose in 2003, and are set forth in detail in the ALJ's decision.

Union (SEIU), on company neutrality toward workers' organizing in some Sodexo locations in other parts of the country.²²⁶ Sodexo pointed to this agreement in a letter to Human Rights Watch, saying that it "superceded any past disagreements that may have existed" and established a "collaborative and problem solving relationship."²²⁷

Sodexo told Human Rights Watch that the Phoenix events were "an exceptional and outdated set of circumstances" that should not be used to "paint a false picture of Sodexo." However, recent developments indicate that Sodexo still resists workers' new organizing attempts. The neutrality agreement between Sodexo and the unions covering organizing procedures at selected company locations ended in 2009.²²⁸ Since then, Sodexo has again expressed hostility toward unions and workers' organizing efforts, and taken steps to thwart union formation.

In response to the introduction in the US Congress of the Employee Free Choice Act (EFCA)—a union-supported bill that would reform the National Labor Relations Act by permitting union formation when a majority of workers sign cards for union representation, without any need for NLRB elections—Sodexo held new sessions for managers on combating unionization.²²⁹ A Sodexo PowerPoint slide show presentation titled "Organized Labor and the Employee Free Choice Act – Are You Ready?" warned that with EFCA, "unions may attempt to engage in 'hidden' or 'stealth' campaigns" and told managers to "complete the union vulnerability checklist." It pointed to "signs of potential organizing activity" such as "changes in employees' behavior and attitude" and "new 'buzz' words such as 'grievance,' 'seniority,' or 'just cause.'" It instructed managers to "contact the Labor Relations Team at the first sign of organizing activity" and to "send an email to USA Union Incident."²³⁰

²²⁶ Scott Simonson and Levi J. Long, "Unite Here aims to add all linen workers in state," *Arizona Daily Star*, July 10, 2006; See also letter from George Chavel, Sodexo, to Human Rights Watch, March 31, 2009 (copy on file with Human Rights Watch). The Sodexo agreement with the unions generated controversy within and without the labor movement. See Kris Maher, "Unions Forge Secret Pacts With Major Employers," *The Wall Street Journal*, May 10, 2008, p. A1; Steve Franklin, "Unions strike deal to recruit; Groups work with companies to get 'in'," *Chicago Tribune*, May 11, 2008, p. C3; Paul Abowd, "Food Service Workers Buck Secret Organizing Deals," *Labor Notes*, September 2009. The text of the agreement between Sodexo and the two unions was confidential. Human Rights Watch takes no position on the controversy.

²²⁷ Letter from George Chavel, president and chief executive officer, Sodexo, to Human Rights Watch, March 31, 2009 (copy on file with Human Rights Watch).

²²⁸ Human Rights Watch e-mail exchange with SEIU international representative, December 10, 2009; see also the Clean up Sodexo website, www.cleantupsodexo.org.

²²⁹ Steven Greenhouse, "Bill Easing Unionizing Is Under Heavy Attack," *The New York Times*, January 9, 2009, p. A12.

²³⁰ Sodexo, "Organized Labor and the Employee Free Choice Act – Are You Ready?" undated, PowerPoint presentation (copies of slides on file with Human Rights Watch).

Sodexo told Human Rights Watch that “the document of this name is no longer available for use at Sodexo.”²³¹ The company said “This document did indeed provide tools to our managers to recognize potential signs of union activity and to notify company Labor Relations at the first sign of such activity,” and explained that this was so that managers could be advised how to avoid labor law violations because “Sodexo aspires to 100% compliance with our labor laws, and training our managers to recognize signs of union activity and to contact labor relations upon learning of such activity is an essential part of our compliance program.”²³²

The EFCA slide show also referred managers to Sodexo’s Employee and Labor Relations Guidelines. Chapter 7 of the Guidelines is titled “Union-Related Questions Employees Frequently Ask.” Here, Sodexo instructs managers to make the following statements to employees:

- The union is allowed to make promises because it doesn’t pay your wages. The union’s promises are meaningless.
- There are some people who, for their own selfish reasons, have been putting a lot of pressure on many of you.... [T]hese people would manipulate things for their own ends.
- A union is not concerned about job security. It cares only about its security, which means your dues in the union’s pocket.
- If you read the newspapers and watch the news, you know how many represented companies have closed their doors in this state and all over the country.... Nearly every labor union contract contains language that provides for the potential of layoffs.
- The company has the legal right to conduct its business and hire permanent economic replacements for every striker.... the company would do what it had to do to ensure business continuity in the event of a strike.
- You may want to ask yourself why some people have been promoting a strike when they know that employees risk being permanently replaced. Ask yourself what they have to gain.²³³

²³¹ Letter of Michel Landel, chief executive officer, Sodexo, to Human Rights Watch, July 27, 2010 (copy on file with Human Rights Watch).

²³² Ibid.

²³³ Sodexo, “Employee and Labor Relations Guidelines,” 2006 (“Original Issue: Dec.12, 2006) (copy on file with Human Rights Watch).

Sodexo told Human Rights Watch that its Employee and Labor Relations Guidelines “state clearly, ‘Sodexo recognizes and respects the rights of our employees to unionize, or not to unionize, as they may so choose’” and added that “the version of the Q & A reflected in your inquiry is obsolete” and “none of the statements in the obsolete Q & A comes anywhere near the type of statement that the ILO has determined may amount to interference.”²³⁴

Sodexo said that in instructing managers to make these statements, it was exercising freedom of opinion and expression afforded to employers under international standards and under the NLRA, and that “statements of fact or expressions of opinion, including factual statements about how to vote *against* a union in a representation election do not constitute interference.”²³⁵ The company said that it provides “truthful and accurate information” to employees instead of “false or inaccurate misrepresentations by the union representatives.”²³⁶

With respect to its instructions to managers to tell employees that “If you read the newspapers and watch the news, you know how many represented companies have closed their doors in this state and all over the country” and “the company has the legal right to conduct its business and hire permanent economic replacements for every striker.... the company would do what it had to do to ensure business continuity in the event of a strike,” Sodexo told Human Rights Watch that the statements are presented as opinions and factually accurate answers to questions by employees.²³⁷

²³⁴ Letter from Landel to Human Rights Watch, July 27, 2010.

²³⁵ *Ibid* (emphasis in original). Sodexo cited a recent decision of the ILO Committee on Freedom of Association on a complaint against the United States filed by the Association of Flight Attendants and the AFL-CIO involving workers’ organizing efforts at Delta Airlines under the Railway Labor Act (RLA), which governs union organizing and collective bargaining in the railroad and airline industries. The case turned on a feature of the RLA that contrasts with the NLRA. Under the NLRA, representation elections are decided by a majority of workers actually voting. The RLA requires a majority of the entire bargaining unit regardless of how many actually vote. Under this system, employers systematically tell workers not to vote, because not voting is effectively a vote against the union. In this case, Delta put up posters and banners and passed out pins to workers telling them to “Shred It” (the ballot). Sodexo’s told Human Rights Watch that “even the ILO refused to condemn” such tactics. But this mischaracterizes the CFA decision. Refusing to condemn is not the same as approbation. The CFA said it was “not in a position to assess the factual evidence in this specific case” and that it would “not attempt to re-evaluate the assessments already undertaken” by US authorities. At the same time, the CFA noted the “stress” such tactics place on employees and “concern” over the “Shred it” campaign, concluding that “the active participation by an employer in a way that interferes in any way with an employee exercising his or her free choice would be a violation of freedom of association and disrespect for workers’ fundamental right to organize.” The CFA did not dismiss the case. Instead, its final recommendation said, “The Committee draws the Government’s attention to the importance of providing for specific and effective protection in relation to the right to organize and the selection of a collective bargaining agent and requests it to review the current application of the RLA with the social partners in respect of the issues raised in this specific case, with a view to taking the necessary measures so as to ensure full respect for the principles set forth in its conclusions.” ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 2683, Report No. 357 (2010).

²³⁶ Letter from Landel Human Rights Watch, July 27, 2010.

²³⁷ *Ibid*. Sodexo told Human Rights Watch that it “has never hired a permanent replacement worker in North America,” a fact which, if true (Human Rights Watch has no reason to question its veracity), would be an important part of a balanced, factually accurate communication to employees, alongside “the company has the legal right ... to hire permanent economic

West Orange, New Jersey

Sodexo recently also failed to respect workers' organizing rights under international standards in its food service operations at the West Orange, New Jersey, public school system. When workers began an organizing effort in late 2009, management allegedly responded by, as the union's unfair labor practice charge said, demanding that workers sign an anti-union petition, interrogating workers about their union activity, and telling workers that their organizing efforts were under surveillance.²³⁸

Following an investigation of these charges, Sodexo entered into a settlement agreement with the NLRB on May 24, 2010 under which the company posted a remedial notice stating:

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to interfere with these rights;

WE WILL NOT ask you about employee support for the Union;

WE WILL NOT make it appear to you that we are watching your union activities;

WE WILL NOT ask you to sign a petition against SEIU, Local 32BJ or any other union;

replacements for every striker ... the company would do what it had to do to ensure business continuity in the event of a strike." Indeed, a better indication of Sodexo's fidelity to international labor standards would be a straightforward declaration that, as a matter of policy, the company would not hire permanent replacement workers in the United States (permanent replacements are not allowed in Canada or Mexico in any event).

²³⁸ NLRB, Charge Against Employer, Sodexo, Inc., Case No. 22-CA-29322, April 21, 2010. This charge is cited only to lay a foundation for discussion of the subsequent settlement agreement.

WE WILL NOT in any other manner, interfere with, restrain, or coerce any of you in the exercise of your right to support or assist a union or to engage in protected activities.²³⁹

Easton, Pennsylvania

Sodexo also took actions contrary to its international commitments at the food services operation of Lafayette College in Easton, Pennsylvania, with an even broader range of conduct thwarting trade union formation. When workers at this facility began to organize, management allegedly responded, according to the union's unfair labor practice charge, by interrogating workers about their union activity, disciplining an employee for her organizing activity, and prohibiting workers from talking about the union.²⁴⁰

Sodexo employee Greg Ward is a food preparer and server at a campus dining facility. In an interview, he told Human Rights Watch that at a back-to-work meeting for employees at the start of the new semester in January, 2010, Sodexo's top on-site manager told workers "the union is coming around harassing people" and that "if they bother us we should call security to get them thrown out."²⁴¹ In February, Ward said, a manager told him and another employee "we can't talk about the union while we're on the clock" even though employees were allowed to talk about other non-work-related subjects. Ward told Human Rights Watch that the next day, in a meeting with all the employees, "she told us we can't talk about the union while we're on the clock, we can only do it on break time. And she said if we talk about the union on the clock, we will get a write-up."²⁴²

Describing the January back-to-work meeting, Sodexo employee Calep Repsher told Human Rights Watch that the general manager "got in an angry attitude when he started talking about the union" and said to employees "that we can call the police if union organizers come to our house, and that the campus is private property and we should call security if we see a union organizer on campus."²⁴³

²³⁹ NLRB, Settlement Agreement, *In the Matter of Sodexo, Inc.*, Case No. 22-CA-29322, May 24, 2010. The settlement agreement contains a standard non-admission clause.

²⁴⁰ NLRB, Charge Against Employer—Amended, Case No. 4-CA-37334, March 3, 2010. This charge is cited only to lay a foundation for discussion of the subsequent settlement agreement.

²⁴¹ Human Rights Watch interview with Greg Ward, Easton Pennsylvania, July 7, 2010.

²⁴² Ibid.

²⁴³ Human Rights Watch interview with Calep Repsher, Easton, Pennsylvania, July 7, 2010.

Repsher said that soon after the meeting his supervisor asked him in a private conversation “if I went to a union meeting, who else was at the meeting, where was the meeting, if I was involved in the union. Then she said, ‘this doesn’t leave this room.’”²⁴⁴

Genevieve Repsher is an active union supporter who participated in union protests at Sodexo’s US headquarters in Gaithersburg, Maryland, in January 2010, and then joined a union delegation to the company’s annual shareholders’ meeting in Paris. She told Human Rights Watch that after she invited coworkers to a union meeting in early January 2010, her manager called her at home. “She asked me if anybody from the union called me, and she told me to let her know if anybody from the union contacts me.”²⁴⁵

Genevieve Repsher told Human Rights Watch that in February, Sodexo’s general manager called her into his office “to issue me a write-up.” She said “this was unusual because it is usually your nearest manager who gives you a write-up, not the general manager.” She said, “He told me he was writing me up for leaving my work station, but then all he talked about was how I was supposedly harassing other employees by talking to them about non-work related matters. I said we talk about non-work related matters all the time: kids, the weather, sports, whatever. He just kept repeating that I was harassing other employees about non-work related matters.”²⁴⁶

Following an investigation by the Regional Director, Sodexo entered into a settlement agreement with the NLRB on June 30, 2010 under which the company posted a remedial notice stating:

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities or the support for union activities of other employees.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

WE WILL NOT tell employees, or say in the presence of employees, that employees may not talk to other employees or other persons about the union while on company time or on Sodexo controlled property while permitting employees to talk to others about non-union-related topics.

WE WILL NOT engage in surveillance of employees' conversations about union or protected concerted activity, prevent employees from talking about union activity such as an Open Forum meeting while on company time while permitting employees to talk to others about non-union-related topics, or call campus security to remove persons from areas we control to prevent our employees from talking to them about what we believe to be union activity.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT direct employees to tell the Employer about their union activities or the union activities of others.

WE WILL NOT direct employees to not tell others about coercive conversations between supervisors and employees about the union.

WE WILL NOT advise employees to report the presence of union organizers talking to employees in areas open to the public.

WE WILL NOT discipline or threaten to terminate you because you talk to other employees about the union on company time.

WE WILL remove from our files any reference to the discipline imposed upon Genevieve Repsher for talking to other employees about the union on company time and WE WILL notify her that we have done so and that the discipline will not be used against her in any way.²⁴⁷

Sodexo told Human Rights Watch that the unfair labor practice charges in West Orange and at Lafayette arose in the context of a "smear campaign" by the Service Employees

²⁴⁷ NLRB, Settlement Agreement, *In the Matter of Sodexo, Inc.*, Case No. 4-CA-37334 (2010). The settlement agreement contains a non-admission clause in which Sodexo does not admit to any unlawful action.

International Union (SEIU) that caught local managers by surprise, a campaign flowing from a dispute with the Unite-Here union over which union should organize food service workers.²⁴⁸ In both the West Orange and Lafayette instances, “Sodexo would have contended that virtually all of the allegations were false or, even if true, lawful.”²⁴⁹

Regarding the charge that a supervisor circulated an anti-union petition in West Orange, Sodexo told Human Rights Watch that the employee in question was a “lead,” not a supervisor excluded from coverage of the NLRA, and thus management “did not believe that it could properly interfere with the employee’s circulation of the petition.” However, Sodexo noted that “the NLRB indicated that it was not prepared at this stage of the investigation to agree to that characterization of the employee, and was instead prepared to issue a complaint against the company on this issue.”²⁵⁰

Sodexo said it “did not admit any wrongdoing” in agreeing to post the settlement notices, and that the settlement agreements in West Orange and at Lafayette reflected “restatements of our commitments to our employees’ rights that are in any event wholly consistent with Sodexo’s policies.”²⁵¹

Regarding its stated policy on employees’ right “to unionize, or refrain from unionizing, as they so choose,” Sodexo told Human Rights Watch that it “has expanded upon this statement of policy in management training and communication.”²⁵²

Sodexo advised managers to tell employees that union representatives are manipulators who make meaningless promises and care only about collecting dues. This implicitly brands workers who support the union as dupes or collaborators.²⁵³

Sodexo advised managers to tell employees “you know how many represented companies have closed their doors in this state and all over the country.” This implicitly warns workers that their jobs are at risk if they form a union.²⁵⁴

²⁴⁸ Letter from Landel to Human Rights Watch, July 27, 2010. This report focuses on management responses to *workers’* organizing efforts at the workplace. Motivations or rivalries among unions are not at issue, and Human Rights Watch takes no position on this dispute.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Sodexo, “Employee and Labor Relations Guidelines,” 2006 (Original Issue) December 12, 2006 (copy on file with Human Rights Watch).

Sodexo advised managers to tell employees that the company can hire permanent replacements and “would do what it had to do” in the event of a strike, a statement permitted under US labor law, but fraught with menace and contrary to international standards.²⁵⁵

Local managers’ responses in West Orange and Lafayette reflect Sodexo’s advice and suggest a management culture of deeply imbued hostility to workers’ organizing rights. Under US labor law, Sodexo is entitled to infuse anti-union hostility into its management culture. But this would not be the policy of a company adhering to the Universal Declaration of Human Rights, ILO core labor standards and other international norms. If, on the other hand, local managers’ actions are contrary to company policy, they reflect a failure to push down to local management levels Sodexo’s commitment to freedom of association.

Tesco PLC

UK-based Tesco is one of the world’s largest retailing companies, operating in more than a dozen countries around the globe and employing 450,000 workers. With more than \$90 billion in annual sales, Tesco ranks 58th on the Fortune Global 500 list.²⁵⁶

In 2006, Tesco announced plans to enter the US market with “Fresh & Easy” convenience stores opening in California and other southwestern states. The company declared a goal of reaching \$10 billion in sales by 2015, which would put it into the top 10 American food retailers. Some analysts project that Tesco will have 5,000 stores and \$60 billion in annual sales by 2020, making it larger than Safeway, the nation’s second-largest supermarket chain.²⁵⁷

Public Commitments on Freedom of Association and Corporate Social Responsibility

In its corporate responsibility policy statement on human rights, Tesco declares, “Tesco is committed to upholding basic Human Rights and supports in full the United Nations Universal Declaration of Human Rights and the International Labour Organisation Core Conventions.” The company elaborates on the right to organize, stating, “Employees have

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ For these and other company data, see the Tesco Website at www.tescopl.com; see Fortune, “Global 500,” <http://money.cnn.com/magazines/fortune/global500/2010/index.html>.

²⁵⁷ Bruce Horowitz, “British invasion hits grocery stores; Fresh and Easy arrives to take on the big guys in the USA,” *USA Today*, April 7, 2008, p. 1B.

the right to freedom of association. We recognise the right of our staff to join a recognised trade union where this is allowed within national law.”²⁵⁸

Speaking of its corporate responsibility program and corporate governance, Tesco declares:

We aim for the highest standards of corporate behaviour. This requires strong leadership, clear governance and effective communication to staff of the behaviour we expect of them.

The Board considers strategic reputational risks every time it meets and discusses Corporate Responsibility strategy bi-annually. The Executive Committee receives regular updates on Corporate Responsibility performance, assesses future risks and opportunities, and develops our strategy in this area.²⁵⁹

At home and throughout Europe, most of Tesco’s employees are represented by trade unions, and the company takes pride in its forthright interaction with workers’ representatives. Tesco’s dealings with trade unions were featured at an international conference on labor-management cooperation in the retail sector, where a conference report noted:

The partnership agreement between Tesco and UNI Commerce affiliate USDAW [Union of Shop, Distributive and Allied Workers, Tesco’s main UK union] drew much positive attention at the conference. Tesco’s human resource director Catherine Glickman and USDAW’s deputy general secretary John Hannett shared the opinion that the agreement had brought about a considerable improvement of labour relations in Britain’s largest retail company, where USDAW has more than 100,000 members.

Alex Rüdig [a Swedish union official] told the conference about the cooperation between Tesco and UNI-Europa Commerce in exporting the partnership concept to other European countries. She said that the UNI Commerce affiliates in Poland and Hungary have already had very positive experiences with the agreements, and that a similar approach has been

²⁵⁸ See Tesco human rights policy statement at “Good Jobs” website at www.tescopl.com/plc/corporate_responsibility/good_jobs.

²⁵⁹ See Tesco “Managing Corporate Responsibility” website at www.tescopl.com/plc/corporate_responsibility/approach/managing_corp_resp.

taken by the social partners in the Czech Republic, through their collective agreement.²⁶⁰

In a similar vein, a paper by four UK management studies scholars noted:

The EU concept of social dialogue centres on partnership between employers and employees, through representative bodies, notably trade unions and works councils. It also advocates participation as an extension of employee citizenship rights and not just business expediency. The information and consultation Directive is the latest important development. Some British companies are responding directly to this new public policy framework. Others, such as Tesco, have struck voluntary partnership deals with trade unions.²⁶¹

In a letter to Human Rights Watch, Tesco pointed to “positive relations with trade unions around the world.”²⁶² Indeed, all of Tesco’s non-management employees in its UK home are represented by the Union of Shop, Distributive and Allied Workers (USDAW). However, Tesco appears to be taking a different approach to labor practices and trade unions in the United States, an approach marked by sharp resistance to workers’ organizing efforts and one that has already run afoul of US labor law.

“Union Avoidance” Executive Recruiting

At the outset of its move into the American market, Tesco signaled an intention to deviate from its declared support for international human rights norms and its commitment to “recognise the right of our staff to join a recognised trade union.”

One of the company’s first actions was to recruit an employee relations director for its new US headquarters in El Segundo, California, and a director of human resources at its massive distribution center in Riverside, California. In its recruiting advertisement, Tesco declared

²⁶⁰ See UNI Global Union, “European commerce is committed to social responsibility and dialogue between the social partners,” November 11, 2003, www.union-network.org/unisite/Sectors/Commerce/Activities/European_commerce_committed_to_social_responsibility.htm (accessed October 31, 2008).

²⁶¹ Peter Ackers, Mick Marchington, Adrian Wilkinson, and Tony Dundon, “Partnership and Voice, With or Without Trade Unions: Changing UK Management Approaches to Organisational Participation,” Research Series Paper 2003:4, Loughborough University Business School (2003).

²⁶² Letter from Lucy Neville-Rolfe, executive director, Corporate and Legal Affairs, Tesco PLC, to Human Rights Watch, October 22, 2009 (copy on file with Human Rights Watch).

that it wanted an applicant for each post who “has primary responsibility for management of employee relations; maintaining non-union status and union avoidance activities.”²⁶³ One company advisor confirmed that “Tesco is aiming for a non-unionized US workforce.”²⁶⁴

In a letter to Human Rights Watch, Tesco said that the “union-free” recruitment advertisement “is an old story that dates back to 2006 before we had opened any stores.... The advertisement was an error by one of our recruitment agencies. They apologized and took full responsibility for the mistake.”²⁶⁵

Since opening more than 120 stores under the “Fresh & Easy” name since 2007, Tesco has intensified the signal in its corporate management recruiting pitch. To begin, management rejected requests from the United Food and Commercial Workers (UFCW), the retail food workers’ union, to discuss the possibility of a mutually-agreed company-wide system for employees’ choosing union representation.²⁶⁶ Tesco told Human Rights Watch “it is not true to say that we are ‘aiming for a non-unionised US workforce.’ We had hoped to have good relations with unions in the US. However, it is difficult to develop relations with an organization which has appeared to try to damage our business from day one and has misrepresented the truth about the way Fresh & Easy treats its staff.”²⁶⁷

Employee Views

Shastina Furman was hired in November 2007 as an hourly-paid “team lead” employee in Fresh & Easy locations in San Diego. “I was one of the original one hundred Fresh & Easy hires,” she told Human Rights Watch. “I grand opened two stores for them.”

“Two weeks before the first opening I went to a big meeting in San Diego with all the big guys from management,” she said. They showed us a video on a model store and how it would operate, and on how the company got started. I remember the top British manager saying ‘you are part of the company now, part of a Fresh & Easy family. There is no need to have a

²⁶³ Jonathan Birchall, “Tesco job ads follow non-union line,” *Financial Times* on-line, May 26, 2006.

²⁶⁴ See “Unions threaten Tesco development,” *Convenience Store News*, undated, http://www.csnews.com/csn/news/article_display.jsp?vnu_content_id=1003527986 (accessed August 27, 2010); see also Amanda Shaffer et al., *Shopping for a Market: Evaluating Tesco’s Entry into Los Angeles and the United States*, Urban & Environmental Policy Institute, Occidental College (August 1, 2007).

²⁶⁵ Letter from Lucy Neville-Rolfe, executive director (corporate and legal affairs), Tesco, to Human Rights Watch, July 26, 2010 (copy on file with Human Rights Watch).

²⁶⁶ David Teather, “American unions bring Tesco fight to UK: Claims that US offshoot will not recognise unions: Company says staff are well paid and happy,” *The Guardian*, June 5, 2008, p. 14; James Thompson, “Obama urges Tesco to meet US unions over employment rights,” *The Independent* (London), June 26, 2008, p. 40.

²⁶⁷ Letter from Neville-Rolfe to Human Rights Watch, July 26, 2010.

union here. Why would you want a union?’ and things like that. Another British guy said ‘unions just want to protect lazy workers.’”

Furman added “It was constantly driven home to us in team lead meetings that we should tell employees they have no need for the union, that the company will take care of them so they don’t need a union. When the union started passing out flyers outside our store, my manager told us ‘You don’t want to be part of it. These are not the right people for you.’”²⁶⁸

Fred Baquet was a Fresh & Easy hourly-paid “team lead” for two years after his hiring in August 2007. “I was there at the start-up,” he told Human Rights Watch. “I worked a lot with the British managers. They told us we were part of a major new business in the area and that we were going to change the way America shops.”

“I was putting in 10- and 12-hour days to help get things started,” Baquet said. “I was fully trusting in the company. When people started getting interested in the union, management started calling the team leads into meetings and asking us what we were hearing. They told us ‘we don’t need a union in here; we don’t want a union; we don’t need outside groups coming in here.’ It was always about outside groups, not about the employees.”

Baquet said, “We had lots of issues. The time sheets were confusing. They had us working through breaks and lunch. People lost a lot of money. I would bring up people’s pay problems and management would tell me to tell them ‘if you don’t like it, there’s the door.’ I had to say this to people or my job was in jeopardy. People came to me with complaints and I told them ‘my job’s on the line, too.’”

Baquet concluded, “Knowing what I know now, we really needed a union. But we thought that any union talk was against Tesco rules. The managers were always preaching ‘no union’ to us. Anything union was unmentionable because it could cost you your job.”²⁶⁹

²⁶⁸ Human Rights Watch interview with Shastina Furman, San Diego, California, February 22, 2010. Ms. Furman voluntarily left Fresh & Easy in March 2008.

²⁶⁹ Human Rights Watch interview with Fred Baquet, San Diego, California, February 11, 2010. Fresh & Easy dismissed Mr. Baquet from employment in August 2009. Baquet prevailed against the company when management contested his unemployment insurance claim. Management claimed that Baquet was fired for misconduct. The unemployment insurance appeals board found that he was not fired for misconduct and was therefore entitled to weekly unemployment benefits. The administrative law judge found that “The claimant’s testimony was credible and subject to cross examination as well as scrutiny by the undersigned. The claimant’s testimony is accepted as true and the employer’s characterization in its testimony is rejected as inherently less credible because the eye-witnesses did not testify.” See decision of Elizabeth Merkin, Administrative Law Judge, California Unemployment Appeals Board, *Fred L. Baquet, Claimant and Fresh & Easy Neighborhood, Employer*, Case No. 3074481, March 30, 2010.

San Diego, California

Shannon Hardin began work as a Fresh & Easy customer assistant for \$10 per hour in January 2008. “I got interested in the union because I thought we needed more say at work, a way to be heard on an equality level with some backing from an organization,” she explained. “I started bringing in stuff about the union to work. The union rep told me to be careful and only pass out union stuff back in the break area, not in the shopping area. Plus it was OK to talk about the union the same way we talk about the weather or about a TV show or something else, that they couldn’t discriminate against union talk.”²⁷⁰

“But the store manager told me I couldn’t talk about the union at work from the time I clocked in to the time I clocked out,” Hardin said. “It made me worry. The union said it was OK on break or lunch or like any other conversation, but management said I couldn’t do it. I was afraid I’d get fired.”²⁷¹

“[A top human resources manager from headquarters] came to the store and asked me why I support the union,” Hardin added. “This made me worried too, like they were targeting me. I thought this was my right and management shouldn’t be getting into my personal thoughts.”²⁷²

On September 25, 2009, the NLRB regional office found merit in a union charge and issued a complaint against Tesco for ordering that “employees may not talk about the Union while employees are on the clock or the sales floor.”²⁷³ The NLRB found further that Tesco management “impliedly threatened employees engaged in Union or protected concerted activities by stating that if [the employee] had a manager that did not like her, she would take her check and leave” and that management’s conduct was “interfering with, restraining, and coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.”²⁷⁴

²⁷⁰ Human Rights Watch interview with Shannon Hardin, San Diego, California, September 29, 2009.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ The NLRB has determined that “the Section 7 right to discuss union topics ... may not be prohibited while permitting employees to discuss, during working time, virtually all other subjects.” See *Visador Co.*, 303 NLRB 1039 (1991).

²⁷⁴ NLRB, Complaint and Notice of Hearing, *Fresh & Easy Neighborhood Market Inc. and United Food and Commercial Workers International Union, Region 8*, Case No. 21-CA-38882, September 25, 2009.

The very next day, management told employees that they could not discuss disciplinary matters with each other while working on the sales floor. This gave rise to a new unfair labor practice charge and complaint.²⁷⁵

Las Vegas, Nevada

In July 2009, the NLRB found merit in charges by Tesco employees and the United Food and Commercial Workers union that the company interfered with workers' rights to communicate with one another about organizing.²⁷⁶ This complaint took aim at Tesco's company-wide no-solicitation policy in its Employee Handbook, which said:

We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation of team members during working time for any purpose.

We also prohibit the distribution of literature during working time or on Company premises for any purpose.... And keep in mind that violations of this policy could lead to discipline – they could even cost you your job.

The no-solicitation rule and accompanying threat of discipline fly in the face of a bedrock rule in US labor law that workers have the right to pass out literature, express support for organizing, sign union cards, invite each other to meetings, and otherwise engage in freedom of association “in non-work areas on non-work time,” including on company premises and during working hours.²⁷⁷ Typically, workers might do this in a break or lunch area during their break or lunch, whether or not it is a paid break or lunch. But Tesco's rule prohibited even such lawful activity.

In addition to finding merit in the unfair labor practice charge on Fresh & Easy's no-solicitation rule, the NLRB regional director found merit in charges that Tesco management in Las Vegas interrogated its employees about their union activities, created an impression

²⁷⁵ NLRB, Order Consolidating Cases, Consolidated Amended Complaint, and Amended Notice of Hearing, *Fresh & Easy Neighborhood Market Inc. and United Food and Commercial Workers International Union, Region 8*, Case No. 21-CA-38882, 21-CA-39100 (January 11, 2010).

²⁷⁶ NLRB Region 28, Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, Cases Nos. 28-CA-22520, 28-CA 22521, July 31, 2009.

²⁷⁷ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

among employees that management was spying on their union activities, and promised improved terms and conditions of employment if workers halted their organizing efforts.²⁷⁸

Unfair Labor Practice Rulings

On June 3, 2010, ALJ William G. Kocol issued his decision in the San Diego unfair labor practice cases.²⁷⁹ Crediting Shannon Hardin’s testimony, he found that Fresh & Easy management unlawfully prohibited employees from talking with each other about the union and that a store manager who told Hardin about the “no-talking” rule said that the rule “was from corporate.”²⁸⁰ The ALJ also credited a co-worker’s testimony that the store manager told employees in a “team huddle” that “he had received word from corporate about the union representatives, that they would not be allowed in the store and that the employees were not allowed to *talk* about the union in the store or with each other.”²⁸¹

The ALJ noted that the day after Shannon Hardin’s exchange with her store manager, Fresh & Easy’s corporate human resources manager, Paula Agwu, came to the store and summoned Hardin into a private meeting with her where she warned Hardin that “if she has employees telling her that Hardin is harassing them then something is going to have to be done about it.” She also asked Hardin why she supports the union.²⁸²

The ALJ further found that in early August, a “team leader” told Hardin, “If I had a manager who didn’t like me, I would walk out” and “if you get fired, at least you would get unemployment” [compensation].²⁸³ In September, Hardin’s store manager told her not to discuss disciplinary matters with other employees while she was on the clock or on the sales floor and he had instructed the team leaders to immediately document if she did so and to send her home.²⁸⁴

The ALJ ruled that Fresh & Easy violated Section 8(a)(1) of the NLRA by “prohibiting employees from talking about the union with each other while working but not prohibiting

²⁷⁸ NLRB Region 28, Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, Cases Nos. 28-CA-22520, 28-CA 22521, July 31, 2009.

²⁷⁹ Decision of ALJ William G. Kocol, Fresh & Easy Neighborhood market, Inc. and United Food and Commercial Workers International Union, Region 8 – Western, Cases Nos. 21-CA-38882 and 21-CA-39100, June 3, 2010.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*, emphasis in the ALJ’s decision.

²⁸² *Ibid.* The ALJ noted here that “The General Counsel does not allege that anything that occurred in this conversation is unlawful.”

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

talking about other subjects.” The judge found that management violated the Act for two reasons: “First, the rule was promulgated in response to union activity. Second, the rule prohibits talking only about union matters while allowing employees to talk to each other about other nonwork related matters.”²⁸⁵

The ALJ also found that Fresh & Easy violated the NLRA by “inviting employees to quit their employment as a response to the protected concerted activities of the employees.”²⁸⁶ He concluded that “the invitation to quit was directed in response to the protected concerted activity” and noted “it is well-settled that an employer violates Section 8(a)(1) when it invites employees to quit their employment rather than continue to engage in union or protected, concerted activities.”²⁸⁷

Finally, the ALJ found that Fresh & Easy violated the NLRA “by prohibiting employees from talking about their discipline with other employees while working but not prohibiting talking about other subjects.” He noted that “an employee has a right protected by Section 7 of the Act to talk about discipline that he or she has received from their employer with other employees. “This is so because the discussions may become the basis for collective action by employees to respond to discipline perceived to be unfair by the employees.”²⁸⁸

The ALJ ordered the standard remedy of a cease-and-desist order and posting a notice in the San Diego store. The notice says:

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;

Choose representatives to bargain with us on your behalf;

Act together with other employees for your benefit and protection;

²⁸⁵ Ibid. The ALJ cited case authority that “It is well established that an employer violates Section 8(a)(1) when, as here, employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees’ activities in regard to the union organizational campaign.” *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Liberty House Nursing Homes*, 245 NLRB 1194 (1979); *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978), *enfd.* 608 F.2d 762 (9th Cir. 1979).

²⁸⁶ Ibid.

²⁸⁷ Ibid. Here, the ALJ cited case authority in *McDaniel Ford*, 322 NLRB 956, n.1 (1997).

²⁸⁸ Ibid. The ALJ here cited *Verizon Wireless*, 349 NLRB 640, 658 (2007).

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting employees from talking to each other about the Union while working but not prohibiting talking about other subjects.

WE WILL NOT invite employees to quit their employment as a response to the protected concerted activities of the employees.

WE WILL NOT prohibit employees from talking about their discipline with other employees while working but not prohibiting talking about other subjects.

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

On February 17, 2010, ALJ Gregory Z. Myerson issued his decision in the consolidated Las Vegas unfair labor practice cases. He found that Fresh & Easy management had issued an unlawfully broad no-distribution rule, had unlawfully interrogated employees about their union activities and sympathies, and unlawfully created an impression among employees that their union activities were under surveillance by management.²⁸⁹

The company's no-distribution rule prohibited "the distribution of literature during working time or on Company premises for any purpose."²⁹⁰ This is a classic overly-broad rule interfering with workers' organizing rights, because earlier NLRB and Supreme Court decisions made clear that employees have a Section 7 right under the NLRA to distribute union-related materials within the place of employment in non-work areas such as lunch rooms and break rooms.

The ALJ also found that store management approached employees and told them to write statements of protest to the union about home visits by union organizers, saying "Everyone is writing a statement ... you need to write yours." The ALJ ruled that this was "coercive in nature.... [A]sking them to furnish written statements ... was really questioning them about their contacts with the Union and their support for the Union's organizational campaign" and

²⁸⁹ Decision of ALJ Gregory Z. Myerson, *Fresh & Easy Neighborhood Market, Inc. and United Food and Commercial Workers International Union*, Cases. Nos. 28-CA-22520 et al. (February 17, 2010).

²⁹⁰ As quoted in ALJ Myerson decision, *Ibid.*

was “interfering with, restraining, and coercing [the employees] in the exercise of their Section 7 rights.”²⁹¹

The ALJ went on to find that management’s importuning “created the impression among [the employees] that their union activities were under surveillance” by Fresh & Easy. It “really left them in an untenable position,” the ALJ concluded, “believing that management was watching employees and was interested in knowing whether they had any contacts with the Union.”²⁹²

Tesco told Human Rights Watch that it has appealed the ALJ rulings in these two cases “because we firmly believe that our employees did not act inappropriately.”²⁹³ Tesco said that it “supports in full the United Nations Universal Declaration on [sic] Human Rights and the International Labour Organisation Core Conventions.”²⁹⁴ The company further stated that “Fresh & Easy Neighborhood Market, our business in the United States, complies with all U.S. legislation relating to labour practices and trade unions and regularly exceeds the standards in U.S. law.”²⁹⁵ The unfair labor practice findings described above belie the latter claims and give reason to question Tesco’s statement of unqualified support for ILO core conventions.

Group 4 Securicor PLC

Group 4 Securicor (G4S) is a London-based \$11 billion company and the world’s largest security firm. It has operations in more than 100 countries with nearly 600,000 employees. It is the largest employer listed on the London Stock Exchange and the second-largest private employer in the world.²⁹⁶

The Wackenhut Corporation is G4S’s subsidiary in the United States. An American company founded in the 1950s by former Federal Bureau of Investigation agents, Wackenhut was bought in 2002 by a Danish company, Group 4 Falck. In 2004, Group 4 Falck merged with Securicor, and the combined companies became Group 4 Securicor.²⁹⁷

²⁹¹ Ibid.

²⁹² Ibid. On March 8, 2010, Tesco announced that it was appealing the ALJ’s decision to the NLRB in Washington, DC. See “Fresh & Easy to Appeal NLRB Ruling,” *Supermarket News*, March 8, 2010.

²⁹³ Letter of Neville-Rolfe to Human Rights Watch, July 26, 2010.

²⁹⁴ Letter from Neville-Rolfe to Human Rights Watch, October 22, 2009.

²⁹⁵ Ibid.

²⁹⁶ For these and other company data, see the Group4Securicor website at www.g4s.com.

²⁹⁷ Ibid.

Headquartered in Palm Beach Gardens, Florida, G4S Wackenhut employs more than 40,000 workers across the United States. They provide security for public buildings, nuclear power plants, chemical factories, retail businesses, gated communities, and many other facilities, as well as transportation-related security, bodyguards, and private detective services.²⁹⁸

Public Commitments on Freedom of Association and Corporate Social Responsibility

On its “Social Responsibility” web page, G4S declares:

G4S recognises its ethical responsibility to its Employees, Customers, Suppliers, Investors, and Local Communities....

Good Corporate Citizenship

Our *Business Ethics Policy*, our code for good corporate citizenship, seeks to establish best practice guidelines for all the various businesses within the organisation, covering a number of important ethical areas including Human Rights, Health and Safety, Employee Relations and Equal Opportunities & Diversity.²⁹⁹

With respect to “Our Employees” in its Social Responsibility statement, G4S insists:

Our relations with our employees and their representatives are extremely important to us.

We have established global minimum standards for employee relations, which set out our commitment to principles such as the ILO Core Labour Standards and the UN Universal Declaration of Human Rights.

We are fundamentally committed to constructive social dialogue and believe that long-term partnerships with employees and their representatives, including trade unions, can help us raise standards wherever we operate....

²⁹⁸ For these and other US operations data, see the Group4Securicor North America website at http://www.g4s.com/home/g4s_worldwide/united_states.htm.

²⁹⁹ See G4S, “Social Responsibility” web site at <http://www.g4s.com/home/csr.htm> (accessed April 5, 2008).

In Europe, we have union representation levels of 55%, compared to an industry average of 46%. In the UK, our relationship with the GMB, one of the UK's largest unions, has continued for more than 40 years.³⁰⁰

G4S's *Business Ethics Policy* says in the section headed "Employees":

G4S supports the principles of the United Nations Universal Declaration of Human Rights and is committed to upholding these principles in its policies, procedures and practices. Respect for human rights is and will remain integral to our operations. We will respect freedom of association and the right to collective bargaining in accordance with local legislation and practice....

We will endeavour to ensure that we work with business partners who conduct their business in a way that is compatible with our policies of respect for human rights and ethical conduct. We will work with customers to ensure that contractual requirements do not infringe human rights.

We value all our employees for their contribution to our business and their opportunities for advancement will be equal and not influenced by considerations other than their performance, ability and aptitude.

Employers' obligations to employees under labour or social security laws and regulations must be respected. The businesses and their employees will work towards creating permanent long-term relationships. To achieve a working environment in which team spirit and commitment to G4S's goals and values are maintained, the Company will ensure that individual employees are treated fairly and with dignity and respect.³⁰¹

Minneapolis, Minnesota: An Organizer Fired

Richard Dieterle had 30 years of experience in the security industry when he took a position with Wackenhut in July 2007 guarding the Wells Fargo (WF) Home Mortgage center in

³⁰⁰ See G4S, "Our Employees" web site at <http://www.g4s.com/home/csr/csr-people.htm> (accessed April 5, 2008).

³⁰¹ See G4S "Business Ethics Policy," Section 8, http://www.g4s.com/home/csr/csr-business_ethics-policy.htm#csr-business_ethics-policy-employees (accessed April 5, 2008).

Minneapolis, Minnesota, for \$11.00 per hour. The WF center is a campus-type property with two large buildings and two large parking lots spread over several acres.

“I got off to a good start, doing a good job making my security rounds,” Dieterle told Human Rights Watch in an interview. “They liked me because I checked out places nobody had ever gone before.”³⁰²

Dieterle had worked as a union-represented security guard for many years in other companies. “I’m pretty liberal. I’m open to the union,” he explained. He added:

A union organizer came and talked to me and another guard. I was for it so I signed a union card. Most of the card signing is employee-to-employee. It’s not like the companies say, with somebody pressuring you. There’s no pressure. Most of the time the guy says, “You don’t have to sign it; don’t hold it against me for asking you.”³⁰³

Dieterle became an active union supporter and organizer. He told Human Rights Watch:

I went around asking people if they wanted to join. I gave them union cards [and] told them, “You can give it back to me or you can throw it out; it’s up to you.” One of the anti-union employees yelled at me when I gave him a card. It was like the opposite of those ads you see on TV against the Employee Free Choice Act. I was careful about how I did it. The SEIU representatives explained that I should do it during breaks and lunch or before and after work. A big majority signed up with the union. We got to 70 percent on cards.³⁰⁴

He said that in December 2007:

The SEIU reps asked me to come with them to the Wackenhut office downtown to give management a letter asking them to bargain with the union. So it was just me as the employee organizer together with the SEIU

³⁰² Human Rights Watch interview with Richard Dieterle, Minneapolis, Minnesota, October 1, 2008.

³⁰³ Ibid.

³⁰⁴ Ibid.

reps. When the managers came out, we told them a majority joined the union and we would like to bargain a contract.

They kicked the SEIU reps out, told them they were trespassing. They told me to wait in the lobby. Then [a management representative] came out and asked me ‘Did you collect cards during your shift?’ I said yes, but now I just came to ask for bargaining. They said they would get back to me.³⁰⁵

After the bargaining request, said Dieterle, “there was not a word for two or three weeks.” He continued:

So we got into January, after the holidays. I was still active for the union. On January 18 I put union flyers into employees’ lockers—only the card-signers, which was most of them. I didn’t want to offend the people who didn’t sign. At the 4-hour assignment change, I got a call at the guard station from the control center telling me to stay put and wait to be picked up. A security vehicle pulled up and took me back to control. They told me to pack up my stuff because “you’re not coming back here.” They told me to go to the main Wackenhut office downtown.³⁰⁶

Dieterle added:

When I got downtown, [a top manager] pulled out my file and showed me six or seven “incident reports” where other employees said I had talked to them about the union. He said I was fired and gave me a pink slip and told me to sign it. At the end it said something like I promised I would not defy against the company for firing me. I told him, “You’re firing me already so why should I sign anything?” I didn’t sign it. I turned in my uniforms and went home.³⁰⁷

Dieterle said:

The union helped me file for unemployment insurance to try to get some income right away, and an unfair labor practice at the NLRB because they

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

fired me for what I was doing for the union. To help with the cases I got my file from the company because Minnesota law lets me get the file. I saw the incident reports with write-ups from other employees. One said, “Richard talked about the union.” That’s all it said. Another one said, “Richard talked to me in the lunchroom about trying to improve conditions for the guards.” That’s what they had.³⁰⁸

Wackenhut challenged Dieterle’s claim for unemployment insurance benefits, saying he was terminated for cause. The Minnesota Unemployment Law Judge heard evidence in the case and issued the following ruling:

Dieterle worked as a security guard for Wackenhut from July 9, 2007 to January 18, 2008, in full-time employment for a final wage rate of \$11 per hour. Dieterle sometimes spoke with co-workers about forming/joining a union. He distributed pro-union flyers or letters and would ask co-workers if they were willing to sign union cards and petitions. He did not threaten, harass, coerce, or intimidate any of his co-workers. He did not neglect his work duties. Wackenhut discharged Dieterle for conduct occurring primarily during non-work times in non-work areas. Wackenhut discharged Dieterle in retaliation for his union activities.... He was not discharged for neglecting his work duties.³⁰⁹

Of the NLRB proceeding on his dismissal, Dieterle told Human Rights Watch:

The union told me that the company wanted to settle the case with a payoff if I don’t take reinstatement and go back to work. I told them I wanted to fight the case and get my job back. If I went back triumphant I think I could organize again. But when they explained that the company could drag it out for three or four years, I decided to take the settlement.³¹⁰

³⁰⁸ Ibid.

³⁰⁹ Joseph Cox, Unemployment Law Judge, Notice of Decision of the Unemployment Law Judge, Richard Dieterle, Employee, Wackenhut Corporation, Employer, Document ID No. 101518911, April 15, 2008.

³¹⁰ Human Rights Watch interview with Richard Dieterle, Minneapolis, Minnesota, October 1, 2008.

Wackenhut paid Richard Dieterle nearly \$7,000 in lost wages. Dieterle said, “I got \$4,888 net after taxes. They had to pay \$6,950 to get rid of me and they figure it was a bargain at the price because it killed the organizing. It was worth it for them.”³¹¹

As part of the settlement, Wackenhut also agreed to post a notice in the workplace saying:

WE WILL NOT unlawfully solicit employees to write incident reports about other employees in an attempt to interfere with employees’ assistance and support for a union.

WE WILL NOT unlawfully interrogate employees about their activities in support of the Union.

WE WILL NOT unlawfully interrogate about other employees’ activities in support of the Union.

WE WILL NOT threaten employees for engaging in union or other concerted protected activities.³¹²

Miami, Florida

When staff employees holding “sergeant” job titles guarding a Florida Power & Light (FPL) plant near Miami sought to organize and then bargain collectively with management of G4S’s Wackenhut subsidiary in late 2002, the company fought fiercely to deny them this right. Co-workers holding “security officer” titles had voted in favor of union representation in 1999. Management argued that the approximately twenty “sergeants” should be considered supervisory employees and therefore excluded from the protections of the NLRA.

The NLRB ruled against Wackenhut and found that workers holding the title “sergeant” were not supervisors under the NLRA. They were more akin to “lead persons” performing the same functions as lower-ranked “security officers” under instructions from higher management,

³¹¹ Ibid.

³¹² NLRB Settlement Agreement, *The Wackenhut Corporation*, Case No. 18-CA-18625 (emphasis in original; copy on file with Human Rights Watch). The agreement contains a non-admission clause stating that “The Charged party does not admit to violating the National Labor Relations Act as alleged.”

but without power to hire and fire or discipline security officers.³¹³ The Board scheduled an election for March 2003.

Despite the NLRB's decision, G4S's American management went on the offensive. Management told employees that sergeants "would always be supervisors in the eyes of the Respondent [Wackenhut], notwithstanding the Board's decision to the contrary."³¹⁴

The top manager issued a memorandum to employees stating "sergeants are *not in unions, any unions....* [W]e believe that our sergeants are part of the management team.... [The company] hopes that the sergeants will unanimously reject [the union]."³¹⁵

Another management memo a few days later laid out an ominous threat to sergeants:

The Company continues to consider you as our first line supervision. The NLRB has ruled that you are entitled to vote for a Union. And therein lies the problem. While we expect you to function as supervisors, if you are unable to direct the security force and to administer discipline as needed, then the question becomes what role the Sergeants will play if the Union is voted in.³¹⁶

Reprisal against Employees' Choice

Wackenhut sergeants voted in favor of union representation in March 2003. But instead of accepting the employees' choice and honoring their right to bargain collectively, Wackenhut management retaliated against them because of their vote. Claiming that its service contract with FPL prohibited Wackenhut from bargaining with workers in a "sergeant" classification, the company shifted some of the sergeants' job duties to higher-ranked "lieutenants" and demoted the sergeants to "security officers," eliminating the "sergeant" classification altogether and thus putting the sergeants' bargaining unit out of existence.³¹⁷ Management also refused to bargain with the union over this change.

³¹³ NLRB Decision and Order, *The Wackenhut Corporation and International Union of Security, Police, and Fire Professionals of America (SPFPA)*, 345 NLRB 850, August 27, 2005.

³¹⁴ As characterized in NLRB Decision and Order, *Ibid.*

³¹⁵ *Ibid.*, citing Wackenhut memo to employees, January 28, 2003 (emphasis in original).

³¹⁶ *Ibid.*, citing Wackenhut memo to employees, February 3, 2003. The NLRB specifically found that sergeants did *not* have these powers of direction and discipline.

³¹⁷ *Ibid.*

The union filed unfair labor practice charges over the company's actions. In September 2004, an administrative law judge found that the FPL contract was silent on the status of sergeants and that Wackenhut's reliance on the FPL contract was a pretext for anti-union discrimination. The judge ruled that Wackenhut violated the NLRA when it "failed and refused to bargain collectively in good faith with the Union," including by "eliminating the sergeant position without the consent of the Union."³¹⁸ The ALJ further held that Wackenhut "was discriminatorily motivated in deciding to eliminate the sergeants' position" and that the elimination was based on "anti-union animus" in violation of Section 8(a)(3) of the NLRA, the Act's anti-discrimination clause.³¹⁹

On appeal, the NLRB found that the company's actions were a "refusal to bargain" unfair labor practice that interfered with and coerced employees' exercise of rights to organize and bargain collectively.³²⁰ The Board ordered Wackenhut to restore the sergeant position, to reinstate demoted employees back to their sergeant posts, and to bargain in good faith with the union, noting, "[W]e find it unnecessary to pass on the judge's finding that the Respondent's action also violated Section 8(a)(3) ... [b]ecause the remedy ... is a restoration of the status quo ante [and] a finding of an 8(a)(3) violation would not alter or add to the remedy."³²¹

G4S's attempt to deny rights of association and bargaining to "sergeants" at the Florida Power and Light facility not only violated US law but also ran afoul of clear ILO norms. The ILO Committee on Freedom of Association, in its findings and recommendations on complaints involving Conventions 87 and 98, has had extensive experience with cases involving attempts by employers and governments to treat employees as supervisors, managers, confidential employees, and similar categories as a pretext for stripping these employees of their right to form and join trade unions and to bargain collectively. The Committee has repeatedly found that that the legal definition of "supervisors" should not give rise to an expansive interpretation excluding large numbers of workers from collective bargaining.³²² Instead the expression "supervisors," should be limited to cover only those

³¹⁸ Decision of ALJ Michael A. Marcionese, *The Wackenhut Corporation and International Union of Security, Police, and Fire Professionals of America (SPFPA)*, Case Nos. 12-CA-23294, 12-CA-23295, 12-CA-23407 (September 7, 2004).

³¹⁹ *ibid.*

³²⁰ NLRB Decision and Order, *The Wackenhut Corporation and International Union of Security, Police, and Fire Professionals of America (SPFPA)*, 345 NLRB 850 (August 27, 2005).

³²¹ *Ibid.*

³²² Dominican Republic (Case No. 1751), *The National Federation of Sugar, Agricultural and Allied Workers (FENAZUCAR)*, 22-Nov-93, Report No. 295 (Vol. LXXVII, 1994, Series B, No. 3); see also Canada (Case No. 1951), *The Canadian Labour Congress (CLC) and the Ontario Secondary School Teachers' Federation (OSSTF)*, 02-Feb-98, *Interference with collective bargaining*;

persons who genuinely represent the interests of employers.³²³ Similarly, the company's retaliation against employees—eliminating their “sergeant” classification and demoting them to “security officers” because they voted in favor of union representation—violated both the anti-discrimination clause of the NLRA and ILO Convention 87's stricture against “acts calculated to ... prejudice a worker by reason of union membership or because of participation in union activities.”

Washington, DC

Wackenhut security officers at the International Monetary Fund (IMF) in Washington, D.C. began an organizing effort in the fall of 2003. The massive IMF headquarters building occupies a complete city block in downtown Washington and has been the target of many civil society protests against “Washington Consensus” trade and development policies over the years.³²⁴ Security at the building is vigilant, and security officers have important responsibilities carrying out their tasks.

Workers were concerned about wages, health benefits, and harsh and subjective treatment by supervisors. Their concern was underscored by G4S's employee handbook that starkly declared, “The Company retains the absolute right to terminate any employee at any time without good cause.”³²⁵ With a union, employees hoped they would have a “just cause” standard for disciplinary action, backed up by union representation and recourse to an independent arbitrator empowered to remedy unjust disciplinary moves.³²⁶

denial of the right to organize, to bargain collectively and to strike of principals and vice-principals; lack of protection against anti-union discrimination and employer interference, Report No. 325 (Vol. LXXXIV, 2001, Series B, No. 2).

³²³ Ibid. The ILO Committee on Freedom of Association has found,

It is not necessarily incompatible with the requirements of ... Convention No. 87 to deny ... supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to establish their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership.

ILO Committee on Freedom of Association, *Digest of Decision: Distinctions based on occupational category (Right of workers and employers, without distinction whatsoever, to establish and to join organizations)*, 2006, para. 247.

³²⁴ See, for example, Manny Fernandez, “Peaceful Protest Puts Focus Back on IMF; Extensive Street Closures Prompt Some Complaints,” *The Washington Post*, April 14, 2003, p. B1. “Washington Consensus” is an often used reference to a set of trade and development policies promoted by the IMF, the World Bank, and other international financial institutions headquartered in Washington stressing belt-tightening fiscal policies, privatization of public services, and new protections and guarantees for international investors. For a critical discussion, see Joseph Stiglitz (former Chief Economist at the World Bank), “Challenging the Washington Consensus,” 9 *Brown Journal of World Affairs*, Vol.2 (Winter/Spring 2003), p. 33.

³²⁵ Cited in *The Wackenhut Corporation and Service Employees International Union*, 348 NLRB No. 93 (December 19, 2006).

³²⁶ Ninety-seven percent of collective bargaining agreements in the United States contain a “just cause” standard for discipline, and 99 percent of contracts provide for arbitration of unresolved grievances. See Kenneth G. Dau-Schmidt and Timothy A. Haley, “Governance of the Workplace: The Contemporary Regime of Individual Contract,” 28 *Comparative Labor Law and Policy Journal* 313 (Winter 2007).

G4S Wackenhut responded to the employees' organizing effort not with the "respect for freedom of association" and "constructive social dialogue" promised in its corporate social responsibility statements, but with hostile attitudes and messages, and with actions that violated the NLRA and the international standard of non-interference with workers' freedom of association. Managers told employees that:

- Wackenhut was a non-union organization;
- the IMF was opposed to workers' organizing;
- Wackenhut's contract with the IMF prohibited unions;
- organizing would jeopardize Wackenhut's contract with the IMF, and thereby jeopardize jobs;
- if an employee wants to organize a union, he should seek a transfer away from the IMF assignment.³²⁷

Management also told employees that surveillance cameras were monitoring them and that they would be fired if cameras caught them in organizing activity. Management interrogated employees about organizing activity and asked employees to report the actions of organizing leaders among them.³²⁸

The NLRB found that these actions by G4S Wackenhut interfered with and coerced workers exercising rights of association in violation of Section 8(a)(1) of the NLRA. The Board ordered the company to cease and desist from such actions and to post a notice in the workplace promising not to repeat the unlawful conduct "or in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act."³²⁹

In a letter to Human Rights Watch, G4S pointed to a "positive track record in the US" and says that legal cases alleging labor violations arose in a five-year union "corporate campaign" against the company, with no finding of wrongdoing on most claims.³³⁰ As we have noted with respect to similar claims by other companies discussed in this report, a positive record in some locations does not excuse violations at other locations, nor does it lessen the need for management systems capable of identifying rights violations as they are occurring so that company officials can intervene appropriately to better safeguard workers'

³²⁷ *The Wackenhut Corporation and Service Employees International Union*, 348 NLRB No. 93 (December 19, 2006).

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ Letter from Jenni Myles, director of employee engagement and HR, G4S plc, to Human Rights Watch, February 20, 2009 (copy on file with Human Rights Watch).

rights. In the present instance, as detailed above, US labor law authorities made conclusive findings of unlawful conduct.

The December 2008 Agreement

G4S' letter to Human Rights Watch also cited agreements reached in December 2008 with Union Network International (UNI), the international federation of service workers' unions, and with the Service Employees International Union (SEIU) in the United States. G4S pointed out that "the cases discussed above precede the signing" of these agreements.³³¹

In December 2008, SEIU and Wackenhut Corp. announced an agreement identifying four types of establishments in nine cities where management would refrain from interference in workers' organizing efforts and workers could express majority support for collective bargaining either through a card-signing process or through an NLRB election.³³²

These indeed are positive steps. The SEIU-Wackenhut settlement was part of a broader, global Ethical Employment Partnership (EEP) agreement between UNI and G4S.³³³ The agreement contains the following provisions:

G4S recognises the important role that unions play in representing employees' interests and recognizes UNI as its global partner ...

G4S is committed to being a socially responsible corporate citizen and will sustain its efforts to lead and inspire the industry by applying its Business Ethics policy. The company will respect rights established through the core conventions of the ILO and will apply them in accordance with this agreement wherever legally possible. This includes the rights of its employees to freedom of association and to be members of trade unions, and the right of unions to be recognised for the purpose of collective

³³¹ Letter of Jenni Myles, director of employee engagement and HR, G4S, to Human Rights Watch, July 30, 2010 (copy on file with Human Rights Watch).

³³² Susan R. Hobbs, "SEIU, Wackenhut Reach Neutrality Agreement for Certain Security Guards in Nine Cities," Bureau of National Affairs *Daily Labor Report*, December 18, 2008, p. A-7. The agreement covers employees in government buildings, hospitals, and large residential and commercial buildings in Washington, DC; Los Angeles, San Francisco, and Sacramento, California; Seattle, Washington; Boston, Massachusetts; Chicago, Illinois; Minneapolis, Minnesota; and New York, New York.

³³³ See UNI "List of signed global agreements" at http://www.uniglobalunion.org/Apps/iportal.nsf/pages/20090202_vlnuE (accessed March 14, 2010). Based in Geneva, Switzerland, UNI was formed in January 2000 as the global union federation for workers and unions in telecommunications, property services, banking and commerce, postal, information technology, graphical, media, and other sectors. UNI's 900 affiliated unions represent 20 millions workers in 140 countries. See the UNI website at www.uniglobalunion.org.

bargaining. The company further agrees that it will respect the OECD Guidelines for Multinational Enterprises....

UNI and G4S share the view that employees should be able to make the choice about whether or not to join a union, free from threat or intimidation by either company or union. G4S managers will not oppose this process and upon request G4S will communicate to employees that they are entitled to a free choice over whether or not to join and become active in a union....

G4S will agree specific access arrangements for local unions to explain the benefits of joining and supporting the union ... such arrangements will vary in line with local legal and practical considerations ... Meetings shall be arranged either before and after working hours, or during breaks, and not during working hours ... Meetings will normally take place without managers being present....

[T]he means of establishing union recognition will be determined locally based on the principle that the company will recognise representative and legitimate unions. As part of this process the parties should agree a fair and expeditious system for checking support for the union....³³⁴

G4S told Human Rights Watch “we take pride in being the first UK-based multinational company to enter into a global agreement safeguarding employee rights throughout our operations” and added “we have made significant progress under the US agreement. G4S has recognized SEIU as the bargaining representative for employees working in the Chicago, Minneapolis and Seattle markets. We are in the process of rolling out the agreement in New York, the District of Columbia and in multiple cities in California.”³³⁵

G4S deserves credit for reaching a global agreement with UNI globally and with the SEIU in the United States to reverse the pattern of cases examined in this report in the 2003-2008 period. The EEP, if it proves to be a sustainable program for implementing workers’ freedom of association, offers one model of rectifying corporate behavior that ran counter to international labor standards.

³³⁴ See G4S and UNI, “Ethical Employment Partnership: A global agreement between UNI and G4S,” December 11, 2008 (copy on file with Human Rights Watch).

³³⁵ Letter from Myles to Human Rights Watch, July 30, 2010.

Kongsberg Automotive

Kongsberg Automotive (KA) is a US\$1 billion-revenue Norwegian manufacturing firm with 50 factories in 20 countries. Employing 9,000 workers worldwide, the company produces clutch actuation, cable actuation, gear shifters, transmission control systems, stabilizing rods, couplings, electronic engine controls, specialty hoses, tubes and fittings, and other auto parts. In the United States, Kongsberg Automotive has 10 factories in a half dozen states.³³⁶

Public Commitments on Freedom of Association and Corporate Social Responsibility

Norway is a center of European initiative on corporate social responsibility. As one analyst put it, “There is little doubt that Norwegian companies feel they have a special inclination towards taking on a social and environmental responsibility due to their embeddedness in Norwegian culture and regulatory system.”³³⁷

A 2007 Oslo conference on good governance and social and environmental responsibility drew more than 800 participants. Conference organizers included the World Business Council for Sustainable Development, the UN Global Compact, and the Global Reporting Initiative (GRI). Conference sponsors included the Confederation of Norwegian Enterprise and Norway’s industrial giants like Statoil and Norsk Hydro.³³⁸

The “Agenda for Change” issued by the conference declared as one of three priorities (alongside environmental and good governance goals):

Advancing corporate responsibility by respecting human rights and decent work standards. The protection of human rights is a moral imperative, for governments, individuals, and for companies. Human rights, ... employment and decent work need to be higher up on the sustainable development agenda.... Governments should ratify the ILO core conventions and implement them nationally. When government implementation fails, companies are encouraged to establish and implement corporate standards in line with the ILO core conventions.³³⁹

³³⁶ For this and other information about the company, see www.kongsbergautomotive.com.

³³⁷ Benedicte Bull, “Corporate Social Responsibility: The Norwegian Experience,” Paper prepared for the Initiative on Ethics and Development, Inter-American Development Bank, March 19, 2003.

³³⁸ See Partnerships for sustainable development: the Oslo conference on good governance and social and environmental responsibility, *The Oslo Agenda for Change*, Oslo, Norway, 28-30 March 2007, <http://www.csr-oslo.org> (accessed October 8, 2008).

³³⁹ Ibid.

Reflecting this Norwegian model of corporate social responsibility, Kongsberg Automotive declares that the company “will always comply with prevailing legislation and regulations in the countries in which we operate. In some instances, KA rules may be even more comprehensive than local laws and regulations. Where they do not conflict with local legislation, the company’s principles shall apply.”³⁴⁰

Kongsberg Automotive’s principles are stated in a Code of Conduct adopted in December 2005, which says:

KA has based its principles on the OECD Guidelines for Multinational Enterprises, which give an extensive overview of rules to follow.... Correspondingly, KA will promote the International Labour Organization (ILO) fundamental principles and rights at work. These principles and rights are the right to freedom of association and the elimination of child labour, forced labour and discrimination linked to employment.... KA shall and will always follow the law in the country in which it is operating.³⁴¹

Kongsberg Automotive has also set out a template of “general purchasing conditions” for all its suppliers. In Section 19, titled “Compliance with Laws and Social Responsibility,” KA requires that:

Supplier acknowledges the Directive of the UN Initiative Global Compact (Davos, 01/99) and the principles and rights set approved by the International Labour Organisation in its “Declaration on fundamental principles and rights at work” (Geneva 06/98).³⁴²

Kongsberg Automotive’s Factory in Van Wert, Ohio

Kongsberg Automotive’s behavior at its factory in Van Wert, Ohio, belies the company’s stated commitment to freedom of association and collective bargaining as reflected in ILO core labor standards, OECD guidelines, and the UN Global Compact. In January 2008, KA bought the former Teleflex factory in Van Wert, a small city in rural western Ohio near the

³⁴⁰ See Kongsberg Automotive, “Social Responsibility” web page, <http://www.kongsbergautomotive.com/Templates/Public/Pages/Page.aspx?id=444> (accessed February 24, 2009).

³⁴¹ See Kongsberg Automotive, “Code of Conduct: Guidelines With Regard to Values and Ethics,” <http://www.kongsbergautomotive.com/INVESTOR-RELATIONS/Corporate-Governance> (accessed October 8, 2008).

³⁴² See Kongsberg Automotive, “General Purchasing Conditions” (August 2008), <http://www.kongsbergautomotive.com/OurBusiness/Suppliers/> (accessed February 24, 2009).

Indiana border. With over 300 workers, the plant was one of the largest local employers. The average wage of the hourly workforce was \$15.00 per hour.³⁴³ Prior to Kongsberg's purchase of the company, workers had been represented by the United Steelworkers of America (USWA) for many years and through successive collective bargaining agreements, most of them settled without conflict.

The workers' collective agreement with Teleflex was due to expire in April 2008. When the union sat down to bargain after the change in ownership, Kongsberg Automotive demanded a "two-tier" wage system in which new employees would be paid \$9 per hour. Current employees would be "grandfathered" at their current wage level with no increases. Management also demanded cuts in pensions, health insurance, and other benefits.³⁴⁴

When their contract expired in early April 2008, workers offered to stay on the job and continue negotiating while a federal mediator helped the parties reach a settlement. KA rejected this offer and responded with a lockout of all union-represented employees.³⁴⁵

Management shut the factory door on union workers but opened a side door for replacement workers to take on the jobs of locked out employees. While unheard of in Europe, US labor law allows employers to engage in such "offensive lockouts," as they are called—locking out union workers, then hiring replacements to force union capitulation to company demands. The "offensive lockout" was approved by the NLRB under the Reagan administration in the 1986 *Harter Equipment* decision.³⁴⁶

On April 28, three weeks into the lockout and with the plant operating with replacement workers, Kongsberg Automotive management sent an e-mail to the union and to locked-out employees announcing that it was eliminating 200 jobs and moving them to Mexico.³⁴⁷ The move had been in the works for some time but the timing of it clearly dramatically altered the collective bargaining context.

³⁴³ Kirk Dougal, "Kongsberg president visits Van Wert," *Van Wert Times Bulletin*, April 18, 2008, <http://timesbulletin.com/main.asp?Search=1&ArticleID=146548&SectionID=2&SubSectionID=&S=1> (accessed December 16, 2008).

³⁴⁴ Brian Evans, "Konbsberg Automotive Lockout: 200 jobs to Mexico; Word comes through e-mail to union boss," *Lima (Ohio) News*, April 30, 2008.

³⁴⁵ *Ibid.*

³⁴⁶ *Harter Equipment, Inc.*, 280 NLRB 597 (1986), *aff'd*, *IUOE Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

³⁴⁷ Evans, "Konbsberg Automotive Lockout: 200 jobs to Mexico; Word comes through e-mail to union boss," *Lima (Ohio) News*.

In addition to the transfer of 200 jobs to Mexico, Kongsberg Automotive also declared that if workers did not capitulate to the company's demands by May 2—four days later—the company would change its bargaining demand to reduce *a//*workers' pay to \$9.00 per hour.³⁴⁸

Management attributed its harsh new demand to its decision to eliminate the 200 jobs and move them to Mexico.³⁴⁹ Here is how KA management put it:

[T]he repositioning of the cable lines [the move to Mexico] will have a negative impact on the Van Wert plant's sales margin. Accordingly, Kongsberg's final offer from March 28, 2008 must be modified to delete the grandfathering provision from the two-tier wage scale. Following this modification, the new wage scale from the March 28 proposal will apply to all work performed in the Van Wert facility. However, Kongsberg will forego this modification if the company receives notification prior to 10:00 a.m. on Friday, May 2 that its final offer has been ratified by the Union membership.³⁵⁰

The Kongsberg Automotive case is a stark example of a European company claiming to uphold high labor standards but exploiting features of US labor law that are inconsistent with higher standards of practice at home. In Norway, as in Europe generally, when a company and a union reach the expiration date of a contract without a settlement, the contract continues in effect while the parties engage in a lengthy mediation process to achieve a peaceful accord.³⁵¹ One expert explains:

In most Western European countries, the large majority of workers are covered by collective agreements ... [U]nless a work stoppage has been

³⁴⁸ Letter from Larry Alberding, Van Wert plant manager, Kongsberg Automotive, to Aaron Collins, president, United Steelworkers of America Local 1-524, April 28, 2008 (copy on file with Human Rights Watch).

³⁴⁹ US labor law gives employers unilateral power to close all or part of a workplace without bargaining with workers' unions over the decision to close. Instead, employers only must bargain over the effects of the closure, such as severance pay, "bumping right," and the like. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

³⁵⁰ Letter from Larry Alberding, Van Wert plant manager, Kongsberg Automotive, to Aaron Collins, president, United Steelworkers of America Local 1-524, April 28, 2008 (copy on file with Human Rights Watch).

³⁵¹ See *Norway Labor Disputes Act* (1927), Sec. 6 ("Recourse shall not be had to strike, lockout or other industrial action to settle a dispute between a trade union and an employer or an employers' association respecting the regulation of terms of employment or wages or other matters relating to employment which are not covered by a collective agreement, until the time-limits fixed in §§ 29 and 36 have expired.... As long as strike, lockout or other industrial action can not be carried out, the collective agreement and the terms of employment and wages which were in force at the outbreak of the dispute shall stand, unless otherwise agreed by the parties.").

initiated, it is in most countries a well-established practice that production continues under the terms of the old agreement until a new agreement is reached, even after the old agreement has expired. This implies that the union must agree to a change in the terms of the agreement, i.e. the employer may not lawfully unilaterally change the terms of the agreement, even after the agreement has expired.³⁵²

Confirming this view, a prominent Norwegian and comparative labor law expert explains that in Norway, “[B]y virtue of statute law provisions a collective agreement has ‘continued effect.’ It does *not* lapse on the expiry of its ordinary period of validity but remains in force as a binding contract with full effect until the expiry of the time limits ensuing from the rules on notice and mediation mentioned above.”³⁵³

Hiring replacement workers to take the jobs of locked-out employees is also contrary to labor relations practice in Norway. As Professor Evju explains:

Hiring replacement workers did occur in the 1920s and early 1930s but not systematically or on a large scale. Since the compromise between the dominant private sector actors in 1935, such practices have virtually disappeared. The industrial relations ethos of the post war era, still forcefully alive, is that hiring of replacement workers is unacceptable, unethical and incompatible with essential industrial relations standards.³⁵⁴

In a letter to Human Rights Watch, Kongsberg Automotive acknowledged that “While ‘offensive lockout’ is not prohibited by law in Norway, it is correct that it is not an acceptable or recognized measure in industrial disputes and therefore for all practical purposes non-existent.”³⁵⁵ KA added that it is “the intention and policy of the KA Group to avoid taking such measures in industrial disputes and rather aim at solving such disputes through negotiations regardless of where in the world labor disputes may occur.”³⁵⁶ However, KA said,

³⁵² Steinar Holden, “Monetary Policy and Nominal Rigidities under Low Inflation,” Center for Economic Studies, CES Working Paper No. 481 (May 2001).

³⁵³ Stein Evju, “The right to strike in Norwegian labour law,” 5 *Arbeidsrett* 79 (2008).

³⁵⁴ See Stein Evju, Professor of Labor Law, Department of Private Law, University of Oslo, e-mail to Human Rights Watch, October 14, 2008 (on file with Human Rights Watch). Prof. Evju adds, “On this point, for the reasons I have sketched, we have no case law that I can refer to.”

³⁵⁵ Letter of Hans Peter Havdal, CEO, Kongsberg Automotive, to Human Rights Watch, August 9, 2010 (copy on file with Human Rights Watch).

³⁵⁶ *Ibid.*

“the Van Wert situation was exceptional and KA were under the circumstances left with no other option than a lockout and hiring of temporary workforce.”³⁵⁷

After workers refused Kongsberg Automotive’s ultimatum,³⁵⁸ the company completed the movement of cable lines production to Mexico in October 2008, eliminating 200 jobs.³⁵⁹ The lockout continued into late 2008 as the plant continued operating with replacement workers. For workers, the danger loomed that the lockout would last for over one year and KA might move to get rid of the union altogether. The one-year cutoff is significant because US labor law permits employers to claim, after a year-long lockout, that the union no longer enjoys majority support among active workers and to withdraw recognition on that basis.³⁶⁰

The Plant Shutdown

The dispute at Kongsberg Automotive’s Van Wert, Ohio, facility never reached the one-year mark. Instead, after nine months, with workers still locked out and no progress in negotiations, KA announced in December 2008 that, due to the crisis in the automotive industry, it was shutting the Van Wert plant and moving all production to Nuevo Laredo, Mexico.³⁶¹ The company and the union reached an agreement in “effects bargaining” on terms and conditions of the shutdown, covering such matters as severance pay, temporary health insurance coverage, early retirement, and the like.³⁶²

In a letter to Human Rights Watch, Kongsberg Automotive noted that its replacement workers were temporary, not permanent, and that the company prevailed on most of the claims brought by the union.³⁶³ KA acknowledged that the NLRB was prepared to issue a complaint

³⁵⁷ Ibid.

³⁵⁸ Greg Sowinski, “Kongsberg job offer deadline passes,” *Lima (Ohio) News*, May 3, 2008.

³⁵⁹ See “Kongsberg shifter line says adios to Van Wert,” *Van Wert Times Bulletin*, October 17, 2008.

³⁶⁰ *NLRB v. Curtin Matheson*, 494 U.S. 775 (1990); *Allentown Mack Sales v. NLRB*, 522 U.S. 359 (1998). As Professor LeRoy noted, discussing the breaking of the union at the Harter Equipment company after one year of its lockout: “There is developing evidence that some employers use replacement lockouts as another tool to break unions.... The Harter Equipment Co. succeeded in cloaking its intentions in neutral-sounding negotiating that emphasized the economic need for concessions. Of course, the danger in a doctrine that permits this negotiating tactic is that any careful employer can disguise its unlawful intentions.” Michael H. Leroy, “Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons under the NLRA,” 74 *Washington University Law Quarterly* 981 (Winter 1996).

³⁶¹ Marty Schladen, “Van Wert plant closing; 105 jobs lost: Move to Mexico follows lockout,” *Fort Wayne Journal-Gazette*, December 16, 2008. Human Rights Watch takes no position on management motivations or intentions in connection with the plant closing.

³⁶² Under US labor law, unions have no right to “decision bargaining” with management over the decision to close a workplace, but is entitled to “effects bargaining” about the impact of closure. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

³⁶³ Letter from Olav Volldal, president and CEO, Kongsberg Automotive, to Human Rights Watch, March 17, 2009 (copy on file with Human Rights Watch). The company also maintained that its wage cut demands were “in line with what other companies

on union unfair labor practice charges of unlawful surveillance, interference, and failure to notify the union of subcontracting plans but said it believes that “a full hearing would have resulted in dismissal of these claims as well.” KA told Human Rights Watch that it “agreed with the NLRB on the underlying principles of law involved” and “agreed to post notices explaining the rights of employees in regard to these issues” as part of a settlement agreement on these ULP charges.³⁶⁴

Kongsberg Automotive concluded, “Kongsberg Automotive is of the firm opinion that we in the Van Wert case have acted according to all the standards, norms and guidelines that we refer to in our Codes of Conduct. NLRB’s decisions, based on factual evidences presented by the parties, are supporting this conclusion.”³⁶⁵ Here, however, Kongsberg mistakenly conflates US law and the international standards referred to in its Code of Conduct.

The fact that some features of US labor law allow employers to violate workers’ rights under international human rights standards does not justify KA’s use of the “offensive lockout” doctrine, one which is incompatible with international standards and with practices in its home country. US law does not require KA to act in this fashion. It permits such anti-union tactics, but Kongsberg Automotive had the choice whether to take advantage of these features of US law or to act in accordance with its principles.

Kongsberg Automotive has publicly committed to the position that where its principles are more comprehensive than local legislation, and they do not conflict with local legislation, KA will apply its principles. Indeed, in this case where KA principles surpass US law, the company could have acted consistently with its principles “based on the OECD guidelines for multinational enterprises,” its promise to “promote the International Labour Organisation (ILO) fundamental principles and rights at work,” and its invocation of the UN Global Compact in requirements for suppliers.

Kongsberg could have accepted the union’s offer to continue working upon expiration of the contract while negotiations continued with assistance from a federal mediator. If terms of the existing contract were too onerous from management’s perspective to keep it in effect while negotiations continued, Kongsberg could have declared an impasse in bargaining and implemented its final offer to the union. This would leave to the union a decision whether to

in the region are paying.” Human Rights Watch takes no position on the adequacy of economic proposals in collective bargaining, which are not susceptible to human rights analysis.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

strike or to accept management's terms. If the union opted to strike, Kongsberg could then have hired temporary replacements.

Instead of choosing one of these options, Kongsberg Automotive acted immediately under the *Harter Equipment* doctrine to undertake an offensive lockout and to hire replacements when the contract expired. This action reflected a choice to adopt US management-style anti-union strategies and tactics belying the company's claims of social responsibility, the values and guidelines of its Code of Conduct, and adherence to OECD guidelines and ILO core standards.

Gamma Holding and National Wire Fabric

Gamma Holding is a Netherlands-based multinational manufacturer of textile products ranging from fashion textiles, sleepwear, and sailcloth to industrial textiles for conveyor belts, coated and composite products, roofing systems, filtering systems, bulletproof vests, and other uses. The company employs 6,500 workers in 42 countries and had almost a billion dollars in sales in 2008.³⁶⁶

Public Commitments on Freedom of Association and Corporate Social Responsibility

"People are the key to Gamma Holding's success," the company says of its working environment.³⁶⁷ In its Code of Conduct, the company declares, "Gamma Holding firmly believes that good business practice is based not only on economic and financial principles, but also on values such as a healthy social climate and a sound environmental policy."³⁶⁸

Gamma Holding's code says, "Gamma Holding recognises the employees' right to organise themselves to protect their collective and individual interests." It goes on to define its "social commitment" this way:

Gamma Holding considers a good relationship with the local community in the countries in which it is active to be of fundamental importance for its long-term success. Such a relationship is based on mutual respect, the

³⁶⁶ For these and other company data, see Gamma Holding website at www.gammaholding.com.

³⁶⁷ See "Working Environment" web page at http://www.gammaholding.com/en/HRM/Working_environment.

³⁶⁸ See Gamma Holding, "Code of Conduct," http://www.gammaholding.com/en/Corporate_Governance/Corporate_documents_and_downloads.

objective being lasting ties built on trust. Gamma Holding strives to make a positive contribution to the society in which it is represented.³⁶⁹

Gamma Holding notes that it has signed the Code of Conduct of the Social Partners in the European Textile and Clothing Sector. Negotiated by textile companies and European trade unions in the sector, article 1 of that code cites “freedom of association and the right to negotiate” under ILO Conventions 87 and 98, stating, “The right for workers to form and join a trade union, as well as the right for employers to organise, are recognized. Employers and workers may negotiate freely and independently.”³⁷⁰

In its 2009 Annual Report, Gamma Holding says of its Code of Conduct, “Important elements of this code of conduct include employees’ right to organise and the prohibition of any form of discrimination” and that the company “applies these business principles not only in Europe, but also in all of the countries in which the group is active.”³⁷¹

The Annual Report notes that:

[W]orks councils are active in the various countries and trade unions are consulted on important issues.... As well as these and other forms of employee participation, Gamma Holding has a European Works Council, which discusses not only the developments and outlook for the company, but also strategic choices and specific plans.... [O]n 2 February 2010 the European Works Council reached an accord with Gamma Holding about extending the agreement between them. Under this agreement the European Works Council will remain active for a new period up to and including 31 December 2013.³⁷²

This “human resources management” section of Gamma Holding’s Annual Report ends cryptically with the statement, “At the end of April, Filtration Technology resolved the labour dispute at National Wire Fabric in the US state of Arkansas.”³⁷³

³⁶⁹ Ibid.

³⁷⁰ See *A Charter by the Social Partners in the European Textile and Clothing Sector: Code of Conduct* on the European Union website at http://ec.europa.eu/employment_social/soc-dial/news/chartertextile_en.htm.

³⁷¹ See Gamma Holding, “2009 Annual Report,” www.gammaholding.com (accessed August 27, 2010).

³⁷² Ibid.

³⁷³ Ibid.

Star City, Arkansas

What Gamma Holding did not say in its 2007 Annual Report was that the labor dispute in Arkansas was the longest strike in the history of that state, one marked by the company's use of permanent replacement workers, bad-faith bargaining, and several other unfair labor practice charges found to be meritorious by the NLRB.

National Wire Fabric (NWF) in Star City, Arkansas, is part of Gamma Holding's Clear Edge Filtration division, which makes metallic and synthetic wires and fabrics for the building products, pulp and paper, and corrugator industries. Gamma Holding acquired the NWF facility in 2001. Local 1671 of the United Steelworkers union represented 56 hourly employees at the plant.³⁷⁴

In July 2005, after months of negotiations on a new contract and despite intervention by the Federal Mediation and Conciliation Service, NWF workers exercised their right to strike. NWF management was demanding cuts in vacations and health insurance and contract "flexibility" that would destroy seniority rights and other protections built up over years of negotiations.³⁷⁵

Concessionary demands by management do not come within the scope of ILO conventions 87 and 98. However, these international norms require good-faith bargaining and condemn the use of permanent replacement workers against lawful strikers. Gamma Holding violated both these international standards although, with respect to permanent replacements, it did not violate US law.

When members of the United Steelworkers exercised the right to strike, Gamma Holding's NWF management hired permanent replacements to take their jobs. Explaining the move in a letter to union officials, Gamma Holding's CEO said, "Once National Wire Fabric made the legal decision to continue its operations, the company, logically and legally, decided it would need to use permanent replacements."³⁷⁶

For almost two years, the company maintained production with permanent replacement workers despite the ILO's decision that the use of permanent replacements violates workers'

³⁷⁴ Richard Massey, "Star city walkout near end of year one," *Arkansas Democrat-Gazette*, July 5, 2006.

³⁷⁵ Ibid.

³⁷⁶ Letter from Gamma Holding CEO Meint Veninga to Neil Kearney, general secretary, International Textile, Garment and Leather Workers' Federation, cited in Richard Massey, "Factory in Star City broke law, union says Strikebreakers offered promotions, it claims," *Arkansas Democrat-Gazette*, March 13, 2006.

freedom of association.³⁷⁷ When ... AFL-CIO Secretary-Treasurer Richard Trumka protested the use of permanent replacements in a letter to Gamma officials in the Netherlands,³⁷⁸ Gamma Supervisory Board member Aris Wateler responded:

After extensively reviewing the available information one more time, I came to the conclusion that neither the company nor Gamma Holding as the ultimate parent company have broken any laws in the United States. Although I would certainly welcome this labor dispute to come to an end, it has also become clear to me that terminating the employment of the replacement workers and reinstating the striking workers does not seem to be a viable option. Since I understand this would be a prerequisite for you to settle this labor dispute, I am afraid I cannot be of much help to you in this situation.³⁷⁹

Regardless of whether the claim that the company had not violated US law was accurate at the time, this statement is a clear assertion that Gamma Holding would not honor the international labor standard proscribing use of permanent replacements where US law allows the practice.

As it later developed, the NLRB found merit in charges that NWF and Gamma *did* violate US labor law. The union filed unfair labor practice charges against NWF in 2006 and 2007 alleging that management was bargaining in bad faith by trying to entice strikers to return to work with promises of supervisory positions. In January 2007, the NLRB regional director issued a complaint and set the case for trial before an administrative law judge in May 2007.³⁸⁰

In its complaint, the Board said that NWF management for several months between October 2005 and February 2006 repeatedly “bypassed the union and dealt directly with its employees by soliciting striking employees to cross the picket line and to return to work

³⁷⁷ International Labor Organization, Committee on Freedom of Association, *Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, para. 92, Report No. 278, Case No. 1543 (1991).

³⁷⁸ Letter of Richard L. Trumka, AFL-CIO to Michel Tilmant, CEO and chairman, ING Group, June 26, 2006 (ING Group is the largest shareholder of Gamma Holding) (copy on file with Human Rights Watch).

³⁷⁹ Letter from Aris Wateler, member of the Supervisory Board of Gamma Holding, to Richard L. Trumka, AFL-CIO, July 17, 2006 (copy on file with Human Rights Watch).

³⁸⁰ NLRB Region 26, National Wire Fabric, Inc. and United Steelworkers Local 1671, *Complaint and Notice of Hearing*, Case No. 26-CA-22394, January 29, 2007.

under new job titles and altered terms and conditions of employment.”³⁸¹ In fact, no striking worker responded to the company’s unlawful offers and crossed the picket line.

The NLRB also said that the employer’s actions amounted to refusal to bargain in good faith and that “the strike was converted to an unfair labor practice strike on February 28, 2006,”³⁸² five months before Gamma’s claim in its July 17 letter that “neither the company nor Gamma Holding as the ultimate parent company have broken any laws in the United States.”

Upon issuance of the Board’s complaint, workers decided to end their strike. They offered to negotiate a return to work with replacement workers removed while bargaining resumed. However, management refused to reinstate the striking workers, and insisted that replacement workers stay on the job permanently.³⁸³

The strike at National Wire Fabric lasted nearly five more months until May 2007. At 22 months, it was the longest strike in the history of Arkansas.³⁸⁴ Despite the NLRB’s findings and in violation of international labor rights norms, NWF management kept in place throughout the dispute the permanent replacements it had hired to take the jobs of union members who had exercised the right to strike.

Finally, faced with growing potential liability as time passed and the trial before an administrative law judge drew near, management settled the dispute. Pursuant to a settlement agreement, the company posted at the workplace and mailed to every employee the following notice:

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Human Rights Watch interview with United Steelworkers representative Shawn Gilchrist, Pittsburgh, Pennsylvania, December 17, 2008.

³⁸⁴ Mike Linn, “Star City firm’s strike finally ends; Union workers back on job at National Wire Fabric after 22 months,” *Arkansas Democrat-Gazette*, May 22, 2007.

WE WILL NOT do anything to prevent you from exercising the above rights.

UNITED STEELWORKERS LOCAL 1671 is the representative of our production and maintenance employees in dealing with us regarding the wages, hours and other workers conditions of these employees and WE WILL NOT, upon request, refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of these employees.

WE WILL NOT refuse to meet and discuss in good faith with the Union about the creation of new job classifications or any other proposed changes in wages, hours and working conditions.

WE WILL NOT bypass the Union and deal directly with unit employees concerning positions as working supervisors or any other changes in wages, hours and working conditions.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with United Steelworkers Local 1671 as the exclusive collective-bargaining representative of our unit employees.³⁸⁵

NWF reached a contract agreement with the union under which the company offered reinstatement to all striking workers who still wanted to return to work. Twelve of the original 56 strikers chose to return to work. The rest took early retirement and severance pay packages or moved to jobs with other employers.³⁸⁶

OECD Complaint

While pursuing unfair labor practice charges before the NLRB, the Steelworkers union in February 2006 also filed a complaint under the OECD Guidelines for Multinational

³⁸⁵ NLRB Settlement Agreement, *In the Matter of National Wire Fabric, Inc.*, Case No. 26-CA-22394 (April 2007, copy on file with Human Rights Watch). The settlement agreement contained a non-admission clause under which the company did not admit to violating the NLRA.

³⁸⁶ Human Rights Watch interview with United Steelworkers representative Shawn Gilchrist, Pittsburgh, Pennsylvania, December 17, 2008.

Enterprises over events at Gamma Holding's NWF facility.³⁸⁷ The Guidelines' Chapter IV on Employment and Industrial Relations incorporates the ILO core labor standards, including freedom of association.³⁸⁸

The OECD's official commentary on the Guidelines' Chapter IV states:

The first paragraph of this chapter is designed to echo all four fundamental principles and rights at work which are contained in the ILO's 1998 Declaration, namely the freedom of association and right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour, and nondiscrimination in employment and occupation. These principles and rights have been developed in the form of specific rights and obligations in ILO Conventions recognized as fundamental.³⁸⁹

Citing the company's use of permanent replacements in violation of international norms, the union directed its complaint to the US National Contact Point (NCP) in keeping with OECD complaint procedures.³⁹⁰ Under these procedures, if the parties involved do not reach agreement on the issues raised, the NCP is supposed to "issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines."³⁹¹

The US NCP did not issue a statement or make recommendations between the filing of the complaint in February 2006 and the strike settlement in May 2007. The NCP did forward a copy of the union's complaint to the Dutch NCP and to the US Labor Department in June 2006, but according to USWA representative Shawn Gilchrist, the US NCP "just allowed this case to die on the vine" after that, with no further communication to the union accounting

³⁸⁷ "Complaint" is used here in the generic sense of the term. The OECD Guidelines do not admit use of the word "complaint." Instead, parties must file a "request for clarification" of "issues related to the Guidelines." See "The OECD Guidelines for Multinational Enterprises," OECD Policy Brief, June 2001, www.oecd.org/dataoecd/12/21/1903291.pdf.

³⁸⁸ See OECD, "Employment and Industrial Relations," Chapter IV, OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, DAFFE/IME/WPG(2000)15/FINAL, October 31, 2001.

³⁸⁹ OECD, "Commentary on the OECD Guidelines for Multinational Enterprises" (2000), p. 46.

³⁹⁰ Letter of Joseph J. Drexler, United Steelworkers of America, to US National Contact Point, Office of Investment Affairs, US Department of State, February 2, 2006 (copy on file with Human Rights Watch); See OECD Guidelines "Procedural Guidance" (2000) at http://www.oecd.org/document/39/0,3343,en_2649_34889_1933095_1_1_1_1,00.html.

³⁹¹ See OECD Guidelines, "Procedural Guidance," paragraph C. 3.

for its efforts, if any, to carry out actions called for by the Guidelines' Procedural Guidance.³⁹² In May 2007, the union informed the US NCP of the contract settlement at National Wire Fabric and said that no further action was necessary.³⁹³

The US NCP's inaction in the Gamma Holding case reflected a broader pattern of failure to apply the industrial relations guidelines for multinational enterprises. In the 2000-2008 period, the US NCP considered and concluded 16 cases arising under the Industrial Relations guidelines. According to the OECD, the US NCP issued a final statement in just one of its 16 cases.³⁹⁴

The US NCP's handling of the Gamma Holding case also reflects broader weaknesses in applying the OECD Guidelines for Multinational Enterprises. The United Nations' special representative for business and human rights recognized this problem in a 2008 report that found:

The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential. The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported. In sum, many NCP processes appear to come up short when measured against the minimum principles [on non-judicial grievance mechanisms in the business and human rights field].³⁹⁵

³⁹² E-mail from USW representative Shawn Gilchrist to Human Rights Watch, January 8, 2009 (on file with Human Rights Watch). In a letter to Human Rights Watch, Gamma Holding said that company officials met with two representatives of the Dutch NCP in March 2007 to discuss the complaint.

³⁹³ E-mail communication from Joseph J. Drexler, manager of Strategic Research and Planning, United Steelworkers, to US NCP, May 3, 2007 (copy on file with Human Rights Watch).

³⁹⁴ OECD, Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises, "Draft Report by the Chair of the 2009 Annual Meeting," DAF/INV/NCP(2002)1, May 29, 2009. The single "final statement" was a one-page document concerning Saint-Gobain, discussed above.

³⁹⁵ John Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights," Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Human Rights Council, Eighth Session, April 7, 2008, <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on August 27, 2010).

Siemens

Siemens is a world-renowned multinational manufacturing and services firm based in Germany. The company specializes in power generation, communications, electronics, and business services. Siemens employs 400,000 people around the world, including more than 60,000 people at hundreds of facilities in the United States. Much of Siemens' US employment stems from its 1998 acquisition of Westinghouse Electric Corp., a \$1.5 billion transaction. In 2009, the company enjoyed more than \$100 billion in revenues. It holds ranking number 40 in the Fortune Global 500.³⁹⁶

Public Commitments on Freedom of Association and Corporate Social Responsibility

Siemens maintains a high-profile website touting its corporate social responsibility initiatives. On human rights and labor relations, Siemens promises:

Our Corporate Principles reflect the principles of [the] Global Compact with respect to human rights and work relationships. We operate not only in accordance with our Business Conduct Guidelines, which are mandatory worldwide, but also with further sets of principles such as the "Guiding Principles for Promoting and Managing Diversity." In addition, our company is involved in numerous long-established corporate citizenship activities.³⁹⁷

Siemens' 2007 corporate responsibility report declares:

Siemens supports the Global Compact

As an international UN initiative for corporate social responsibility, the Global Compact unites governments, businesses and civil society in an effort to improve people's lives all around the world. The Compact's Ten Principles specify the key areas on which nations, companies and social institutions must focus their efforts if this goal is to be achieved.

³⁹⁶ For these and other company data, see the Siemens website at www.siemens.com; for US operations, www.usa.siemens.com; Fortune, "Global 500" at <http://money.cnn.com/magazines/fortune/global500/2010/index.html>.

³⁹⁷ See Siemens, "Corporate Responsibility," <http://w1.siemens.com/responsibility/en/index.htm> (accessed February 20, 2008).

By joining the Global Compact in November 2003, Siemens demonstrated its willingness and sense of obligation to fully and effectively implement these Principles.³⁹⁸

Siemens also sets forth “International Guidelines” as part of its corporate responsibility framework, which state:

Siemens observes and respects local laws and statutory requirements as the legal foundation of its business activities in all of the countries in which it does business. We also place great emphasis on recommendations and standards issued by national and international organizations. As a rule, these recommendations and standards are directed toward member states rather than individual companies. Nonetheless, they also serve as guiding principles for global companies like Siemens as well as for the behavior of our employees.

As a result, Siemens places considerable emphasis on worldwide compliance with the guidelines published by major organizations, and we expect our suppliers and business partners to do the same. The most important agreements in this regard are as follows:

- The United Nations’ Universal Declaration of Human Rights (1948);
- The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950);
- The International Labor Organization’s (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977);
- The ILO’s Declaration on Fundamental Principles and Rights at Work (1998);
- The Organization for Economic Cooperation and Development’s Guidelines for Multinational Enterprises (2000).³⁹⁹

³⁹⁸ See Siemens, “Interim Communication on Progress Report 2007 for Global Compact,” (accessed February 20, 2008), *Ibid.*

³⁹⁹ See Siemens, “Responsibility Framework,” <http://w1.siemens.com/responsibility/en/framework/international.htm> (accessed November 3, 2008).

The 2007 corporate responsibility report underscores Siemens' commitment to hold its suppliers and other business partners to high standards, announcing:

New guidelines for corporate supply chain and procurement

To effectively implement the principles of our CR strategy, we require that our suppliers and business partners also commit themselves to principles of ethical conduct. The basic requirements, which have been in force since 2002, have been supplemented and made more precise. The new Code of Conduct for Siemens Suppliers is oriented toward our company's principles of conduct and also takes into account the principles of the UN Global Compact. Starting in May 2007, the Code of Conduct for Siemens Suppliers will be a fixed component of all purchasing contracts. Compliance with the Code will be regularly reviewed in audits and supplier self-assessments.⁴⁰⁰

Siemens' new Code of Conduct for Siemens Suppliers requires suppliers, under the heading "Respect for the basic human rights of employees," "to recognize, as far as legally possible, the right of free association of employees and to neither favor nor discriminate against members of employee organizations or trade unions."⁴⁰¹

Monroe County, New York

Siemens made commitments to workers' freedom of association when it joined the Global Compact and set standards for its business partners and suppliers beginning in 2002. But when the company took over powerhouse stations providing energy services to Monroe County, New York, in January 2003, it unlawfully refused to bargain with the workers' union. Siemens management argued: 1) it was not a "successor" to the previous employer; 2) the union no longer represented a majority of workers; and 3) that the workers' jobs had substantially changed in ways that required extensive retraining and so excluded them from collective bargaining coverage.⁴⁰²

⁴⁰⁰ See Siemens, "Interim Communication on Progress Report 2007 for Global Compact," Ibid.

⁴⁰¹ See Siemens, "Code of Conduct for Siemens Suppliers," http://w1.siemens.com/responsibility/en/responsibility_performance/supplier_management.htm (accessed February 20, 2008).

⁴⁰² The company's position is recounted in NLRB Decision and Order, *Siemens Building Technologies, Inc. and International Union of Operating Engineers, Local 832*, 345 NLRB 1108 (September 30, 2005) and NLRB Decision and Order, *Siemens Building Technologies, Inc. and International Union of Operating Engineers, Local 832*, Case No. 3-CA-24624, 346 NLRB 53 (December 14, 2005). See also Siemens letter to Human Rights Watch stating its positions, February 11, 2008.

It took nearly three years, during which employees' bargaining rights were nullified by Siemens' actions, before the National Labor Relations Board ruled against the company's arguments, finding Siemens liable for its violation of workers' rights. On the successorship argument, the Board upheld the finding by the administrative law judge who heard evidence in the case that "it is clear that [Siemens] is a *Burns* successor with an obligation to recognize the union and bargain with it...."⁴⁰³

On the company's argument that the union no longer represented a majority of employees, the NLRB found:

[Siemens] did not show that the Union had lost actual majority support ...
[Siemens] decided not to recognize or bargain with the Union for reasons other than a good-faith reasonable doubt of the Union's majority status ...
[Siemens] relied on employees' failure to object when they were told ... that [Siemens] would be "non-union" ... [W]e accord little weight to that silence ...
The fact that the employees took "non-union" jobs does not establish that they no longer wanted union representation.⁴⁰⁴

As for a later poll conducted by Siemens management, the NLRB found that "[Siemens] June 2003 poll was tainted by its earlier refusals to recognize and bargain with the union [and] the poll may not be relied on to demonstrate either a good-faith doubt about majority status, or a loss of majority support."⁴⁰⁵

On the issue of whether employees' jobs had substantially changed, the NLRB upheld the Administrative Law Judge's findings that:

"[T]here was no change in job skills for the regular full-time building operators ... they received very minimal formal and informal training ...
[Management's] assertions ... that the job skills and tasks of the building

⁴⁰³ Decision of ALJ Martin J. Linsky, *Siemens Building Technologies, Inc. and International Union of Operating Engineers, Local 832*, Cases 3-CA 24050 and 3-CA-24304, February 25, 2004, upheld in NLRB, *Siemens Building Technologies, Inc. and International Union of Operating Engineers, Local 832*, 345 NLRB 1108 (September 30, 2005). "Burns" is a reference to NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), which established the rule that when a successor employer retains a majority of the prior employers' union-represented employees, the successor has an obligation to bargain with the union.

⁴⁰⁴ NLRB Decision and Order, *Siemens Building Technologies, Inc. and International Union of Operating Engineers, Local 832*, 345 NLRB 1108 (September 30, 2005).

⁴⁰⁵ *Ibid.*

operators are very different are contradicted by the testimony of the employees with firsthand knowledge of the operations ... ”⁴⁰⁶

The NLRB ordered Siemens to:

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively and in good faith with the Union as the exclusive bargaining representative agent of its employees in the appropriate bargaining unit ...

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

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

(a) On request, recognize and bargain collectively and in good faith with the Union as the exclusive bargaining representative of employees in the above-described appropriate unit and, if an understanding is reached, embody that understanding in a signed agreement.⁴⁰⁷

The NLRB further ordered Siemens to post a notice in the workplace stating:

We will not unlawfully fail and refuse to recognize and bargain in good faith with the International Union of Operating Engineers, Local 832, as your exclusive collective-bargaining representative ...

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal law.

⁴⁰⁶ Decision of ALJ C. Richard Miserendino, *Siemens Building Technologies, Inc. and International Union of Operating Engineers, Local 832*, Case No. 3-CA-24624 (August 25, 2004) and NLRB Decision and Order, *Siemens Building Technologies, Inc. and International Union of Operating Engineers, Local 832*, Case No. 3-CA-24624, 346 NLRB 53 (December 14, 2005).

⁴⁰⁷ Ibid.

We will recognize the International Union of Operating Engineers, Local 832, as your exclusive collective-bargaining representative and on request bargain with the Union in good faith concerning wages, hours, benefits, and other terms and conditions of employment.⁴⁰⁸

This case demonstrates not only Siemens' failure to live up to its voluntary workers' rights commitments but also the weaknesses in US labor law that compound the harm when employers violate labor rights. Though the NLRB found that "by failing and refusing to recognize and bargain collectively and in good faith with the union, the Respondent [Siemens] has engaged in and continues to engage in conduct which violates Section 8(a)(1) and (5) of the Act,"⁴⁰⁹ the Board only ordered the company to post a notice and return to the bargaining table, almost three years after its first unlawful refusal to bargain. Nothing in the Board's remedy allowed the workers to recapture or receive compensation for the three years' loss of fundamental rights.

In its letter to Human Rights Watch, Siemens acknowledged that it was found to have acted unlawfully, but said that it "fully adhered to the NLRB order" upholding the findings and entered into bargaining with the union.⁴¹⁰ In the end, bargaining failed to lead to an agreement and the union disclaimed representation. "That delay made people lose heart," Joe Agnello told Human Rights Watch. Agnello was the union representative at the bargaining table with Siemens once the company acceded to the NLRB's order. "All that time with nothing happening, it made it look like the union wasn't able to do anything."⁴¹¹

"They would call the union office and ask what's going on, when something would happen," Agnello explained. "All we could tell them was that it was out of our hands, it was in front of the NLRB in Washington, we just had to wait. The frustration just built up, the guys got disenchanted with nothing going on. When we finally got into bargaining we couldn't get the commitment back. I really don't blame the guys after what they went through."⁴¹²

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Letter from Daniel W. Hislip, associate general counsel, Siemens Building Technologies, Inc., to Human Rights Watch, February 11, 2009 (copy on file with Human Rights Watch).

⁴¹¹ Human Rights Watch interview with Joe Agnello, Rochester, New York, February 16, 2009.

⁴¹² Ibid.

VI. Recommendations

European companies that hold themselves out as supportive of workers' international human rights, open to worker representation and collective bargaining at home, too often fail in their US operations to "walk" their "talk."

As the cases detailed in this report have shown, the European companies in some cases engage in practices that, while legal in the United States, are directly contrary to ILO Conventions 87 and 98 and other international instruments, classifying workers as "supervisors" to deprive them of organizing and bargaining rights,⁴¹³ threatening to permanently replace workers who exercise the right to strike,⁴¹⁴ and calling police in an attempt to intimidate workers who might obtain information from union representatives in publicly accessible non-work areas.⁴¹⁵

One repeated example documented in this report is the use of captive-audience meetings or "forced listening" sessions in which employers require all workers to stop work and assemble for threat-filled presentations by management about the perils of union organizing without allowing workers comparable opportunities to hear from union representatives. In Europe (and in the rest of the world, for that matter), this practice is virtually unheard of.⁴¹⁶

⁴¹³ ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 2524, Report No. 349 (March 2008).

⁴¹⁴ ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1543, Report No. 278 (1991).

⁴¹⁵ ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1523, Report No. 284 (1992).

⁴¹⁶ In Europe, the practice of anti-union captive audience meetings is virtually unheard of, with or without unions' opportunity to respond. In a special issue of the *Comparative Labor Law & Policy Journal* titled "The Captive Audience," an examination of law and practice around the world on what Americans know as the captive-audience meeting, a Spanish scholar states, "[E]mployers may call on their workers to attend meetings to inform them of certain items but these must not allude to union issues. Meetings are tools that serve to exchange ideas and opinions but whose contents may not violate workers' fundamental rights to freedom of association and ideology." Núria Pumar Beltrán, "Captive Audience Speech: Spanish Report," 29 *Comparative Labor Law & Policy Journal* 177 (2008). A German scholar explains, "[T]he employer is not entitled ... to force speeches against unionization on his employees.... [T]here is no room for American style captive audience meetings.... If the employer wants to address issues typically addressed in American captive audiences, there is virtually no chance [of] doing so legally." Christopher Gyo, "Legitimacy of Captive Audiences in Germany," 29 *Comparative Labor Law & Policy Journal* 177 (2008). Summing up contributions to this volume on captive-audience meetings, journal editors noted in the articles by European authors a "line of analysis embedded in several of these essays ... that the law conceives of a captive audience as an affront to human dignity, of the right to be treated as an autonomous adult, not a child in tutelage to one's employer, subject to its instruction on political or social subjects including unionization." *Ibid.*, Editors' Note, at 69. Human Rights Watch does not take the position that a violation of international human rights norms occurs whenever employers meets with workers to convey management's preference that workers not choose union representation. As we stated in *Unfair Advantage*, "Human Rights Watch advocates more free speech for workers, not less free speech for employers." The key is providing comparable opportunity for employees to communicate with union representatives and with each other at the workplace, consistent with international standards.

In other cases, company officials engage in threats, intimidation, and coercion in violation of US labor law as well as international standards.

- Robert Bosch declares its commitment to ILO standards on freedom of association, but in violation of those standards threatened to permanently replace workers who exercised the right to strike.
- Deutsche Telekom has a Social Charter based on ILO standards and the OECD Guidelines statements on freedom of association, but T-Mobile management spied on workers engaged in organizing and defined “employees engaging in group behavior” and “talking about rights” as dangerous activity to be immediately reported to management.
- Deutsche Post has a code of conduct based on the Universal Declaration of Human Rights, ILO conventions, and the UN Global Compact, but its DHL management threatened and discriminated against workers who sought to exercise the rights set forth in these instruments.
- Saint-Gobain proclaims “Principles of Conduct respecting the philosophy and spirit of the Global Compact,” but US management refused to bargain with workers’ chosen union about key terms of employment.
- Sodexo says, “Since its creation, Sodexo has always recognized and respected trade unions,” but it threatened, interrogated, and fired workers who tried to form trade unions in the United States.
- Tesco says it “is committed to upholding basic Human Rights and supports in full the United Nations Universal Declaration of Human Rights and the International Labour Organisation Core Conventions,” but its US Fresh & Easy management set a priority of “maintaining non-union status” and stifled workers’ organizational activity.
- Group4 Securicor holds up a “Business Ethics Policy” committed to the Universal Declaration of Human Rights, but Wackenhut management threatened, spied on, and fired workers exercising rights established in the UDHR.
- Kongsberg Automotive cites the UN Global Compact, ILO core labor standards, and OECD guidelines in its corporate social responsibility pledges, but US management in Van Wert, Ohio, offensively locked out union members while negotiations were still ongoing and brought in replacement workers.
- Gamma Holding signed a code of conduct that embraces the right to organize under ILO Conventions 87 and 98, but its management at National Wire Fabric in Star City,

Arkansas, hired permanent replacements, in contravention of ILO standards, to take the jobs of workers who exercised the right to strike.

- Siemens points to the UN Global Compact, the Universal Declaration of Human Rights, the ILO Tripartite Declaration, and the OECD Guidelines as the underpinnings of its corporate social responsibility program, but for years US management in Monroe County, New York, unlawfully refused to bargain with workers.

Nothing in American labor law or practice forces European companies to adopt practices that undermine workers' freedom of association, practices enabled by shortcomings in US law and all too common among US companies. European companies are fully capable of acting in compliance with international human rights standards on workers' freedom of association—standards that companies included in this report have publicly promised to uphold—in their American labor relations practices, rather than descending to behavior and practices typical in the United States that fall short of compliance with international norms.

The violations of workers' rights found in this report also call into question the efficacy of corporate social responsibility mechanisms, both those undertaken by companies in their internal governance systems and those created by international bodies searching for voluntary alternatives to regulations and enforcement regimes. By definition, companies' own corporate social responsibility programs are voluntary and dependent on management's willingness to implement them. Intergovernmental corporate social responsibility (CSR) instruments are likewise wanting in enforcement mechanisms. The UN Global Compact "asks companies to embrace, support and enact" the Ten Principles,⁴¹⁷ and explicitly recognizes that "it is not now and does not aspire to become a compliance based initiative."⁴¹⁸ The OECD Guidelines "provide voluntary principles and standards for responsible business conduct.... Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable."⁴¹⁹

The cases examined in this report illustrate a key weakness in governmental and intergovernmental-inspired voluntary standards: companies can choose whether they want

⁴¹⁷ UN Global Compact, "About the UN Global Compact: The Ten Principles," at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed January 16, 2009).

⁴¹⁸ UN Global Compact, "Note on Integrity Measures," <http://www.unglobalcompact.org/AboutTheGC/integrity.html>, updated November 6, 2008 (accessed February 9, 2009).

⁴¹⁹ OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, DAFFE/IME/WPG(2000)15/FINAL, October 31, 2001; *Preface*, para. 1; *Concepts and Principles*, para. 1.

to support those rules. The absence of meaningful monitoring and compliance mechanisms means that these initiatives fail to ensure that companies actually follow their rules.

Governments try to coax better behavior by multinational companies by saying, in effect, “Do the right thing voluntarily and we will not require you to meet international human rights standards and back up our requirement with effective enforcement.” But governments have not followed through when companies do not do the right thing voluntarily. Precisely by failing to create an effective international enforcement system applicable to multinational corporations, governments make it easy for companies that sign on to their initiatives to engage in hypocritical behavior.

Finally, these case studies indicate the continuing failure of US labor law and practice to comport with international standards on workers’ freedom of association. While this report focuses on violations of American workers’ organizing and bargaining rights by European companies, it should not blur US responsibility for failing thus far to reform flawed laws and create effective enforcement mechanisms to safeguard freedom of association in American workplaces consistent with international standards.

To European Multinational Companies Operating in the United States:

1. Create rigorous internal “due diligence” systems to continuously monitor and evaluate the labor relations performance of all US operations. Where a US acquisition is contemplated, apply the same due diligence system to the record of the company to be acquired, and where such review shows evidence of violations of workers’ right to organize and bargain collectively, take such measures as are necessary to change management policies and behavior and to hold US management accountable for any further violations.
2. Declare publicly, post on the company website, disseminate to all US managers and employees, and post conspicuously in all US workplaces (in English and in all languages spoken by non-English speaking workers) the company’s commitment to international human rights standards on workers’ freedom of association in the United States.
3. In the same way, declare and disseminate the company’s position that where US labor law falls below the international standards that the company applies in its European ILO-compliant operations, the company will comply with the higher standard.

4. Develop internal management training and implementation systems to ensure that US managers understand and implement freedom of association policies that comport with international standards.

5. Negotiate international framework agreements with appropriate global unions embodying freedom of association principles and policies with effective oversight and enforcement mechanisms.

6. In the United States, consider working with union representatives toward sectoral or industry-level framework agreements (or separate undertakings if a framework agreement is not in place) to better guarantee workers' exercise of their organizing and bargaining rights. Such agreements should create mechanisms along the lines of those used in European works councils that:

- allow workers and unions to initiate claims that management is violating guarantees of freedom of association with rapid, transparent, and effective methods of investigating, resolving, and remediating such claims;
- provide for independent, neutral, and expeditious monitoring and dispute resolution;
- establish transparent, accessible forums for workers with claims to have their voices heard while maintaining their pay and job security if they lose time from work to avail themselves of the mechanism;
- allow workers to have information and assistance from union representatives at the workplace in accordance with ILO standards on access;
- Ensure that any negotiated ground rules and mechanisms to ensure greater respect for workers' freedom of association do not replace, interfere with, or waive workers' right to turn to the NLRB or other government authorities for enforcement of labor laws.

To the US Government:

1. The Senate should ratify ILO Conventions 87 and 98 on workers' freedom of association (these conventions were submitted to the Senate in 1949, making them the longest unratified international instruments on the treaty calendar of the Senate Foreign Relations Committee).⁴²⁰

⁴²⁰ Steve Charnovitz, "The ILO Convention on Freedom of Association and its Future in the United States," *American Journal of International Law*, Vol. 102, No. 1; George Washington University Law School Public Law Research Paper No. 409, May 2008.

2. Congress should adopt labor law reforms to bring the United States into full compliance with international human rights standards on workers' freedom of association, including:

- Adopt reforms to the National Labor Relations Act to address widespread employer interference with workers' freedom of association rights;⁴²¹
- Reform the National Labor Relations Act to prohibit the permanent replacement of workers who exercise the right to strike;
- Allow workers to receive information from union advocates in non-work areas on non-work time within the workplace;
- Require proportional access under similar conditions for union representatives where employers require workers to attend meetings to persuade them against union organizing;
- Where the NLRB's investigation finds merit in a worker's claim of discriminatory discharge in the context of a union organizing drive, provide for immediate reinstatement while the case continues to be litigated; only such an interim reinstatement remedy can overcome the impact on individual workers who are dismissed and on workers' exercise of their freedom of association rights;
- Apply new, stronger, more dissuasive sanctions against companies that violate workers' rights.

To the European Commission and European Governments:

1. Develop systematic means of scrutinizing EU-based firms operating abroad, including in the United States, with respect to their freedom of association policies and behavior. To begin, require that European firms operating abroad produce a public annual report on workers' rights in their facilities in countries outside the European Union. For example, in the United States this shall include information on any unfair labor practice cases or representation proceedings under the National Labor Relations Act. Such scrutiny should also invite communications from and participation in public hearings by trade unions, NGOs, and other interested parties on behavior by European firms abroad [in non-EU countries].

2. Adopt EU legislation requiring that European firms operating abroad, including in the United States, conform their behavior to international standards on freedom of association as reflected in the Universal Declaration of Human Rights; UN covenants on civil and political rights and on economic, social, and cultural rights; ILO core labor standards; principles of

⁴²¹ Human Rights Watch, *The Employee Free Choice Act: A Human Rights Imperative*, January 2009, <http://www.hrw.org/en/reports/2009/01/27/united-states-employee-free-choice-act>.

the UN Global Compact; OECD Guidelines for Multinational Enterprises; and European human rights treaties and other international instruments, wherever such instruments set forth standards higher than US labor law or labor laws of other countries in which European firms operate.

3. Adopt EU rules incorporating the recommendations above to European firms regarding due diligence, public commitments, dissemination of policies, training and implementation systems, and the development of framework agreements regarding workers' right to freedom of association.

To the Organization for Economic Cooperation and Development (OECD):

Human Rights Watch recommends that the OECD develop a robust complaint and enforcement system to hold multinational corporations accountable for violations of the OECD Guidelines for Multinational Enterprises. Such a system should be marked by:

- Easily accessible complaint mechanisms available to workers and trade unions;
- Transparent and expeditious procedures that move rapidly to resolution;
- A full range of tools for National Contact Points to effectively implement the guidelines, including recourse to mediation, use of public hearings, field missions, special investigations, and other methods that will allow affected workers to tell their stories first-hand in their own voices and their own words;
- Guarantees of no reprisals and right to representation in the process for workers and trade unions who turn to the OECD Guidelines enforcement mechanism;
- Effective enforcement, including such measures as reinstatement, backpay and other remedies for individual workers and, for unions, union recognition with good faith bargaining.

VII. Acknowledgments

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