



# **FREE SPEECH AND FREEDOM OF ASSOCIATION: FINDING THE BALANCE**

**A Position Paper of the International Trade Union Confederation**

**June 2013**





# FREE SPEECH AND FREEDOM OF ASSOCIATION: FINDING THE BALANCE

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## I. INTRODUCTION\*

The fundamental right to freedom of association guarantees that workers are able to form and join trade unions free from any interference from employers and governments. This basic principle has been applied consistently by the International Labour Organisation (ILO) for over 60 years. However, the International Organisation of Employers (IOE) is now attempting to undermine that principle by arguing, in the name of freedom of expression, that anti-union campaigns meant to discourage workers from forming or joining a union are consistent with international standards. They even go so far as to argue that anti-union campaigns may be an obligation of employers.

To accomplish this, the IOE relies heavily on a contorted interpretation of a 2010 decision by the ILO's Committee on Freedom of Association (CFA) concerning Delta Airlines' campaign to encourage workers to "shred" their union election ballots.<sup>1</sup> Only by claiming that the Delta decision represents a radical departure from precedent can the IOE now argue the existence of an international right to wage anti-union campaigns worldwide. Indeed, the IOE had previously conceded that U.S.-style anti-union campaigns violate the right to freedom of association as established by the ILO.

The International Trade Union Confederation (ITUC) recognizes that employers and workers have a right to express themselves; however, that right is not unlimited. The limit must be drawn where interference with the right to association begins. The vitriolic anti-union campaigns waged by U.S.-based employers cross that line. The fact that aggressive anti-union campaigns are considered legal under the domestic labour law of a country does not override international standards. Indeed, labour laws like those found in the U.S. are outliers among nations, permitting anti-union speech that is illegal (and unthinkable) elsewhere when workers seek to form and join trade unions.

## II. THE PRINCIPLE OF NON-INTERFERENCE

The ILO has taken a consistent view with regard to a worker's choice to form or join a trade union – simply put, government and employers must not interfere in that decision. The principle of non-interference was articulated as long ago as 1949, shortly after Convention No. 87 on the right to freedom of association and to organise was adopted. The ILO said at that time that the Convention 87's Article 11 "lays down an obligation for the State to take measures to prevent any interference with such rights without qualification, that is, interference by individuals, by organisations or by public authorities".<sup>2</sup>

Of course, workers, trade unions and employers have a right to freedom of expression as well as association. However, employers' right to freedom of expression cannot interfere with workers' right to freedom of association. These rights are to be complementary, not in conflict. Indeed, workers must be able to exercise freedom of association in "a climate free of violence, pressure, fear and threats of any kind".<sup>3</sup>

\*This report responds to the arguments made by the International Organisation of Employers in its paper, "A Response by the International Organisation of Employers to the Human Rights Watch Report 'A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations', A Special Edition of the International Labour and Social Policy Review (May 2011).

<sup>1</sup> ILO Committee on Freedom of Association, Complaint against the United States, Case No 2683, Report No. 357, June 2010. The committee is a tripartite body that by consensus makes conclusions and recommendations on complaints filed by worker and employer representatives relating to the right to freedom of association, to organise and to bargain collectively.

<sup>2</sup> International Labour Conference, Record of Proceedings, 32d Sess. 306, 470 (1949) (emphasis added).

<sup>3</sup> ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition (2006), paragraph 35.

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Few international cases that deal directly with the intersection of association and expression, but those that do make clear that where speech interferes with the decision of a worker to join a union, it is prohibited by principles of freedom of association.

In a United Kingdom case arising from events in the 1980s and treated by the CFA in the 1990s, the Committee found that an employer's "persuasion" crossed the line to interference. The case involved intermingled issues of speech intended to persuade, on one hand, and alleged threats of dismissal.

Much as employers in the United States aggressively try to persuade employees not to join a union or to vote for a union in an NLRB election (as they are permitted to do under U.S. law but contrary to the ILO non-interference standard), a UK steel company took advantage of Thatcher-era anti-union legislation and pressured employees to forego membership in their trade union. Instead, management tried to persuade employees to opt for an individual contract of employment instead of union representation.

The union alleged that management threatened to dismiss employees who did not abandon the union. The UK government, in a later reply, denied that such threats occurred. The CFA did not make a finding on the threat issue. On the persuasion issue, the CFA found that "the employer has used this freedom to unduly influence the choice of workers ... and to undermine the position of the union".<sup>4</sup>

The Committee concluded:

As concerns the acts allegedly taken by the management of Co-Steel with a view to changing its contract arrangements with its employees, the Committee would recall that attempts by employers to persuade employees to withdraw authorizations given to a trade union could unduly influence the choice of workers and undermine the position of the trade union, thus making it more difficult to bargain collectively, which is contrary to the principle that collective bargaining should be promoted.<sup>5</sup>

In a separate communication to workers, the employer cautioned them that they should "avoid getting involved" in a lawful union rally – the implication being that the employer might punish them for participation. Thus "persuaded", employees did not attend the union rally. The UK government, in its reply, said that "Co-Steel believes that no one attended because they did not consider it appropriate. However, if staff had attended they would certainly not have been disciplined".<sup>6</sup>

Here is how the CFA addressed the employer's use of speech intended to persuade in this context:

As concerns the TUC rally . . . the Committee must recall that the right to organise public meetings constitutes an important aspect of trade union rights and such activity would seem all the more legitimate given that, in the present case, its specific purpose was to address the clearly legitimate trade union issue of the right to representation. The Committee considers that the posting of a notice by the management suggesting that the employees of Co-Steel not get involved in such a rally could be understood as a threat to the workers in question not to exercise their trade union rights in this respect and therefore constitutes undue interference with such rights. It requests the Government to make all efforts to ensure that such interference does not reoccur.<sup>7</sup>

In a 1994 case arising in New Zealand, the CFA similarly found that the employer's efforts to "persuade" workers as to whether to be represented by a union violated principles of freedom of association. There, workers were asked to sign collective employment contracts individually and asked to withdraw their authorization of the union as their bargaining agent. In New Zealand, such speech by employers

<sup>4</sup> ILO Committee on Freedom of Association, Complaint against the United Kingdom, Case No. 1852, Report No. 304, paragraph 495 (1996).

<sup>5</sup> Id., paragraph 494 (emphasis added).

<sup>6</sup> Id., Report in which the committee requests to be kept informed of development, Report No 309, paragraph 328 (1998).

<sup>7</sup> Id., paragraph 340.

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was deemed legal at the time. The CFA decided however that “employers’ attempts to negotiate collective contracts by seeking to persuade employees to withdraw authorizations given to a trade union could unduly influence the choice of workers and undermine the position of the trade union[.]” The CFA further stated that the domestic law “gives clearly insufficient protection against actions intended to interfere with a worker’s decision to authorize a union”. It concluded that “protection against interference and discrimination on the basis of membership of a union is insufficient in the New Zealand context, if it is not accompanied by protection against interference and discrimination on the basis of authorization of a union”.<sup>8</sup>

In a 2010 case, the CFA had noted several “fundamental deficiencies” in the labour law and called on the government of Malaysia amend it to ensure that “employers do not express opinions which would intimidate workers in the exercise of their organisational rights... or encouraging workers to withdraw their membership”.<sup>9</sup>

Further, while it is not as authoritative as the CFA, a “Guide for Business” on core labour standards issued jointly by the ILO and the Global Compact in 2008 (reissued in 2010) articulated the non-interference standard as follows:

Employers should not interfere in workers’ decision to associate, to try to influence their decision in any way, or discriminate against either those workers who choose to associate or those who act as their representatives.<sup>10</sup>

As explained in the following section, the CFA reaffirmed the nature of the interrelationship between the rights of association and expression in Case 2683, which responded to a complaint filed by the Association of Flight Attendants (AFA-CWA) after an anti-union campaign by Delta Airlines management frustrated the workers’ organising effort.

Despite the ILO’s consistent approach, the International Organisation of Employers (IOE) has recently attempted in several fora to use the Delta case to turn decades of ILO’s jurisprudence on its head. In the view of the employers, the CFA decision signals support for a radically different view than previously expressed – namely that employers are free to engage in anti-union campaigns to discourage workers from forming or joining a union. The IOE apparently seeks to export U.S.-style union-busting campaigns around the world with the imprimatur of the ILO. But, as the IOE well knows (and in fact previously conceded), American management-style anti-union tactics are not in conformity with ILO jurisprudence.

### III. DELTA DECONSTRUCTED

The facts of the Delta case centre on an anti-union campaign in which management launched a “Shred it!” crusade, telling flight attendants to tear up their ballots in a union representation election to prevent a majority from voting.<sup>11</sup> The labour law governing the airline sector in the U.S., the Railway Labour Act (RLA), made it necessary at the time of the AFA organising campaign for the union to secure a majority vote from the entire “bargaining unit” of employees eligible to vote in the representation election. This is in contrast to the requirements of a representation election under the National Labour Relations Act, and indeed most labour laws, in which a union need only the support of the majority of those voting. In light of this unusual voting requirement, Delta management made tearing up their ballots - “Shred it!” – its main slogan as all non-votes (shredded ballots) would be counted as votes against the union.

In its analysis, the Committee explained its long-standing position that, “While having stressed the importance which it attaches to freedom of expression as a fundamental corollary to freedom

<sup>8</sup> ILO Committee on Freedom of Association, Complaint against New Zealand, Case No. 1698, Report No. 292, paragraphs 730, 731, 732 (1994).

<sup>9</sup> ILO Committee on Freedom of Association, Complaint against Malaysia, Case No. 2301, Report No. 356 (2010).

<sup>10</sup> ILO and UN Global Compact, The Labour Principles of the United Nations Global Compact: A Guide for Business (2008; reprinted 2010).

<sup>11</sup> ILO Committee on Freedom of Association, Complaint against the United States, Case No 2683, Report No. 357, June 2010.

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of association and the exercise of trade union rights on numerous occasions, the Committee also considers that they must not become competing rights, one aimed at eliminating the other...<sup>12</sup>

In further clarification of the decision, the ILO Office stated:

The complementary nature of these two freedoms [expression and association] as mutually reinforcing has long been established principle. . . There is no doubt that freedom of expression is a basic civil liberty whose protection... is essential to the meaningful exercise of freedom of association. Care should be taken within the national context, along the lines of the basic principles mentioned above, to ensure that the former freedom does not interfere in practice with the free choice of workers in relation to their right to organise.<sup>13</sup>

Despite this reaffirmation of long-settled principles, the IOE argues that the CFA's decision "was an endorsement of the approach under U.S. law to determine whether employer speech amounts to interference".<sup>14</sup> In other words, they argue that U.S. law is now the international standard. U.S. notions of free speech in the labour context is quite expansive as compared to many other countries, and allows employers to openly and aggressively interfere with workers' organising efforts through sustained, fear-mongering campaigns of psychological pressure and thinly-veiled threats aimed at blocking trade union formation. This is entirely contrary to the ILO's non-interference standard.

Contrary to the employers' claims, the CFA did not endorse the anti-union campaign "speech" exemplified by Delta's conduct. Indeed, the CFA was quite critical of management's conduct. It couched its criticism in typically diplomatic ILO language, taking "due note of the stress placed by the complainants on what they consider to be the unacceptable practice of encouraging employees to rip up their voting instructions, displaying posters and banners calling on employees to shred their ballots and distributing similar pins to flight attendants". The committee went on to say,

"The Committee expresses a general concern at the use of "shred it" buttons in this regard. While providing all relevant ballot information, including how to vote against a union, would be acceptable as part of the process of a certification election, the Committee considers that the active participation by an employer in a way that interferes in any way with an employee exercising his or her free choice would be a violation of freedom of association and disrespect for workers' fundamental right to organise..."<sup>15</sup>

Employers make much of the fact that the CFA did not upset the finding by domestic authorities that management's tactics were within the wide parameters of U.S. law permitting aggressive anti-union campaigns. Employers exploit this self-restraint to insist that the CFA affirmatively declared management's campaign consistent with ILO standards. It said no such thing. The CFA exercised forbearance in not trying to substitute itself for a domestic fact-finding and adjudicative body. The CFA did not say "management was right and the union was wrong". It said,

[The Committee] is not in a position to assess the factual evidence in this specific case and weigh the various elements with meaningful authority, especially in the light of the contradictions brought to light between the complainants' allegations and the information transmitted by the Government. The Committee therefore will not attempt to re-evaluate the assessments already undertaken by the NMB [the relevant U.S. agency] of the facts in this particular dispute.<sup>16</sup>

<sup>12</sup> Id., paragraph 584.

<sup>13</sup> Letter from International Labour Standards Department to International Organisation of Employers, 12 July 2010.

<sup>14</sup> International Organisation of Employers, "A Response by the International Organisation of Employers to the Human Rights Watch Report "A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations", A Special Edition of the International Labour and Social Policy Review (May 2011), at [http://www.uschamber.com/sites/default/files/comments/IOE\\_HRW\\_Response.pdf](http://www.uschamber.com/sites/default/files/comments/IOE_HRW_Response.pdf) (accessed 27 March 2013).

<sup>15</sup> Id., at paragraph 584.

<sup>16</sup> Id., at paragraph 581.

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Finally, if the union had really “lost” the case, the CFA would have dismissed it. Instead, it adopted a report “in which the committee requests to be kept informed of developments”, a formulation signalling on-going concern about the case’s implications for freedom of association. Further underscoring its concern, the CFA concluded its decision with a recommendation formulated as follows:

The Committee draws the Government’s attention to the importance of providing for specific and effective protection in relation to the right to organise and the selection of a collective bargaining agent and requests it to review the current application of the RLA with the social partners in respect of the issues raised in this specific case, with a view to taking the necessary measures so as to ensure full respect in practice for the principles set forth in its conclusions.<sup>17</sup>

Quite clearly, the Delta case did not enunciate a dramatically new standard on freedom of expression. Rather, the CFA restated longstanding support for the principle of non-interference in workers’ exercise of their right to freedom of association.

The IOE also argues that international law defers to national law on the question as to where to draw the line between permissible employer speech and impermissible employer interference. That simply cannot be the case and neither the Delta case nor CFA Case No. 2654 (Canada), cited for that proposition, say anything of the sort. CFA 2654 did find that as Canadian law considers an unfair labour practice any employers’ speech that interferes with, restrains, intimidates, threatens or coerces a worker in the exercise of the right to freedom of association, it is consistent with international principles of freedom of association. This is not the same as saying that national law gets to set the boundaries as to when speech interferes with the right of association. If it were otherwise, it could vitiate the protections afforded by Convention 87.

### IV. AN EMPLOYER OBLIGATION TO CAMPAIGN AGAINST UNIONS?

In addition to claiming that the Delta decision signalled a new standard on interference with workers’ freedom of association, the employers make the astonishing assertion that ILO standards actually require employers to launch anti-union campaigns. They suggest that they must hold captive-audience meetings and supervisor-employee pressure sessions because they have the best interests of workers at heart. They call it “an obligation not to stand by idly.”<sup>18</sup>

Employers are again standing on its head a fundamental precept of freedom of association. Workers have the right to form and join trade unions for the defence of their interests, and employers have the same right with respect to their interests. It is not the employer’s role to defend workers’ interests. Employers’ coercive power over employees and employees’ subordination make impossible the independence that workers need to form and join trade unions.

The employers refer to the CFA Digest of Decisions for the proposition that “[t]he full exercise of trade union rights calls for the free flow of information, opinions and ideas, and to this end workers, employers and their organisations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities.”<sup>19</sup> We agree, but the IOE is wholly disingenuous in citing this principle to claim an obligation to impose their views on unions upon workers. By “their” meetings, the CFA clearly meant employers’ and unions’ own meetings within their own councils, not labour-management meetings and especially not captive-audience meetings or one-on-one supervisor-employee meetings in which employers tell workers that terrible things will happen if they form a trade union.

<sup>17</sup> *Id.*, at paragraph 585.

<sup>18</sup> International Organisation of Employers, “A Response by the International Organisation of Employers to the Human Rights Watch Report “A Strange Case: Violations of Workers’ Freedom of Association in the United States by European Multinational Corporations”, A Special Edition of the International Labour and Social Policy Review (May 2011), at [http://www.uschamber.com/sites/default/files/comments/IOE\\_HRW\\_Response.pdf](http://www.uschamber.com/sites/default/files/comments/IOE_HRW_Response.pdf) (accessed 27 March 2013).

<sup>19</sup> See ILO Committee on Freedom of Association, Digest of Decisions, Fifth (revised) edition (2006), para. 154.

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A review of the cases in the Digest cited by employers makes it clear that the free flow of speech being protected by the CFA is that among trade unionists and between unions and the government over trade union matters, not between management and workers.

1. **Congo:** Police agents broke up a union meeting and assaulted union members, expelled union leaders from the city, closed and ransacked a union office, banned union meetings, created an anti-union blacklist, among other abuses, all because the union was making public statements at union meetings and rallies in opposition to government policy.<sup>20</sup>
2. **Belarus:** The authorities detained and expelled a delegation from the Polish NSZZ Solidarnosc union after the visiting union leaders held meetings with workers. The police then arrested the Belarus unionists who organised the meetings and closed their headquarters.<sup>21</sup>
3. **Chile:** An employer dismissed union leaders and government authorities arrested them after they organised a protest against proposed legislation.<sup>22</sup>
4. **Uruguay:** An employer undertook a series of anti-union actions against trade union leaders who held a meeting with union members inside the workplace, a practice they had carried out without interference for 30 years.<sup>23</sup>
5. **Nepal:** Police assaulted and arrested trade unionists who held meetings and protests against the government's issuance of an over-reaching list of "essential services" in which strikes were banned (including all newspapers and TV stations, all transportation sectors, hotels, motels and other tourism workplaces and many more). The government banned union meetings and confiscated union banners and communications.<sup>24</sup>

These are not cases that stand for the proposition that employers can haul workers into meetings to hear anti-union diatribes and force employees to sit down with supervisors to listen to scripted "predictions" of dire consequences if they form a union. They stand for the proposition that the "free flow of information, opinions and ideas" is a right of workers among themselves and in their own meetings and communications to the public that should not be trampled upon by employer or government interference.

The law firm Littler Mendelson makes a similar claim to that of the IOE, stating:

"Many labour unions seek so-called "neutrality" agreements from employers. While styled as 'neutrality' they are more akin to agreements to remain silent in the face of efforts by unions to organise workers. By agreeing to remain silent, an employer effectively may deny workers information, opinions and ideas they have a right to receive under international law. Without such information, workers are left with an incomplete picture as they make their decision whether or not to affiliate with a labour union. Where this occurs, the right to freedom of association has effectively eliminated the right to freedom of expression, and that violates the principles of international law... As the result of ILO CFA Case No. 2683, it is now clear that under international law, information from employers in the form of expression and opinion is not only welcome, but also – it might be argued – necessary."

First, there is absolutely nothing in the Delta case that stands for the proposition that anyone must exercise their right of expression. It provides only that if one decides to do so, that expression must remain within bounds so as not to infringe on the right of association. No violation is committed when employers leave workers alone to make up their own minds about union representation.

<sup>20</sup> See ILO Committee on Freedom of Association, Complaint against Congo, Case No. 1850, Report No. 304 (1996).

<sup>21</sup> See ILO Committee on Freedom of Association, Complaint against Belarus, Case No. 1885, Report No. 306 (1997).

<sup>22</sup> See ILO Committee on Freedom of Association, Complaint against Chile, Case No. 1945, Report No. 309 (1998).

<sup>23</sup> See ILO Committee on Freedom of Association, Complaint against Uruguay, Case No. 2014, Report No. 324 (2001).

<sup>24</sup> See ILO Committee on Freedom of Association, Case against Nepal, Case. No. 2340, Report No. 336 (2005).



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Employers distort the nature of the typical neutrality agreement between companies and unions. Such agreements do not impose silence on employers. Some employers agree to say forthrightly to employees: “forming a union is your affair; we do not want to influence your decision; if you form a union we will enter into good-faith bargaining”. More often, both parties, employers and unions, voluntarily agree to present their positions to employees in a positive manner in which neither side makes negative attacks on the other. Often they agree that employers might communicate their views, but not in captive-audience meetings or one-on-one supervisor-employee sessions fraught with imbalance.

Typical neutrality agreements also contain rapid dispute resolution procedures, avoiding drawn-out litigation in labour agencies and courts. When workers choose representation in these circumstances, the positive approach is likely to affect collective bargaining, also in a positive fashion. The parties come to the table in an already mutually respectful relationship, not after warring with each other.

### V. EMPLOYERS HAVE ALREADY CONCEDED THAT US STYLE ANTI-UNION CAMPAIGNS VIOLATE CONVENTION 87

The employers’ attempt to claim a radically new norm on freedom of expression stems from the fact that they already conceded that U.S. law allowing aggressive anti-union campaigns in fact runs afoul of existing international standards. As the U.S. Council for International Business (the U.S. employer representative at the ILO) explained:

Five of the ILO core conventions (87, 98, 29, 138 and 100) have been found to directly conflict with U.S. law and practice and would require significant and widespread changes to U.S. state and federal law if they were ratified. U.S. ratification of Conventions 87 and 98 would require particularly extensive revisions of longstanding principles of U.S. labour law to conform to their standards. . . . U.S. ratification of the convention would prohibit all acts of employer and union interference in organising, which would eliminate employers’ rights under the NLRA to oppose unions”.<sup>25</sup>

That is, the USCIB concedes that U.S. law allows employer interference in organising, contrary to Convention No. 87’s non-interference standard. But they can’t have it both ways. They cannot oppose U.S. ratification of Convention No. 87 saying that ratification would make them halt their anti-union pressure campaigns, and then say that the ILO blessed the same campaigns in the CFA decision in Case No. 2683.

The USCIB’s 2007 statement is based on an exhaustive analysis published in a 1984 book by Edward E. Potter, who has long served as chief legal advisor to the U.S. employer delegation to the ILO. Edward Potter’s expertise in the international labour law field is universally acknowledged. He noted that, with regard to workers’ organising rights, the ILO standard “lays down an obligation for the state to take measures to prevent any interference with such rights without qualification that is, interference by individuals, by organisations or by public authorities”.<sup>26</sup> But U.S. law runs counter to this standard, Potter explained:

U.S. law and practice is not so broad in application to prohibit any interference in organising rights from any source. . . . [S]ome interference is permitted. Section 8(c) of the [National Labour Relations] Act permits employers to oppose unions . . . Under the NLRA, “an employer does not commit an unfair labour practice if he makes a pre-election speech on company time and premises to his employees

<sup>25</sup> USCIB, “U.S. Ratification of ILO Core Labour Standards”, Issue Analysis, April 2007 (emphasis added).

<sup>26</sup> See Edward E. Potter, *Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 and No. 98* (1984), at 43 (emphasis in original), citing International Labour Conference, Record of Proceedings, 32d Sess. 306, 470 (1949).

and denies the union's request for an opportunity to reply . . . or when anti-union statements are made by management representatives to individual employees at their respective work stations . . . [Potter added several more examples of employers' legally permitted anti-union campaign tactics against workers' organising]. These are all forms of interference with organising, but are lawful under the NLRA . . . [S]uch employer "free speech" and other acts of interference permitted under the NLRA would be illegal under Convention No. 87.<sup>27</sup>

For employers, claiming that the Delta decision allows anti-union campaigning is the only way they can overcome the long-standing admission that such conduct violates international law. They have not succeeded in doing so.

### VI. ISRAEL'S 2013 PELEPHONE DECISION: RECOGNIZING THE IMBALANCE OF POWER REQUIRES LIMITATIONS ON EMPLOYERS' SPEECH

Confronted with the issue of employer speech to derail workers' organising efforts, the National Labour Court of Israel recently issued an important decision that comports fully with the ILO's non-interference standard. The court made a key distinction between the period when workers are first attempting to form a union, and the period after they have gained collective bargaining rights and have the protection of union representation.

Pointing to "the inherent strengths as between the employer and his employees who are free as unorganised individuals as against the extra power of the employer by virtue of his ownership of the workplace and his managerial prerogative" when the union "is in the throes of being established and recognised at the work-place", the court said:

The decision as to whether or not to unionise and in what employees' organisation they will be organised is a matter as between the employees themselves and is exclusively their preserve. During the period of initial organisation until the establishment of a Representative Employees Organisation, prior to the coming to fruition of collective discourse between the parties, the presumption arises that the expression of a view by the employer or his representative as regards such organisation or its ramifications . . . constitutes the exercise of pressure and coercion and undue influence on the employees in exercising their right as to whether or not to organise.<sup>28</sup>

In the court's opinion, the employer would have greater scope for speech once the union is established in the workplace and workers have a representative voice. Then, said the court, "a material change has occurred in the relationship of forces between the employer who owns the enterprise and the employees who are represented by the trade union"<sup>29</sup> because communication now takes place between the employer and the union representing employees, not between the employer and vulnerable unrepresented employees.

The court issued the following injunctive orders:

- The Company shall desist from presenting its position as to unionisation, at public information assemblies of employees who are engaged in [union] organising at the Company's sites; in personal or in group meetings with the employees, in electronic mail communications or in any other way.

<sup>27</sup> *Id.*, at 43-44 (emphasis added).

<sup>28</sup> Histadrut – Pelephone Communications LTD, National Labour Court of Israel, Appeal Case File No. 25476-09-12 (2013), paragraphs 76, 83.

<sup>29</sup> *Id.*, paragraph 80.

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- The Company shall desist from presenting the employees with the disadvantages that exist, in its opinion, in joining a trade union and the ramifications that unionisation will have on the economic or other activity of the Company, including referral of position papers to the employees and disseminating its views with regard to unionisation.
- The Company's statements pertaining to the dimensions of the damage that might be caused as a result of the unionisation and damage to its competitive ability vis à vis competing entities . . . constitute an improper expression of opinion and is prohibited.
- [W]e hereby order that Pelephone desist from initiating a personal meeting with employees, with groups of employees, in relation to the exercise of the right to organise; and further, the Company shall not make use of the means of communication at its disposal and its accessibility to the employees, in the dissemination of sms messages against the unionisation, to mobile telephone devices or the distribution of messages to employees by electronic mail.<sup>30</sup>

### VII. WHY EMPLOYERS WANT U.S.-STYLE "LAWFUL" INTERFERENCE TO BECOME THE NEW STANDARD

Employers appear to be motivated by the desire to deflect moves in recent years by human rights organisations, labour rights advocates, socially responsible investors and other forces of civil society to hold employers to account for violating international labour standards. U.S. corporations and foreign multinational companies with operations in the United States have come under particular criticism for launching aggressive campaigns against workers' organising efforts, taking advantage of weak U.S. labour laws that allow such campaigns in violation of international standards.<sup>31</sup>

One cannot overlook the financial interest of the American law firm promoting the view that the ILO has endorsed U.S.-style anti-union campaigns under the guise of free speech. Indeed, employers' most prominent materials in their move to recast ILO standards are a memorandum<sup>32</sup> and related materials from the Littler Mendelson group, a prominent U.S.-based anti-union law firm which advises management on how to combat workers' organising efforts under U.S. labour law. "We provide legal advice to companies as they devise and implement strategies for lawful union avoidance", the firm says on its website. It goes on to describe its "Union Prevention" practice as "Maintaining a union-free workplace . . . Every day, Littler provides legal advice to help employers understand their legal rights and obligations as they develop preventive strategies to... detect early warning signs of organising activities, and minimize the risk of organising campaigns".<sup>33</sup>

Anti-union consulting is a gigantic industry in the United States. Employers pay hundreds of millions of dollars each year for law firms and other outside advisors to write speeches, produce videos and DVDs, and to train managers and supervisors on how to pressure employees against forming a union. If they succeed in exporting the American anti-union model to the rest of the world under claims of ILO endorsement, theirs will become a multi-billion dollar global industry based on interference with workers' freedom of association.<sup>34</sup>

#### The U.S. Model

Here is what U.S. law lets employers do when workers try to organise a union:

<sup>30</sup> Id., final order.

<sup>31</sup> See, for example, Human Rights Watch, *A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations* (2010), at <http://www.hrw.org/reports/2010/09/02/strange-case-0>.

<sup>32</sup> See Stefan Marculewicz and Brent Wilton, "Employer Freedom of Opinion and Expression Within the Context of Union Organising – A Fresh Perspective from the ILO, Littler Mendelson ASAP memo, November 2010, [http://www.littler.com/files/press/pdf/2010\\_11\\_International\\_EmployerFreedom\\_WithinUnionOrganizing\\_ILO.pdf](http://www.littler.com/files/press/pdf/2010_11_International_EmployerFreedom_WithinUnionOrganizing_ILO.pdf) at p. 3.

<sup>33</sup> See <http://www.littler.com/practice-areas/labor-management-relations> (accessed April 2, 2013).

<sup>34</sup> See John Logan, "Consultants, lawyers, and the 'union-free' movement in the United States since the 1970s", 33(3) *Industrial Relations Journal* 197 (2002); "U.S. Anti-Union Consultants: A Threat to the Rights of British Workers", *Trades Union Congress* (2008).

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- Predict that the workplace will close if employees choose union representation, as long as the “prediction” includes conditions not completely within the employer’s control. Thus, an employer cannot say “if you vote for a union, I will close the workplace”, but can say “if you vote for a union, and the union makes us uncompetitive, I might have to close the workplace”.<sup>35</sup> Anti-union consultants have made an art form of turning “threats” into “predictions”. Here is how one such group advises employers:

Using conditional words in discussing union issues with employees can be helpful in avoiding claims by a union that the employer committed unfair labour practices or objectionable conduct. Words such as “may”, “might”, and “could” are preferred to “will.” For example, say, “The plant could shut down” rather than, “The plant will shut down” if the union gets in.<sup>36</sup>

- Tell employees that if they choose a union, “bargaining starts from zero and you could lose everything you have”, including health insurance and other benefits. Remember that the United States has no national health insurance program, so workers are dependent on their employers for health insurance for themselves and their families – making the threat of lost health insurance one with special influence.
- Tell employees that if the union “forces you to strike” or “pulls you out on strike” (even though all union charters require membership votes to authorise a strike), “we will hire permanent replacements to take your jobs”. This takes advantage of another feature of U.S. labour law that the CFA has found violates ILO norms - allowing employers to permanently replace workers who exercise the right to strike.<sup>37</sup>
- Tell workers that union leaders are corrupt and dishonest troublemakers who destroy firms’ competitiveness; that they are only interested in collecting dues payments; and that they will trade away employees’ wages and benefits to gain guaranteed income through “check-off” of union dues.
- Require workers to attend “captive-audience” meetings in the workplace to hear anti-union speeches and watch anti-union videos and DVDs containing the same implicit and explicit threats, recited over and over in a classic psychological “repetition” campaign of fear and intimidation. Employers can force workers to attend captive-audience meetings and order them to remain silent, and dismiss them for insubordination if they refuse.
- Require first-line supervisors to undergo training by anti-union consultants, and then to meet one-on-one with employees to frighten them against supporting the union. The use of one-on-one meetings between employees and their immediate supervisor is an especially insidious and effective interference with workers’ organising rights, since workers are so dependent on their relationship with immediate supervisors. When supervisors call employees into an individual one-on-one meeting, by definition they are a relationship of authority and subordination. The supervisor is vested with all the power of company management while the worker is unrepresented and vulnerable. In this setting, supervisors’ anti-union statements intensify the climate of fear and intimidation cultivated by management’s captive-audience meetings and other propaganda tactics.

<sup>35</sup> As a dissenting judge in a court decision that allowed such threats explained: “An employer can dress up his threats in a language of prediction – ‘You will lose your job’ rather than ‘I will fire you’ (and fool the judges). He doesn’t fool his employees. They know perfectly well what he means”. See *NLRB v. Golub Corp.*, 388 F.2d 921 (2d Cir. 1967). The parenthetical remark is in the original citation.

<sup>36</sup> See William R. Adams, Adams, Nash, Haskell & Sheridan, *A Manager’s Guide to Labour Relations Terminology* (second edition, 2003; emphasis in original).

<sup>37</sup> Permanent striker replacement is not in U.S. labour legislation. It is a doctrine resulting from a decision by the U.S. Supreme Court interpreting the law. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The ILO Committee on Freedom of Association found that the permanent replacement doctrine violates workers’ freedom of association; see International Labour Organisation, Committee on Freedom of Association, Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), para. 92, Report No. 278, Case No. 1543 (1991).

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- Fire any supervisor who prefers not to pressure employees in one-on-one meetings, or indeed who expresses any sympathy for workers' organising efforts or unions in general.<sup>38</sup> Suddenly, employers' claimed concern for freedom of expression goes out the window. They want management to have the right to launch fear-inducing anti-union campaigns, but they want to maintain the right to dismiss any supervisor who expresses the slightest sympathy for employees' organising.<sup>39</sup>

This is just a sample of employers' anti-union tactics to interfere with workers' organising efforts. In addition to meetings, employers convey messages of dire consequences if workers form union by sending letters and DVDs to workers' homes and sending a constant stream of e-mails with the same message.

### Communication Imbalance

The "free speech" justification for employers' interference with workers' freedom of association in the United States cannot be separated from another element in U.S. labour law that runs afoul of international standards: the overwhelming imbalance of communication power between management, on one side, and workers and their unions on the other side – a fact duly considered in the *Pelephone* case. Employers are in complete control of communication with employees at all times inside the workplace, and make clear their desire to be union free and remind workers that they are at will and can be fired at any time. For the new employee, such statements create a threshold of fear about getting involved with a trade union.

As mentioned above, management can require workers to attend "forced listening" captive audience meetings and can also forbid workers from speaking up or asking questions that might present a viewpoint favourable to unions. Even though U.S. labour law prohibits anti-union dismissals, it does not prohibit dismissals for insubordination. Refusing to obey an employers' order to remain silent at a captive-audience meeting is considered insubordination, which opens the door to dismissal. Under the prevailing "at-will" legal doctrine, employers can dismiss workers at any time without justification. Similarly, employers can require workers to sit down in one-on-one meetings with their supervisors to hear anti-union views and predictions, again under pain of dismissal if workers do not attend such meetings.

In contrast to employers' total, one-sided control of communications, trade unions and union advocates inside the workplace have no power to compel employees to hear their views. Pro-union employees can distribute materials and speak with co-workers, but only during lunch and break periods in non-work areas. The imbalance in communication power is compounded by similar imbalance in workers' opportunities to hear from union advocates.

Unions can invite employees to meetings outside the workplace, but many workers are already faced with conflicting time demands related to family needs, transportation problems, overtime requirements, and sometimes sheer exhaustion from work. As a result, unions have difficulty having employees come to meetings, compared with the employer's captive audience inside the workplace. All the while, employers can invoke property rights to deny equal opportunity for workers to hear from union representatives inside the workplace.

In most instances, union representatives are reduced to trying to hand out leaflets at the nearest public street corner to workers driving in or out of the workplace. Moreover, management can set up surveillance cameras to videotape such distribution, making workers reluctant to even be seen taking a leaflet from a union representative. This is another violation of ILO norms, which require

38 Collective rights of front-line supervisors were protected in the original National Labour Relations Act of 1935, and hundreds of thousands of supervisors formed and joined trade unions (the law required that supervisors be in different bargaining units from supervised employees). But in the 1947 anti-labour reforms known as the Taft-Hartley Act, Congress nullified these rights, destroyed supervisors' unions, and stripped supervisors of any protection for trade union activity or beliefs.

39 Here is a test: any civil society organisation or socially responsible investment group that gets the employers' arguments discussed here should write back and ask: "Do you support freedom of expression for front-line supervisors to express support for unions, and do you promise never to dismiss a supervisor for such expression?"

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“access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionisation”.<sup>40</sup>

Underpinning the whole dynamic of American employers’ anti-union campaigns is the power that management holds over employees. In every other country in the world, including Anglo-Saxon countries with similar legal traditions, employers must demonstrate “just cause” to dismiss an employee. But the prevailing doctrine in U.S. law is the “at-will” rule. Under the at-will rule, the employee and the employer are considered to be in an equal bargaining posture. Either is free to accept or reject employment terms. Afterward, either is free to terminate the employment relationship at any time, for any reason – in the classic U.S. legal definition, “a good reason, a bad reason, or no reason at all” – as long as it is not a reason prohibited by law.

American law prohibits dismissals for union activity. But faced with the barrage of anti-union invective that marks most employers’ anti-union campaigns permitted by U.S. labour law, many employees’ thought process, not surprisingly, is this: my employer hates unions; if I support the union my employer will be angry with me; if he is angry with me he will fabricate a reason to fire me; he does not have to show just cause to fire me; therefore I will keep my head down and not show any support for the union”.

### VIII. Case Study: Deutsche Telekom and T-Mobile

One employer in particular has aggressively echoed the IOE free speech argument to excuse its persistent interference with American workers’ organising rights: Deutsche Telekom (DT), the multinational telecommunications giant, and its T-Mobile USA affiliate. In multiple letters to trade unions, NGOs, government officials, legislators and other parties asking about T-Mobile’s interference, top DT executives have repeatedly argued that its communication to employees is permissible because international standards embrace freedom of expression. Yet, even DT concedes that communication is permissible only so long as it does “not interfere” with its employees’ freedom of association.

It is hard to imagine how DT can seriously claim that its communication does not represent “interference”, applying either a common understanding of the term or long standing precedent, as discussed above.

T-Mobile’s anti-union campaigning began a decade ago. To help it stay “union-free”, T-Mobile in 2003 enlisted a prominent labour relations consulting firm that specializes in breaking workers’ organising efforts to prepare a guide and provide related management training. Specially prepared for T-Mobile, the firm’s 150-page guide declares at the outset, “Preserving the union free privilege is an honor” and goes on to recommend that T-Mobile should resist employees’ efforts to form unions to “protect them from themselves”.<sup>41</sup> A more contemptuous attitude toward workers’ organising rights can hardly be imagined. Although T-Mobile has since abandoned this guidebook, the basic practices have continued to date.

In May 2008, T-Mobile’s Human Resources department distributed a memorandum to “front-line managers” across the country urging them to immediately launch concerted anti-union campaigns whenever CWA organisers attempted to communicate with T-Mobile employees. The memorandum contained an instruction with ominous implications for workers’ freedom of association. Among the “Signs of Union Activity” that managers should watch for, the memorandum cites:

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<sup>40</sup> See ILO Committee on Freedom of Association, Complaint against the United States, Case No. 1523, Report No. 284 (1992).  
<sup>41</sup> Adams, Nash, Haskell & Sheridan, “For Your Information: The Union Free Privilege, Prepared for T-Mobile” (2003).

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- Unusual groupings or newly developing social relationships among our employees
- Unionization activity going on among employees in nearby companies
- Restrooms suddenly become a very popular place
- Employee reports of union activity (a “condition red” indicator of problems)
- Employees engaging in group behavior
- Employees talk a lot about “rights”.<sup>42</sup>

T-Mobile’s view that when “employees talk a lot about ‘rights’”, it is a problem requiring immediate reporting to human resources management, and that reports of union activity are a “condition red” indicator, betrays a fundamental contempt for workers’ freedom of association. This attitude reflects management’s harsh determination to interfere with union organising by its employees in the United States.

In the most recent election for trade union representation, in 2011, T-Mobile resorted to the same tried and true tactics they have used to intimidate employees since 2003, including mandatory meetings in groups and individually with supervisors to learn about the “horrors” of unionism.

Deutsche Telekom also reprises employers’ argument that ILO norms actually require them to aggressively campaign against employees’ organising efforts. DT’s top human resources manager said “it would be a disservice to T-Mobile employees and stakeholders to remain silent”.<sup>43</sup> Responding to CWA and UNI proposals for a neutrality agreement with T-Mobile and access to T-Mobile facilities consistent with international standards (in non-work areas at non-work times, so as not to affect work processes), he said, “Such a neutrality agreement would be inconsistent with [T-Mobile’s] free speech rights, rights guaranteed under U.S. and International law and is for these reasons unacceptable for Deutsche Telekom and T-Mobile USA”.<sup>44</sup>

Even while Deutsche Telekom grounds its argument in pious free speech claims, T-Mobile management has repeatedly run afoul of U.S. labour law in spite of the wide leeway it gives to employer anti-union speech, contrary to international norms. When T-Mobile management instructed northwest region employees to spy on each other’s union activity and report it to management, U.S. labour law authorities had management promise not to repeat such conduct. Under a “settlement agreement”, T-Mobile posted a “Notice to Employees” in its stores that said:

**WE WILL NOT** promulgate, maintain, or enforce rules that ask or require you to report to us about your co-workers’ support for, or activities on behalf of, the Communications Workers of America, AFL-CIO or any other labor organization.<sup>45</sup>

Indeed, in the name of Deutsche Telekom’s claimed “employer free speech” rights, T-Mobile has consistently interfered with workers’ organising rights in violation of international standards. Management’s actions have provoked new unfair labour practice charges resulting in similar “WE WILL NOT . . . [act unlawfully]” notice postings in the workplace.

Although these settlement agreements are based on findings by the NLRB of “merit” in the unfair labour practice charges after a thorough investigation, they normally contain a “non-admission” clause allowing T-Mobile to claim that it did not break the law – it only settled the case to avoid the cost of litigation.

<sup>42</sup> See T-Mobile Human Resources Department, Memo to front line managers, May 2008.

<sup>43</sup> See letter from Dietmar Frings, Senior Vice President, Deutsche Telekom, to Marcus Courtney, UNI Global Union, 19 April 2013.

<sup>44</sup> See letter from Dietmar Frings, Senior Vice President, Deutsche Telekom, to Marcus Courtney, UNI Global Union, 18 January 2013.

<sup>45</sup> NLRB, “In the Matter of T-Mobile USA, Inc.”, Settlement Agreement, Case No. 36-CA 10359 (January 5, 2009).

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Below are examples of such unfair labour practice settlement agreements at locations around the United States during the period when top Deutsche Telekom officials were sending letters to myriad civil society groups arguing that ILO norms allow the company's aggressive anti-union campaigns. In each instance, the "WE WILL NOT" header indicates that the company indeed did what it now promises not to repeat:

- **WE WILL NOT** remove Union literature from the employee break room or other non-work areas.<sup>46</sup>
- **WE WILL NOT** stop you from talking about unions during working time if we permit talk about other non-work topics during working time.<sup>47</sup>
- **WE WILL NOT** stop you from distributing literature on non-working time and in non-work areas.<sup>48</sup>
- **WE WILL NOT** interfere with your right to solicit for a union during non-work time on our premises.<sup>49</sup>
- **WE WILL NOT** question you about your protected activities on behalf of a union (or the protected activities of others), or take actions that reasonably create the impression that your protected union activities are under observation.<sup>50</sup>
- **WE WILL NOT** engage in surveillance of your activities on behalf of the CWA union.<sup>51</sup>
- **WE WILL NOT** record the license plate numbers of vehicles parked outside our facility while you are engaged in activities in support of the CWA.<sup>52</sup>

One must put these promises alongside Deutsche Telekom's sanctimonious claims that its actions are justified by free speech and that it "cannot remain silent" when workers try to form trade unions. These settlement notices appear months or often years after the events, after management has delayed legal proceedings and employees have already felt the pressure of management's interference – pressure that is not overcome by a notice posted on a bulletin board. Management has already conveyed its hostility toward unions and had the desired effect of discouraging union formation.

### IX. AN INTERNATIONAL COMPARISON

In comparative terms, the United States is an outlier in its toleration of such systematic, vitriolic anti-union campaigns by employers. This makes even more audacious the claim by employers that the ILO has endorsed American management-style anti-union speech.

For example, captive-audience meetings are unheard of in most countries. Forcing employees to attend meetings to hear employers' anti-union views is seen as an affront to workers' privacy, dignity, and autonomy, equivalent to requiring workers to attend meetings to hear employers' diatribes on race or religion or politics. The Comparative Labour Law & Policy Journal, a leading scholarly publication, devoted a special issue to an examination of law and practice around the world on what Americans know as the captive-audience meeting. Titled "The Captive Audience", this volume contains analyses from labour law specialists around the world. The country experts responded to the following *problématique* from the editors:

<sup>46</sup> See National Labor Relation Board, Settlement Agreement, In the matter of T-Mobile USA, Case No. 01-CA-04668, (Oakland, Maine, 2012).

<sup>47</sup> See National Labor Relation Board, Settlement Agreement, In the matter of T-Mobile USA, Case No. 16-CA-066986 (Frisco, Texas, 2012).

<sup>48</sup> Id.

<sup>49</sup> See National Labor Relation Board, Settlement Agreement, In the matter of T-Mobile USA, Case No. 17-CA-060297 (Wichita, Kansas, 2012).

<sup>50</sup> Id.

<sup>51</sup> See National Labor Relation Board, Settlement Agreement, In the matter of T-Mobile USA, Case No. 28-CA-086617 (Albuquerque, New Mexico, 2013).

<sup>52</sup> Id.



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“Under U.S. labour law, an employer is privileged to hold what is called a ‘captive audience speech’ to resist unionisation. Management is allowed to assemble the workforce - as a whole, by shift, or department or the like - on paid time and either by speech or by display of video (usually professionally prepared) argue why a union is not needed or would not be in the employees’ interest. . . . Moreover, employees not only must attend - failure to do so would be dismissible as ‘insubordination’ - and, of course, must not leave, they can be told to be silent, to make no protest during the speech and to ask no questions on pain of suffering the same fate. Unions are not entitled to equal time. In recent years, some employers have extended the use of captive audience speeches to include captive speeches on political or social issues”.<sup>53</sup>

The editors asked the scholars how their countries’ labour law systems would treat captive-audience meetings. Here are excerpts from the experts’ papers on the subject:

### Argentina:

The fact is, in Argentina, employers do not hold these compulsory meetings in which workers are forced to listen to their arguments for resisting syndicalisation. . . . [T]his behaviour would violate trade union freedom . . . Our position does not intend to deny the employer his right to speak but, the fact is that he has other ways, less detrimental and more compatible with the workers’ right of freedom of association, to convey his opinion on self-organisation.<sup>54</sup>

### Germany:

[T]he employer is not entitled . . . to force speeches against unionisation on his employees. . . . [T]here is no room for American style captive audience meeting. . . . It is also prohibited for employers to act hostile toward unions or take sides against unions . . . If the employer wants to address issues typically addressed in American captive audiences, there is virtually no chance doing so legally.<sup>55</sup>

### Japan:

Because the very fact that employees at “captive audience speeches” are forced to assemble by order of the employer and compelled to listen to anti-union speeches delivered by the employer underscores the strong posture of the employer against unions, employees at such speeches are more easily influenced than by other forms of expression of anti-union opinion by the employer. Thus, “captive audience speeches” are assumed to more seriously infringe on the workers’ constitutional right to organise. . . free from an employer’s influence. The constitutional guarantee of workers’ right to organise. . . provide[s] the basis for the negative evaluation of “captive audience speeches.”<sup>56</sup>

### New Zealand:

Employer captive audience speech to resist unionisation, or on political or social issues, is not, and has never been, a feature of New Zealand industrial relations. . . . [I]t would be unthinkable that an employee could ever be dismissed or disciplined for refusing to attend, or cooperate with, the giving of such a speech. . . . [I]t is

53 Editors’ Note, “The Captive Audience,” 29 Comparative Labour Law & Policy Journal 67 (2008).

54 Jorgelina Allimenti, “Captive Audience Speech: Argentina”, *Id.*, at 71.

55 Christopher Gyo, “Legitimacy of Captive Audiences in Germany”, *Id.*, at 119.

56 Hisashi Okuno, “Captive Audience speeches in Japan: Freedom of Speech of Employers v. Workers’ Rights and Freedoms”, *Id.*, at 129.

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highly unlikely that the country's laws would lend any support to the practice. . . . In particular, it is a breach of the [legally required] duty of good faith "for an employer to advise, or to do anything with the intention of inducing, and employee not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement".<sup>57</sup>

### Spain:

Spanish legislation does not accept any possible interference by employers in establishing workers' representatives in the companies. . . . [E]mployers may call on their workers to attend meetings to inform them of certain items but these must not allude to union issues. Meetings are tools that serve to exchange ideas and opinions but whose contents may not violate workers' fundamental rights to freedom of association and ideology.<sup>58</sup>

### Turkey:

There have been no practices of captive audience speeches in turkey and consequently no jurisprudence to this end. . . . Theoretically speaking, an employer is free to communicate to his workers his general views and considerations about unionism or any other issue through holding a captive audience speech . . . so long as the communications are non-threatening. . . . Where a compulsory assemblage . . . aims at quashing organising attempts, it shall be deemed to impair union rights and freedoms guaranteed by the laws. Such a (provocative) managerial stance is the corporate executive's opposition to organised labour, a challenge to union rights and freedoms. It will thus constitute illegal intrusion/interference by the employers in union affairs.<sup>59</sup>

### Brazil:

"Captive audience speech" struck us as something unknown to our labour reality . . . the subject would hardly be considered an issue in Brazilian labour law. . . . We just could not find any litigation on the matter.

Even though, a general grasp from Brazilian labour jurisprudence seems to indicate that captive audience speeches would be considered illegal because they interfere with the right to unionise. As one assumes this as the probable answer, it becomes then necessary to explain how it interferes. . . . The interdiction comes from the actions' nature that is far beyond the scope of a labour contract.

Sure, employers are entitled to free speech but they cannot stretch their prerogative to impose on workers the burden of listening to whatever they want. They cannot make political proselytism or anything alike. Captive audience speeches must then be related to the workplace and it is not so unusual to have this kind of situation related, for example, to a safer work environment. Thus, professional videos, PowerPoint presentations, scholar discourses connected to a better healthy life, to nutritional circumstances, or to hygiene demands seem to be acceptable. On the other hand, speeches advocating a certain political choice or emphasizing the disastrous consequences of unions' activities seem to be unacceptable. . . . The idea of carrying an anti-discourse seems so unnecessary that the problem is not present in our Courts and Tribunals.<sup>60</sup>

<sup>57</sup> Paul Roth, "Captive Audience Speech Under New Zealand Law", *Id.*, at 147.

<sup>58</sup> Núria Pumar Beltrán, "Captive Audience Speech: Spanish Report", *Id.*, at 177.

<sup>59</sup> Nurhan Süral, "Captive Audience Speeches in the Labour-Management Setting in Turkey", *Id.*, at 191.

<sup>60</sup> Roberto Fragale Filho and Ronaldo Lobao, "Captive Audience Speech in the Brazilian labour Law", *Id.*, at 341.

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Summing up contributions to this volume on captive-audience meetings, journal editors concluded, “the law conceives of a captive audience as an affront to human dignity, of the right to be treated as an autonomous adult, not a child in tutelage to one’s employer, subject to its instruction on political or social subjects including unionisation”.<sup>61</sup>

### X. CONCLUSION

Workers, trade unions, socially responsible investors and other forces of civil society – including business groups and companies committed to respect for ILO standards on freedom of association – should unite in rejecting the self-serving and fallacious arguments of U.S. employers that the ILO has endorsed their bellicose anti-union campaigning as a new international standard.<sup>62</sup> The standard is unchanged: employers have freedom of speech, but they cannot abuse freedom of speech in ways that interfere with workers’ freedom of association and organising.

Preserving this standard is essential particularly given the imbalance in power between employers and workers. Rather, workers’ exercise of the right must proceed in “a climate free of violence, pressure, fear and threats of any kind”.<sup>63</sup> This has always been the position of the ILO, and it remained the position of the CFA in Case No. 2683, which employers have purposefully misconstrued in pushing for a “union-free” agenda. Indeed, this is also the norm in the labour laws of most countries.

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<sup>61</sup> Editors’ Note, *Id.*, at 69.

<sup>62</sup> One can only wonder about some employers’ real sentiments about ILO norms. Advising member companies on codes of conduct, international framework agreements, and other labour policies, the International Organisation of Employers told them to “avoid references to ILO standards themselves or the Declaration” [on Fundamental Principles and Rights at Work]. See IOE, “International Labour Standards and Companies”, IOE Information Paper (June 2008).

<sup>63</sup> ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition (2006), paragraph 35.



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