International Labor Rights Forum
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REPORT ON FREEDOM OF ASSOCIATION AT UNITED NATURAL FOODS, INCORPORATED

(Moreno Valley, CA; Auburn, WA)

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I. Introduction

This report outlines the ILRF's findings with respect to labor rights compliance by United Natural Foods, Incorporated (UNFI), a major distributor of natural and organic foods, nutritional supplements, and personal care products. UNFI's clients include Whole Foods Market, Safeway, and numerous other retailers. The company describes its mission as "to bring our customers the best selection of high-quality natural, organic and specialty food through a sustainable supply chain."[1]

The ILRF is a non-profit human rights organization dedicated to achieving the just and humane treatment for workers worldwide. For more than twenty years, the organization has called upon corporations to ensure respect for the rights of workers in their global supply chains. The ILRF believes that all workers have the right to a safe working environment where they are treated with dignity and respect, and where they can organize freely to defend and promote their rights and interests.

As an organization working principally to research and advocate for workers in the developing world, the ILRF has previously documented many instances of labor rights abuse in the production of goods on farms and in factories in developing countries. However, the ILRF recognizes that international labor rights violations may occur at the other end of these supply chains, as well – once these goods have arrived on our shores, but before they reach the local store or market.

The ILRF carried out an investigation of UNFI's practices after allegations of labor rights violations at UNFI warehouses were brought to us by the International Brotherhood of Teamsters. The allegations concerned certain labor practices at UNFI warehouse facilities in Moreno Valley, California and Auburn, Washington. In view of the serious nature of the issues involved and the UNFI's claims to operate a "sustainable supply chain," the ILRF determined to undertake this inquiry.

In the course of this investigation, the ILRF gathered substantial evidence concerning UNFI's practices through detailed offsite interviews with employees and documents produced by the Teamsters and UNFI. The ILRF assessed UNFI's behavior against the core standards of the International Labor Organization (ILO), the agency of the United Nations charged with defining and protecting the rights of workers, focusing principally on ILO Conventions 87 and 98, which protect workers' right to freedom of association.

On the basis of the evidence gathered, the ILRF concludes that UNFI has engaged in serious violations of workers' rights of association at both its Moreno Valley and Auburn facilities. In both cases, the violations were carried out in response to efforts by workers to press for improved working conditions through participation in trade unions.

At the Moreno Valley facility, UNFI responded to an effort by its largely immigrant workforce to organize in early 2012 by waging an aggressive antiunion

[1] United Natural Foods, Inc, Corporate Social Responsibility Report, 2011-2012, https://www.unfi.com/Sustainability/Documents/UNFI_CSR_2012-2012.pdf.

campaign. Most concerning, in the course of this campaign, a UNFI manager on two occasions threatened violence against workers who support the union. In one instance, the manager stated, in Spanish, "If the union comes into the warehouse, I am going to go and kill all of those motherfuckers from the union." ("Si llegara a entrar la union voy a matar a todos los hijos de la puta madre de la union.") The threats were taken seriously by workers and union representatives. Additionally, the company required its workers to repeatedly sit through lengthy mandatory meetings in which managers and outside consultants predicted that voting to unionize could ultimately lead to workers losing their jobs. The company carried out these actions in the weeks leading up to an election for union representation supervised by the National Labor Relations Board (NLRB) that was held on May 17, 2012. The union lost the election, although the union has filed objections to the results in light of the company's conduct leading up to and during election which the NLRB is presently investigating.

At the Auburn facility, the company violated workers' rights in the context of a push by the facility's already unionized workforce for improved wages and benefits which began in March 2012. The facility pays its workforce approximately 24% less in wages than the prevailing rate in the warehouse industry in Northwest Washington.

As an apparent attempt to intimidate its employees into withdrawing their demands for higher compensation, UNFI, beginning in May 2012, introduced to the Auburn warehouse a parallel workforce of non-union contract workers hired through a temporary employment agency, Roadlink, to whom it pays wages that are roughly half those the company pays to its unionized workers and to whom it provides no health insurance. It has shifted work previously performed by unionized employees to these contract workers and threatened that if workers went on strike over their wage demands it would use the contract workers, as well as additionally hired employees, to permanently replace them. The company has also shifted the warehousing of goods supplied to Whole Foods – which accounts for 36% of UNFI's sales overall[2] – from the Auburn facility to a non-union warehouse in Ridgefield, Washington. Through these actions UNFI has dramatically reduced its unionized employees' take home pay – in many cases by 30-40% – resulting in substantial hardship.

UNFI's labor practices at both facilities are presently being investigated by the NLRB in relation to compliance with U.S. labor laws. As noted above, the ILRF's investigation focused on compliance not with U.S. laws but with ILO standards which in some cases are more protective of worker rights than is domestic law.

The conduct described in this report would be troubling were it carried out by any employer. It is all the more so because UNFI has represented itself to the public as a company that operates according to principles of social responsibility and because parallel conduct at different locations and involving national executives suggests that the violations detailed here reflect a common corporate policy toward workers' exercise of freedom of association rather than isolated actions of individual managers. In short, the findings of this investigation suggest that a wholesale shift in UNFI's labor policy is

[2] United Natural Foods, Incorporated, Form 10-K Annual Report (September 26, 2012), http://biz.yahoo.com/e/120926/unfi10-k.html.

necessary for the company to comply with international norms for the acceptable treatment of workers.

At present, none of the violations described here has been remedied. This report concludes with a set of recommendations for remedial action by UNFI, as well as steps that the company's customers and other stakeholders should take in order to persuade UNFI to reform its labor practices.

II. Terms of Reference

The ILRF investigates worker rights violations with reference to core labor standards as defined by the ILO, the UN entity recognized as the primary standard-setting body internationally for worker rights. In 1998, in its Declaration on Fundamental Principles and Rights at Work, the ILO identified "core" labor rights that are applicable to all its member states, including the United States, regardless of their ratification status:[3]

- the right to associate (ILO Convention No. 87);
- the right to organize and bargain collectively (ILO Convention No. 98);
- equal employment opportunity and non-discrimination (ILO Convention Nos. 100 and 111);
- prohibition of forced labor (ILO Convention Nos. 29 and 105); and
- prohibition of child labor (ILO Convention No.138)

These standards are applicable to all employers in the United States, including UNFI.

The allegations examined in this report chiefly involve violations of workers' freedom of association, employees' right to organize a union to protect their interests on the job and in the broader economy and society. As has been stated by Human Rights Watch, "[f]reedom of association is the bedrock workers' right under international law on which all other labor rights rest."[4]

International standards for freedom of association are embodied in Conventions 87 and 98 of the International Labor Organization. ILO Convention 87 provides that

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[3] *See* ILO Declaration on Fundamental Principles and Rights at Work (1998) ("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,"), *available at:* http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

[4] Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards" 19 (2000) [hereinafter, Human Rights Watch: Unfair Advantage], ("In the workplace, freedom of association takes shape in the right of workers to organize to defend their interests in employment. Most often, workers organize by forming and joining trade unions."), http://www.hrw.org/sites/default/files/reports/uslbr008.pdf.

"workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."[5]

ILO Convention 98 declares that "workers shall enjoy adequate protection against acts of antiunion discrimination in respect of their employment. . . . Such protection shall apply more particularly in respect of acts calculated to—a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish union membership; b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities."[6] It states further that "workers' ... 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."[7]

The ILO Committee on Freedom of Association, the highest international body charged with interpreting and protecting this right, has identified numerous examples of employer conduct which constitutes prohibited "interference" with freedom of association, including engaging in violence, imposing pressure, instilling fear, and making threats that undermine workers' exercise of this right.[8]

III. Sources of Evidence

The ILRF reached the conclusions outlined in this report on the basis of the following evidence:

- Interviews with, and written statements from, current employees of UNFI's warehouse facility in Auburn, Washington.

- Interviews with, and written statements from, current employees of UNFI's warehouse facility in Moreno Valley, California.

- A review of relevant documents, including: documents related to collective bargaining between the Teamsters and UNFI (including, *inter alia*, expired agreements and bargaining proposals); written communications from UNFI

[5] International Labor Organization, Convention concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Art. 2.
[6] International Labor Organization, Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (No. 98), Art. 1(1).
[7] *Id.*, Art. 1(2).
[8] *See* International Labor Organization, "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) [hereinafter ILO Committee on Freedom of Association Digest], paras. 35, 67, 514, 638, 682, 772, 780, 781, 786, 787, 803, 810, 837, 839, 858, 863, 864, 865. For a concise summary of forms of interference identified by the ILO Committee on Freedom of association, *see* Human Rights Watch, "A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations" 10 (September 2010) [hereinafter Human Rights Watch: A Strange Case], http://www.hrw.org/sites/default/files/reports/bhr0910web_0.pdf.

management to employees; and objections and charges against UNFI filed with the National Labor Relations Board by the Teamsters on behalf of employees.

Despite the ILRF's efforts to request information from the company through letters and telephone calls, UNFI has declined to cooperate with this inquiry.[9] Nevertheless, the ILRF was able to gather sufficient evidence to reach firm conclusions with respect to the issues of concern in this case.

IV. Allegations Assessed in this Report

The ILRF investigated the following alleged violations of worker rights:

- That, at its Moreno Valley, California facility, UNFI has violated its employees' fundamental rights to freedom of association and collective bargaining by:
    - subjecting union supporters to threats of violence.
    - requiring workers to attend antiunion captive-audience sessions while denying workers comparable access to pro-union views.
    - subjecting workers, in the course of the captive-audience sessions, to threats that workers would lose their jobs if they voted to unionize.
    - subjecting workers, in other settings, to various forms of harassment and intimidation with respect to their decision whether or not to unionize.
- That, at its Auburn, Washington facility, UNFI has violated its employees' fundamental rights to freedom of association and collective bargaining by:
    - discriminating against unionized workers by shifting work opportunities to a newly hired non-union workforce of employees hired through a temporary employment agency, thereby substantially reducing unionized workers' earnings.
    - threatening to permanently replace any worker who exercises his or her right to strike with the temporary contract workers and other newly-hired employees.

V. Findings

A. UNFI Facility in Moreno Valley, California

1. Background

[9] The ILRF faxed letters addressed to UNFI CEO Steven L. Spinner to UNFI's corporate headquarters on October 25, 2012 and November 9, 2012 and left multiple telephone messages.

Employees at UNFI's Moreno Valley warehouse initiated an effort to organize a union at the facility in late 2011 when a group of workers began meeting offsite with an organizer from the International Brotherhood of Teamsters, Local 166, based in Bloomington, California. In February 2012, an organizing committee of workers was formed.

Among the reasons cited by workers as to why they sought to unionize were that they felt that working conditions in the facility were unsafe, that management engaged in favoritism in allocating work assignments and equipment, that the workloads and hours demanded of them were excessive, and that their wages and benefits should be improved, particularly, with respect to the cost to employees of health insurance.

In early 2012, the employees who were members of the organizing committee began gathering signatures of workers' cards to authorize an election to certify the union as the bargaining representative of most of the key work positions within the warehouse. At the beginning of April, the union submitted a petition to the NLRB to hold a representation election, which the Board conducted at the warehouse on May 17, 2012. A majority of workers voted against union representation. Workers reported that many of their co-workers voted against unionization because the company's antiunion campaign had caused them to fear that, if the workforce voted to unionize, the workers would lose their jobs. The union subsequently filed objections with NLRB seeking to have the results overturned in light of the company's conduct leading up to and during the election, as well as a number of charges alleging unfair labor practices. The objections and charges are presently being investigated by the NLRB.

Many of the violations of freedom of association that are discussed below were committed during the period immediately prior to the election; however, violations have continued to be committed at the facility up to the present day.

2. Findings

a. Threats of Violence against Union Supporters

The ILRF finds, based on credible worker testimony, that a UNFI manager, on at least two occasions, threatened violence against workers who supported unionization. The use or threatened use of violence to prevent workers from organizing a union is an extraordinarily serious violation of freedom of association.[10]

According to this testimony, during April 2012, the Moreno Valley facility's Maintenance Manager approached a worker who played a leading role in the unionization effort while the worker performed his job inside the warehouse. The manager asked the worker what he knew about the union organizing effort, an inquiry that, in itself, represented a violation of workers' right to organize without management interference.

[10] *See, e.g.,* ILO Committee on Freedom of Association Digest, paras. 44 ("The rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected."); 45 ("A genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty.").

The worker attempted to ignore the question. The manager then stated, in Spanish, "If the union comes into the warehouse, I am going to go and kill all of those motherfuckers from the union." ("Si llegara a entrar la union voy a matar a todos los hijos de la puta madre de la union.") The worker took the threat seriously and the union shortly thereafter filed a complaint with the police department and filed a charge with the National Labor Relations Board about the threat.

Approximately two weeks later, the same manager approached the same worker inside the warehouse and made a further threat of violence. The manager told the worker, again in Spanish, that the manager's brother-in-law, who was incarcerated, had told the manager that the manager should let his brother-in-law know who was involved with the union, so that "he could do something" ("que podia hacer algo").

The worker understood the statement to imply the manager's brother-in-law could arrange for union organizers or supporters to be physically harmed. The worker's alarm at this repeated threat was reasonable, particularly in light of the fact that the community where the warehouse is located is home to violent street gangs.[11] Such gangs are well-known to be linked to and influenced by gangs operating within Southern California's jails and prisons.[12]

The ILRF expresses alarm that the manager who made the threats – of which UNFI appears to have been aware for many months – continues to be employed at the facility and, as described below, engage in antiunion harassment. According to several workers, the manager is a friend of the plant's General Manager.

The ILRF additionally expresses serious concern that UNFI Moreno Valley management has retaliated against the worker who received these threats for having reported them to the police and continuing to support the unionization effort.

During late October 2012, the warehouse's Maintenance Manager called this worker into his office, apparently in response to rumors from other employees that the worker was depressed because of problems at the workplace and feelings of persecution by the warehouse's management. The manager told the worker, "You have the solution. Stop going around complaining to the Labor Board and to the union." Several days later, another employee informed this worker that he had overheard the Maintenance Manager telling another manager at the warehouse that this worker would be "gone by December."

Finally, shortly before the publication of this report, the victim of the threats reported to the ILRF that over the past several weeks on at least four occasions he has been followed around Moreno Valley by cars with darkened windows or seen strange

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[11] *See, e.g.,* Darrell Santschi, "Moreno Valley: 4 Arrested in Gang Shooting," *Press Enterprise* (Oct. 13, 2012), http://www.pe.com/local-news/riverside-county/moreno-valley/moreno-valley-headlines-index/20121013-moreno-valley-4-arrested-in-gang-shooting.ece.

[12] *See, e.g.,* Fred Ortega, "Mexican Mafia's Roots Run Deep in San Gabriel Valley," *Whittier Daily News*, (Feb. 8, 2008) (noting Mexican Mafia prison gang's influence with Latino street gangs across Southern California), http://www.whittierdailynews.com/gangs/ci_8251694.

cars parked for extended periods outside his home. The worker reported that he fears for his safety as well as that of his family because of these incidents.

In one instance, according to the worker, a pickup truck with polarized windows parked near the UNFI facility began to follow him as he left work. The worker took various turns to try to lose the truck and eventually went to a medical appointment at a nearby clinic. Afterward, the worker saw the same truck parked near his house and he went up to the window and asked the driver what he was doing. The driver replied, "What do you want? You want money?"

In another instance, the worker found a black Jeep Cherokee parked outside his home when he was leaving his house to go to a shopping center at about 3:00 p.m. The car followed him to the shopping center at which time it stopped pursuing him.

Several days later, at around 11:30 am, the worker noticed a yellow Toyota Camry parked near his home, which he had not previously seen. Later on the same day, at around 6:00 pm, he saw the same Camry still parked near his house, as well as the black Jeep Cherokee that had previously followed him. The Camry and Chereokee began to follow him in his car. The worker stopped and began to take pictures of the cars, at which point the cars drove away. He drove around his neighborhood to see if he could find them and found both cars parked together at a small shopping center near his house. He went up to the driver of one of the cars to ask what they were doing. The driver replied, "You better get the fuck out of here. You are by yourself. Get the fuck out of here."

The worker, with the help of a union representative, has reported these incidents to the police. The status of any police investigation was not clear as of the time of publication of this report. The ILRF does not have any evidence to attribute the recent incidents to UNFI management. Nevertheless, the incidents are consistent with the possibility that the implied threat by the Maintenance Manager discussed above to involve criminal elements has been acted upon. The IRLF finds the reports extremely concerning.

b. Threats During Mandatory Captive-Audience Meetings

A key element of UNFI's efforts to prevent workers from organizing was to require employees to attend antiunion "captive-audience" or "forced listening" meetings. As described by Human Rights Watch, such meetings are 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."[13] While permitted under current U.S. labor law, the use of captive-audience meetings – in combination with the denial to workers of similar access to information from union supporters – has been frequently criticized as violating freedom of association under international labor standards.[14]

[13] *See, e.g.,* Human Rights Watch: A Strange Case at 121.
[14] *See, e.g.,* Human Rights Watch: A Strange Case at 10; Human Rights Watch: Unfair Advantage at 26.

The ILRF heard substantial, credible testimony that beginning roughly one month before the union election, UNFI required employees to stop work, and in groups of 10-15 workers, to listen to antiunion presentations by UNFI managers and consultants in the warehouse's conference room. The warehouse's general manager, Frank Manzano, reportedly attended most of these the meetings; other participants included two to three UNFI executives who did not ordinarily work at the facility; and two or more outside consultants reportedly hired by UNFI, whom workers had not seen prior to the unionization effort. Over the course of the next month, the company required virtually every worker at the warehouse to attend these sessions, each of which lasted from 45 minutes to two hours. Workers reported having had to attend three to six captive-audience sessions during this period.

As described by workers, the managers, executives, and consultants who conducted the meetings repeatedly conveyed the following messages:

- That the union only wanted the workers' dues and would not do anything to help them.

- That if the union won the election it would call a strike, during which the company would permanently replace striking employees.

- That the company could shut down the warehouse and reopen in another location at any time.

- That there were no guarantees that the union would achieve improvements, but that the company could guarantee that it was not going to pay workers any more than it was already paying them.

- That the union was as a "mafia" made up of people who live in "big houses" and have "nice clothes" who would take the workers' money and go to Las Vegas.

The fact that attendance at these sessions was mandatory upset many workers, not only because they disagreed with what they were told, but also because it caused employees to fall behind in meeting their daily quotas for picking products from the warehouse's shelves. One worker, who asked if she could leave the meeting to return to work, was told by a senior UNFI executive, "You have to stay and listen."

Workers reported being afraid to speak freely during the meetings. One employee stated, "People were afraid because the manager was there. How are you going to talk negatively about your boss if he is sitting in front of you?" Another worker recounted, "I was afraid to ask any questions because the general manager was at all of the meetings. I felt like you couldn't ask any questions because [if you did,] he was going to see who was involved."

Importantly, while requiring that workers repeatedly attend antiunion sessions, UNFI did not permit employees who were members of the union's organizing committee

or other representatives of the union to make presentations to workers from a pro-union perspective. In one of the first captive audience meetings that the company held, several union supporters did attempt to question UNFI's consultant regarding his antiunion statements. The exchange became aggressive and culminated in the consultant saying to the union supporters, "I hate you fuckers." Following this incident, UNFI excluded many of the union supporters from the remainder of the meetings.

UNFI management's antiunion campaign resulted in an atmosphere of fear among the warehouse's workers and led to the defeat of the unionization effort in the May 17 NLRB election. As one worker put it, "At the beginning I was sure that I was going to vote for the union. But so many things happened and I started to doubt. I was worried that I would be left without work. These are hard times; it's difficult to be without work. I was scared and stressed." Similarly, another worker reflected, "At the beginning a lot of people were in favor of the union. But [then] the company made them feel afraid and harassed them into deciding not to vote for the union. That is why the union lost the election. … The [captive audience] meetings had a big effect on the vote. A lot of people voted against the union because they were afraid."

The ILRF concludes that UNFI's conduct during the period prior to the election violated workers' freedom of association in two ways. First, UNFI's use of specific threatening messages – including implying that the warehouse may shut down if workers' vote for the union, stating explicitly that it would permanently replace workers in the case of a strike, and that the union would be powerless to compel the company to improve working conditions – were plainly calculated to, and did, have the effect of instilling fear and a sense of futility among workers. These messages undermined workers' ability to make an uncoerced decision with respect to union representation.

Among these messages, the threat to hire permanent replacement employees in the case of a strike was the most damaging. It is noteworthy that, according to workers interviewed, union representatives had never discussed calling or carrying out a strike. The company's harsh threats with respect to this issue served as potent tactic in instilling fear that a vote to unionize could lead to the loss of workers' jobs.

Because permanent replacement of striking employees has the effect of severely undermining freedom of association, this practice, though permitted under U.S. labor law, has been repeatedly criticized by international labor law bodies and human rights authorities. In 1991, the ILO Committee on Freedom of Association determined that the practice of permitting permanent replacement of striking employees under U.S. labor law violated workers' right to strike and, therefore, their freedom of association itself.[15] Similarly, in a report published in 2000, Human Rights Watch found that "Employers' power to permanently replace workers in the United States who exercise the right to strike runs counter to international standards recognizing the right to strike as an essential

[15] "The right to strike . . . 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 just as legally." 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).

element of freedom of association."[16] Permanent replacement of striking workers is incompatible with freedom of association because it threatens workers with the ultimate employer penalty – the loss of employment itself.

UNFI may seek to defend its managers' and consultants' statements as constituting not "threats" but legally permissible "predictions." However, this distinction has been harshly criticized by human rights advocates and has not been embraced in the context of the international labor rights. As Human Rights Watch has explained:

> Under U.S. law, employers and consultants have refined methods of legally "predicting" – as distinct from unlawfully threatening – workplace closures, firings, wage and benefit cuts, and other dire consequences if workers form and join a trade union. For example, a prediction that the workplace will be closed if employees vote for union representation is legal if the prediction is based on objective facts rather than the employer's subjective bias. While this distinction might be discernible to lawyers and judges, it is not clear to workers who hear managers holding superior economic power linking "union" and "closing" in captive audience and in one-on-one discussions with employees.[17]

The National Labor Relations Board is presently investigating charges that UNFI violated U.S. law with respect to specific statements by managers and consultants. The ILRF found that, even under the more restrictive definition of "threats" adopted under U.S. labor law, UNFI likely did violate its employees' rights by engaging in prohibited employer threats.

For the purposes of this report, however, the ILRF considers the company's conduct under what we believe is the more reasonable and realistic standard endorsed by international human rights experts. Under this standard, we find that the company's predictive statements about strikes and closure of the warehouse created an environment of fear which interfered with workers' ability to make a free choice concerning unionization.

Second, the ILRF finds that UNFI denied workers an opportunity to make a free choice with respect to union representation by dominating and restricting workers' access to information. UNFI's practice of forcing its employees to repeatedly sit through lengthy presentations of antiunion views by management, while at the same time denying its employees similar opportunities to hear pro-union views from workers who were union supporters or union representatives, created an environment incompatible with respect for freedom of association. Just as we would not consider a political election free and fair if the incumbent administration required voters to sit through sessions of propaganda against its challengers, while at the same time preventing voters from hearing the latter's views, UNFI's domination of its workers' access to information violates basic norms of a free and fair elections.[18]

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[16] *See* Human Rights Watch: Unfair Advantage at 38.
[17] *See id.* at 29.
[18] For a discussion of the analogy between union elections and political elections, *see* Human Rights Watch, "Discounting Rights: Wal-Mart's Violation of US Workers' Right to Freedom of Association 73, 76 (May 2007) [hereinafter Human Rights Watch: Discounting Rights],

To be sure, UNFI's conduct is not unusual among U.S. companies waging aggressive antiunion campaigns. Indeed, UNFI's tactics are strikingly similar, for example, to those used by Wal-Mart in its efforts to prevent unionization by its employees, as documented by Human Rights Watch.[19] Like Wal-Mart, UNFI may find acceptance in U.S. law of its holding captive audience meetings, highlighting the threat of permanent striker replacements, and excluding union representatives from the worksite.[20] Such practices nevertheless violate international labor standards, which call for employers to allow workers' comparable access to information concerning unionization. The ILO Committee on Freedom of Association has held that the failure of U.S. labor law 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 unionization" is incompatible with respect for freedom of association as required by ILO Conventions 87 and 98.[21]

c. Additional Forms of Antiunion Intimidation

In addition to the practices described above, the ILRF also heard testimony from workers concerning a variety of additional management practices which further contributed to an environment of fear in the Moreno Valley facility. A common theme was the managers' communication to workers that forming a union was a form of betrayal against the company.

Several weeks before the election was held, for example, a manager approached a worker on the job and told her, "I'm very disappointed in you because I never thought you would do this." The worker replied that she did not know what the manager was talking about. The manager then said, "You went to the union meeting."[22] The worker then acknowledged that she had signed a union affiliation card. The manager replied that

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http://www.hrw.org/sites/default/files/reports/us0507webwcover.pdf; Gordon Lafer, "Free and Fair? How Labor Law Fails U.S. Democratic Election Standards," American Rights at Work (June 2005), http://www.americanrightsatwork.org/dmdocuments/ARAWReports/FreeandFair%20FINAL.pdf. Note that although the Teamsters Local 166 was given phone numbers and addresses of bargaining unit employees prior to the election, as is required under U.S. labor law, and accordingly made telephone calls and sent letters, these opportunities to communicate with workers are plainly not comparable to UNFI's practice of requiring employees to sit through lengthy, mandatory meetings.

[19] Human Rights Watch: Discounting Rights at 16, 76.

[20] Id. at 5, 99.

[21] International Labor Organization, Committee on Freedom of Association, *Complaint against the Government of the United States presented by the United Food and Commercial Workers International Union (UFCW), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET)*, Report No. 284, Case No. 1583 (1992) [hereinafter, Complaint Against United States re Permanent Striker Replacements]. *See also* Human Rights Watch: Unfair Advantage at 27.

[22] It bears noting that giving the impression of surveillance of union activity can, by itself, constitute an unfair labor practice under U.S. labor law. *See, e.g.*, *Waste Stream Management*, 315 NLRB 1099, 1124 (1994). Surveillance of union activities can also be the basis for setting aside the results of a subsequent election lost by the union. *See, e.g.*, General Engineering, Inc., 131 NLRB 901 (1961).

he was "very disappointed" by what the worker had done.

On the day of the NLRB election, May 17, 2012, the facility's general manager circulated among workers and spoke to them as they entered the voting area, asking them if he "could count on their vote" against the union. These and other comments conveyed to workers the message that they could not exercise their right to self-organization without betraying the trust of UNFI management.

Several workers also noted that actual process of voting itself was inherently intimidating because workers were required to walk down a hallway lined with administrative offices filled with managers before entering a conference room to cast their ballots. The conference room was the same room previously used by management to hold the captive audience meetings discussed above.

Since the May 27 election, UNFI management has continued to engage in intimidating or harassing conduct against employees who are union supporters. On various occasions the factory's General Manager has used the occasion of factory-wide meetings to make antiunion statements and single out union supporters. During one such meeting in late September, the manager announced that he had heard a rumor that there was going to be another union election at the facility and then turned to the union supporter who had been threatened by a manager with violence, as described above, and said, "and I know where [these rumors] are coming from." (In fact, to the ILRF's knowledge, no such election is planned; the members of the union's organizing committee and Teamsters Local 166 are awaiting the results of the NLRB's investigation of the union's unfair labor practice charges and election objections to determine further steps toward organizing the facility.)

Workers reported an incident in the past two weeks where a supervisor told workers that he used to be a member of a union at another worksite and described an altercation he had with a union leader which culminated in the manager physically hitting the former.[23] On the same conversation, the supervisor told workers that if a union came in, "[t]he company will follow the same rules and the union won't help you with anything."

Additionally, several workers reported that they believed that UNFI management has discriminated against union supporters by attempting to discipline them for their work performance more aggressively than it has other workers. One worker stated, "I think that the situation is bad; if they find out you are organizing, they start to watch you very carefully; they are looking to call you out for any small reason."

Finally, the ILRF heard allegations that UNFI had orchestrated the termination of several union supporters, justifying the dismissals on pretextual grounds related to work performance. In one instance reported by a worker, a supervisor told the worker in a conversation regarding unionization, "It would be better if you kept quiet. There are three people who have complained about what is happening here and they have all been fired." The ILRF was not able in the course of this inquiry to fully investigate the circumstances

[23] It was unclear from the testimony whether the union leader was a worker or union staff person.

of alleged retaliatory dismissals. A comprehensive review of these cases is necessary, as we recommend below.

B. UNFI Facility in Auburn, Washington

1. Background

Workers at UNFI's Auburn facility have been represented by Teamsters Local 117 since the early 1990's. At the time, the workforce originally unionized, the facility was owned by Nutra Source and later became Mountain People's Warehouse. In 1996, this firm merged with Cornucopia Natural Foods to form UNFI.

Workers at UNFI's Auburn facility are paid wages and benefits that are substantially lower than those paid to other unionized warehouses supplying the retail food service market in the Seattle area. A comparison of current wages and benefits prepared by the Teamsters shows that UNFI workers are paid 24% less in wages than other warehouse workers covered by other collective bargaining agreements in the region.[24] A comparison of overall compensation – including wages, pension, and health and welfare benefits – shows that UNFI pays it employees 38% - 49% less than other employers.[25]

The most recent collective bargaining agreement covering the UNFI's Auburn facility expired on February 29, 2012. Shortly thereafter, the union presented the company with a proposal for a successor agreement which included revisions the union said were needed to bring the company up the local industry standard for wages and healthcare and pension benefits. The union argued that these improvements were warranted given the growth of UNFI's business since the previous agreement was negotiated, including its becoming a distributor for Safeway, which had resulted in a significant increase in the number of workers the facility employs.[26]

After making minimal progress during initial negotiation sessions held on March 14 and April 23, the parties agreed on May 14 to extend the terms of the previous

[24] These figures reflect wages as of 2011 for the following food service warehouse employers, as indicated in extant collective bargaining agreements: UNFI, Safeway, Unified, Fred Meyer, Supervalu, Sysco, Food Services of America, and US Foodservice.

[25] The range reflects alternative calculations of retirement benefits. Reflecting that UNFI does not provide employees with a defined benefit pension plan, the lower figure assumes zero contribution to pension benefits. UNFI does have an employee stock option plan, the value of which depends on the value of the company's stock. The second figure in the range conservatively assumes a stock value of $2.00 per hour. The health and welfare figure for UNFI is an estimate based on information provided by UNFI to the Teamsters. The Teamsters reported that when it presented the estimate to UNFI, the company indicated that it had "no argument" with the analysis.

[26] Regarding UNFI's distribution agreement with Safeway, *see e.g.*, Jon Springer, "Safeway Boosts UNFI Q2 Sales," Supermarket News (Mar. 12, 2012) ("Sales to conventional supermarkets — including the first full quarter of business with Safeway — led to a 15.5% sales gain during the fiscal second quarter for United Natural Foods Inc., the distributor here said last week. The Safeway addition helped UNFI increase overall sales to conventional supermarkets by 32% in the quarter. The Pleasanton, Calif.-based chain began sourcing from UNFI late last year. Conventional supermarkets now comprise 25% of UNFI's overall sales."), http://supermarketnews.com/retail-amp-financial/safeway-boosts-unfi-q2-sales#ixzz2AnEdhr1Q

agreement through June 30, 2012. The incidents that are the focus of this inquiry began in the days immediately following the parties having reached the May 14 extension agreement.

2. Findings

As noted above, the National Labor Relations Board is presently investigating UNFI's conduct at the facility in response to unfair labor practices charges filed by the Teamsters. Those charges focus principally on the alleged failure of UNFI to comply with its duty under U.S. law to negotiate in good faith with the union as its employees' collective bargaining representative.

The ILRF focused our investigation, however, on the allegation that the company violated employees' freedom of association at this facility by discriminating against them on the basis of their union membership.

a. Discrimination on the Basis of Union Membership in the Allocation of Work Opportunities

As noted above, ILO Convention 98, Article 1 provides that "[w]orkers shall enjoy adequate protection against acts of antiunion discrimination in respect of their employment," and notes that such discrimination includes in particular "acts calculated to … prejudice a worker by reason of union membership." The ILO Committee on Freedom of Association has stated that this prohibition on discrimination applies to the allocation among employees of work assignments and benefits.[27]

The ILRF found, based on extensive, credible worker testimony, that UNFI engaged in antiunion discrimination in violation of Convention 98 by responding to its Auburn workers' proposals for improved wages and benefits with a campaign of retaliation that has significantly reduced its unionized workers' compensation, work opportunities, and job security. In particular, UNFI has shifted overtime and work opportunities away from unionized workers to a newly hired, parallel workforce of non-union, contract workers hired through a temporary labor agency and to a separate, nonunionized facility in Ridgefield, Washington. These actions have had the effect of reducing the take home pay of many of the unionized workers in Auburn by 30-40%.

As elaborated in the following section, the company's apparent purpose in taking these actions has been to reinforce a message to workers that it can and will permanently replace them if they exercise their right to strike, a threat that, as already discussed, is incompatible with respect for freedom of association.

Shift of Work Opportunities to Nonunion Contract Workforce

Beginning around May 15, UNFI introduced into the warehouse substantial numbers of contract workers employed by a temporary agency, Roadlink. UNFI directed these workers to perform duties previously performed by the company's regular

[27] *See, e.g,* ILO Committee on Freedom of Association Digest, paras. 780 ,781, 787, 788.

employees, including such tasks as receiving, loading, and picking orders.[28] Within a month, UNFI had brought in approximately sixty-five Roadlink workers, more than one third the size of the regular unionized workforce of approximately 190. The company has maintained the contract workforce at fluctuating levels since this time.

UNFI deployed this contract workforce in a manner that reduced compensation and job security for unionized employees. First, the introduction of a large contract workforce eliminated daily overtime opportunities for regular employees. As discussed further, below, overtime has historically been a significant portion of workers' earnings.

Second, UNFI management assigned to the contract workers certain "premium" work assignments, in the repack, "Haba," freezer, chill, and dock departments, while rejecting requests from unionized employees to work in these positions. These assignments are highly desirable because employees working in these areas receive an additional $0.75 per hour and are not subject to the numerical production quotas which employees in other departments must meet in order to avoid discipline, up to and including termination.

Third, management favored contract workers working in the "selector" classifications by assigning them larger order batches which make meeting production quotas significantly easier to meet, and, thereby eroding job security for unionized employees in the same classification who were not so favored.

The union formally protested the company's use of the Roadlink workers shortly after they were introduced – both verbally on May 22 and 24 and through a formal grievance lodged on May 19 – asserting that the performance of bargaining unit work by these contract employees was a violation of the collective bargaining agreement. This grievance remains unresolved.

The introduction of the Roadlink workforce inflamed tensions at the worksite and contract negotiations became focused on the issue. Ultimately, on July 25, 2012, the parties agreed to extend the contract again, with this extension effective through August 31, 2012. The extension included a number of provisions specifically limiting the use of Roadlink employees, including that the Roadlink workforce be reduced to no more than thirty and that Roadlink contract employees not be utilized to perform work in specified categories or "any work if there is/are qualified bargaining unit volunteer/s."[29]

After the July 25 extension agreement was reached, UNFI, reduced the number of contract workers at the facility. UNFI continued however, in numerous cases, to assign Roadlink contract workers to perform the core work of warehouse employees, such as receiving shipments and picking orders, displacing unionized workers' opportunities for

[28] While UNFI had previously contracted to have a handful of 4-5 Roadlink workers perform a specialized task at the facility, the company had not before contracted with Roadlink on the scale it did in May 2012.

[29] As also reflected in the extension agreement, the union continued to dispute UNFI's entitlement to use contracted employees at all and reserved its right to challenge the practice through grievance and arbitration or before the National Labor Relations Board.

work hours.

The second contract extension ended on August 31, 2012. On the following day, UNFI management began again to substantially increase the contract workforce at the warehouse. Within several weeks, there were approximately seventy contract employees at the facility – the majority of whom were working on the second shift – performing the core work of unionized employees, including receiving shipments, pulling items from racks, and loading shipments. The company also brought to work at the warehouse employees from its facilities in Colorado, who were assigned to take inventory, drivers from Texas, California, and Oregon, and managers to function as "security" personnel from Rhode Island.

Shift of Work to Nonunion Facility

After the expiration of the contract extension employees also learned that the company was transferring the servicing of its Whole Foods account from the Auburn facility to the company's warehouse in Ridgefield, Washington, a nonunionized facility. Employees learned of the transfer of this work when they were told to pack a large quantity of Whole Foods goods for shipment to Ridgefield in early September 2012. Managers initially told workers this was being done to remedy a shortage at the Ridgefield facility, but managers later acknowledged that the entire Whole Foods account for the region had been moved to Ridgefield for an indefinite period of time.

According to UNFI's annual report to shareholders, Whole Foods Market accounts for more than a third of UNFI's net sales.[30] Employees reported that prior to the shift of this work to the Ridgefield facility, handling of goods for Whole Foods made up a similar proportion of the overall work of the Auburn facility.

The increase in the contract workforce and the shift of the Whole Foods account to Ridgefield had the effect of reducing the unionized workforce's work opportunities to such an extent that many workers did not have sufficient work to complete a standard straight time shift of eight hours and were, in many cases, sent home early.

Elimination of Overtime

On the morning of Saturday, September 8, the unionized workers at UNFI's Auburn facility voted on the company's contract offer. The majority voted against accepting the company's proposal. During the following week, UNFI management substantially curtailed overtime opportunities for its unionized employees. Management announced to the facility's night shift that the company would no longer permit employees the opportunity to perform overtime work on their days off. It also eliminated overtime completely for drivers. At the same time, the company assigned overtime to the contract workforce, such that in the most common position, order selector, contract workers were regularly working ten hours or more per week more than were the facility's

[30] United Natural Foods, Incorporated, Form 10-K Annual Report (September 26, 2012), http://biz.yahoo.com/e/120926/unfi10-k.html.

regular unionized workers.

Overtime had historically been a regular part of employment at UNFI and a significant portion of employees' income during much of the year, which workers had come to rely on to afford basic expenses. Because many workers regularly had worked 15 to 20 hours of overtime per week, the elimination of overtime reduced their take-home pay by fully 30-40 percent, with their net wages typically falling from approximately $1,700 to $1000 per two-week pay period.

Several workers relayed that, as a consequence of losing overtime income and being unable to make payments, they have lost their apartments or cars. One worker recounted, "It is cold in my home, but I have not turned on the heat yet. My kid asked me to turn on the heat but I had to tell him, 'Not yet, we can't afford it.'"

b. Threats of Permanent Striker Replacement

UNFI has compounded the violations of freedom of association described above by threatening to permanently replace any unionized worker who exercises the right to strike. As discussed above, although the practice is permitted under U.S. labor law, the permanent replacement of striking employees has the effect of severely undermining freedom of association. It has accordingly been the subject of repeated criticism from international labor law bodies, including the ILO Committee on Freedom of Association[31], and human rights authorities such as Human Rights Watch.[32]

UNFI has repeatedly threatened to permanently replace its unionized employees should those workers strike. During late August, UNFI management sent personalized letters to employees' homes encouraging them to accept what the company termed its "last, best, and final offer" (the first of two such offers it has made to date). The letter stated that, should employees go on strike following the expiration of the contract, "[o]ne of the things a company can do to ensure business continues without disruption is to permanently replace all striking workers during such a strike." The letter further stated that no replaced worker would receive UNFI pay, health benefits, or unemployment benefits. The company reiterated this threat in an October 2 memorandum to unionized employees in which it stated, "The company has the lawful right to hire permanent replacements for strikers. Permanent replacements may be retained by the Company in their positions even after a strike ends."

While the use or threatened use of permanent striker replacements violates workers' freedom of association in any context, UNFI's use of this threat at the Auburn facility has been particularly damaging to workers' rights in this case because the company has taken such substantial steps to make the threat credible. As detailed above, the company introduced into the warehouse a large, parallel workforce of contract workers and shifted to this workforce work assignments previously performed by unionized workers.

[31] Complaint Against United States re Permanent Striker Replacements, supra note 20.
[32] Human Rights Watch: Unfair Advantage at 38.

As reported by workers, UNFI managers openly acknowledged that they had taken on the contract workforce specifically to replace the unionized workers in the case of a strike. Additionally, on September 26, UNFI posted an advertisement on Craigslist for a "Hiring Event" on September 27 and 28, stating that the company was "Hiring REPLACEMENT Warehouse Positions & CDL Drivers." The interviewing of applicants was held at the warehouse itself. Through these actions, UNFI underlined the seriousness of its threat to workers that it would replace them if they exercised their right to strike by effectively showing them their replacements.

UNFI further reinforced this threat of permanent replacement, by conveying an expectation on the part of the company that if there is a strike, it will be long and conflict-ridden. The company communicated this message most strikingly by the company's militarization of the physical environment at the facility.

On the morning of September 8, as noted above, the facility's unionized workers held a vote on the company's contract offer. The majority voted down the proposal. Only hours later, on the same afternoon, UNFI began installing a chain link fence and flood lights around the facility and began having the grounds patrolled by armed guards, a practice it has maintained to the present.

Although, as noted, permanent replacement of strikers violates international labor standards, one argument typically made in favor of the practice is that an employer confronted by an indefinite strike by workers possessing specialized skills might find that, in order to keep its business in operation, it needs to offer permanent positions to replacement employees.[33]

In this case, however, UNIFI managed to hire dozens of workers on temporary status through Roadlink to perform core warehouse functions without offering these workers, upon hire, regular employment. It has paid these workers $10.50 an hour – just over half of the wages it pays to its unionized employees – and does not provide them with health insurance. UNFI has maintained this parallel, contract workforce for more than five months.

Finally, it bears noting that UNFI has provided inaccurate information to workers with respect to the company's legal right to replace strikers. While permanent striker replacement is allowed under U.S. law in the case of an economic strike, the company does not have the right to hire permanent striker replacements if the strike is carried out to protest a management action that is deemed an "unfair labor practice."[34] UNFI omitted this important exception in each of its written communications to workers concerning the permanent replacement of striking employees. The omission is

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[33] *See generally,* Jeffrey Sherman, *The Striker Replacement Doctrine as Seen by a Management Attorney,* Perspectives on Work (LERA, 2006), available at: http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Fall06-Sherman.htm.

[34] If a job action is deemed by the NLRB an unfair labor practice strike, the employer is required to reinstate striking employees at the time of their return to work even if the employer has hired permanent replacements. *See, e.g., Mastro Plastics Corp. v. NLRB,* 350 U. S. 270, 278 (1956).

particularly noteworthy in view of the fact that the company has engaged in conduct that may well be deemed unfair labor practices by the National Labor Relations Board, which as noted is now investigating UNFI's practices.

VIII. Recommendations

In view of the findings outlined above, the ILRF recommends that UNFI take the following steps without delay.

With respect to the Moreno Valley, California facility:

1. Terminate the manager who made threats of violence against union supporters. Inform the workforce of this action and issue a formal apology to workers concerning these threats.

2. Issue a statement to the workforce conveying the following: i) workers of UNFI have the right to join a union of their choosing; ii) management will in no way interfere with this choice nor take any adverse action of any kind against any worker who makes this choice; iii) any manager or supervisor who attempts in any way to coerce or threaten any worker because of his choice to unionize will be disciplined; iv) UNFI will negotiate a collective bargaining agreement in good faith with any union selected by workers as their representative; v) UNFI will not close or transfer work away from the facility in response to a decision by workers to unionize; vi) UNFI will not hire permanent replacements in the case that workers exercise their right to strike. vii) Require every department supervisor or manager to read this statement aloud to the employees under his or her direct supervision. viii) Provide a typed copy of this statement, on company letterhead, to every employee. The public announcement and distribution procedures should be carried out under the observation of the ILRF or another respected labor rights advocacy organization.

3. Cooperate with the Teamsters and ILRF in the investigation of allegations that particular workers have been terminated in retaliation for their union activities. Reinstate with back pay any worker found to have been so terminated.

4. Pledge to recognize and bargain in good faith any union which has gained the support of a simple majority of workers as demonstrated by the third party verification of signed union membership cards. This is the procedure recommended by Human Rights Watch, among numerous other authorities, as the fairest process for determining workers' decision with respect to union representation.

5. Grant outside union organizers access to non-work areas of its facilities to communicate regularly with workers during non-work time (breaks and between work shifts).

With respect to the Auburn, Washington facility:

1. Cease discriminating against union members in the allocation of opportunities for work and training. To accomplish this, it will be necessary to remove from the facility and from among the facility's drivers contract replacement workers hired through Roadlink or any other labor service who are performing jobs that are part of the bargaining unit and/or which have previously been performed by unionized workers.

2. Issue a statement to the workforce that UNFI will not hire permanent replacements in the case that workers exercise their right to strike. Require every department supervisor or manager to read this statement aloud to the employees under his or her direct supervision. Provide a copy of the text of this statement, on company letterhead, to every employee. The public reading and distribution of this statement should be carried out under the observation of the ILRF or another respected labor rights advocacy organization.

3. Engage in good faith bargaining with workers and their representatives at Teamsters Local 117 toward the completion of a successor collective bargaining agreement. In so doing, the company should bear in mind its commitment, as a member of the Sustainable Food Trade Association, to "guarantee all workers in our industry access to fair wages, sufficient benefits and quality work conditions."[35]

4. Grant outside representatives of Teamsters Local 117 organizers access to non-work areas of its facilities to communicate regularly with workers during non-work time.

The ILRF recommends that retailers doing business with UNFI, including, in particular, Safeway and Whole Foods, condition continued dealings with UNFI on the company's demonstrable compliance with the fundamental rights of its employees.

The ILRF encourages stakeholders, including organizations concerned with respect for the rights of workers in food supply chains as well as the general public, to contact UNFI and to work in appropriate ways to compel the company to cease the violations basic labor rights documented in this report.

[35] Sustainable Food Trade Association, Declaration of Sustainability, http://www.sustainablefoodtrade.org/declaration-of-sustainability/