

In Critical Solidarity

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Carolina Bank

Undocumented workers and recent changes in labor law and practice:

New Challenges for Labor: Hoffman and Social Security No-Match

September 11, 2001 proved to be a critical turning point for civil liberties in general, but especially for immigrants and immigrant workers. The Bush administration changed its policy from considering limited legalization, to replacing airport workers who are non-citizens, and advocating the trial of "suspected terrorists," predominantly immigrants, in military tribunals with no right to an attorney. These acts of blatant racial profiling are only a few of many examples of heightened attacks on immigrants in this country.

Six months after 9/11 the Supreme Court ruled in *Hoffman Plastics Compounds, Inc v. NLRB* that "the NLRB had over-stepped its authority in its judgment by awarding back pay to Castro (an undocumented immigrant)." (Robin 2003). The court argued that providing back pay to undocumented workers conflicted with U.S. Immigration law (Immigration Reform and Control Act of 1986). Therefore, undocumented workers who were fired for protected activity under the National Labor Relations Act (NLRA), such as union organizing, were not entitled to back wages "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud." (*Hoffman Plastics, INC v. NLRB*, 2002).

This case began when Jose Castro an employee of Hoffman Plastics and several co-workers were fired for their union activities. The NLRB subsequently ruled that Hoffman Plastics had violated the NLRA and therefore ordered back wages (for years not worked due to being fired) to the employees that were fired. When Jose testified at the NLRB and disclosed his documentation status, the NLRB ruled that Jose Castro was entitled to back wages regardless of immigration status. Hoffman Plastics appealed this decision, and the Supreme Court reversed the NLRB ruling (Robin 2003).

This is a particularly significant decision given that under U.S. labor law all workers are supposed to be protected under the NLRA, Fair Labor Standards Act (FLSA), and other federal statutes regardless of immigration status. While the Hoffman decision is reproachable, it is not surprising. In the past decade we have seen a consistent erosion of rights for immigrant workers. This has particularly played out in the increased interagency cooperation between the Department of Labor (DOL), Immigration and Naturalization Services (INS), and the Social Security Administration (SSA). This heightened cooperation is highlighted by the 1992 Memorandum of Understanding (MOU) between the DOL and the INS, under which the DOL was required to inspect I-9¹ forms whenever it investigated violations of labor standards. If the DOL did find evidence of unauthorized employment it was required to refer the case to the INS. This obviously had huge implications for immigrant workers, as they were afraid to file complaints against their employer for fear of being reported to the INS by the DOL. In 1998, as a result of protests by human rights, civil liberties, and immigrant rights activists, the MOU was changed and the DOL could no longer refer cases to the INS that were initiated by worker complaints. Despite this enormous victory, the DOL and the INS continue to cooperate on cases that are not "complaint driven." (NILC, 1998a, b).

Fortunately for workers, the Hoffman decision only ruled on one particular law, the

NLRA. Workers are still protected under the FLSA regardless of documentation status and can file for back wages on hours actually worked. Regardless, the Hoffman decision has some serious implications for organizing. The Supreme Court ruled that undocumented immigrants are not protected if they are fired for organizing a union. This can create a serious chilling effect on both a union's willingness to take on an organizing drive in a heavily immigrant industry, and an immigrant's willingness to participate in an organizing drive. Unions used to be able to claim that U.S. labor law would protect workers from getting fired if they organized in their workplace; this claim is no longer true in the case of immigrant workers. This not only has consequences for the labor movement and its ability to bring immigrant workers into its ranks, but it also serves the larger purpose of maintaining a low wage, racialized labor force for large and small companies alike. Many lawyers and immigrant advocates believe that the Hoffman decision will not decrease the employment of undocumented immigrants, as the court supposedly intended, but rather, "employers will seek undocumented workers. The Court held that there is no financial penalty for violating the NLRA when employing illegal aliens. From an employer's standpoint, hiring illegal aliens is beneficial...If by chance the workers want to organize a union, the employer need not worry, it can just fire all of the union supporters with little to no repercussions" (Robin 2003; 10).

The Hoffman decision is only one policy that has affected immigrant workers in the post 9/11 environment. The Social Security Administration (SSA) also seems to be getting involved in immigration issues. In 2000 the SSA began to send "No-Match" letters to employers whose workers have social security numbers that do not match those in the SSA's system. While the administration claims not to be targeting immigrant workers, these letters have had huge repercussion on immigrant workers. All no-match letters issued state "it is not a basis, in and of itself, for [an employer] to take adverse action against an employee, such as laying off, suspending, firing, or discriminating against an individual who appears on the list." But despite its innocuous intentions, the Social Security No-Match Letter has become a significant and often

¹ The I-9 form is an employment eligibility verification form. It is intended to ensure that workers are authorized to work in the U.S.

insurmountable obstacle to job security for workers in diverse industries. Immigrant advocacy groups and unions suspect that thousands of workers have been fired as a result of this policy. And this does not count the scores of workers who have been threatened, harassed, and disciplined, particularly during organizing drives. Furthermore, many immigrants quit their jobs when faced with the no-match letter; such is their fear of deportation. Moreover, many immigrants have no faith in institutions to preserve their legal rights, and rightfully so. In March of 2003, the SSA issued a Spanish version of the no-match letter and they forgot to include the Spanish qualifier “no” into the letter and so the letter read, employers CAN retaliate, instead of CANNOT. These constant “errors” on behalf of the administration wreak havoc in the workplace. The SSA states that this policy is not a response to 9/11. However, between 2000 and 2002, the number of letters sent from the administration rose from about 50,000 to 900,000. This year the number of letters issued by the SSA has dropped to 130,000, but this drop is not comforting given the administration’s new pilot program of “instant verification.” Under this new program, employers would only need to call the administration to instantly verify whether or not a new employee has an appropriate social security number. This could result in an even greater number of firings. While no-match letters often negatively affect individual employers, they benefit employers as a *class*, because this policy produces a legitimate fear that maintains workers in jobs with low wages and poor working conditions.

The good news is that many unions have been successfully challenging the no-match policy and as a result unionized workers are less likely to be fired as a result of the policy. The Union of Needletrades, Industrial and Textile Employees (UNITE), the Hotel Employees, Restaurant Employees Union (HERE), the Service Employees International Union (SEIU), and the United Food and Commercial Workers Union (UFCW) have all been proactive in assuring rights for their members. These four unions have won contract language that effectively deals with the no-match issue by giving workers extended time to work out their documentation status. They have also been proactive in sending letters to employers before

they receive the no-match letter, explaining that employers should not take action against any worker without consulting the Union. Below is sample contract language developed by the National Immigration Law Center (NILC) and the UFCW².

“In the event that the employer receives notice, either by correspondence or otherwise, from the Social Security Administration (“SSA”) indicating that some of the employee names and Social Security numbers (“SSN”) that the employer reported on the Wage and Tax Statements (Forms W-2) for the previous tax year do not agree with SSA’s records, the employer agrees to the following: (1) the employer will notify the union upon receipt of any such notice and will provide a copy of the notice to all employees listed on the notice and to the union; (2) the employer will display the following notice prominently on its premises: “Attention All Employees. In order to ensure that the Social Security taxes that are withdrawn from your wages are properly credited to your Social Security records, please compare the name and Social Security number that appears on your check stub with the name and number on your Social Security card to ensure that we are using the exact same information. Even the simplest typographical error can sometimes cause problems in the Social Security Administration’s records, and your earnings might not be properly credited. Correcting this information is very important for your future Social Security benefits should you become disabled or when you retire. Please contact the human resources office if you notice any errors. Thank you.”; (3) the employer agrees that it will not take any adverse action against any employee listed on the notice, including firing, laying off, suspending, retaliating, or discriminating against any such employee; (4) the employer agrees that it will not require that employees listed on

² This contract language is from the National Immigration Center Website (www.nilc.org/immsemplymnt/index.htm)

the notice bring in a copy of their Social Security card for the employer's review, complete a new I-9 form, or provide new or additional proof of work authorization or immigration status; (5) the employer agrees not to contact the SSA or any other governmental agency after receiving notice of a no-match from the SSA."

Contract language such as the above one is one of the most significant ways that unions can effectively deal with the no-match policy. In addition to unions, immigrant advocacy groups have been at the fore front of challenging the no-match policy. These groups were able to successfully challenge the SSA and reform the text of the letter so that it included a clause explaining that employers should not retaliate against workers.

The bad news is, of course, that there are thousands of immigrants that are not represented by unions. And there are many unions that do not know how to respond to the no-match policy. It is therefore critically important that there be a massive campaign to educate both unions and unorganized workers on these issues. The UCLA Labor Center has done significant work in this area, holding trainings on no-match policy for unions in Southern California. We are also co-sponsoring a hearing with community groups, unions, students, politicians, and workers to pressure the SSA to send no-match letters directly to workers instead of employers. This is a strategy that many immigrant advocacy groups have taken across the country, with particular success in Chicago.

The already unfavorable situation of immigrants and immigrant workers in this country has taken a turn for the worse. It is more critically important now than ever before for unions to take a leading role in challenging these assaults on immigrants. The best protection against many anti-immigrant policies is to have a union. This is no easy task in the post-Hoffman environment, but most immigrant workers still want unions, and the Labor Movement needs immigrants to regain its strength for the future.

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Labor and the War

Gender issues

By Dan Clawson, University of Massachusetts Amherst

The face of labor is changing and with it labor's position on a host of issues, including war. During the Vietnam War the AFL-CIO convention voted down an anti-war resolution by a vote of 2,000 to 6; this time the entire AFL-CIO came out with a cautious anti-war statement, and unions with more than 4 million members endorsed a stronger resolution.

The contrast in labor's pro and anti-war faces could not be more clear. The New York Times April 11 photo of (part of) labor's "Support Our Troops" rally shows perhaps a thousand faces; I can't find a single woman anywhere in the photo. (In fact, I can't think when I've seen a photo of such a large group that is so overwhelmingly male; the military is far more gender-integrated.) On the other hand, what were the international unions that came out early against the war? SEIU, AFSCME, CWA (all with a majority of women members), APWU, UFW, and two unions with a long left history, the UE and ILWU.

Labor's changing gender and racial-ethnic composition is having a significant impact on labor's stance on the issues, from the war to immigrant rights. That's a process that will become stronger over time.

Principle or Retaliation?

By Brian O. Sheppard, Student, Dallas County Community College

When the AFL-CIO resolved to oppose an Iraqi war on February 27, the peace movement applauded. "The president has not fulfilled his responsibility to make a compelling and coherent explanation to the American people and the world," the anti-war resolution said.

Some of us in the labor movement would like to believe the resolution grew out of deeply held principles that value peace over war. But in reality, this resolution probably came in retaliation to a combination of recent Bush administration slights against unions, as well as Labor Secretary Elaine Chao's combative address at the federation's convention. (She showed up with a laundry list of grievances against union officials, many seated directly across from her.)

A recent Counterpunch article by Joann Wypijewski, "Workers Against War," does a great job of surveying anti-war attitudes in labor: <http://www.counterpunch.org/wypijewski01172003.html>

CyberUnionism

By Art Shostak, Drexel University

When in 2025 ce savvy scholars discuss over the Internet the unvarnished history of Organized labor in the early 21st century, much is likely to be made of the fact that the use of the Internet in 2003ce by Labor's anti-war plurality demonstrated once and for all the extraordinary power of information technology (IT) in shaping Labor's fate. (See Lee, Eric, *The Labour Movement and the Internet*).

Until that time and usage it was easy for decision-makers in the AFL-CIO and its 64 International Union to direct, constrain, and

control the uses and impact of IT. Most of Labor's Web sites were uni-directional, weighed down by top-down sanitized material, or, "business as usual." Only a few activist zines and list serves ventured into the high quality zesty material that always beckoned (eg, Eric Lee's Labourstart.org; tkatona@portup.com, OPEIU LOCAL 512's On Line 'Zine!; MODEM, brimitch@springnet1.com; Solidarity4Ever-subscribe@igc.topica.com). (See Shostak, a., ed., *The CyberUnion Handbook: Transforming Labor through Computer Technology*).

A veritable "explosion" occurred when anti-war union rank-and-filers reached out via the Internet to hobble together overnight the most powerful juggernaut of membership opinion the Labor Movement had seen since the rush in the 1930s to create the CIO. (According to a spring issue of *Labor Notes* - "By March 2003 roughly 130 local unions, 45 central labor councils, 26 regional bodies, 11 national/international unions, and the AFL-CIO Executive Council had passed resolutions condemning the Bush Administration's actions around Iraq in varying degrees of criticism.")

Labor leaders scrambled to get back in front of the parade, and the general public and the media were treated to the unprecedented sight of a cadre of dedicated members actually taking the lead. Organized Labor, in the USA and worldwide as well, was never the same - as this demonstration of what CyberUnionism could, should, and would mean in Labor's reinvention of itself was clear, emphatic, and empowering. (See Shostak, A., *CyberUnion: Empowering Labor through Computer Technology*).

Resources for Research on Unions

Tom Juravich, Labor Center
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Most sociologists are familiar with data about work, employment and the workforce, but are less likely to know about sources of data specifically on unions in the United States. These include a variety of primary sources, as well as several secondary sources that compile,

bundle and repackage much of the primary information. Given the easy availability of these data sets, they should become part of our discourse as we examine unions and their activities in greater detail. Here is a brief summary of the major sources.

Union Certification, Decertification, and Unfair Labor Practices

The National Labor Relations Board (NLRB), the federal agency established by the National Labor Relations Act (NLRA) in 1935, oversees the establishment and operations of unions. Employees seeking to be represented by a union petition the Board, which if presented with a showing of interest schedules an election. (Legally, a showing of interest usually requires signed support from at least 30 percent of the workforce; many unions will not file unless they have majority support, or two-thirds support.) Information from these NLRB petitions and elections, including the union involved, the size and type of the bargaining unit, and the outcome of the election is available from the NLRB. Information on decertification elections, where employees (often with the tacit support of management) petition to no longer be represented, is also available.

The NLRB is also charged with ensuring that unions operate free from employer domination and that collective bargaining takes place in good faith. Faced with employer interference, a worker fired for pro-union activity, or bargaining in bad faith, unions, and in some instances employers, can file Unfair Labor Practices (ULPs). Information on ULPs is also compiled by the NLRB.

While data can be obtained directly from the NLRB, most researchers use one of two secondary sources. The Food and Allied Service Trades (FAST) Department of the AFL-CIO has compiled a CD which includes both certification/decertification and ULP data. It also includes data from other sources mentioned below and is a great bargain. Early versions of the CD were a bit sloppy, but each successive edition has been much cleaner. I would still recommend double-checking data carefully. Contact FAST at <http://www.fastaflcio.org/laborcd/lcd.html> . Note

that the CD is not just available to everyone. As someone outside the labor movement, you will need to present your credentials as a union-friendly academic to obtain a copy.

The Bureau of National Affairs (BNA) specializes in gathering data and publishing a variety of material about labor relations (<http://www.bna.com/>). They are perhaps best known for their Daily Labor Reporter which is the preeminent source of news on labor relations. For a fee considerably larger than the FAST CD, their research division (BNA Plus), will compile NLRB data, as well as much of the remainder of the data described below. They can create custom data sets of extremely high quality using data from a variety of sources. Contact BNA Plus at 1-800-452-7773 or (202) 452-4323 or on line at bnaplus@bna.com.

The NLRB data have been heavily used, particularly in the field of industrial relations. While the data gathered by the Board provides an important overview of union activity, the very basic data they gather tells us little about the actual shape of union organizing, which is often more likely the subject of our inquiries.

Note that the NLRB covers only private sector employers and employees. Federal workers and those covered by the Railway Labor Act (including airlines) are not covered by the NLRB. Public sector workers at the state and local level are also not covered by the NLRB, though many but not all states have legislation that mirrors the NLRA. There is no central source for data on union activity of public sector workers and the information must be obtained from state labor relations agencies. For a listing and contact information for these state agencies, go to the AFSCME website at <http://www.afscme.org/otherlnk/weblnk28.htm> . See Bronfenbrenner and Juravich's Union Organizing in the Public Sector (Cornell, 1995), for a compilation of public sector union activity based on data gathered from 37 state boards.

Overall, there has been little research on organizing in the public and federal sectors, and among workers covered by the Railway Labor Act. There is also no central data source on non-board elections. These are situations where the union, frustrated by the delays and

ineffectiveness of the NLRB process, chooses to forego an NLRB-run election, and persuades/pressures the employer to accept another form of union certification, for example, a "card check" conducted by local ministers or some other reputable group. The creation of a data set on such "non-Board" union certifications would be a major contribution.

Union Disclosure Information

The Labor Management Disclosure and Reporting Act of 1959 (known as Landrum-Griffin) amended the original NLRA and requires unions to disclose financial information to the U.S. Department of Labor on an annual basis. Unions with annual receipts of less than \$10,000 file form LM-4; those less than \$200,000 file the LM-3; and those with more than \$200,000 file the LM-2. The LM-2 contains the most detailed information including payments to officers, assets, liabilities and disbursements by activity. While this information has always been available to the public from the Office of Labor-Management Standards (OLMS), over the past year much of it has become available on-line at <http://union-reports.dol.gov/olmsWeb/docs/index.html> (Many have suggested that this is a product of the Bush administration's anti-unionism. There is no similar effort at putting employer information on-line!) The on-line system is impressive, yet because it is still under development, it is not clear how comprehensive the data is at this point. You may want to still request a hard copy or a CD. See the web site for details.

In many ways the OLMS data has been underutilized by the research community. Marick Masters' Unions at the Crossroads (Quorum, 1997) is one of a few major research projects based on data from LM2 reports.

In addition to the standard union "LM" forms, a variety of other information on unions and labor relations is available from DOL. LM-15 and LM-16 are filed by union trustees, and LM-20 and LM -21 must be filed by "union avoidance" consultants. LM-20s, which list basic information are available on the FAST CD. Not included are LM-21s which includes the financial arrangements between employers and

consultants. Information from all these additional LM forms are available from DOL for a small charge. See the DOL website for details.

Union Contract Data

Under provisions of the Taft-Hartley Act of 1974, unions and employers must provide notice 60 days prior to contract expiration. Unlike LM forms, these F-7 notices, as they are known, are not filed directly with DOL, but with the Federal Mediation and Conciliation Service (FMCS). They are available directly from FMCS (<http://www.fmcs.gov>) and are also included on the FAST CD.

There are several sources for union contracts themselves. The Bureau of Labor Statistics at <http://stats.bls.gov/cba/cbaccess.htm> maintains a list of contracts, which can be downloaded for a modest fee. BNA at <http://www.bna.com/bnaplus/labor/labordata.htm> has a more extensive contract database, although fees are considerably higher. The Institute of Industrial Relations at Berkeley <http://www.iir.berkeley.edu/library/contracts/> has begun compiling union contracts. Some unions also provide copies of their contracts on-line. For example, see AFSCME's contracts at <http://www.afscme.org/otherlnk/weblnk38.htm>. Industrial Relations libraries often collect collective bargaining agreements. For example, the Catherwood library at Cornell has an extensive collection of contracts.

Union Density

The Bureau of Labor Statistics at <http://www.bls.gov/> provides a variety of macro level data on unions, including the union/non-union wage differential, as well as basic numbers on who is represented by unions (union density). If you're not familiar with this site, you should spend some time reviewing what is available from BLS. Barry T. Hirsch and David Macpherson have, for a number of years, been using the Current Population Survey (CPS) to make much more detailed estimates of union density by industry, states and selected SMSAs. Their Union Membership and Earnings Data Book is published annually by BNA, but they have developed an excellent web site that

provides most of the information at <http://www.unionstats.com>. This detailed information on union density was invaluable to me when compiling a recent analysis of organizing in Massachusetts for the State Federation.

Resources for Research on Unions: An Ongoing Dialogue

These are just the basic sources for research on unions. There are also a variety of data sources that are typically used in corporate research by unions that also include some union information. For example the OSHA web site (<http://www.osha.gov/>) provides information on occupational injuries and accidents and the UNICORE data base, available only from the AFL-CIO, identifies which firms and facilities are unionized. Perhaps a later article will focus more on corporate research that a number of us are conducting in support of the labor movement. In the meantime, I would encourage us to begin a dialogue on the use of these data sets and other, more specific resources that are available.

PLEASE write the newsletter (clawson@sadri.umass.edu) about other data sets you have found useful.

Labor Notes Conference, September 12-14:

A Unique Opportunity for Labor-Oriented Sociologists

By Barry Eidlin, formerly of TDU, entering graduate student, Univ. of California Berkeley

Sociologists interested in getting a glimpse into how the current political and economic climate is affecting workers and their unions from the shop floor on up should make plans to be in Detroit from September 12-14 for the twelfth

international conference organized by Labor Notes magazine.

Few conferences bring together such a mix of rank and file workers, organizers and staff, union officials, and labor-oriented academics and intellectuals. The result is a unique forum for labor-oriented scholars to share ideas with others grappling with similar issues from a wide array of perspectives.

The Labor Notes conference is also unique for its truly international character. This year's meeting will host delegations of workers from across Europe, Asia, and Latin America, as well as our North American neighbors from Canada and Mexico.

The theme for this year's conference is "Troublemaking in Troubled Times: Organizing to Win". Topics addressed will include: organizing strategies for the workplace, community, and the unorganized; alternative forms of organizing, such as workers centers, non-majority unions and alliances; fighting concessions; and the labor movement's response to war.

As always, there will be dozens of educational, hands-on workshops on topics such as fighting racism in the workplace, day labor/immigrant worker organizing, and reforming your local union. There will also be sectoral meetings where workers in the same union and/or industry can share ideas and discuss common problems, as well as meetings focused around specific interests, including student-labor organizing, technology in the workplace, and trade policy.

For more information on the conference, including a list of speakers, descriptions of workshop offerings, and an online registration form, go to <http://www.labornotes.org/conferences/index.html>. You can also contact Labor Notes by phone at 313-842-6262, or e-mail business@labornotes.org.