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"Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards"

Introduction

Nico Valenzuela and his coworkers at a Chicago-area telecommunications castings company voted by a large majority in 1987 to form and join a union. Valenzuela is still working, but collective bargaining proved futile in the face of a management campaign to punish workers for their vote. Despite repeated findings by the National Labor Relations Board (NLRB) that the company acted unlawfully, legal remedies took years to obtain. The workers abandoned bargaining in 1999, twelve years after they formed a union, never having achieved a contract. The delays "took away our spirit," said Valenzuela of the bargaining process. "I don't know how the law in this country can allow these maneuvers."[1]

These midwestern telecommunications workers have much in common with workers across the country who are seeking to exercise their labor rights. In the first comprehensive analysis of workers' freedom of association in this country under international norms, Human Rights Watch found widespread labor rights violations across regions, industries, and employment status. The cases revealed in our research and described in this testimony are not exceptional, but rather are indicative of a systemic failure to ensure the most basic right of workers: their freedom to choose to come together to negotiate the terms of their employment with their employers. The right to associate freely with others – to pursue common goals, to express ideas, to further a shared desire to work in safety and with dignity – is a fundamental freedom of democratic societies and a core American value. America owes it to its workers to respect this right. It also compromises its ability to champion this freedom around the world when it is imperiled at home.

Human Rights Watch is neither pro-union nor pro-management. Our work on labor rights stems from our commitment to freedom of association and freedom of choice for individual workers. Our commitment is to enable workers to exercise their right to organize, bargain collectively, and strike, not to serve the institutional interests of either unions or employers.

Many Americans think of workers' efforts to organize, bargain collectively, and strike solely as union-versus-management disputes. They do not see these disputes as raising human rights concerns that implicate core freedoms. Simply put, if the rights of workers are not respected and protected, then the strength of American democracy and freedom is

[1] Human Rights Watch interview, Chicago, Illinois, July 8, 1999.

diminished. Both historical experience and a review of current conditions around the world indicate that freedom of association is a vital element of democratic societies. Human rights cannot flourish where workers' rights are not enforced.

Scope of HRW's Research

Our report, released in August of 2000, is entitled *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*. The report was based on field research undertaken during 1999-2000 in California, Colorado, Florida, Illinois, Louisiana, New York, North Carolina, Michigan, Washington, and other states. Our research includes case studies from a range of sectors – services, industry, transport, agriculture, high tech – in order to assess the state of workers' freedom of association across the economy. We looked at cases that arose in cities, suburbs, and rural areas in different parts of the United States. We deliberately focused on a cross-section of workers – high skill and low skill, blue collar and white collar, resident and migrant, women and men, involving people of different races, ethnicities, and national origins. Many of the cases involved the most vulnerable parts of the labor force. These include migrant farmworkers, sweatshop workers, household domestic workers, undocumented immigrants, and welfare-to-work employees. The report, however, also examines the rights of U.S. workers with many years of employment at stable, profitable employers. These include packaging factory workers, steel workers, shipyard workers, food processing workers, nursing home workers, and computer programmers.

Our research examines a cross-section of workers' attempts to form and join unions, to bargain collectively, and to strike. Although this hearing focuses largely on obstacles to forming unions, it is important to emphasize that these three rights are inextricably linked.

Freedom of association, of course, is the bedrock workers' right under international law on which all other labor rights rest. In the workplace, freedom of association takes shape in the right of workers to organize, most often by forming and joining trade unions, to defend their interests in employment. Protection of workers' right to organize is an affirmative responsibility of governments to ensure workers' freedom of association.

The right to organize, however, does not exist in a vacuum. Workers organize for a purpose: to give unified voice to their need for just and favorable terms and conditions of employment when they have freely decided that collective representation is preferable to individual bargaining or management's unilateral power. The right to bargain collectively stems from the principle of freedom of association and the right to organize. Protecting the right to bargain collectively guarantees that workers can engage their employer in dialogue, exchange relevant information, and debate proposals governing terms and conditions of employment. It is the means by which the right of association shapes the lives of workers and employers.

The right to bargain collectively is compromised without the right to strike. This right also must be protected because without it there cannot be genuine collective bargaining.

There can be only collective entreaty. As with collective bargaining, international norms contemplate a greater level of regulation of strikes because strikes can affect not only the parties to a dispute, but others as well. Congress nonetheless should keep these rights squarely within its sights as it focuses on obstacles to forming and joining unions. The right to organize, the right to bargain collectively, and the right to strike all derive from the basic right to freedom of association. The case studies detailed in our report reflect violations and obstacles that workers encountered in the exercise of these three interrelated rights.

Summary of Findings

Human Rights Watch found that freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it. Violations of this right occur across regions, industries, and employment status because U.S. labor law is feebly enforced and filled with loopholes. Some workers still succeed in organizing new unions, but only after surmounting major obstacles.

According to statistics from the National Labor Relations Board (NLRB), the federal agency created to enforce workers' organizing and bargaining rights, the problem is getting worse. In the 1950's, workers who suffered reprisals for exercising the right to freedom of association numbered in the hundreds each year. In 1969, the number was more than 6,000. By the 1990's, more than 20,000 workers each year were victims of discrimination that was serious enough for the NLRB to issue a "back-pay" or other remedial order. There were nearly 24,000 such workers in 1998, the last year for which official figures are available. Meanwhile, the NLRB's budget and staff have not kept pace with this growing need.

Freedom of association is a fundamental human right recognized under international law. The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, declares: "[E]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The ICCPR requires ratifying states "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" and "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The ICCPR also constrains ratifying states "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." These principles have been further developed by the International Labor Organization (ILO), a U.N.-related body with tripartite representation by governments, workers, and employers and nearly universal governmental membership. The ILO's Committee on Freedom of Association has elaborated authoritative guidelines for implementing the rights to organize, bargain collectively, and strike.

The basic provisions of the NLRA comport with international human rights norms regarding workers' freedom of association. The NLRA declares a national policy of "full freedom of association" and protects workers' "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 . . . ."[2] The NLRA makes it unlawful for employers to "interfere with, restrain, or coerce" workers in the exercise of these rights. It also creates the National Labor Relations Board (NLRB) to enforce the law by investigating and remedying violations.

Despite the law's facial compliance with international human rights principles, Human Rights Watch found in our research that the reality of NLRA enforcement falls far short of these standards. Private employers are the main agents of abuse, but international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. In the United States, efforts to enforce labor law often fail to deter unlawful conduct. When the law is applied, enervating delays and weak remedies invite continued violations.

Violations of workers' freedom of association in the United States fall into five broad categories:

1. *reprisals for trying to organize unions*

Each year thousands of workers in the United States are spied on, harassed, pressured, threatened, suspended, fired, deported, or otherwise victimized by employers in reprisal for their exercise of the right to freedom of association. Firing a worker for organizing is illegal but commonplace in the United States. Many of the cases examined by Human Rights Watch reflect the frequency and the devastating effect of discriminatory discharges on workers' rights. An employer determined to get rid of a union activist knows that all that it risks, after years of litigation if the employer persists in appeals, is a reinstatement order that the worker is likely to decline and a modest back-pay award. For many employers, that is a small price to pay to destroy a workers' organizing effort.

Employers also often threaten to call the Immigration and Naturalization Service (INS) to have immigrant workers deported if they form and join a union.

These abuses are facilitated by one-sided rules on communications in the course of a labor dispute. Employers can take advantage of the lack of level playing field regarding communications by waging aggressive campaigns against workers' self-organization through written, oral, and filmed communications, and "captive-audience meetings" while workers are severely limited in their ability to communicate with union representatives at the workplace.

2. *inadequate remedies*

Labor law is so weak that companies often treat the minor penalties as a routine cost of doing business, not a deterrent against violations. Any employer intent on resisting

[2] 29 U.S.C. §§ 151-169, Section 7.

workers' self-organization can drag out legal proceedings for years, fearing little more than an order to post a written notice in the workplace promising not to repeat unlawful conduct and grant back pay to a worker fired for organizing. In one case, a worker fired for five years received $1,305 back pay and $493 interest.[3] Many employers have come to view remedies such as back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice. Moreover, the recent Supreme Court decision in Hoffman Plastic Compounds v. NLRB denying back pay to an undocumented worker because he was not legally authorized to work in the United States makes the problem even more severe for undocumented workers. The case, which was decided in March of this year, represents a decision by the Supreme Court to value legislation governing undocumented immigration more highly than legislation protecting the rights of workers.

3. procedural delays

Employers can resist union organizing by dragging out legal proceedings for years. Workers fired for organizing and bargaining often wait years for their cases to be decided by labor boards and courts, while employers pay no price for deliberate delays and frivolous appeals. Debilitating delays occur in unfair labor practice cases. Most cases involve employers' discrimination against union supporters or employers' refusal to bargain in good faith. After the issuance of a complaint, several months usually pass before a case is heard by an administrative law judge. Then several more months often go by while the judge ponders a decision. The judge's decision can then be appealed to the NLRB, where one, two, or three years can go by before a decision is issued. The NLRB's decision can then be appealed to the federal courts, where again up to three years pass before a final decision is rendered. Many of the workers in cases we studied had been fired years earlier and had even won reinstatement orders from administrative judges and the NLRB, but they were still waiting for clogged courts to rule on employers' appeals.

In another example, U.S. law forbids permanent replacement of workers who strike over employers' unfair labor practices, as distinct from "economic strikers" seeking better contract terms. The latter can be permanently replaced; unfair-labor-practice strikers are entitled to reinstatement when they end their strike. However, it often takes years of NLRB and federal court proceedings before a final decision is made on whether replaced workers have a right to reinstatement.

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[3] Under the NLRA, back-pay awards are "mitigated" by earnings from other employment. Employers who illegally fire workers for organizing need only pay the difference, if any, between what workers would have earned had they not been fired, and what they earned on other jobs during the period of unlawful discharge. Since workers cannot remain without income during years of litigation, they must seek other jobs and income, leaving the employers who violate their rights with an often negligible back-pay liability.

4. undermining the right to strike

Employers have the legal power to permanently replace workers who exercise the right to strike. This power in the hands of employers effectively nullifies the right to strike. While international norms limit the right to strike, for example exempting members of the military and the police, they do not authorize permanent replacements. Permanent replacement crosses the line balancing the rights of workers and employers and undercuts a fundamental right of workers. With the one-sided pain of a strike marked by permanent replacements, the employer maintains operations, workers who exercised the right to strike are left to languish, and after just one year permanent replacement workers can vote to extinguish the strikers' right to representation and collective bargaining. In addition, harsh rules against "secondary boycotts" frustrate worker solidarity efforts. Mutual support among workers and unions recognized in most of the world as legitimate expressions of solidarity is harshly proscribed under U.S. law as an illegal secondary boycott.

5. exclusion of workers from coverage under labor laws

Millions of workers – including farm workers, household domestic workers, low-level supervisors, and "independent" contractors who are really dependent on a single employer – are excluded from labor laws meant to protect workers' organizing and bargaining rights. They can be fired with impunity for trying to form a union, and their number is growing. The H2-A program, for example, grants migrant workers a temporary visa for agricultural work in the United States. They labor at the sufferance of growers who can fire them and have them deported if they try to form or join a union.

Labor laws have failed to keep pace with changes in the economy and new forms of employment relationships, creating millions of part-time, temporary, subcontracted, and otherwise "atypical" or "contingent" workers whose exercise of the right to freedom of association is frustrated by the law's inadequacy. Many workers find themselves caught up in a web of labor contracting and subcontracting, which effectively denies them the right to organize and bargain with employers who hold real power over their jobs and working conditions.

Without diminishing the seriousness of the obstacles and violations confronted by workers in the United States, a balanced perspective must be maintained. U.S. workers generally do not confront gross human rights violations where death squads assassinate trade union organizers or collective bargaining and strikes are outlawed.[4] However, the absence of systematic government repression does not mean that workers in the United States have effective exercise of the right to freedom of association. On the contrary,

[4] At the same time, Human Rights Watch did find instances in various case studies of interference with workers' rights by government authorities. They included biased intervention by police and local government authorities and government subsidization of workers' rights violators. While these cases do not rise to a level of systemic abuse, they are no less troubling and, if they are not addressed and stopped, such abuses could spread.

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.

Selected Case Studies from the Human Rights Watch Report[5]

1. Service sector workers

Nursing home workers in southern Florida

At the Palm Garden nursing home in North Miami, managers forged signatures on warning notices against Leonard Williams, a key union activist. They backdated the notices, then fired Williams shortly before a union election in April 1996. The union lost the election 35-32. Soon afterward, the company fired Marie Sylvain, another organizing leader.

The NLRB has ordered Palm Garden to offer Williams and Sylvain reinstatement to their jobs with back pay. The agency also ordered a new election because of management's unlawful conduct. The company had appealed both rulings, and they were tied up in courts. Meanwhile, Williams and Sylvain were obliged to wait.

"Why does it take so long?" asked Marie Sylvain. "I've been fired for more than three years. Everything takes too long. Where is the justice? Everything is at the boss's advantage with all these delays. The law gives you something with one hand then takes it away with the other hand." Asked if she would accept reinstatement, Sylvain said, "I would like to come back for one week just to show them the union can win."

Workers at the King David Center in West Palm Beach voted 48-29 in favor of union representation in an NLRB election in August 1994. "I had a determination to get respect," said Jean Aliza, the first of several workers fired for organizing activity at King David. "I am a citizen, and I deserve respect." The NLRB ruled that the company proceeded systematically to fire the most active union supporters, including Jean Aliza and Ernest Duval. In 1999, however, the workers had still not been reinstated because of appeals to the courts.

Jean Aliza was "set up" by managers and fired early in the organizing effort, after a year-long "satisfactory" record suddenly became "unsatisfactory" based on warning notices he never saw. The NLRB said that King David "was determined to rid itself of the most vocal union supporter from the beginning," referring to Ernest Duval.

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[5] The cases detailed in this testimony are described in Human Rights Watch's August 2000 report. Human Rights Watch has not yet done a follow-up investigation to that report. Developments occurring since August 2000 thus are not described in this testimony.

Ernest Duval was still vocal about his union support when he spoke to Human Rights Watch in July 1999, but he was also frustrated. "I see the government protecting management," he said. "It's been four or five years now, and I've got bills to pay. Management has the time to do whatever they want."

2. Food Processing Workers

Pork Processing Workers in North Carolina

Smithfield Foods hog-processing plant in Tar Heel, North Carolina is the largest hog slaughtering facility in the country. According to NLRB complaints, ten workers were fired between 1993 and 1995 for union activity at the Smithfield plant, and five more organizing leaders were fired in 1997 and 1998. Besides firing key union activists, Smithfield management opposed workers' organizing efforts with interference, intimidation, coercion, threats, and discrimination. These unfair labor practices came so fast and furious that a hearing originally set for 1995 on complaints from the 1994 campaign did not take place until 1998-99 as new complaints were consolidated with earlier ones.

The NLRB complaints describe in detail Smithfield's offensive against union supporters. In dozens of instances cited in the complaints, Smithfield managers and supervisors issued oral and written warnings and suspensions against union supporters; threatened to close the plant, deny pay raises and promotions, fire workers, and blacklist any striking workers from employment at other companies; confiscated union flyers from workers; asked workers to spy on other workers' union activity; grilled workers about other workers' union activities; interrogated workers about their own union sentiments; spied on the activities of pro-union workers; indicated to workers that management was spying on their union activities; applied a gag rule against union supporters while giving union opponents free rein; applied work rules strictly against union supporters but not against union opponents; offered benefits to workers if they would drop support for the union; and assaulted and caused the arrest of an employee in retaliation for workers' engaging in union activity.

3. Manufacturing Workers

Low-Wage Packaging Workers in Maryland

In the mid-1990s, a new company called Precision Thermoforming and Packaging, Inc. (PTP) employed more than 500 workers in a federal "empowerment zone" in a Baltimore, Maryland neighborhood called "Pigtown." This company in an urban factory setting, with low-wage workers exercising their right to freedom of association, offers an example of even harsher anti-organizing tactics.

The company received indirect state subsidies worth millions of dollars through a low-cost lease of manufacturing space in a converted warehouse bought by the state in 1994. PTP also received a federal subsidy of $3,000 for each employee it hired who lived inside the empowerment zone. It hired more than 250 such workers. Thanks to subsidies, the federal government's empowerment-zone designation is worth a lot of money to employers who set up operations in a zone. The government, however, does not use this financial leverage to condition empowerment-zone benefits on the fair treatment of workers.

PTP ran a plastic packaging and shipping operation for flashlights, batteries, and computer diskettes. Major customers included Eveready Battery and America Online (AOL). AOL shipped millions of free diskettes to consumers from the PTP plant.

In mid-1995, a group of PTP workers began an effort to form and join a union. A complaint issued by the NLRB finding merit in unfair labor practice charges filed by the union tells what happened next. PTP management fired nine workers active in the union-organizing effort. In addition, PTP managers and supervisors threatened to close the plant if a majority of workers voted in favor of union representation; threatened to move work to Mexico; threatened to move the AOL production line to another country; threatened that Eveready Battery would pull its business from PTP; threatened to fire workers who attended union meetings; threatened to fire anyone who joined the union; threatened to replace American workers with foreigners if the union came in; threatened to transfer workers to dirtier, lower-paying jobs if they supported the union; told workers not to take union flyers from union organizers; told workers that upper management was going to "get them" for supporting the union; asked employees to report to management on the activities of union supporters; stationed managers and security guards with walkie-talkies to spy on union handbilling and report on workers who accepted flyers; interrogated workers about their union sympathies and activities; and denied wage increases and promotions to workers who supported the union.

Charges of massive unfair labor practices by PTP were upheld by the NLRB's regional director, who issued a wide-ranging complaint on the management conduct described above. The NLRB found PTP's conduct so egregious that the regional director announced he would seek a Gissel bargaining order, an unusual remedy in U.S. labor law based on a 1969 Supreme Court decision. Under the Gissel doctrine, a union that has obtained majority support from workers who sign cards joining the union and seeking bargaining can be certified as the bargaining agent even if it loses an election. The Supreme Court in Gissel said that the bargaining-order remedy is not limited to "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. The court said that a bargaining order can also be applied "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." However, in practice, the NLRB and the federal courts have applied the Gissel remedy sparingly, effectively undermining the right of many workers to bargain collectively.

The NLRB also sought reinstatement and back pay ranging from $6,000 to $21,000 for workers fired for union activity. In March 1997, however, PTP shut its Baltimore plant and declared bankruptcy, citing a legal dispute with AOL. With no employer to order to bargain with the union, the NLRB fashioned a settlement of the unfair labor practice case before it went to hearing. Under the settlement, PTP acknowledged the actions outlined in the complaint, promised not to repeat them, and promised back pay to the fired workers in the amounts sought by the NLRB. Thereafter, the fired PTP workers waited in vain to receive the first penny of back pay for their unlawful firings. The Gissel remedy is meaningless when there is no employer with whom to bargain. However, had the NLRB been empowered to act quickly to initiate bargaining, workers might have been able to negotiate over severance pay, continued medical insurance, and other conditions in a bankruptcy-related closing, or indeed to have offered steps to avoid closing.

Steelworkers in Colorado

Oregon Steel Co. permanently replaced more than 1,000 workers who exercised the right to strike at its Pueblo, Colorado steel mill in October 1997. Many of the replacements came from outside the Pueblo area, drawn by the company's newspaper advertisements throughout Colorado. A company notice declared, "It is the intent of the Company for every replacement worker hired to mean one less job for the strikers at the conclusion of the strike."

On December 30, 1997, three months after their strike began, Oregon Steel workers ended the strike and offered unconditionally to return to work. The company refused to take them back except when vacancies occur after a replacement worker left. Some workers returned under this legal requirement, but most of the Oregon Steel workers were still out of work in 2000 because the company permanently replaced them with new hires.

According to a judge who held an eight-month-long hearing on the case, the company was guilty of interference, coercion, discrimination, and bad-faith bargaining. In all, said the judge, Oregon Steel's unfair labor practices "were substantial and antithetical to good faith bargaining."

Under this ruling, workers are entitled to reinstatement, because a company that violates the law loses the right to permanently replace strikers. However, the company appealed the decision and vowed to keep appealing for years before a final decision is obtained in the case. In the meantime, the workers remained replaced and without their chosen means to support themselves and their families.

Joel Buchanan, a worker with twenty-nine years in the Oregon Steel plant, told Human Rights Watch, "Before the strike the company was pushing us for forced overtime. When we asked them to hire new people to give us some relief, they told us they couldn't find qualified workers anywhere in Colorado. But when we went out, suddenly they came up with hundreds of replacements."

Apparel Workers in New York

The resurgence of sweatshops in America reflects a "race to the bottom" on labor rights and labor standards more often attributed to export processing zones in Third World countries. For workers in the United States, as is often the case in Central American or East Asian sweatshops, freedom of association is the first casualty.

Researching violations of workers' freedom of association in U.S. sweatshops posed a sharp challenge. Workers trapped in the sweatshop system are so victimized in every aspect of their working lives that an open exercise of the right to organize and associate is an extraordinary event. Most sweatshop workers are so burdened by the need to make it through another day that forming a union is beyond their energies. Moreover, as Human Rights Watch found in other, non-sweatshop-sector cases, immigrant workers' problems with authorization papers and fear of deportation also prevent efforts to organize in sweatshops.

Sweatshop workers turn to collective action as a last resort, usually when they realize that their employer has no intention of paying them even their sub-minimum wages for weeks of work already performed. Minimum-wage violations, overtime-pay violations, health and safety violations, sexual harassment, and other problems in the garment industry are an accepted fact of working life, especially in the two largest urban regions in the country, New York and Los Angeles.

A 1994 report by the federal government's General Accounting Office found that sweatshops were widespread in the garment sector. The report noted declining resources for labor-law enforcement by federal and state authorities and concluded that "In general, the description of today's sweatshops differs little from that at the turn of the century."[6]

Apparel manufacturing is a multibillion-dollar industry employing more than 700,000 workers in the United States. The garment sector is the biggest manufacturing industry in New York and Los Angeles, where in each region more than 100,000 workers labor in some 5,000 contracting and subcontracting sewing shops. Women who have recently migrated to the United States from Asia and Latin America are a significant majority of the workforce. These small shops compete fiercely for business from the manufacturers. Violating wage and hour laws is the quickest and easiest way to gain a competitive advantage, particularly when workers are not likely to complain or organize for improvements.

Under current law, retailers and manufacturers who profit from sweatshops' race to the bottom on labor standards are not held responsible for labor-law violations committed by contractors or subcontractors, including violations of workers' organizing rights. The large companies are insulated by the hierarchical structure of the industry and the reliance

[6] See U.S. General Accounting Office, "Prevalence of Sweatshops," GAO/HEHS-95-29, November 2, 1994.

on one-job, quick-turnaround, unpredictable subcontracting arrangements that have largely displaced traditional longer-term, stable contracting relationships.

One example illustrates the difficulties faced by workers in the apparel industry. According to UNITE representative Bertha Wilson, employees from a Manhattan sewing shop called YPS came to the union-sponsored workers' center in 1997 because they were owed back wages, even though YPS subcontracted production for brand-name companies such as Lord & Taylor, Ann Taylor, and Express. One of the workers told Human Rights Watch that workers were not being paid on time, that managers mistreated workers, that drinking fountains did not work, and that workers received no rest or lunch breaks. "We were aware that we were illegal," she said, "so we were kind of like slaves." She said that women workers were especially mistreated. "One of the managers would touch the women," she said. "If they complained they were fired. A few women were actually fired, and others just took it. We didn't know what our rights were, so we just accepted things." With four to five weeks' back pay owing to workers, "the boss wanted to pay us with clothes. But how were we going to sell them for money?"

In November 1997, YPS employees stopped work and demanded union recognition and four to six weeks of back pay. According to Bertha Wilson, the owner said he would recognize the union as long as the union did not contact Ann Taylor. In December, the owner signed an agreement calling for an end to sexual harassment, a forty-five-minute lunch break, and incremental back-pay disbursements each week.

The YPS agreement held up only for two weeks. The owner again halted back-pay disbursements, and employees stopped work. YPS shut its doors and went out of business. UNITE organized a workers' demonstration at the headquarters of brand-name companies that had contracted for work with YPS. Those companies agreed to make workers whole for lost wages, but by then workers had scattered to other locations. Many failed to collect their pay, fearing to come forward, said Wilson, because they were undocumented and afraid of INS action.

4. Migrant Agricultural Workers

Apple Workers in Washington

Thousands of workers are employed in the warehouse sector of the Washington apple industry. Like apple pickers, many seasonal workers in the warehouses are migrants from Mexico.

Apple-warehouse workers are not defined as agricultural workers. They are covered by the NLRA, which makes it an unfair labor practice to threaten, coerce, or discriminate against workers for union-organizing activity. But when workers at one of the largest apple-processing companies sought to form and join a union in 1997 and 1998, management responded with dismissals of key union leaders and threats that the INS would deport workers if they formed a union.

Here is how one worker described the company's tactics:

> At the meetings they talked the most about the INS. . . .[T]he company keeps talking about INS because they know a lot of workers on the night shift are undocumented – I would guess at least half . . . . It is only now that we have started organizing that they have started looking for problems with people's papers. And it is only now that they have started threatening us with INS raids . . . .They know that we are afraid to even talk about this because we don't want to risk ourselves or anyone else losing their jobs or being deported, so it is a very powerful threat. . . .

The union lost the NLRB election even though a majority of workers had signed cards to join the union and authorize the union to bargain on their behalf.

H-2A Farmworkers in North Carolina

About 30,000 temporary agricultural workers enter the United States each year under a special program called H-2A giving them legal authorization to work in areas where employers claim a shortage of domestic workers. H-2A workers have a special status among migrant farmworkers. They come to the United States openly and legally. They are covered by wage laws, workers' compensation, and other standards.

But valid papers are no guarantee of protection for H-2A workers' freedom of association. As agricultural workers, they are not covered by the NLRA's anti-discrimination provision meant to protect the right to organize.

H-2A workers are tied to the growers who contract for their labor. They have no opportunity to organize for improved conditions and no opportunity to change employers to obtain better conditions. If they try to form and join a union, the grower for whom they work can cancel their work contract and have them deported.

More than 10,000 migrant workers with H-2A visas went to North Carolina in 1999, making growers there the leading employers of H-2A workers in the United States. North Carolina's H-2A workers are mostly Mexican, single young men, who harvest tobacco, sweet potatoes, cucumbers, bell peppers, apples, peaches, melons, and various other seasonal crops from April until November.

At home "there's no work," workers told Human Rights Watch, explaining their main reason for emigrating. Many of the workers come from rural villages in Mexico. In most cases earnings in U.S. dollars from their H-2A employment were the only source of income for their families and for their communities.

Human Rights Watch found evidence of a campaign of intimidation from the time H-2A workers first enter the United States to discourage any exercise of freedom of association. Legal services attorneys and union organizers are "the enemy," they are told by growers'

officials. Most pointedly, officials lead workers through a ritual akin to book-burning by making them collectively trash "Know Your Rights" manuals from legal services attorneys and take instead employee handbooks issued by growers.

On paper, H-2A workers can seek help from legal services and file legal claims for violations of H-2A program requirements (but not for violation of the right to form and join trade unions, since they are excluded from NLRA protection). However, in this atmosphere of grower hostility to legal services, farmworkers are reluctant to pursue legal claims that they may have against growers. "They don't let us talk to legal services or the union," one worker told Human Rights Watch. "They would fire us if we called them or talked to them."

5. Contingent Workers

High-Tech "Perma-temps" in Seattle

An example of temporary-agency workers' dilemma is found among workers at the cutting edge of the new economy. At the time of our report, more than 20,000 workers were employed at Microsoft's facilities in the Seattle area. Six thousand of them, however, were not employed by Microsoft. Instead, they were employed by temporary agencies supplying high-tech workers to Microsoft and other area companies. Many had worked for several years at Microsoft, and had come to be known as "perma-temps."

Some Microsoft perma-temps formed the Washington Alliance of Technology Workers (WashTech) in early 1998. WashTech has a "Catch-22"-type problem. By defining perma-temps as contractors employed by various temporary agencies, Microsoft avoided being their employer for purposes of the NLRA's protection of the right to organize. Meanwhile, the agencies told temps that in order to form a union that agency management would deal with, they would have to organize other employees of the agency, not just those working at Microsoft.

"First we asked our Microsoft managers to bargain with us," said perma-temp Barbara Judd, describing an effort by her and a group of coworkers to be recognized by Microsoft. Management refused. Responding to press inquiries, a spokesman for Microsoft said, "bargaining units are a matter between employers and employees and Microsoft is not the employer of the workers."

Attempts to be recognized by the temp agencies were equally unavailing. "'We don't have to talk to you, and we won't' is what they told us," said Judd. "They told us we had to get all the temps that worked at other companies besides Microsoft. We had no way to know who they were or how to reach them. Besides, they had nothing to do with our problems at Microsoft."

Barbara Judd's perma-temp post at Microsoft ended in March 2000 when the company announced it was abandoning the tax-preparation software project that she and her coworkers developed. "We received two days notice" before being laid off, Judd told

Human Rights Watch. Some workers moved to another tax-preparation software company, but Judd decided to look for full-time employment. "I don't want to be a part of that system," she said. "Workers who take temp jobs do not realize there is a larger impact than just the absence of benefits. You essentially lose the ability to organize . . . . [T]he legal system is just not set up to deal with these long-term temp issues."

Undermining U.S. Promotion of Labor Rights Internationally

The United States has long been a global leader in promoting human rights and fundamental freedoms. Freedom of association is a basic human right and a bedrock principle of democratic society. The United States, however, cannot champion this right effectively around the world unless it is protected here at home.

Over the past few years, the U.S. government has periodically endorsed calls for integrating human rights and labor rights into the global trade and investment system. Freedom of association is the first such right cited. To give effective leadership to this cause, the United States must confront and begin to solve its own failings when it comes to workers' rights. Moving swiftly to strengthen labor-rights enforcement and deter labor-rights violations in the United States will advance U.S. concern for ensuring worldwide respect for core labor standards.

Conclusion

Our report, *Unfair Advantage*, contains numerous specific recommendations for remedying violations of workers' rights in the United States and promoting workers' freedom of association. I urge the members of the Committee to review these recommendations and give them careful consideration as the Committee formulates its response to the problems detailed in today's testimony.

There is, however, a more overarching point that bears emphasis. Freedom of association occupies a fundamental place in the American legal system and among American values. Beyond the technicalities of administrative regulations, jurisprudence or statutory reforms, a larger reality looms over labor law and practice in the United States. So long as worker organizing, collective bargaining, and the right to strike are seen only as economic disputes involving the exercise of power in pursuit of higher wages for employees or higher profits for employers, change is unlikely. Human Rights Watch took on this issue because it is a human rights issue, and we believed that our involvement could provide an impetus for change by carefully documenting violations and obstacles confronting workers seeking to organize, and analyzing these issues as human rights concerns.

The United States should look to international human rights standards to inform its analysis of the problem and of possible remedies. Such a perspective is critically important for the government, but employers, workers, and unions should also carry out their affairs with a clear recognition that workers' self-organization is a fundamental

human right and a core American value. In addition, the United States should ratify ILO Conventions 87 and 98 on worker organizing and protections against anti-union discrimination to demonstrate that it is serious about workers' freedom of association. U.S. government efforts to stand tall for freedom around the world will strengthened by supporting freedom of association at home.

In the end, what is most needed is a new spirit of commitment by the labor law community and the government to give effect to both international human rights norms and the still-vital affirmation in the United States' own basic labor law for full freedom of association for workers. The specific findings and recommendations contained in our report should be seen in this broader context. We are hopeful that today's hearing will shine a spotlight on the human rights implications of the obstacles to workers' freedom of association in the United States, and that the Congress will lead an effort to protect and promote this fundamental freedom.