

INTERNATIONAL LABOUR ORGANIZATION
COMMITTEE ON FREEDOM OF ASSOCIATION
CASE NO. CASE No. 2227
REPORT IN WHICH THE COMMITTEE REQUESTS
TO BE KEPT INFORMED OF DEVELOPMENTS

Complaints against the Government of the United States presented by — the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and — the Confederation of Mexican Workers (CTM)

Allegations: The complainants allege that, following the Supreme Court decision in the case of Hoffman Plastic Compounds v. National Labor Relations Board, on the basis of their immigration status, millions of workers have lost the only protection that had been available to ensure respect for their freedom of association rights

551. The complaints are contained in communications from the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM) dated 18 and 30 October 2002, respectively.

552. The Government sent its reply in a communication dated 9 May 2003.

553. The United States has ratified neither the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

554. In its communication of 18 October 2002, the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international unions in the United States, representing approximately 13 million working men and women, submitted a complaint concerning actions of the United States Government directly and indirectly affecting these workers. The Confederation of Mexican Workers (CTM) submitted a complaint in a communication dated 30 October 2002 on the same issue on behalf of its 5.5 million members who have close family and labour ties with Mexican workers working abroad and whose rights are directly and indirectly affected by the United States Government action denounced hereafter.

555. The complainants refer to the United States Supreme Court ruling in March 2002 in the case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally dismissed for exercising rights protected by the National Labor Relations Act (NLRA). By this decision, the complainants contend that millions of workers in the United States lost their only protection of the right to freedom of association, the right to organize, and the right to bargain collectively. The Supreme Court had overruled a decision by the National Labor Relations Board (NLRB) and a federal appeals court that granted back pay to the worker. The *Hoffman* decision and the continuing failure of the United States administration and Congress to enact legislation to correct such discrimination puts the United States squarely in violation of its obligations under ILO Conventions Nos. 87 and 98 and its obligations under the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. From a human rights and labour rights perspective, workers' immigration status does not diminish or condition their status as workers holding fundamental rights.

556. The background of the case concerns the Hoffman Plastic Compounds Company which hired Jose Castro in May 1988. In December 1988, Castro and his co-workers began a union organizing campaign. In January 1989, management laid off Castro and three other workers because of their efforts to form and join a trade union. In January 1992, the NLRB ordered Hoffman to offer reinstatement and back pay for lost wages for these four workers. In June 1993, at a hearing to fix the amount owed to each worker, Jose Castro acknowledged that he did not have proper work authorization papers. Because of this, reinstatement was no longer available as a remedy for Castro. However, earlier NLRB and court decisions left open the possibility of enforcing the NLRB's back pay remedy. Hoffman refused to pay the back pay.

557. In September 1998, the NLRB decided that Hoffman should pay Castro back pay for the period of time between his discharge and the date of his admission that he lacked documentation. In that decision, the NLRB said, "the most effective way to accommodate and further [United States] immigration policies ... is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees". The NLRB ordered Hoffman to pay US\$66,951 in back pay to Jose Castro.

558. Hoffman refused to pay Castro and filed an appeal. In 2001, the Federal Court of Appeals upheld the NLRB's order. Hoffman appealed to the Supreme Court. In its March 2002 decision, the Supreme Court reversed the decisions of the appeals court and of the NLRB by a 5-4 vote, denying all back pay to Jose Castro after his unlawful dismissal. The Supreme Court held that, for undocumented workers who suffer reprisals for union organizing activity, the immigration law's prohibition on unauthorized employment is superior to the labour law's protection of the right to form and join a union. This decision and its impact on the right to freedom of association of all workers is the subject of this complaint.

559. ILO Convention No. 87 protects the right of workers "without distinction whatsoever" to establish and join organizations of their own choosing. The *Hoffman* decision, including the failure of the United States administration to propose and Congress to enact legislation remedying the injustice, creates a distinction based on immigration status – a clear violation of Convention No. 87. The rights contained in Convention No. 87 are fundamental human rights that belong to all workers regardless of their immigration status. However, the *Hoffman* decision establishes a subclass of workers who cannot obtain the same remedies for violations of their rights available to all other workers. A majority of these workers in the United States are Mexican, making them the single largest national group affected by the decision.

560. There are 8 million undocumented workers in the United States. Nearly 60 per cent of them are migrant workers from Mexico. Already subject to widespread exploitation and abuse in their wages and working conditions, they are now left with no protection whatsoever if they exercise rights of association, organizing and bargaining to defend themselves. The discrimination created by the *Hoffman* decision prevents these workers from exercising their right to establish and join organizations of their own choosing.

561. ILO Convention No. 98 requires "adequate protection against acts of anti-union discrimination". The *Hoffman* decision nullifies such protection for millions of workers based on their immigration status. Back pay for lost wages is an integral and necessary element of a system for protecting against acts of anti-union discrimination. This is especially true in the United States, where the NLRA allows no fines or other penalties against employers who violate workers' trade union rights.

562. The complainants contend that the United States falls far short of the Committee on Freedom of Association's affirmation of "the need to ensure by specific provisions accompanied by *civil remedies and penal sanctions* the protection of workers against acts of anti-union discrimination at the hands of employers". United States law provides only civil remedies such as reinstatement and back pay.

563. The Supreme Court earlier decided that undocumented workers who are illegally dismissed for union activity are not entitled to reinstatement to their jobs. Back pay for lost wages was the *only* remedy available to such workers, and back pay was the *only* economic cost faced by an employer who illegally

dismissed workers for union organizing activity – until the *Hoffman* decision, which eliminated this last defence.

564. Back pay does not only serve the purpose of compensating victims. It also serves a deterrent purpose. Back pay discourages employers from violating workers' rights because they know they will face an economic cost for violations. Other remedial measures under the NLRA include an order to "cease and desist" the unlawful conduct, and an order to post a written notice on the company bulletin board stating "we will not" repeat the unlawful conduct. Experience has shown that these are not remedies taken seriously by employers and do not serve as any meaningful deterrent to prevent repeat violations.

565. The complainants emphasize that they do not concede that back pay is a *sufficient* remedy for violations of workers' rights, but it is the *only* remedy with economic impact under United States labour law. Where undocumented migrant workers are involved, back pay is the only potential deterrent to unlawful discrimination, because reinstatement is not possible. Eliminating the back pay remedy grants carte blanche to employers to violate undocumented workers' rights with impunity, and discourages workers from exercising their rights. As the dissenting justices in the *Hoffman* case put it: "in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity ... [T]he backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay."

566. In a 1992 complaint to the Committee on Freedom of Association involving workers' organizing rights in the United States, the United States Government cited the back pay remedy as one of the "legal remedies available under the NLRA [that] are effective to redress violations of organizational rights" and noted further that "the NLRB has broad remedial authority to take such action as is necessary to effectuate the policies of the NLRA" [see 284th Report, Case No. 1523, para. 159].

567. By eliminating the back pay remedy for undocumented workers, the *Hoffman* decision annuls protection of their right to organize. The decision grants license to employers to violate workers' freedom of association with impunity. Workers have no recourse and no remedy when their rights are violated. The fact that a judicial decision, rather than a statutory provision, has caused immigrant workers to lose their right to back pay is immaterial. Absent congressional action to overturn the effect of *Hoffman*, that decision amends the NLRA, and it is no longer the case that back pay remedies are available to all workers covered by that statute. The result is the same as if Congress had amended the NLRA to condition back pay on immigration status. In fact, a recent report by the United States Government Accounting Office, the investigative arm of the United States Congress, concluded that "since back pay is one of the major remedies available to workers for a violation of their rights, the Court's decision [in *Hoffman*] effectively diminishes the bargaining rights of such workers under the NLRA".

568. Instead of respecting, promoting and realizing fundamental principles and rights at work, in particular the principles of freedom of association and collective bargaining, the *Hoffman* decision mocks, impedes and abandons them. The *Hoffman* decision has a profound effect on all workers, not just undocumented workers directly affected. Most undocumented workers are employed in workplaces with documented migrant workers and with United States citizens. Before the *Hoffman* decision, union representatives assisting workers in an organizing campaign could say to all of them, "we will defend your rights before the National Labour Relations Board and pursue back pay for lost wages if you are illegally dismissed". Now they must add: "except for undocumented workers – you have no protection". The resulting fear and division when a group of workers is deprived of their protection of the right to organize has an adverse impact on *all* workers' right to freedom of association and right to organize and bargain collectively.

569. The *Hoffman* decision also promotes new and perverse forms of discrimination. It creates an incentive for employers to hire undocumented workers because of their new vulnerability in union organizing efforts, rather than hire documented workers or citizens. As is often the case, the employer

only needs to look at false work papers so that he or she has a defence against sanctions for “knowingly” hiring an unauthorized worker. The resulting discrimination is twofold: discrimination in hiring against documented workers and citizens, but only so the employer can further discriminate against the undocumented. To stop an organizing campaign from even getting off the ground, employers can threaten to dismiss undocumented workers, telling them they have no protection under the NLRA. And then if workers do get a campaign off the ground, employers can carry out the threat, dismissing them with impunity.

570. Instead of realizing the principles of freedom of association, the *Hoffman* decision destroys the principles. The decision is a vengeful assault on workers’ fundamental rights. Instead of protecting workers’ rights the Supreme Court’s decision penalizes workers who exercise fundamental rights. The decision rewards the violators and punishes the victims.

571. The complainants explain that both the NLRB and the Supreme Court treated the *Hoffman* case as one requiring a balancing of labour law and immigration law. The NLRB and the four-justice minority of the Supreme Court gave priority to labour law. The five members of the Supreme Court who voted to deny workers’ rights gave priority to immigration law, despite the fact, as pointed out by the four judges who dissented, that “*all* the relevant agencies (including the Department of Justice) have told us [that] the NLRB’s limited backpay order will *not* interfere with the implementation of immigration policy”.

572. According to the complainants, a “balancing” approach is a fundamentally mistaken treatment of the case. Both the NLRB and the Supreme Court failed to take into account international human rights law and international labour rights norms. They also failed to consider United States obligations as a member of the ILO. Still, the decision of the NLRB and the opinion of the four dissenting justices were consistent with ILO freedom of association principles, even if they were not based on those principles.

573. The complainants emphasize that they are not asking the Committee on Freedom of Association to interpret or intrude on United States immigration law. The right of every country to establish immigration rules is not in question here. The question is whether countries can set immigration rules that violate human rights. Fundamental rights cannot be balanced against policy options. Human rights cannot be abrogated to achieve policy goals but rather must always have priority over these goals. Policy options must be formulated in compliance with basic human rights standards. In this respect, the complainants refer to the Committee’s conclusions in Case No. 2121 involving denial of the right to freedom of association of undocumented foreign workers in Spain [see 327th Report, para. 561] and various other precedents of the Committee’s examination of cases concerning foreign workers.

574. The *Hoffman* decision has direct repercussions on the exercise of trade union rights as it impacts workers in connection with the free choice of their trade union, results in the dismissal of certain workers, and creates other prejudice due to union membership. The decision applies immigration law in such a way as to hinder the free exercise of trade union rights. As such, the *Hoffman* decision constitutes a violation of workers’ rights to form and join trade unions and their right to adequate protection against acts of anti-union discrimination.

575. Moreover, the *Hoffman* decision has had devastating effects in the months since it was issued. Employers have made threats against workers, telling them of the decision and emphasizing that they can be dismissed for trade union organizing with no right to reinstatement or back pay. Workers have abandoned many trade union organizing campaigns because of the fear instilled by the *Hoffman* decision. Employers have also threatened workers with dismissal if they complain about minimum wage or overtime violations, health and safety violations, or any other claim before a government labour law enforcement agency.

576. While in the wake of the *Hoffman* decision worker protection agencies, such as the Department of Labor and the Equal Employment Opportunity Commission, have reaffirmed their commitment to enforcing the laws under their jurisdiction without regard to immigration status, these agencies have

conceded that, under the logic of *Hoffman*, they cannot seek back pay on behalf of undocumented workers for work not performed. Moreover, the fate of common law and statutory remedies, such as damages for pain and suffering caused by sexual harassment, lost wages caused by the failure to promote an employee because of his or her nationality and other remedies, are now at stake. Employers will try to extend the logic of *Hoffman* to defeat any meaningful relief for victims of discrimination who lack proper work authorization or who are afraid to have their immigration status become an issue.

577. The complainants argue that it is now up to the executive and the legislature to act to overturn the *Hoffman* decision, however, the administration has not promoted legislation to accomplish this, and Congress has thus far failed to act. As a result, the complainants conclude that the United States remains in clear and open violation of its obligations as a Member of the ILO. The complainants therefore request the Committee to call upon the United States Government to take the measures needed to fulfil its obligations regarding freedom of association and protection of the right to organize and bargain collectively for all workers without distinction whatsoever and to suggest to the Government the availability of relevant forms of tripartite cooperation regarding the issues raised in this complaint.

B. The Government's reply

578. In its communication dated 9 May 2003, the Government observes that the complaints in this case have alleged that the United States Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* violates fundamental rights of freedom of association and protection of the right to organize and bargain collectively with respect to migrant workers in the United States. In particular, the complainants allege that the *Hoffman* case creates a distinction based on immigration status that violates United States obligations under Conventions Nos. 87 and 98 as well as the 1998 ILO Declaration on Fundamental Principles and Rights at Work. In this respect, the Government first recalls that the United States has not ratified ILO Conventions Nos. 87 and 98, and therefore has no international law obligations pursuant to these instruments and thus no obligation to accord their provisions' domestic effect in United States law. Nonetheless, the Government affirms that, on numerous occasions, it has demonstrated that its labour law and practice are in general conformity with Conventions Nos. 87 and 98, and adds that the ILO supervisory bodies have generally upheld this view.

579. Likewise, the Government states that the ILO Declaration is a non-binding statement of principles, is not a treaty and gives rise to no legal obligations. However, the United States Government has submitted annual reports under the follow-up procedures established by the ILO Declaration that demonstrate that it respects, promotes and realizes the fundamental principles and rights at work embodied in the Constitution of the ILO.

580. As far as the present case is concerned, the Government's position is that the *Hoffman* decision does not conflict with the principles of freedom of association by creating a distinction based on immigration status. The *Hoffman* decision was very narrowly drawn – the Supreme Court limited *one* remedy under United States labour law on the ground that illegal immigrants may not be awarded back pay *for work not performed* and for a job obtained in the first instance by a *criminal fraud*. The United States Government has made clear that the decision will not be applied beyond this narrow scope, and United States courts since *Hoffman* have interpreted the decision just as narrowly.

581. By way of background, the Government explains that Hoffman Plastic Compounds, Inc. which custom-formulates chemical compounds for businesses that manufacture pharmaceutical, construction and household products, hired Jose Castro in May 1988 to operate various blending machines. Before being hired for this position, Castro presented documents that appeared to verify his authorization to work in the United States. In December 1988, the United Rubber, Cork, Linoleum, and Plastic Workers of America began a union-organizing campaign at Hoffman's production plant. Castro and several other employees supported the organizing campaign and distributed authorization cards to co-workers. In January 1989, the employer laid off Castro and other employees engaged in these organizing activities.

582. In January 1992, the National Labor Relations Board (NLRB) found that the employer unlawfully selected four employees, including Castro, for lay-off “in order to rid itself of known union supporters” in violation of section 8(a)(3) of the National Labor Relations Act (NLRA), which prohibits discrimination “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization”. To remedy this violation, the NLRB ordered that the employer: (1) cease and desist from further violations of the NLRA; (2) post a detailed notice to its employees regarding the remedial order; and (3) offer reinstatement and back pay to the four affected employees. The employer agreed to abide by the order.

583. The parties proceeded to a compliance hearing before an administrative law judge (ALJ) to determine the amount of back pay owed to each of the employees. On the final day of the hearing, Castro revealed that he was born in Mexico and that he had never been legally admitted to, or authorized to work in, the United States. He admitted gaining employment with the employer only after tendering a birth certificate belonging to a friend who was born in Texas. He also admitted that he used this birth certificate to fraudulently obtain a California driver’s licence and a social security card, and to fraudulently obtain employment following his lay off by Hoffman. Neither Castro nor the NLRB’s General Counsel offered any evidence that Castro had applied or intended to apply for legal authorization to work in the United States. Based on this testimony, the ALJ found that the NLRB was precluded from awarding Castro back pay or reinstatement as such relief would be contrary to Supreme Court precedent and in conflict with the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. section 1324a, which makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility. This decision did not affect the award of reinstatement and/or back pay to the other three employees who were improperly laid off, with which the employer complied.

584. The NLRB subsequently reversed the ALJ decision with respect to back pay (the impermissibility of reinstatement was not questioned). The NLRB thus found that Castro was entitled to US\$66,951 of back pay, plus interest. It calculated this back pay award from the date of Castro’s termination to the date Hoffman first learned of his undocumented status, a period of four-and-a-half years. Employer petitions for review were denied at the Court of Appeals.

585. The Government clarifies that, as far back as 1984, the Supreme Court confirmed that the NLRA applied to unfair labour practices committed against undocumented workers (*Sure-Tan*, 467 U.S. 883). Therein, the Court found that the definition of “employee” under the NLRA included “any employee” and did not list undocumented aliens as specifically exempted workers. In *Sure-Tan*, the employer was found to have committed an unfair labour practice in reporting undocumented workers to the Immigration and Naturalization Service in retaliation for their union activity. However, the Court found that the NLRB’s authority to select remedies was limited by federal immigration policy. The Court thus held that “in computing back pay employees must be deemed ‘unavailable’ for work (and the accrual of back pay, therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States”.

586. In 1986, Congress enacted the IRCA, which embodied a comprehensive scheme prohibiting the employment of illegal aliens in the United States as a central focus of federal immigration policy. It did so by establishing an extensive “employment verification system” designed to deny employment to aliens who: (a) are not lawfully present in the United States; or (b) are not lawfully authorized to work in the United States. To enforce the verification system, the IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. It is a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. Federal immigration law prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for purposes of obtaining employment in the United States. Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. Similarly, employers

who violate the IRCA, either by knowingly hiring an unauthorized alien or failing to discharge the worker upon discovery of the worker's undocumented status, are punished by civil fines and may be subject to criminal prosecution.

587. The *Hoffman* decision in March 2002 reaffirmed the Court's position in *Sure-Tan* in the context of the new federal immigration legislation. Therefore, in *Hoffman*, the Supreme Court determined that an NLRB award of back pay conflict with federal immigration policy, as expressed in the IRCA, encourage evasion of apprehension by immigration authorities, condone prior violations of immigration laws and encourage future violations. On this basis, the Court held that an undocumented worker was barred from a back-pay award where he had never legally been authorized to work in the United States. The Court concluded that back pay should not be awarded "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 a criminal fraud".

588. It is particularly important to note that the *Hoffman* decision does not represent a significant change in the Supreme Court's view of the balance between United States immigration policy and labour law. Since the inception of the NLRB, the Court has consistently set aside awards of reinstatement or back pay to employees found guilty of serious illegal conduct in connection with their employment. In *Sure-Tan*, as noted above, the Court held that, in cases involving employees who were not lawfully entitled to be present and employed in the United States, with respect to back pay, the NLRB's authority was limited by federal immigration policy. The IRCA made it criminally punishable for an alien to obtain employment with false documents. The *Hoffman* decision is therefore consistent both with the interpretation of labour law in *Sure-Tan* and federal immigration policy as expressed in the IRCA.

589. The Government asserts, however, that the decision does not restrict freedom of association on the basis of immigration status. The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". The First Amendment freedom of association language provides workers, without distinction, with a constitutionally protected right to establish, join and participate in a labour union. This right applies to all persons in the United States, without regard to immigration status.

590. The NLRA governs the relationship between most private employers and their non-supervisory employees. The declaration of policy in the NLRA states that it is the policy of the United States to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing ...". The NLRA relates to the right to organize as well as protection against anti-union discrimination. As noted above, the United States Supreme Court has confirmed that the NLRA applies to undocumented workers.

591. The *Hoffman* decision did not alter or question, but rather confirmed, the principle that in the United States undocumented workers have the right to form and join trade unions. The Court specifically cited its earlier decision in *Sure-Tan* as to the applicability of the NLRA to undocumented workers. The decision therefore does not create any new authorization procedures – as was the situation in the Committee on Freedom of Association Case No. 2121 – that would have a discriminatory effect on the right of undocumented workers to form, join or participate in the trade unions of their choosing.

592. In fact, in response to the *Hoffman* decision the General Counsel of the NLRB specifically reaffirmed the following: ✍ It is unassailable that all statutory employees, including undocumented workers, enjoy protection from unfair labour practices and the right to vote in NLRB elections without regard to their immigration status. ✍ An employee's work authorization status is irrelevant to an employer's liability under the Act, and questions concerning that status should be left for the compliance stage of the case. ✍ An employee's immigration status is irrelevant to a unit determination or voter eligibility.

593. The sole issue in *Hoffman* was the authority of the NLRB to award back pay to undocumented workers in one distinct circumstance – that is, post-termination back pay for work not performed when the alien was not authorized to be present or employed in the United States. The Court found that such an award runs counter to policies underlying the IRCA, which the NLRB has no authority to enforce or administer. The award, thus, was beyond the bounds of the NLRB’s remedial discretion. The Court was very clear that the limitation on back pay, however, did not affect the other remedies available to the NLRB and the courts in enforcing the NLRA: Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed significant sanctions against Hoffman – sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. Hoffman will be subject to contempt proceedings should it fail to comply with these orders. We have deemed such “traditional remedies” sufficient to effectuate national labor policy regardless of whether the “spur and catalyst” of backpay accompanies them.

594. The NLRB also confirmed the narrow effect of the *Hoffman* decision. In a July 2002 memorandum, the General Counsel reminded the NLRB regional offices that the Court’s decision in *Hoffman* did not affect other Board remedies. Similarly, *Hoffman* has not affected enforcement of other laws governing the employment relationship (except where there are issues of back pay for work not performed). In June 2002, the Department of Labor issued a fact sheet making it clear that the *Hoffman* Court “did not address laws that the Department enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labour protections for vulnerable workers”. The Department will continue to enforce the FLSA and MSPA, without regard to whether an employee is documented or undocumented, to ensure that employees are paid as required for hours actually worked.

595. The United States Equal Employment Opportunity Commission (EEOC), also in June 2002, released a statement stressing that the *Hoffman* decision does not affect the Government’s ability to root out discrimination against undocumented workers. The Supreme Court’s decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes. While *Hoffman* may affect a person’s eligibility to receive some forms of relief once a violation is established, immigration status remains irrelevant to the EEOC when examining the underlying merits of a charge.

596. The Government emphasizes that United States federal district courts have also upheld this narrow view of *Hoffman* and cites a variety of cases distinguishing *Hoffman* and upholding awards for unpaid wages to undocumented workers for work actually performed.

597. In conclusion, the Government states that it has no legal obligation to give effect to the instruments referenced in the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) complaint. Moreover, it emphasizes that the *Hoffman* decision is not wide-ranging in that it affects only one of the remedies available in the enforcement of the NLRA. Discrimination against undocumented employees for union activity remains illegal after *Hoffman*, and there is no evidence that the decision has or will significantly erode fundamental worker protection. In fact, the United States Government has taken steps to have alleviate concerns that *Hoffmann* will be applied beyond its intended scope.

C. The Committee’s conclusions

598. *The Committee notes that the allegations in this case refer to the consequences for the freedom of association rights of millions of workers in the United States following the United States Supreme Court ruling that, because of his immigration status, an undocumented worker was not entitled to back pay for lost wages after having been illegally dismissed for exercising the trade union rights protected by the National Labour Relations Act (NLRA).*

599. *The Committee takes due note, in the first instance, of the Government’s reply to the complainants allegations concerning United States obligations under Conventions Nos. 87 and 98, as well as the ILO*

Declaration on Fundamental Principles and Rights at Work. The Government rightly states that having not ratified these two instruments, it has no international law obligations directly pursuant to Conventions Nos. 87 and 98. The Government adds that the 1998 ILO Declaration on Fundamental Principles and Rights at Work is a non-binding statement of principles that does not give rise to legal obligations.

600. *The Committee would recall, however, that, since its creation in 1951, it has been given the task to examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions. Its mandate is not linked to the 1998 ILO Declaration – which has its own built-in follow-up mechanisms – but rather stems directly from the fundamental aims and purposes set out in the ILO Constitution. The Committee has emphasized in this respect that the function of the International Labour Organization in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association and to protect individuals as one of the primary safeguards of peace and social justice [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1994, para. 1, and Annex I, para. 23.] It is in this spirit that the Committee intends to pursue its examination of the present complaint.*

601. *The complaint stems from the United States Supreme Court ruling in **Hoffman Plastic Compounds, Inc. v. National Labor Relations Board**. In summary, this case concerned an undocumented worker, Jose Castro, who was fired from Hoffman Plastic for having supported a union organizing campaign and distributing union authorization cards to coworkers. The fact that this dismissal was in violation of section 8(a)(3) of the NLRA, which prohibits anti-union discrimination, is not contested. In light of this unlawful dismissal, the National Labour Relations Board (NLRB) ordered Hoffman to comply with the following remedies: (1) cease and desist from further violations of the NLRA; (2) post a detailed notice to its employees regarding the remedial order; and (3) offer reinstatement and back pay to the affected employees. At the compliance hearing before the administrative law judge (ALJ), Jose Castro admitted that he had never been legally admitted to, or authorized to work in, the United States and that he had gained his employment after having proffered fraudulent documents. Based on this testimony, the ALJ found that the NLRB was precluded from awarding Castro back pay or reinstatement as, in the ALJ's opinion, such relief would be contrary to Supreme Court precedent and in conflict with the Immigration Reform and Control Act of 1986 (IRCA), which makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility.*

602. *The NLRB subsequently reversed the ALJ decision with respect to back pay (the impermissibility of reinstatement was not questioned) and calculated the award from the date of Castro's termination to the date Hoffman first learned of his undocumented status, a period of four and-a-half years. Following denial of employer petitions for review by the Court of Appeals, Hoffman finally appealed to the Supreme Court against the NLRB award. The Supreme Court found in Hoffman's favour concluding that "allowing the NLRB to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in the IRCA".*

603. *The Committee notes that the complainants challenge not only the conformity of the Supreme Court's decision in **Hoffman** with the principles of freedom of association, but also the inaction of the executive and legislative branches of the Government to redress this violation. The Committee emphasizes that it is not called upon to examine the specific acts of Hoffman Plastic Compounds, Inc., or to alter the effects of the Supreme Court decision in respect of the Hoffman Company. Moreover, the Committee wishes to make clear that its task is not to judge the validity of the majority of the Court in **Hoffman**, which is based upon complex internal legal issues and precedents, but rather to examine whether the outcome of this decision is such as to deny workers' fundamental right to freedom of association. The Committee further notes in this regard that the Government does not contest that undocumented workers should enjoy this fundamental right, to the contrary. This fact thus distinguishes this case from Case No. 2121 recently examined by the Committee (and raised by the complainant) concerning legislation adopted by the Spanish Government, which prohibited "irregular" foreign*

workers (those without proper working papers) from exercising the right to organize [see 327th Report, paras. 548-562]. In contrast with Case No. 2121, the Government's reply in the present case emphasizes that all workers, without regard to their immigration status, benefit from the constitutionally protected right to establish, join and participate in a labour union (First Amendment to the United States Constitution) and adds that the NLRA, which is aimed at protecting the exercise of full freedom of association, self-organization, and designation of representatives of their own choosing, also applies to undocumented workers.

604. The question in this case is whether the remedies remaining for undocumented workers to protect them in their exercise of freedom of association rights after **Hoffman** can be considered sufficient to ensure that these rights have any real meaning. The Government has indicated in its reply that the **Hoffman** decision was drawn very narrowly and that the Supreme Court prohibited only one remedy, that of back pay for work not performed and for a job obtained in the first instance by a criminal fraud. The Committee further notes from the NLRB, General Counsel memorandum concerning the consequences of **Hoffman** on NLRB future procedure and remedies (attached to the Government's reply), that, even though the employer in **Hoffman** was unaware that the "discriminatee" was undocumented when it hired him (and therefore could potentially permit back pay remedies in cases where the discriminating employer knew of the undocumented status), "the clear thrust of the majority opinion precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstances of their hire". The General Counsel thus recommends that, "[b]ecause the Court's considerations focused on the employee's wrongdoing and apply in equal measure whether or not the employer knowingly hired undocumented employees, backpay in either event should not be sought".

605. The impact of **Hoffman** currently in United States practice is therefore not limited to employers who have been misled as to their workers' status, but includes undocumented workers hired by employers in full knowledge of their status and who may then subsequently be dismissed for exercising their fundamental right to organize in an effort to ensure respect for basic workers' rights. The consequences for the employer for illegally dismissing the undocumented worker are now limited to a cease and desist order in respect of violations of the NLRA and the conspicuous posting of a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. The employer will be subject to contempt proceedings in certain circumstances should it not comply.

606. The complainants argue that these existing remedies are insufficient to protect foreign workers' freedom of association rights and describe a post-**Hoffman** workplace environment where either employers intimidate foreign workers into not exercising these rights or where these workers are quite simply too frightened to even try to exercise this basic right. According to the complainant, the impact on freedom of association rights is particularly devastating in light of the some 8 million undocumented workers in the United States. While, on the other hand, the Supreme Court states that it has deemed such remedies sufficient to effectuate national labour policy, it adds that "in light of the practical workings of the immigration laws, any perceived deficiency in the NLRA's existing remedial arsenal must be addressed by congressional action".

607. The Government, in its reply, indicates a variety of measures that it has taken to ensure that **Hoffman** is not applied beyond its intended scope, including the drafting of Labor Department fact sheets to clarify that the decision does not affect the application of the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act concerning, in particular, minimum wages and overtime rates. It adds that the United States Equal Employment Opportunity Commission (EEOC) has released a statement stressing that, while the decision may affect a person's eligibility to receive some forms of relief once a violation is established, immigration status remains irrelevant to the EEOC when examining the underlying merits of a charge.

608. The Committee wishes to make it clear that the issues arising from the main aims and objectives of the IRCA are not called into question here. No contention has been made that undocumented workers,

unlawfully dismissed for exercising trade union rights, should be exempt from the IRCA for any violations they may have been found to commit. The Committee's concern is uniquely to examine whether the remedies that remain available under the NLRA are sufficient for effectively ensuring the basic trade union rights it purports to guarantee to all workers, including undocumented workers. The Committee recalls in this respect the importance it attaches to the principle that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see *Digest*, op. cit., para. 748]. The basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see *Digest*, op. cit., para. 739].

609. The Committee recalls that the remedies now available to undocumented workers dismissed for attempting to exercise their trade union rights include: (1) a cease and desist order in respect of violations of the NLRA; and (2) the conspicuous posting of a notice to employees setting forth their rights under the NLRA and detailing the prior unfair practices. Contempt sanctions for failure to comply are only available for violations of court-enforced NLRB orders obtained through litigation or formal settlements (detailed in NLRB General Counsel memorandum on procedures and remedies post-*Hoffman*). The Committee considers that such remedies in no way sanction the act of anti-union discrimination already committed, but only act as possible deterrents for future acts. Such an approach is likely to afford little protection to undocumented workers who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed at dissuading such action.

610. In light of all of the above considerations, the Committee concludes that the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination.

611. The Committee would not, however, go so far as to state what precise remedy or sanction should be made available and considers that, in the light of the *Hoffman* decision, this deficiency should be addressed by executive and congressional action so as to avoid any potential abuse and intimidation of such workers and any restrictions on their effective exercise of basic freedom of association rights. The Committee notes in this regard the good will demonstrated by the Government in the United States-Mexico Joint Ministerial Statement Regarding Labor Rights of Immigrant Workers (attached to the Government's reply), wherein the Labor Secretaries from both Governments reaffirm their commitment to fully enforce the applicable labour laws administered by their Departments to protect all workers (it should be noted, however, that the NLRA is not administered by the Department of Labor) and ask senior officials to consult on the implications of the *Hoffman* decision for the labour rights of immigrant workers in the United States and to explore areas of bilateral cooperation.

612. The Committee thus invites the Government to explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the *Hoffman* decision. The Government is requested to keep the Committee informed of the measures taken in this regard. **The Committee's recommendation**

613. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation: **The Committee invites the Government to explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision. The Government is requested to keep the Committee informed of the measures taken in this regard.**