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INTRODUCTION, 2004

The decision by Cornell University Press to bring out this edition of *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* confirms the continuing timeliness and relevance of this report and reflects a fruitful partnership between two preeminent institutions. Human Rights Watch is the largest U.S.-based independent human rights organization, universally respected for its rigorous investigations and thoroughly documented reports on human rights around the world for more than a quarter century. Cornell University Press, through the ILR Press imprint, is known for its publication of significant books on labor law, industrial and labor relations, and national and international labor policy.

Historically, the labor movement has seen the human rights community as a separate venture, mostly concerned with victims of abuse in other countries. For their part, many human rights advocates and activists have thought little about human rights for workers in the United States. Like many Americans unfamiliar with violations suffered by workers in organizing and bargaining, they saw trade unionists not as victims of abusive treatment but as favored labor elites.

By focusing on case studies of workers' rights violations in the United States in light of international human rights standards, *Unfair Advantage* helped to change that perception. The report analyzes workers' organizing and collective bargaining as fundamental human rights, not simply as labor-management disputes between institutional interests. It aims to promote new consciousness, attitudes, and policy on workers' organizing and bargaining rights. As one Cornell labor and human rights scholar puts it:

The Human Rights Watch report is historically significant. It reverses the usual approach of judging other nations' labor laws and practices by using United States labor law (or an idealized version of that law) as the standard. As evidenced by its title, the report looks inward at United States labor law and policies using internationally accepted human rights principles as standards for judgment. It is a valuable new perspective because human rights standards have not been an important influence in the making or the integrating and applying of United States labor law.¹

¹See James A. Gross, review of *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, 4 *University of Pennsylvania Journal of Labor and Employment Law* 699 (spring 2002).

The Impact of Unfair Advantage

Unfair Advantage garnered significant attention when it was released by Human Rights Watch in August 2000. International, national, and local commentary featured the report's hard-hitting findings, based on exhaustive case studies, which showed that the self-image of the United States as a beacon for human rights flickers badly when it comes to workers' rights.²

Since then, *Unfair Advantage* has become an authoritative reference point in U.S. labor law and human rights discourse. Even sooner than might have been expected in a climate inhospitable to workers' exercise of freedom of association, *Unfair Advantage* is helping to inspire new energy in the labor movement and allied social justice communities. It is also prompting the introduction of legislation in Congress based on the report's recommendations.

The report has created new linkages between the human rights and labor communities. The AFL-CIO has made the report a centerpiece of its Voice@Work campaign.³ Inspired by the report and the prospect of greater links between the labor and human rights communities, a new civil society organization, American Rights at Work (ARAW), has set an ambitious research and education program to drive home the principle that workers' rights are human rights.⁴

Unfair Advantage has become the standard source for labor advocates reaching out to new constituencies using a language of human rights, not just

²See, for example, Julian Borger, "Workers' Rights 'Abused in US'," *Guardian* (London), August 30, 2000, p. 12; Ned Glascock, "Rights Group Targets Firms," *Raleigh News & Observer*, August 31, 2000, p. A3; Editorial, "Study: Labor Law Fails Millions," *New York Daily News*, August 31, 2000, p. 84; Editorial, "Labor Day Finds Some with Old Troubles," *Greensboro News & Record*, September 4, 2000, p. A8; Robert McNatt, "The List: Union Busters," *Business Week*, September 11, 2000, p. 14; Steven Greenhouse, "Report Faults Laws for Slowing Growth of Unions," *New York Times*, October 24, 2000, p. A20; Lance Compa, "U.S. Workers' Rights Are Being Abused," *Washington Post*, October 30, 2000, p. A27; "O governo dos EUA tem sido ineficiente na defesa dos trabalhadores," *O Estado de Sao Paulo*, November 1, 2000; Roy Adams, "U.S. Immigrants Being Exploited," *Hamilton Spectator* (Ontario), November 21, 2000, p. D10; Arvind Panagariya, "Shoes on the Other Foot: Stunning Indictment of Laws Governing Workers' Rights in the United States," *Economic Times* (India), December 20, 2000, p. 1; Scripps Howard News Service, "Worker Rights," February 21, 2001.

³See Web site at www.aflcio.org/aboutunions/voiceatwork; see also AFL-CIO *Issue Brief*, "The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States" (June 2002).

⁴See Web site at www.araw.org.

that of labor-management relations.⁵ One example of such a new constituency was the million-plus readership of *Scientific American*, which published a public policy feature on *Unfair Advantage* one year after the report came out.⁶ At its national convention in June 2002, Americans for Democratic Action (ADA) presented the first Reuther-Chavez Award to Human Rights Watch for its U.S. labor report.⁷

ADA called *Unfair Advantage* “an exhaustive analysis of the status of workers’ freedom to organize, bargain collectively, and strike in the United States, written from the perspective of international human rights standards. It is the first comprehensive assessment of workers’ rights to freedom of association in the U.S. by a prominent international human rights organization.” In presenting the award, ADA noted that “Human Rights Watch, in preparing and releasing *Unfair Advantage*, has given us what we hope will be enduring evidence in the struggle to regain fair advantage for workers in the U.S.”⁸

Unfair Advantage has also become a point of reference in the scholarly community. Many U.S. labor law teachers have added the book as a supplemental law school text. So have professors in human rights, political science, sociology, government, industrial relations, and other academic fields. The American Political Science Association gave a “best paper” award at its 2001 annual meeting to “From the Wagner Act to the Human Rights Watch Report: Labor and Freedom of Expression and Association, 1935–2000.”⁹

British Symposium

The British Journal of Industrial Relations devoted two issues in 2001 to a symposium discussing the report. Symposium editors Sheldon Friedman and Stephen Wood attracted contributions from leading labor law, labor history, and

⁵See, for example, Judith A. Scott, SEIU general counsel, “Workers’ Rights to Organize as Human Rights: The California Experience,” Los Angeles County Bar Association Labor and Employment Law Symposium (February 26, 2004).

⁶See Rodger Doyle, “U.S. Workers and the Law,” *Scientific American* (August 2001), p. 24.

⁷The Reuther-Chavez Award, named for ADA cofounder and United Auto Workers president Walter Reuther and United Farm Workers leader Cesar Chavez, was created by ADA “to recognize important activist, scholarly and journalistic contributions on behalf of workers’ rights, especially the right to unionize and bargain collectively.”

⁸See more at ADA Web site, www.adaction.org/reutherchavez.htm.

⁹See Carl Swidorski, “From the Wagner Act to the Human Rights Watch Report: Labor and Freedom of Expression and Association, 1935–2000,” *New Political Science* 25 (March 2003): 55.

industrial relations scholars in the United States, Canada, and Britain. In the symposium, University of South Carolina business school professor Hoyt N. Wheeler writes, "It is by explicitly taking a human rights approach that the Human Rights Watch report makes its most important contribution to the understanding and evaluation of American labor policy." University of Texas law school professor Julius Getman calls *Unfair Advantage* "a powerful indictment of the way in which U.S. labor law deals with basic rights of workers." University of California at Davis labor historian David Brody writes, "The Human Rights Watch report on labor rights in America is truly a gift to all those working people struggling for, and being denied, full freedom of association."

In the symposium, McMaster University business school professor Roy J. Adams calls the publication of *Unfair Advantage* "an important event because of the new perspective that it brings to bear on American labor policy." University of Essex human rights professor Sheldon Leader terms the report "an important document . . . that should help us see what difference it makes to connect up the corpus of principles in labor law with the wider considerations of human rights law." K. D. Ewing, a law professor at King's College, London, states:

In what is perhaps a novel approach for an American study, the report is set in the context of international human rights law . . . [quoting from the report] "where workers are autonomous actors, not objects of unions' or employers' institutional interests." . . . The approach of the HRW report and the methodology that it employs have a universal application; they are particularly relevant for the United Kingdom.¹⁰

These are the words of serious scholars, and they followed their generous praise for *Unfair Advantage* with constructively critical engagement. Wheeler

¹⁰See Sheldon Friedman and Stephen Wood, eds., "Employers' Unfair Advantage in the United States of America: Symposium on the Human Rights Watch Report on the State of Workers' Freedom of Association in the United States," 39 *British Journal of Industrial Relations* 591 (December 2001) and 40 *British Journal of Industrial Relations* 114 (March 2002), with Hoyt N. Wheeler, "The Human Rights Watch Report from a Human Rights Perspective"; Julius Getman, "A Useful Step"; David Brody, "Labour Rights as Human Rights: A Reality Check"; Lance Compa, "Reply to Wheeler-Getman-Brody papers"; Roy J. Adams, "The Wagner Act Model: A Toxic System beyond Repair"; Sheldon Leader, "Choosing an Interpretation of the Right to Freedom of Association"; K. D. Ewing, "Human Rights and Industrial Relations: Possibilities and Pitfalls."

looks at the foundation of the human rights approach to freedom of association for workers. He probes for deeper roots than the international human rights instruments cited by Human Rights Watch in the report and draws attention to religious, moral, and philosophical first principles as an important complement to the case for workers' rights in *Unfair Advantage*.

Getman criticizes the report for not sufficiently addressing the "deeper causes" of the "toxic system" that U.S. labor law has become. He suggests that one such deeper cause is what he calls a "Capitalist Exception" applied by judges and government officials favoring property rights over workers' associational rights. Getman calls for "a new burst of rank and file-led activism" to bring about changes in law and practice recommended in *Unfair Advantage*.

Brody believes that *Unfair Advantage* should have more historical perspective and that the report too willingly accepts the view that collective bargaining is gained through a bureaucratic process of government certification rather than through workers' direct action. "That a formally democratic process might be at odds with workers' freedom of association," he writes, "seems to fall below the screen of 'human rights analysis.'" Adams also believes that *Unfair Advantage* does not sufficiently break with the "dysfunctional" Wagner Act model and that the report's "prescription for reform, even if followed to the letter, would not cure the sick patient."

Leader addresses two key features of the U.S. labor law model that went unchallenged in *Unfair Advantage*: (1) majority rule (workers achieve bargaining in workplaces where a majority chooses it); and (2) exclusive representation (once a union is established, no other organization may speak for subgroups in the "bargaining unit"). He suggests that a broader, more dynamic application of freedom of association principles should do more for workers who seek to bargain without a majority (sometimes called "members-only" bargaining) and for subdivisions of a bargaining unit such as women workers in a mostly male workplace.¹¹

Ewing warns that the human rights approach "does not answer all the questions that are posed by an industrial relations system." He cautions that "in our readiness to embrace the rhetoric of human rights, we cannot overlook the fact that others may claim human rights that may directly contradict our own. These 'others' may be employers and workers who are opposed to trade unions."

¹¹For a thorough treatment of law and practice on nonmajority unionism in the United States, see Charles A. Morris, *Blue Eagle at Work* (Ithaca: Cornell University Press, 2004).

Readers of *Unfair Advantage* can judge for themselves the merits of the report and these experts' analyses. But by engaging the report so deeply, these scholars, as well as many others who have written about *Unfair Advantage*, stretch the report's boundaries back toward assumptions and forward toward implications in ways that validate the significance of its findings and recommendations.¹² As James Gross notes:

The report is about moral choices we have made in this country. These moral choices are about, among other things, the rights of workers to associate so they can participate in the workplace decisions that affect their lives, their right not to be discriminated against, and their right to physical security and safe and healthful working conditions. The choices we have made and will make in regard to those matters will determine what kind of a society we want to have and what kind of people we want to be. Human rights talk without action is hypocrisy. This report could be an important first step toward action.¹³

Little Change . . . and a Broken Strike

Cornell's republication of *Unfair Advantage* is especially timely and useful in light of the continuing struggle for workers' freedom of association in the United States. The reality of labor law and practice in the United States described in *Unfair Advantage* has not changed much since the report's initial publication in 2000. Many workers who try to exercise the right to organize still suffer widespread harassment, threats, spying, and dismissals for their efforts. In the fiscal year ending September 30, 2002, the last period for which official records are available, the NLRB issued reinstatement or back pay

¹²See, for example, Harry Arthurs, "Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture," 22 *Berkeley Journal of Employment and Labor Law* 271 (2001); Steve Early, "How Stands the Union" (book review), *The Nation*, January 22, 2001, p. 22; Andrew S. Levin, "What Thirty Million Workers Want<M>But Can't Have," 3 *University of Pennsylvania Journal of Labor and Employment Law* 551 (spring 2001); James A. Gross, "Worker Rights as Human Rights: Wagner Act Values and Moral Choices," 4 *University of Pennsylvania Journal of Labor and Employment Law* 479 (spring 2002); Ann-Marie Cusac, "Brazen Bosses," *Progressive*, February 1, 2003, p. 23; Kate E. Andrias, "A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections," 112 *Yale Law Journal* 2415 (June 2003).

¹³See James A. Gross, *supra* note 1.

orders for 17,700 workers who had suffered discrimination for union activity.¹⁴ This is down from the more than twenty thousand victims reported in *Unfair Advantage* for 1998. But it reflects a slowed economy and fewer organizing efforts by workers, not more respect for their rights.¹⁵ When they succeed in forming unions, workers still face obstacles in bargaining. Workers lodged nearly ten thousand allegations of bad-faith bargaining against employers in fiscal 2002.¹⁶

The remarkable thing is that each year hundreds of thousands of workers overcome these obstacles to form new local unions in U.S. workplaces. The organizing impulse springs from a bedrock human need for association in a common purpose to make things better, as corny as that sounds amid predominantly individualistic social pressures. Polls indicate that more than forty million workers would join unions immediately in their workplaces if they did not risk reprisals from employers.¹⁷

Striker Replacement: Continuing Violation, Continuing Abuse

Many workers who exercise the right to strike suffer the consequences of the permanent striker replacement doctrine discussed in the *Unfair Advantage* case study of Oregon Steel in Pueblo, Colorado. A recent, dramatic example of the use of permanent replacements to break a strike came at a Tyson Foods plant in Jefferson, Wisconsin. Tyson, the world's largest meat and poultry producer, purchased a locally owned sausage processing plant in that small Midwest town, where workers had decent wages and benefits and a longstanding good relationship with previous company ownership. In 2003 bargaining, Tyson demanded drastic wage and benefit cuts from plant employees. They went on strike in February 2003 against the company's cutbacks.

Workers' exercise of the right to strike is recognized in international law

¹⁴See "Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 2002," *Annual Report of the National Labor Relations Board 2002* (2003), table 4, p. 90.

¹⁵See Steven Greenhouse, "Worried about Labor's Waning Strength, Union Presidents Form Advisory Committee," *New York Times*, March 9, 2003, p. 22.

¹⁶See "Types of Unfair Labor Practices Alleged, Fiscal Year 2002," *Annual Report of the National Labor Relations Board 2002* (2003), table 2, p. 82. The "merit rate" (cases in which evidence indicates that violations occurred) of these allegations is not further broken down by type of unfair labor practice, but the average merit rate of 35 to 40 percent yields 3,500 to 4,000 instances of bad faith bargaining. See *ibid.*, "Unfair Labor Practice Merit Factor," chart 5, p. 9.

¹⁷See David Moberg, "Labor Fights for Rights," *The Nation*, September 15, 2003, p. 23; Richard B. Freeman and Joel Rogers, *What Workers Want* (New York: Russell Sage Foundation, 1999).

as integral to their freedom of association. However, U.S. labor law permits permanent replacement of striking workers.¹⁸ The International Labor Organization's (ILO) Committee on Freedom of Association has condemned this legal doctrine as a violation of freedom of association.¹⁹

Tyson's Jefferson plant produces pepperoni and other sausage products, many sold to national pizza and other fast food chain companies. "It was a good job," said Sharon Guttenberg, a striking worker. "We weren't getting rich, but we were making a living."²⁰ A labor economist explained, "They [Tyson] want to make their wages and benefits in Wisconsin more or less equal to what they have in the non-union chicken processing plants in Mississippi."²¹

On April 4, 2003, Tyson announced it would hire permanent replacement workers to take the jobs of workers exercising their right to strike.²² The replacement move sparked anger and resentment in the community, especially against prison inmates paroled to halfway houses who were recruited by Tyson to take strikers' jobs.²³ "The community is being torn apart, both emotionally and economically," said a retired employee.²⁴ Local food retailers and the University of Wisconsin responded by withdrawing Tyson products from stores and from campus food services, but sales to national pizza chains sustained the company's reduced operation in Jefferson.²⁵

In January 2004, Tyson crushed the strike. Faced with the prospect of a decertification vote by replacement workers, union members voted to accept

¹⁸See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

¹⁹See 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)*, Report no. 278, Case no. 1543 (1991).

²⁰See Lisa Schuetz, "Tyson Standoff Grinds On," *Wisconsin State Journal*, August 3, 2003, p. A1.

²¹Economist Frank Emspak of the University of Wisconsin, in "Strike Continues at Pepperoni and Sausage Plant in Southern Wisconsin," *Morning Edition*, National Public Radio, July 15, 2003.

²²See "Tyson to Hire Permanent Replacements for Striking Workers at Plant in Wisconsin," *Daily Labor Report*, Bureau of National Affairs, April 14, 2003, p. A4.

²³See Bill Novak, "Union: Probe Parolees at Tyson," *Madison Capital Times*, July 10, 2003, p. 2A.

²⁴See Lisa Schuetz, *supra* note 20.

²⁵See Joe Potente, "UW Bans Tyson Products Till Strike Over," *Madison Capital Times*, August 23, 2003, p. 3A.

the company's offer.²⁶ However, union members could not return to work. In violation of international labor standards, they had been permanently replaced. They must wait until replacement workers vacate positions before any who exercised the right to strike may return to their jobs.²⁷

U.S. Supreme Court: Two Blows against Workers' Rights

Since publication of *Unfair Advantage*, the U.S. Supreme Court has delivered two damaging decisions further impairing workers' rights. One decision dealt with the National Labor Relations Act's (NLRA's) exclusions clause, which defines categories of workers excluded from coverage of the act. The other dealt with remedies for undocumented immigrant workers illegally fired for union activity.

Exclusions and Kentucky River

One of the key findings of *Unfair Advantage* was the extraordinary reach of the NLRA's "exclusions" clause. Section 2 excludes the following categories of private sector workers from the provisions of the act: agricultural employees, household domestic employees, independent contractors, and supervisors. Their exclusion denies them two rights:

- They have no protection of the right to organize a union; employers can discharge them for union activity with impunity.
- They have no right to bargain collectively when a majority—even 100 percent—desires it; employers can ignore their bargaining requests or proposals with impunity.

Public employees are also excluded from the NLRA's coverage, but they have First Amendment rights of association in the public sector workplace, which prevent reprisals against them for union activity. However, twenty-seven states make collective bargaining illegal for many, most, or all public employees, even those in traditional hourly employment or for low-ranking clerical and technical staff.

A 2002 report by the U.S. General Accounting Office on workers without

²⁶See Bill Novak, "Concessions End Tyson Plant Strike," *Madison Capital Times*, January 30, 2004, p. 3A.

²⁷See Joel Dresang and Tom Daykin, "Tyson Workers Battled against All Odds, and Lost," *Milwaukee Journal Sentinel*, February 8, 2004, p. 1D.

collective bargaining rights put these numbers to excluded categories of workers:²⁸

Independent contractors	8.5 million
Low-level supervisors	8.6 million
Public employees	6.9 million
Household domestic workers	532,000
Agricultural workers	357,000

These twenty-five million workers represent almost 20 percent of the total labor force, and almost 30 percent of the non-managerial workforce. A 2001 decision by the U.S. Supreme Court expanded the scope of the exclusions clause, stripping away rights of organizing and bargaining from even more workers. In its *National Labor Relations Board v. Kentucky River Community Care, Inc.* decision, the Court nullified the results of a 1997 NLRB election in which a majority of the hospital's 110 employees voted in favor of union representation.²⁹ The employer refused to bargain with the union, arguing that six "charge nurses" in the voting group were supervisors. The Supreme Court agreed, saying that charge nurses who oversee the work of lower-ranking nurses and nurses' aides, even though they have no disciplinary power over them, are supervisors unprotected by the NLRA.

Health care employers crowed that the decision gave them new ammunition to break workers' organizing efforts, calling it "welcome news" that could give them "an edge in union organizing campaigns." The decision "may make it easier for employers to prove that certain employees are supervisors—and therefore ineligible to vote in union elections." It "has significant and far-reaching implications for all professional and technical employees who direct the work of less-skilled employees. . . . Other labor organizations targeting professional and technical employees who direct the work of other employees can expect to be similarly affected."³⁰

Immigrant Workers and Hoffman Plastic

Many of the abuses described in the *Unfair Advantage* case studies of Washington apple workers, North Carolina slaughterhouse workers, New York

²⁸See U.S. General Accounting Office, *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights*, GAO-02-835 (September 2002).

²⁹See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001).

³⁰See John E. Lynchski and Ronald J. Andrykovitch, "Who's a Supervisor? U.S. Supreme Court Redefines Supervisors in National Labor Relations Board Case," *Human Resources Magazine* (September 2001).

City sweatshop workers, and others are directly linked to the vulnerable immigration status of workers in many American industries. Immigrant workers' defenselessness creates a vicious cycle of abuse. Fearful of being found out and deported, undocumented workers shrink from exercising rights of association or from seeking legal redress when their workplace rights are violated. Fully aware of workers' fear and sure that they will not complain to labor law authorities or testify to back up a claim, employers heap up abuses and violations of their rights. A recent dramatic example involved Wal-Mart, after federal immigration agents raided stores in twenty-one states in October 2003 and arrested more than two hundred undocumented people working in overnight cleaning jobs.³¹ Workers lodged a class-action lawsuit against Wal-Mart alleging failure to comply with minimum wage, overtime, health and safety and social security laws.³² In an amended complaint, workers also alleged violations of civil rights laws by the company's practice of locking doors to prevent workers from leaving the stores.³³

Unfair Advantage does not challenge the capacity of the United States or any country to set conditions for admission of noncitizens into the country and to enforce those conditions. However, immigration rules must be formulated and enforced in compliance with basic human rights standards.

In this light, the 2002 decision of the U.S. Supreme Court in the case of *Hoffman Plastic Compounds v. National Labor Relations Board* highlights the human rights dimensions of a crisis in immigration policy. The Court decided that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally dismissed for exercising rights protected by the NLRA. The Supreme Court's 5–4 ruling overturned an NLRB decision, upheld by a federal appeals court, that granted back pay to the worker. The decision strips away from millions of workers in the United States their only protection of the right to freedom of association, the right to organize, and the right to bargain collectively.³⁴

From a human rights and labor rights perspective, workers' immigration

³¹See Steven Greenhouse, "Wal-Mart Raids by U.S. Aimed at Illegal Aliens," *New York Times*, October 24, 2003, p. A1.

³²See Steven Greenhouse, "Illegally in U.S., and Never a Day Off at Wal-Mart," *New York Times*, November 5, 2003, p. A1.

³³See Steve Strunsky, "More janitors sue Wal-Mart for violations of civil rights; Say they were locked inside during their cleaning shifts," *Bergen Record*, February 3, 2004, p. L11.

³⁴*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

status does not diminish or condition their status as workers holding fundamental rights of association. Most undocumented workers are employed in workplaces with documented migrant workers and with U.S. citizens. Before the *Hoffman* decision, union representatives assisting workers in an organizing campaign could say to all of them, “We will defend your rights before the National Labor Relations Board and pursue back pay for lost wages if you are illegally dismissed.” Now they must add: “except for undocumented workers—you have no protection.” The resulting fear and division when a group of workers is deprived of their protection of the right to organize has adverse impact on all workers’ right to freedom of association and right to organize and bargain collectively.³⁵

International Human Rights Bodies’ Rulings on *Hoffman Plastic*

Two authoritative international human rights bodies have examined the *Hoffman Plastic* doctrine and found that it violates workers’ rights. In September 2003, the Inter-American Court of Human Rights (IACHR) issued an advisory opinion in a case filed by Mexico in the wake of the *Hoffman Plastic* decision. In November 2003, the International Labor Organization’s Committee on Freedom of Association issued its decision in a case filed by the AFL-CIO and the Mexican Workers’ Confederation.

IACHR Ruling

The IACHR held that undocumented workers are entitled to the same labor rights, including wages owed, protection from discrimination, protection for health and safety on the job, and back pay as citizens and those working lawfully in a country. The court said:

The migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them labor rights. . . . The State has the obligation to respect and guarantee human labor rights of all workers, independent of their condition as nationals or foreigners, and to not tolerate situations of discrimination that prejudice them. . . . The State must not permit

³⁵See Alfredo Corchado and Lys Mendez, “Undocumented Workers Feel Boxed In,” *Dallas Morning News*, July 14, 2002, p. 1J; Nancy Cleeland, “Employers Test Ruling on Immigrants,” *Los Angeles Times*, April 22, 2002, p. 1; David G. Savage and Nancy Cleeland, “High Court Ruling Hurts Union Goals of Immigrants,” *Los Angeles Times*, March 28, 2002, p. 20.

that private employers violate the rights of workers, or that a contractual relationship weakens minimum international standards. . . . Workers, by being entitled to labor rights, must be able to count on all adequate means to exercise them. Undocumented migrant workers have the same labor rights that correspond to the rest of workers in the State of employment, and the State must take all necessary measures for this to be recognized and complied with in practice.³⁶

The court held that, as part of its principal obligation to interpret the Charter of the Organization of American States (OAS), it must apply the American Declaration of the Rights and Duties of Man and other international conventions on human rights in the hemisphere. It declared its decision binding on all members of the OAS, whether or not they have ratified certain of the conventions that formed the basis of the opinion. The IACHR based its decision on the nondiscrimination and equal protection provisions of the OAS Charter, the American Declaration, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Universal Declaration of Human Rights.³⁷

ILO Ruling

In November 2003, the ILO's Committee on Freedom of Association issued a decision that the U.S. Supreme Court's *Hoffman Plastic* ruling violates international legal obligations to protect workers' organizing rights. The committee stated:

The Committee recalls that the remedies now available to undocumented workers dismissed for attempting to exercise their trade union rights include: (1) a cease and desist order in respect of violations of the NLRA; and (2) the conspicuous posting of a notice to employees setting forth their rights under the NLRA and detailing the prior unfair practices. . . . The Committee considers that such

³⁶See Inter-American Court of Human Rights, *Legal Condition and Rights of Undocumented Migrant Workers*, Consultative Opinión OC-18/03 (September 17, 2003).

³⁷*Ibid.* For thorough discussion, see Sarah Cleveland, Beth Lyon and Rebecca Smith, "Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status," 1 *Seattle Journal of Social Justice* 795 (spring/summer, 2003).

remedies in no way sanction the act of anti-union discrimination already committed, but only act as possible deterrents for future acts. Such an approach is likely to afford little protection to undocumented workers who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed at dissuading such action.³⁸

The ILO committee concluded that “the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination.” The committee recommended congressional action to bring U.S. law “into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the *Hoffman* decision.”³⁹

Unfair Advantage Case Study Updates

Many of the case studies supporting the findings and recommendations of *Unfair Advantage* continued to develop after the report’s initial publication in 2000. Some ended in total defeat for workers’ rights of association, organizing, and bargaining. Some had positive endings, but at enormous cost. Some are still enmeshed in the labor law system’s wearying delays. Here is a summary.

South Florida Nursing Homes: Five Cases, One Contract

Workers’ organizing efforts at the Palm Garden nursing home in North Miami collapsed under the weight of the company’s rights violations. Years after the organizing drive, the key leader, Marie Sylvain, eventually received modest back pay, but she had moved on to new work outside the nursing home industry. Her coworkers were too frightened to revive the effort.⁴⁰

The NLRB affirmed an administrative law judge’s findings of spying,

³⁸See ILO Committee on Freedom of Association, Complaints against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case no. 2227: Report in which the committee requests to be kept informed of developments (November 20, 2003).

³⁹*Ibid.*

⁴⁰This summary is based on February 2004 interviews with staff of the Service Employees International Union who assisted workers in the organizing campaigns and on NLRB cases recounted in *Unfair Advantage*.

threats, and other violations of workers' rights at the Villa Maria nursing home in Miami.⁴¹ Buying time for employee turnover and discouragement to fatally undermine workers' organizing resolve, management appealed the case to a federal appeals court, then to the U.S. Supreme Court. Both courts refused to hear the appeals, but by then the organizing effort was defunct. It has not been revived.⁴²

The employer's dismissals of organizing leaders, threats, and other violations of workers' rights at The Palace nursing home in Miami had their intended effect: workers abandoned their organizing attempt altogether.

Fired for his organizing in 1994, Ernest Duval gained modest back pay from the King David nursing home and returned to work for a short time before leaving, feeling he was still a target for retaliation and wanting to work in a more comfortable environment. Company management bowed to a bargaining order from the NLRB, but no contract was reached after more than a year of negotiations. Management then sold the home to another chain and walked away from the bargaining table. Workers were seeking to bargain with the new owner in early 2004.

At the Avante nursing home in Lake Worth, workers succeeded in holding their organization together and achieving a first contract in May 2003, with what union representatives call a "civilized relationship."

Hotel Workers at San Francisco Marriott: Finally, a Settlement

The long dispute at the San Francisco Marriott hotel discussed in chapter 5 ended with union recognition, a good first contract, and a decent relationship between management and the Hotel Employees and Restaurant Employees union, HERE. The resolution came fifteen years after the hotel opened, when management reneged on an agreement to abide by the results of a "card-check" determination of workers' organizing choice. A card-check agreement is an accepted, legal alternative means for workers to choose collective bargaining. Under it an employer and a union set a period of time for workers to sign cards authorizing the union to represent them.

Workers had to secure a court order to enforce the card-check agreement,

⁴¹See *Villa Maria Nursing and Rehabilitation Center, Inc. and UNITE*, 335 NLRB 1345 (September 26, 2001).

⁴²See *Villa Maria Nursing and Rehabilitation Center, Inc. v. NLRB*, 49 Fed. Appx. 289 (11th Cir. 2002); *cert. denied*, *Villa Maria Nursing and Rehabilitation Center, Inc. v. NLRB*, 538 U.S. 922 (2003).