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Failure to Deliver:

Assessing Amazon's Freedom of Association Policy under International Labor Standards

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Failure to Deliver: Assessing Amazon’s Freedom of Association Policy under International Labor Standards

EXECUTIVE SUMMARY

On March 11, 2022, Amazon announced a new policy on freedom of association under international standards.¹ Citing International Labor Organization and United Nations principles, Amazon pledged to comply with global norms on union organizing and collective bargaining, even when national labor law reflects a “gap in governance” with international standards.

This assessment shows that Amazon’s freedom of association policy, on its face, is non-compliant with international labor standards, and Amazon management’s conduct before and after issuing the policy continues to violate international standards.

Non-compliant on its face

Amazon’s March 11th statement on Freedom of Association and Collective Bargaining contains no specific references to ILO Conventions 87 and 98, which are the foundation of international freedom of association standards. It makes no reference to the OECD *Guidelines for Multinational Enterprises* and OECD policy prescriptions urging “a positive approach towards the activities of trade unions and an open attitude towards organizational activities of workers.”

Rather than embracing global norms, Amazon’s March 11th policy statement promotes its preferred “direct” (i.e., non-union) relationship with employees, marked by various open-door forums in which workers remain subordinate, dependent, vulnerable, and powerless before Amazon management. In contrast, international standards protect workers’ rights to independently choose their own organizations and their own leaders to engage in arms-length collective bargaining with employers and to defend employees against management mistreatment.

The key international standard and Amazon’s violations

The polestar international principle on freedom of association is that of *non-interference* in workers’ organizing. This rule prohibits imposing pressure, instilling fear, and making threats of any kind that undermine workers’ right to freedom of association, as well as prohibiting discrimination against workers for union activity.

Instilling fear

Both before and since issuing its March 11th freedom of association policy statement, Amazon has violated this non-interference standard. Management imposed pressure and instilled fear through a massive communications offensive in weeks leading up to union elections in Bessemer, Alabama, and Staten Island, New York, led by anti-union consultants paid thousands of dollars per day by Amazon.²

¹ Amazon, “Amazon’s Human Rights Commitment, Policy and Practice: Freedom of Association and Collective Bargaining,” March 11, 2022, at <https://www.aboutamazon.com/news/policy-news-views/amazons-human-rights-commitment-policy-and-practice>.

² John Logan, “How Amazon’s Anti-Union Consultants Are Trying to Crush the Labor Movement,” *Labor Online*, March 22, 2021, at <https://www.lawcha.org/2021/03/22/how-amazons-anti-union-consultants-are-trying-to-crush-the-labor-movement/>; see also Noam Scheiber, “Mandatory Meetings Reveal Amazon’s Approach to Resisting Unions,” *The New York Times*, March 24, 2022, at <https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html>.

Anti-union discrimination

In a case involving the discharge of a union activist in Staten Island, an NLRB administrative law judge ruled on April 18, 2022, that:

- Amazon conducted “an ostrich-like, head in the ground, investigation....”
- Amazon “rushed to judgement and was more concerned about justifying the discharge of [the employee] than conducting a good-faith investigation to determine what actually occurred....”
- Amazon’s “stated reason for discharging [the employee] was a pretext for his protected concerted activity.”

The judge ordered Amazon to reinstate the victimized worker with back pay.³

Workers’ choice—and Amazon’s defiance

In the face of this offensive, a majority of Staten Island workers voted in favor of union representation by the Amazon Labor Union.⁴ In Bessemer, Alabama, results of the NLRB election for representation by the Retail, Wholesale and Department Store Union (RWDSU) are still pending while the status of over 400 challenged ballots is resolved.⁵

Amazon has refused to accept the vote results in Staten Island and has begun a process of objections and appeals that could take years to resolve, nullifying workers’ freedom of association.⁶ And rather than honor the judge’s ruling in the discriminatory discharge case, Amazon immediately announced an appeal to the full five-member Board in Washington, a process that normally takes one to two years to run its course, and then Amazon can appeal to the courts for several more years.⁷

Recommendations

Amazon needs to go back to the drawing board to produce a credible freedom of association policy—and then implement it. Essential elements of a genuine freedom of association policy consistent with international labor standards include specific reliance on ILO Conventions 87 and 98 and commitment to the principle of non-interference with workers’ exercise of the right to freedom of association.

³ NLRB, Decision of Administrative Law Judge Benjamin Green, *Amazon.com Services LLC and Gerald Bryson*, Case No. 29-CA-261755, April 18, 2022, at <https://apps.nlr.gov/link/document.aspx/09031d4583739076>.

⁴ Karen Weise and Noam Scheiber, “Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor,” *The New York Times*, April 1, 2022, <https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html>.

⁵ Noam Scheiber, “Union Trails in Amazon Vote in Alabama, With Challenges Pending,” *The New York Times*, March 31, 2022, at <https://www.nytimes.com/2022/03/31/technology/amazon-union-election-alabama.html>.

⁶ Rachel Lerman, “Amazon Filing Outlines Plans to Fight The New York Union Vote,” *The Washington Post*, April 8, 2022, at <https://www.washingtonpost.com/technology/2022/04/08/amazon-union-vote-objections/>.

⁷ Aaron Gregg, “Judge Orders Amazon to Reinstate Fired Worker, Pay Lost Wages,” *The Washington Post*, April 19, 2022, at <https://www.washingtonpost.com/business/2022/04/19/amazon-union-worker-nlr-staten-island/>.

At a minimum, a freedom of association policy should emphasize:

- Not hiring anti-union consultants to wage campaigns against workers' organizing efforts;
- Not forcing workers into anti-union captive-audience meetings;
- Not creating anti-union websites or using company communication systems to convey anti-union messages;
- Not disparaging, deriding, or otherwise attacking unions;
- Not telling workers that "management starts bargaining at minimum wage" or that workers could lose pay and benefits if they form a union;
- Not telling workers that management will replace them if they exercise the right to strike;
- Not refusing access to the workplace for union representatives to discuss organizing with employees under ILO rules (which specify that such access must be accompanied by "due respect for the rights of property and management").

Amazon should include in a recast policy a concrete, operational due diligence process in line with the UN Guiding Principles to ensure implementation of the policy, including a process for remediation when the policy is violated. The company also should negotiate a "framework agreement" or other instrument on freedom of association with national and global unions whose affiliates represent Amazon workers or to whom Amazon workers have turned for assistance in organizing. Such an agreement would establish that Amazon is truly committed to implementing a policy guaranteeing workers' rights to freedom of association and collective bargaining.

I. Introduction

A. Amazon’s Freedom of Association Policy

On March 11, 2022, Amazon announced a policy statement called *Amazon’s Human Rights Commitment, Policy and Practice: Freedom of Association and Collective Bargaining*. The policy says:

Our human rights commitment and approach are informed by leading international standards and frameworks developed by the United Nations (UN) and the International Labour Organization (ILO) ... and we use the framework of the United Nations Guiding Principles on Business and Human Rights (UNGPs) to guide our approach.... Everywhere we operate, Amazon complies with applicable local laws related to freedom of association and collective bargaining and respects internationally recognized human rights. *When there are gaps in governance or conflicting legal requirements, Amazon follows the UNGPs and seeks ways to honor the principles of internationally recognized human rights.*⁸

This briefing paper assesses Amazon’s freedom of association policy and the extent to which it complies with or falls short of international human rights and labor rights standards. Amazon published the policy shortly before U.S. National Labor Relations Board (NLRB) elections at fulfillment centers in Alabama⁹ and New York.¹⁰

B. Amazon’s Record on Freedom of Association

Amazon faces a challenge making its freedom of association policy convincing. The company’s intense opposition to unions is long-established. More than 20 years ago, renowned labor journalist Steven Greenhouse reported for the New York Times that Amazon “has come out swinging in its fight to stop a new unionization drive, telling employees that unions are a greedy, for-profit business and advising managers on ways to detect when a group of workers is trying to back a union.... [Amazon] gives supervisors antiunion material to pass on to employees, saying that unions mean strife and possible strikes and that while unions are certain to charge expensive dues, they cannot guarantee improved wages or benefits.”¹¹

⁸ Amazon, “Amazon’s Human Rights Commitment, Policy and Practice: Freedom of Association and Collective Bargaining,” March 11, 2022, (emphasis added), at <https://www.aboutamazon.com/news/policy-news-views/amazons-human-rights-commitment-policy-and-practice>.

⁹ On March 31, 2022, the NLRB announced the vote count at the Bessemer, Alabama, warehouse: 871 votes in favor of representation by the Retail, Wholesale and Department Store Union (RWDSU) and 993 votes against representation; however, there were 416 challenged ballots which, if ultimately counted, could affect the results. Hearings on the voting eligibility status of employees who cast challenged ballots are pending (Press Release, “Region 10-Atlanta Announces Results of Bessemer Amazon Ballot Count,” NLRB, March 31, 2022, <https://www.nlr.gov/news-outreach/region-10-atlanta/region-10-atlanta-announces-results-of-bessemer-amazon-ballot-count>).

¹⁰ On April 1, 2022, the NLRB announced that workers at the Staten Island warehouse voted 2,654–2,131 in favor of representation by the Amazon Labor Union, with 67 challenged ballots—not enough to affect the results (Press Release, “Region 29-Brooklyn Announces Results of JFK8 Amazon Ballot Count,” NLRB, April 1, 2022, at <https://www.nlr.gov/news-outreach/region-29-brooklyn/region-29-brooklyn-announces-results-of-jfk8-amazon-ballot-count>). Amazon has filed objections to the election seeking to annul the results.

¹¹ Steven Greenhouse, “Amazon.com Is Using the Web to Block Unions’ Effort to Organize,” *The New York Times*, November 29, 2000, at <https://www.nytimes.com/2000/11/29/business/amazoncom-is-using-the-web-to-block-unions-effort-to-organize.html>.

In 2016 an NLRB regional office found merit in unfair labor practice charges against Amazon that included telling workers that Amazon does not allow unions; that supporting a union “is incompatible with continued employment at Amazon;” and that Amazon would “get” workers who supported a union.¹²

In 2020 Amazon posted a recruiting notice seeking staff for its “Global Intelligence Program” based in Phoenix, Arizona. The notice specified that staff would be responsible for, among other things, collecting information about “labor organizing threats against the company.”¹³ Specifically, the job listing said:

[A]nalytsts “must be capable of engaging and informing ... on sensitive topics that are highly confidential, including labor organizing threats against the company.... Analysts are expected to close knowledge gaps by initiating and maintaining engagement with topical subject matter experts on topics of importance to Amazon, including hate groups, policy initiatives, geopolitical issues, terrorism, law enforcement, and organized labor.”¹⁴

When the job postings were exposed, Amazon quickly deleted them from its website, but not before they were archived. Amazon’s use of “labor organizing threats” and grouping trade unions with “hate groups” and “terrorism” says all one needs to know about the company’s respect for workers’ freedom of association leading up to issuance of the freedom of association policy.

Amazon is equally persistent in its opposition to trade unions worldwide. Within the past year-and-a-half, worker advocates have pointed to Amazon’s firing of union leaders in Canada, Japan, and Poland, and hiring detectives to spy on union workers in Spain.¹⁵ A full review of Amazon’s anti-union practices around the world is beyond the scope of this assessment, but these examples shape the threshold that Amazon must cross to make its freedom of association policy credible and effective on a global level.¹⁶

Amazon’s record of unrelenting antagonism to trade unions raises a question whether the new freedom of association policy signals real change or is a public relations effort to impress socially responsible

¹² The case only came to public notice in 2021: David Streitfeld, “How Amazon Crushes Unions: In a secret settlement in Virginia, Amazon swore off threatening and intimidating workers,” *The New York Times*, March 16, 2021, at <https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html>. The quoted language comes from the remedial notice that the NLRB settlement required Amazon to post in the workplace.

¹³ Louise Matsakis, “Amazon Deletes Job Posts Seeking Analysts to Track ‘Labor Organizing Threats,’” *Wired Magazine*, September 1, 2020, at <https://www.wired.com/story/amazon-deletes-job-posts-labor-organizing-threats/>.

¹⁴ Amazon Job Posting, “Intelligence Analyst, Job ID: 1026060,” (undated), at <https://web.archive.org/web/20200901153123/https://www.amazon.jobs/en/jobs/1026060/intelligence-analyst>.

¹⁵ Mark Kelley, Kinda Guerriero and Lisa Ellenwood, “Workers pushing to unionize Amazon say they faced retaliation and unfair tactics,” *CBC News*, October 21, 2021, at <https://www.cbc.ca/news/canada/amazon-workers-delivery-drivers-unionize-1.6215475>; Kaoruko Ishibushi and Louise Matsakis, “Masafumi Ito, leader of the Amazon Japan Union, sues for wrongful termination,” *Rest of World Global Tech News*, April 30, 2021, at <https://restofworld.org/2021/lawsuit-amazon-japan-union/>; Inicjatywa Pracownicza Trade Union at Amazon Fulfillment Poland, “Amazon fires a protected Inicjatywa Pracownicza shop steward,” *DZial English News*, at <https://www.ozzip.pl/english-news/item/2832-amazon-fires-a-protected-inicjatywa-pracownicza-shop-steward-make-amazon-pay-for-it>; Edward Ongweso, Jr., “Spain’s Biggest Union Is Suing Amazon for Spying on Striking Workers,” *Motherboard Tech by Vice*, December 2, 2020, at <https://www.vice.com/en/article/wx8x8z/spains-biggest-union-is-suing-amazon-for-spying-on-striking-workers>.

¹⁶ For more information on Amazon’s labor policies worldwide, see Jake Alimahomed-Wilson and Ellen Reese, eds., *The Cost of Free Shipping: Amazon in the Global Economy* (2020). See also Committee on Workers’ Capital, “Amazon In-Depth: Work, Rights and Risks at Amazon.com, Inc.,” June 2020, at https://workerscapital.org/IMG/pdf/cwc_amazon_in_depth_investor_brief-06-20-eng_final.pdf.

investors, consumers, political actors, regulators, and other potential critics. For purposes of this assessment, the policy is taken at face value and is analyzed in light of international labor law standards, and in light of Amazon’s conduct before and since issuing the policy.

C. Assessment on Three Levels and Recommendations

This assessment proceeds through three levels of evaluation to show that:

1. Amazon’s freedom of association policy on its face is non-compliant with international labor standards;
2. Amazon’s anti-union actions, both before and after issuing the policy, have been non-compliant with international standards whether or not they were found to have violated the U.S. labor law statute—the National Labor Relations Act (NLRA);
3. In any event, Amazon’s anti-union actions in many instances indeed violated U.S. labor law—by definition violating international standards, because U.S. law is weaker than the standards—and in contradiction to Amazon’s statement that it will adhere to international standards when national law does not.

The assessment concludes with recommendations for Amazon to establish a freedom of association policy that comports with international labor and human rights standards.

II. Amazon’s Freedom of Association Policy in Light of International Standards

A. International Instruments and ILO Conventions 87 and 98

The text of Amazon’s March 11, 2022, statement on its freedom of association policy fails to fulfill international standards in several key respects. It says the policy is “informed by leading international standards and frameworks developed by the United Nations (UN) and the International Labour Organization (ILO).” Similarly, the company’s Amazon Global Human Rights Principles state that “we respect and support the Core Conventions of the International Labour Organization (ILO), the ILO Declaration on Fundamental Principles and Rights at Work, and the UN Universal Declaration of Human Rights.”¹⁷ However, beyond this nod to international standards and frameworks, the policy does not incorporate the substance of these standards into its text.

To begin, Amazon’s freedom of association policy statement makes no mention of the baseline international human rights instruments that protect workers’ freedom of association: the Universal Declaration of Human Rights,¹⁸ the International Covenant on Civil and Political Rights,¹⁹ and the

¹⁷ Amazon, “Amazon Global Human Rights Principles,” accessed April 28, 2022, at <https://sustainability.aboutamazon.com/people/human-rights/principles>.

¹⁸ United Nations, *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), at <https://www.ohchr.org/en/universal-declaration-of-human-rights>.

¹⁹ United Nations, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

International Covenant on Economic, Social and Cultural Rights.²⁰ Each instrument guarantees workers' right to form and join trade unions for the protection of their interests.

The Amazon policy statement on freedom of association contains no specific references to ILO Conventions 87 and 98,²¹ which are the foundation of international freedom of association standards and the *sine qua non* of a genuine freedom of association policy. Nor does it mention the ILO Committee on Freedom of Association or the ILO Committee of Experts on the Application of Conventions and Recommendations. These authoritative oversight bodies give concrete interpretation to the conventions, and their decisions should drive the content of any company's freedom of association policy.

A fully developed freedom of association policy should put conventions 87 and 98 front and center. It should also ground the policy in decisions of the two ILO oversight committees on freedom of association. Instead of giving this solid foundation to its policy, Amazon cobbles together passing references to the ILO and the UN before moving on to an idiosyncratic description of its own practices, which also fall short of adherence to international standards.

B. OECD Guidelines, ILO Tripartite Declaration, and UN Global Compact

Amazon's freedom of association policy makes no reference to the OECD *Guidelines for Multinational Enterprises*, another important international instrument that incorporates ILO standards on freedom of association. The OECD Guidelines chapter on industrial relations requires multinational firms to "respect the right of workers to establish or join trade unions or representative organizations of their own choosing" and to "respect the right of workers to have trade unions of their own choosing recognized for the purpose of collective bargaining."²²

The long-standing position of the OECD is reflected in the following decision by the Committee on Investment, its highest decision-making body:

[I]n specific instances, active efforts may have been undertaken to discourage organizing activities of employees. The Committee regrets that such situations continue to exist or arise and takes the present opportunity to stress again the provisions of the Guidelines as these apply to the question of employee representation. The thrust of the Guidelines in this area is towards management adopting a positive approach towards the activities of trade unions and an open attitude towards organizational activities of workers in the framework of national rules and practices.²³

²⁰ United Nations, *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3., at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

²¹ ILO *Convention No. 87 on Freedom of Association and Protection of the Right to Organise* (1948), at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087; ILO *Convention No. 98 on the Right to Organise and Collective Bargaining* (1949) at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098.

²² OECD *Guidelines for Multinational Enterprises*, Chapter V, Employment and Industrial Relations, at <https://www.oecd.org/corporate/mne/>.

²³ Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International Investment and Multinational Enterprise, *The OECD declaration and decisions on international investment and multinational enterprises: 1991 review* (on file with author).

It is important to note that “the framework of national rules and practices” does not mean that Amazon fulfills its obligations under the Guidelines by following U.S. labor law (in fact the company has violated U.S. labor law, as discussed below). The OECD recognizes this distinction:

The Guidelines provide that they “extend beyond the law in many cases.... A situation where an enterprise has met domestic law requirements is not necessarily equivalent to a situation in which an enterprise observed the Guidelines. Similarly, if an enterprise has followed domestic law, this does not necessarily mean it has met the expectations of the Guidelines.... [T]he expectations of the Guidelines can exceed domestic obligations with respect to the questions at issue.”²⁴

As a multinational company operating worldwide, Amazon is subject to the OECD Guidelines for responsible business conduct. It should include relevant Guidelines requirements in a fully developed freedom of association policy.

Amazon’s March 11th freedom of association policy statement fails to mention or take responsibility under the ILO’s *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, another key international instrument on companies’ social responsibility. The Tripartite Declaration constrains companies to “observe standards of industrial relations,” and explicitly incorporates relevant language from ILO Conventions 87 and 98.²⁵

Amazon (with the incidental exception of Amazon Poland Fulfillment) has not joined thousands of other companies that participate in the UN Global Compact, another important international initiative.²⁶ The Global Compact’s ten “principles” include Principle 3, which says “Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.”²⁷ In a *Guide for Business* published jointly with the ILO, the UN Global Compact explicitly cites Conventions 87 and 98, and says, “Employers should not interfere in workers’ decision to associate, 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.”²⁸

C. Freedom of Association and Amazon’s “Direct” and “Indirect” Relationships

Rather than adhering closely to international standards, Amazon centers its freedom of association policy on an idiosyncratic distinction between “direct” and “indirect” participation of employees in the workplace. This formulation is not part of international labor rights discourse. Rather, it is

²⁴ OECD (2019), *Guide for National Contacts Points on the Initial Assessment of Specific Instances*, paragraphs 18-19 (citing OECD Guidelines (2011), Chapter 1 paragraph 2 and Chapter IV Commentary, paragraphs 38-39), at <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>.

²⁵ ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (Fifth edition, 2017), at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

²⁶ UN Global Compact, “Our Participants,” accessed on April 28, 2022, at <https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=%E2%9C%93&search%5Bkeywords%5D=amazon>.

²⁷ UN Global Compact, “The Ten Principles,” at <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

²⁸ UN Global Compact and ILO, “The Labour Principles of the United Nations Global Compact: A Guide for Business” (2008), at https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Flabour%2Fthe_labour_principles_a_guide_for_business.pdf

Amazon-speak for its preferred “direct” (i.e., non-union) relationship with employees,²⁹ compared with an “indirect” relationship with union-represented employees. Just a month after issuing the freedom of association policy, Amazon CEO Andy Jassy told an interviewer that Amazon workers are already “empowered” because if employees want change, “they can go meet in a room, decide to change it, and change it.” But rather than acknowledge that it is management’s unilateral decision to make a change or not, he concluded, “That type of empowerment doesn’t happen when you have unions.” Jassy said workers are “better off not” joining a union because “people are better off having a direct relationship with their managers.”³⁰

Amazon’s policy statement refers to works councils in Europe. In countries with legal requirements for works councils, Amazon has a long record of first resisting formation of works councils, then dealing with them as grudgingly as possible.³¹ Amazon asserts that it is in the process of establishing a European Works Council, a requirement for firms with at least 1,000 employees in two or more EU countries. But the company should have recognized a works council more than 20 years ago when it first met the EWC threshold. In any event, works councils are not trade unions and they do not engage in collective bargaining, but are limited to information and consultation sessions with management.

Amazon devotes a large part of its policy statement to a recital of in-house forums and venues purporting to implement its “direct” version of freedom of association, including:

- “Associate Forums”
- “Associate Roundtable Meetings”
- “Connections” on-line employee feedback mechanism
- “Voice of the Associate Boards”
- “Global Ethics” line
- “Amazon A-to-Z app”
- “Executive Escalations” system
- “All-hands meetings” with general managers
- “Stand-up meetings” with direct supervisors
- And finally: “Any employee can go directly to Human Resources, the Legal Department, or any manager with a suggestion, concern, feedback or complaint.”

None of these mechanisms fulfill international standards on freedom of association. In all of them, workers remain subordinate, dependent, vulnerable, and powerless before Amazon management. In contrast, international standards protect workers’ rights to independently choose their own organizations and their own leaders to engage in arms-length collective bargaining with employers and to defend employees against management mistreatment. These are the rights that Amazon harshly

²⁹ Part IV (page 15) will discuss Amazon’s repeated insistence on a “direct” relationship in its anti-union campaign tactics in Alabama and New York.

³⁰ Amazon CEO Andy Jassy on CNBC *Squawk Box*, April 14, 2022, at <https://www.cnbc.com/video/2022/04/14/amazon-ceo-andy-jassy-employees-are-better-off-not-joining-a-union.html>.

³¹ Jörn Boewe and Johannes Schulten, “Amazon Strikes in Europe: Seven Years of Industrial Action, Challenges, and Strategies,” in Jake Alimahomed-Wilson and Ellen Reese, eds., *The Cost of Free Shipping: Amazon in the Global Economy* (2020), at <https://www.jstor.org/stable/j.ctv16zjhjc.20>.

opposed before issuing its freedom of association policy, fails to recognize in the policy, and fails to honor in management’s conduct since issuing the policy.

III. The Principle of Non-Interference

A. The ILO and Non-Interference

Before moving to an examination of Amazon’s record of failure to comply with international standards on freedom of association, a clear understanding of international standards is needed. The polestar principle is that of *non-interference* in workers’ organizing.

The principle of non-interference was articulated as long ago as 1949, shortly after the ILO adopted Conventions 87 and 98 on freedom of association, organizing, and collective bargaining. The ILO said at that time that 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 organizations or by public authorities.”³²

The United States has not ratified ILO conventions 87 and 98. But whether or not a country has ratified them, the ILO has determined that ILO member countries are “bound to respect a certain number of general rules which have been established for the common good ... among these principles, freedom of association has become a customary rule above the Conventions.”³³

The United States has accepted this rule and jurisdiction of the Committee on Freedom of Association in complaints filed against it under these conventions. In many cases, the Committee found the United States to be in violation of the Conventions. However, ILO decisions are not binding in U.S. law, and the ILO has no enforcement authority.

The Committee on Freedom of Association has condemned many acts of interference with workers’ organizing rights in its handling of thousands of complaints submitted under Conventions 87 and 98 in the past half-century. Here are some of the Committee’s examples of employer conduct amounting to prohibited interference with workers’ organizing and bargaining rights:

- Imposing pressure, instilling fear, and making threats of any kind that undermine workers’ right to freedom of association;
- Creating an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities;
- Pressuring or threatening retaliatory measures against workers for union membership or for engaging in legitimate union activities;
- Attempting to persuade employees to withdraw authorizations given to a trade union to unduly influence the choice of workers and undermine the union;
- Harassing and intimidating workers by reason of trade union membership or legitimate union activities, including to prevent the free exercise of trade union functions;

³² International Labour Conference, *Record of Proceedings*, 32d Sess. 306, 470 (1949) (emphasis added).

³³ ILO Committee on Freedom of Association, *Fact-Finding and Conciliation Commission Report: Chile*, 1975, paragraph 466, at https://www.ilo.org/global/standards/information-resources-and-publications/WCMS_160778/lang--en/index.htm.

- Discriminating against workers with regard to their employment because of legitimate trade union activities or union membership;
- Dismissing a worker by reason of union membership or legitimate union activities, including by invoking "neglect of duty" [or other employer rules] when the real motive for dismissal is a worker's trade union activities;
- Transferring or downgrading a worker as a result of legitimate union activities or union membership;
- Blacklisting trade union officials or members;
- Artificially promoting workers to positions of authority or management to reduce the number of workers eligible to join a certain trade union and undermine that workers' organization.³⁴

This is not an exhaustive list. Especially in the United States, employers and anti-union consultants who specialize in thwarting employees' organizing efforts have devised myriad strategies and tactics to interfere with workers' freedom of association, not all of which the ILO's Committee on Freedom of Association has had an opportunity to examine.

B. U.S. Law and Non-Interference

Some features of U.S. labor law, especially as interpreted by conservative federal court decisions, allow employers to interfere with workers' freedom of association through the kind of aggressive anti-union campaigns that Amazon has launched in response to employees' organizing efforts. This is not just an assertion of union advocates. U.S. employers themselves have conceded that their anti-union campaigns run afoul of international standards. As the U.S. Council for International Business, the U.S. employer representative at the ILO, explained:

ILO core conventions [87 and 98] 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 the conventions would prohibit all acts of employer and union interference in organizing, *which would eliminate employers' rights under the NLRA to oppose unions.*³⁵

The Council's 2007 statement is based on an analysis published in a 1984 book by the then-chief legal advisor to the U.S. employer delegation to the ILO. It noted, citing several examples of employers' anti-union campaign tactics: "These are all forms of interference with organizing, but are lawful under the NLRA ... acts of interference permitted under the NLRA would be illegal under Convention No. 87."³⁶

³⁴ ILO, *Compendium of Decisions of the Committee on Freedom of Association*, Section 13 "Protection against discrimination," Section 14, "Protection against acts of interference" at https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang--en/index.htm.

³⁵ USCIB, "U.S. Ratification of ILO Core Labour Standards," *Issue Analysis*, April 2007 (emphasis added), at https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf.

³⁶ 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 pp. 43-44.

C. Captive-Audience Meetings

U.S. labor law has enabled the use of what are called “captive-audience” meetings in the workplace. In captive-audience meetings, workers are required to submit to management’s anti-union speeches, videos, power point slides, and other importuning with no opportunity for union representatives or workers themselves to respond to these attacks.

In Europe, the practice of such anti-union captive-audience meetings is unheard of. Forcing employees to attend meetings to hear employers’ anti-union speeches is equivalent to requiring workers to listen to employers’ diatribes on race or religion or politics.

The *Comparative Labor Law & Policy Journal*, a leading scholarly publication, devoted a special issue titled “The Captive Audience” to an examination of law and practice around the world.³⁷ The editors asked scholars how their countries’ labor law systems would treat captive-audience meetings.

A Spanish scholar stated, “Employers 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.”³⁸ A German scholar explained, “The employer is not entitled ... to force speeches against unionization on his employees.... There is no room for American style captive audience meetings.... If the employer wants to address issues typically addressed in American captive audiences, there is virtually no chance of doing so legally.”³⁹

Summing up contributions to this volume on captive-audience meetings, journal editors noted in the articles by European authors a “line of analysis embedded in several of these essays ... that 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 unionization.”⁴⁰

On April 7, 2022, the NLRB General Counsel issued a Memorandum to make mandatory captive-audience meetings unlawful under the National Labor Relations Act. The General Counsel would not prohibit such meetings altogether, but would eliminate the “captive” element, allowing employees to decline to attend such meetings, with guarantees of non-discrimination against workers who choose not to attend. The full five-member Board in Washington will have to act on the General Counsel’s memo in a case that comes before it at some point in the future, so the outcome of the General Counsel’s effort remains to be seen.⁴¹

³⁷ *Comparative Labor Law & Policy Journal*, Vol. 29, Issue 2 (2008), at https://cllpj.law.illinois.edu/archive/vol_29/.

³⁸ Núria Pumar Beltrán, “Captive Audience Speech: Spanish Report,” *Comparative Labor Law & Policy Journal*, Vol. 29, Issue 2 (2008), at https://cllpj.law.illinois.edu/archive/vol_29/.

³⁹ Christopher Gyo, “Legitimacy of Captive Audiences in Germany,” *Comparative Labor Law & Policy Journal*, Vol. 29, Issue 2 (2008), at https://cllpj.law.illinois.edu/archive/vol_29/.

⁴⁰ “Editors’ Note,” *Comparative Labor Law & Policy Journal*, Vol. 29, Issue 2 (2008), at https://cllpj.law.illinois.edu/archive/vol_29/.

⁴¹ NLRB Office of the General Counsel, “The Right to Refrain from Captive Audience and other Mandatory Meetings,” *Memorandum GC 22-04*, April 7, 2022, at <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>; see also Noam Scheiber, “N.L.R.B. counsel calls for a ban on mandatory anti-union meetings: The meetings are a common response by companies like Amazon and Starbucks to union drives among workers. The full labor board will make the decision,” *The New York Times*, April 7, 2022, at <https://www.nytimes.com/2022/04/07/business/economy/nlr-union-amazon-starbucks.html>.

D. Threats vs. Predictions

Based on court decisions distinguishing between “threats” and “predictions” of workplace closure, U.S. employers can legally “predict” that the workplace will close if employees choose union representation, as long as the prediction cites conditions not completely within the employer’s control. The employer cannot make a direct threat such as “if you bring in a union, I will close the workplace,” but the employer can make an implicit threat by couching it as a prediction, for example, “if you bring in a union, and the union makes us uncompetitive, I’ll have to close the workplace.”⁴²

In the minds of employees listening to this statement in anti-union captive-audience meetings or reading it in written employer communications, the interim condition is irrelevant. What they hear is “union—close the workplace,” and employers more often than not repeat this message in the final stages of an organizing campaign before an NLRB election.⁴³

Employers can also tell workers that if they choose a union “you could lose everything you have” as long as they add that things could stay the same or things could improve. But the emphasis is always on the possibility of losing pay and benefits. Employers also tell employees that if the union “forces you to strike” or “pulls you out on strike” or “orders you to strike” (even though all union charters require membership votes to authorize a strike), “we will hire permanent replacements to take your jobs.” This takes advantage of another feature of U.S. labor law that the Committee on Freedom of Association has found violates ILO standards—allowing employers to permanently replace workers who exercise the right to strike.⁴⁴

This is just a sample of employers’ anti-union tactics to interfere with workers’ organizing efforts. It is important again to stress that U.S. law allows management to use these tactics in some circumstances, but it does not require them. Management could refrain from using these anti-union campaign methods and still be in full compliance with U.S. labor law and in compliance with international standards.

⁴² 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.

⁴³ 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 labor 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. See William R. Adams, Adams, Nash, Haskell and Sheridan, *A Manager’s Guide to Labour Relations Terminology* (Second Edition, 2003; emphasis in original); see also Kate Bronfenbrenner, “No Holds Barred—The Intensification of Employer Opposition to Organizing,” Briefing Paper (Washington, D.C.: Economic Policy Institute, May 20, 2009), at <https://www.epi.org/publication/bp235/>.

⁴⁴ Permanent striker replacement is not in U.S. labor 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 Labor Organization, Committee on Freedom of Association, *Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, paragraph 92, Report No. 278, Case No. 1543 (1991).

IV. Amazon’s Anti-Union Conduct, U.S. Labor Law, and International Standards

A. Websites, TV Monitors, Text Messages, etc.

At the Bessemer, Alabama, warehouse where employees sought to organize with help from the Retail, Wholesale and Department Store Union (RWDSU) and at the JFK8 and LDJ5 warehouses on Staten Island where workers formed the Amazon Labor Union (ALU), Amazon created anti-union websites calling on workers to keep a “direct relationship” with management and to vote against union representation.⁴⁵ Amazon conveyed the same anti-union messages to workers on big-screen monitors in company cafeterias and break rooms, in a continuous stream of “text-‘em-all” messages sent to employees’ cell phones, in so-called “InSTALLment” placards posted above every men’s bathroom urinal and on the inside door of all bathroom stalls (employees could not even relieve themselves in tranquility), in “table-toppers” placed on every table in cafeterias and break rooms, and in repeated captive-audience meetings both before and after the company issued its freedom of association policy.⁴⁶

Outlined below are statements taken from Amazon’s anti-union website at the Staten Island warehouse on March 29, the day before votes were tallied in the JFK8 election.⁴⁷ Within them, many labor law scholars could detect assertions that cross the line to unlawful conduct under U.S. labor law. But normally it would require several years of unfair labor practice litigation before reaching a definitive legal ruling.

Whatever the outcome of unfair labor practice proceedings, the following statements in Amazon’s anti-union campaigns in the Staten Island and Bessemer warehouses clearly interfere with workers’ freedom of association and right to organize in violation of international labor standards.⁴⁸

➤ *A union is an outside group elected by associates to speak on their behalf on all matters related to their employment including wages, benefits, and workplace policies.*⁴⁹

By immediately tagging the union as “an outside group” rather than an organization of the workers themselves, Amazon negates any purported commitment to freedom of association, the essence of which is workers’ right to have an organization “of their own choosing” to negotiate with management.

⁴⁵ For the Staten Island warehouse, see <https://www.unpackjfk8.com/>. An archived version of Amazon’s “DoItWithoutDues.com” website for the Bessemer warehouse is available at https://web.archive.org/web/2021*/doitwithoutdues.com; for a description, see Lauren Kaori Gurley, “Amazon Launches Anti-Union Website to Derail Alabama Union Drive,” *Motherboard Tech by Vice*, January 15, 2021, at <https://www.vice.com/en/article/5dtkad/amazon-launches-anti-union-website-to-derail-alabama-union-drive>.

⁴⁶ Testimony of Amazon employee relations manager, NLRB Region 10, “Official Report of Proceedings,” *Amazon.com Services LLC and Retail, Wholesale and Department Store Union*, Case No. 10-RC-269250, May 18, 2021 (on file with NLRB; not available on-line).

⁴⁷ Amazon, “Your Voice. Your Vote. Let’s Keep Jfk8 Working Together As One Team!,” accessed April 28, 2022, at <https://www.unpackjfk8.com/>. Similar statements were contained in Amazon’s “Do It Without Dues” website for the Bessemer union election, with changes to attack the RWDSU rather than the ALU, available at https://web.archive.org/web/2021*/doitwithoutdues.com.

⁴⁸ Nitasha Tiku, Reed Albergotti, Greg Jaffe and Rachel Lerman, “From Amazon to Apple, tech giants turn to old-school union busting,” *The Washington Post*, April 24, 2022, at <https://www.washingtonpost.com/technology/2022/04/24/amazon-apple-google-union-busting/>.

⁴⁹ Amazon, “What is a Union,” accessed April 28, 2022, at <https://www.unpackjfk8.com/unionfacts>.

- *Unions are a business, and like every business they need money to operate. The money to cover their expenses (such as salaries and benefits for union officials) comes from members in the form of dues and fees.*⁵⁰

This is a false statement intended to mislead workers about the nature and functioning of unions. Trade unions are non-profit organizations responsible to their members, not businesses responsible to shareholders seeking return on investment. Highlighting “salaries and benefits for union officials” suggests a corrupt motive, while leaving out the many other expenses that directly serve workers’ interests, such as legal counsel to support workers’ interests, research to support the union’s bargaining proposals, communications departments to keep workers informed, arbitration expenses to contest disciplinary action without just cause, expenses to help workers in the same and related industry organize and thus take wages out of competition, and many more activities that help union-represented workers.⁵¹

- *If a union is elected, Amazon can no longer work directly with you to make positive changes in the workplace.*⁵²

This is a warning to workers that things will get worse with a union because “positive” changes can only come from working “directly” with management. In contrast, a genuine freedom of association policy would say “if a union is elected Amazon will work with your union to make positive changes in the workplace.”

- *We don’t believe the ALU will add value to our relationship or how we work together. They will only come between us.*⁵³

This statement potentially suggests that Amazon will not accept workers’ choice of union representation, thus discouraging workers from supporting or voting in favor of representation.

- *In negotiations, there are no guarantees.... You could end up with better, worse, or the same as you have today....*⁵⁴

This is just a sampling of Amazon’s constant messaging that employees could lose pay and benefits if they vote for a union. Note that Amazon never says “you could end up with less, things could stay the same, or you could get more.” By ending with “you could lose what you have,” management is instilling fear that choosing union representation will have negative consequences for employees.⁵⁵

⁵⁰ *Id.*

⁵¹ This is not meant to gloss over instances of corruption among union officials. In most instances, unions’ own internal auditing procedures uncover and remedy misuse of funds and hold wrongdoers accountable. Where unions fail internally, such conduct is usually—and should be—rooted out and prosecuted by government authorities.

⁵² Amazon, “Amazon Is One Team, Working Together. Let’s Keep It This Way,” accessed April 28, 2022, at <https://www.unpackjfk8.com/oneteam>.

⁵³ *Id.*

⁵⁴ Amazon, “What is a Union,” accessed April 28, 2022, at <https://www.unpackjfk8.com/unionfacts>.

⁵⁵ Communications scholars and linguists identify this rhetorical device dating from Greek and Roman times as a *tricolon*: a succession of three phrases in which the final phrase, usually more elaborated, has a crescendo effect with particular impact, such as Henry Lee’s eulogy of George Washington as “first in war, first in peace, and first in the hearts of his countrymen,” or Abraham Lincoln’s promise to bind the nation’s wounds “with malice toward none, with charity for all, with firmness in the right as God gives us to see the right.” Anti-union consultants usually advise

- *New York is not a right-to-work state, so you can be forced to join a union as a condition of your employment.... And members typically are required to pay union dues even if you don't want union representation or didn't vote for it. That's hard-earned money out of your paycheck, with no guarantees.*⁵⁶

This statement is false. No worker can be forced to join a union as a condition of employment. Union membership is always voluntary under U.S. labor law. Under what is called a “union security” clause in a collective bargaining agreement, employees who choose not to join the union can be required to pay an “agency fee” for union representation (an amount lower than union dues paid by members), except in states with so-called “right to work” laws. A union security clause is a subject of bargaining and only takes effect if management agrees to it. With or without a union security clause, the union has a legal obligation to represent non-members in the same way it represents members.

- *The ALU is trying to come between our relationship with you.... We created our company as One Team, Working Together. Where individuality is respected. And where great ideas can come from anywhere, and we can work together to make changes and improvements. Unions just don't work that way.*⁵⁷

By suggesting that union representation cannot bring any “changes and improvements” because “unions don't work that way,” Amazon is indicating to workers that collective bargaining is futile and voting for the union is useless. Even more: by suggesting that no improvements can be gained through union representation, management insinuates that only negative consequences can come from workers' choice of representation.

B. Amazon and Captive-Audience Meetings

Amazon's repeated use of captive-audience meetings in weeks leading up to NLRB elections—including after issuance of the company's freedom of association policy—has been amply documented by press reports based on interviews with workers.⁵⁸

In many instances, captive-audience meetings and one-on-one meetings with workers became opportunities for management to “take the gloves off” in ways not contained in written anti-union propaganda such as that on the websites. One management video at the Staten Island facility a few days before the March 2022 election said about the union: “[T]heir answer to most things is they should shut down Amazon”—an obvious message that bringing in a union would result in workplace closure.⁵⁹

In another captive-audience meeting at JFK8, an anti-union consultant told workers “There are no guarantees as to what would happen, right?... We can't make any promises things will get better or stay

managers to finish the mantra, after a quick, in-and-out mention of “more” or “same,” with some variant of “you could end up with less than what you have now” to imprint this threat in the minds of employees.

⁵⁶ Amazon, “Questions and Answers—I don't have to join the union, do I?,” accessed on April 28, 2022, at <https://www.unpackjfk8.com/questions>.

⁵⁷ Amazon, “Questions and Answers—Why does Amazon prefer a direct relationship with its associates, without a union?,” accessed on April 28, 2022, at <https://www.unpackjfk8.com/questions>.

⁵⁸ See, for example, Noam Scheiber, “Mandatory Meetings Reveal Amazon's Approach to Resisting Unions: The company has held hundreds of meetings with workers to discourage them from supporting a union in two upcoming elections,” *The New York Times*, March 24, 2022, at <https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html>.

⁵⁹ *Id.*

the same. They could get worse. We can't promise what's going to happen. Amazon can't promise you that they're going to walk into negotiations and that the negotiations will start from the same [pay and benefits workers have already]. They could start from minimum wage, for instance. I don't think that will happen, but it's a possibility."⁶⁰

Amazon's threat to demand worker pay cuts during bargaining as a consequence of choosing union representation clearly interferes with workers' ability to freely choose to form a union. The consultant went on to say the union election has "significant and binding consequences not just for yourselves but for future associates, your coworkers, and potentially for your family"—bringing in workers' family relationship to instill fear of terrible consequences of forming a union.⁶¹

A worker supporting the RWDSU at the Bessemer, Alabama, warehouse told a reporter, "They were saying, 'The union's coming in, and the union is a business. The money they make is gonna be off of you. Your \$9 a week, they're gonna use that money to buy cars'"—again suggesting that union representatives are corrupt and only want dues money for personal gain.⁶²

The volume and pace of required meetings in Bessemer was staggering. Amazon's captive-audience meeting program was described in detail by the company's labor relations manager who directed the anti-union campaign in Bessemer. The testimony came at an NLRB hearing on the RWDSU's objections to the first union election in the Bessemer facility, which took place in February and March 2021.

The Amazon manager said:

I mean, they were 30-minute meetings, and there were—so 24/7 operation, we had multiple shifts, we had back half shifts, we had front half shifts, we had night shifts, both front half and back half, and we would start—and they were held in two rooms. The max amount allowed in one of the rooms was 15 associates. The max allowed in the second room was 25 associates. And because of that, we had to hold a lot of meetings 16—8 hours—16 hours each day in each room, and multiply that over four weeks.⁶³

The NLRB hearing officer's report found:

The captive audience meetings were conducted by employee relations managers, who were given the moniker "mini campaign owners" by the Employer. In addition to these "mini campaign owners" (MCO) the Employer hired a cadre of private paid consultants who assisted the MCO's in the Employer's anti-union campaign.

⁶⁰ Jason Koebler and Lauren Kaori Gurley, "LEAKED AUDIO: Amazon Union Buster Warns Workers 'Things Could Become Worse,'" *Motherboard Tech by Vice*, February 16, 2022, at <https://www.vice.com/en/article/jgmbvg/leaked-audio-amazon-union-buster-warns-workers-things-could-become-worse>.

⁶¹ *Id.*

⁶² Dave Jamieson, "Amazon Spent \$4.3 Million On Anti-Union Consultants Last Year: The online retailer held "captive audience" meetings to dissuade workers from unionizing, with consultants receiving \$3,200 a day for their work," *HuffPost Business*, March 31, 2022, at https://www.huffpost.com/entry/amazon-anti-union-consultants_n_62449258e4b0742dfa5a74fb?c9h.

⁶³ Testimony of Amazon manager, NLRB Region 10, "Official Report of Proceedings," *Amazon.com Services LLC and Retail, Wholesale and Department Store Union*, Case No. 10-RC-260250, May 18, 2021, at p. 1154 (not available online; on file with NLRB and the author). See also John Logan, "How Amazon's Anti-Union Consultants Are Trying to Crush the Labor Movement," *Labor Online*, March 22, 2021, at <https://www.lawcha.org/2021/03/22/how-amazons-anti-union-consultants-are-trying-to-crush-the-labor-movement/>.

While the MCO's presented the Employer's message at its captive audience speeches, the paid consultants also attended meetings to field questions and issues that the MCO's were not equipped to respond to....

The last captive audience meetings were held on February 6, 2021. After the ballots were mailed on February 8, 2021, the Employer's campaign shifted to ... one-on-one face-to-face meetings with associates, and the dissemination of written messages to dissuade employees from supporting the Union.⁶⁴

C. Amazon Statements in Captive-Audience Meetings

Here is just a sample of oral statements by Amazon managers and consultants in captive-audience meetings in Bessemer attacking unions and suggesting that workers will suffer dire consequences if they vote for the RWDSU:⁶⁵

1. Setting the captive-audience meeting stage:

My name is [name omitted], this is [name omitted] sitting over there. We're working together to provide you some information on ... the unionization efforts at BHM1....

I know this is a big room, there's 50 people in here, plus myself and [name omitted], so there's 52....

I am a representative of Amazon ... I'm going to show you a short video.

[Video plays] Today, we want to mention a couple things about unions. We'll share facts about the unions and RWDSU.... It is important to understand that a union is a business. A union is not a charity. It is a business.⁶⁶

... [A] good thing, if you can remember this, is unionfacts.org. That's a website that is unbiased, it's not for the unions, it's not for a company. Unionfacts.org.⁶⁷

⁶⁴ NLRB Region 10, "Hearing Officer's Report on Objections," Amazon.com Services LLC and Retail, Wholesale and Department Store Union, Case No. 10-RC-260250, August 2, 2021, at <https://www.alreporter.com/wp-content/uploads/2021/08/Hearing-Officers-Report-in-Amazon-Case-No.-10-RC-269250.pdf>.

⁶⁵ These statements are drawn from workers' recordings of the captive-audience meetings, recordings which occurred openly with management's knowledge and no attempt to prohibit them.

⁶⁶ Transcript of Captive-Audience Meeting, BHM1, October 10, 2021, on file with author.

⁶⁷ Transcript of Captive-Audience Meeting, BHM1, October 22, 2021, on file with author. Readers are invited to visit the Center for Union Facts website at www.unionfacts.com and decide for themselves if it is unbiased. In a 2014 speech, the founder of the Center for Union Facts said, "I get up every morning and I try to figure out how to screw with the labor unions." Eric Lipton, "Hard-Nosed Advice From Veteran Lobbyist: 'Win Ugly or Lose Pretty,'" *The New York Times*, October 30, 2014, at https://www.nytimes.com/2014/10/31/us/politics/pr-executives-western-energy-alliance-speech-taped.html?_r=2; see also Lee Fang and Nick Surgey, "Anti-Union Operative Warns Business of Historic Rise in Labor Activism," *The Intercept*, May 1, 2020, at <https://theintercept.com/2020/05/01/labor-union-lobbyist-coronavirus/>; Steven Greenhouse, "Lobbyist's campaign targets U.S. unions," *The New York Times*, February 14, 2006, at <https://www.nytimes.com/2006/02/14/business/worldbusiness/14iht-union.html>.

2. Warning that management will be responsive to workers' concerns as long as there is no union, but unresponsive with a union:

I just wanted to share that prior to joining Amazon, I worked for General Motors for 20 years. In a union environment. In my experience, the unions, they are controlling everything we do. Unions make it more difficult for us to speak directly with each other.... Here at BHM1, we value our ability to speak with each other and respond to your concerns. With a union, that relationship may change. In my experience, in a union setting, it's hard for high performing employees to get promoted....⁶⁸

You would lose kind of that direct working relationship to help resolve some of, maybe your personal issues faster, right? You would have to go file a grievance with that union steward, that union steward is then gonna take it to the company, speak on your behalf or whatever, and then get a resolution or maybe not a resolution, and then come back to you with it. So you would lose that direct working relationship. We can resolve things faster working directly with an associate versus going through a third party that knows nothing about our relationship.⁶⁹

In a union setting, it seems like employees were put in a box. And it was hard for them to learn new skills, try new things and move to other areas. That can make it more difficult to get promoted.⁷⁰

3. Warning that management will replace workers who exercise the right to strike:

And we look at this coal mine strike that's happening right now, that's obviously a pressure to have those negotiations go the way the union wants, it's being drawn out right now, because what did the coal mine do? They hired replacement workers, so their business is still running.⁷¹

Well, much like what's happening in Tuscaloosa, the company typically will just hire replacement workers during that time when their workers are out on strike. Alright. So you gotta think about that too....⁷²

So what that means is, you're in negotiations, a strike's ordered because they're trying to put pressure on the company, the company doesn't still go because if we hire replacement workers the business is still running, that's what's happening in Tuscaloosa right now with the mine workers....⁷³

⁶⁸ Transcript of Captive-Audience Meeting, BHM1, October 10, 2021, on file with author.

⁶⁹ Transcript of Captive-Audience Meeting, BHM1, October 22, 2021, on file with author.

⁷⁰ Transcript of Captive-Audience Meeting, BHM1, January 16, 2022, on file with author.

⁷¹ Transcript of Captive-Audience Meeting, BHM1, October 25, 2021, on file with author.

⁷² Transcript of Captive-Audience Meeting, BHM1, October 22, 2021, on file with author.

⁷³ *Id.*

They bring in, you know, replacement workers to keep the business going.... If you choose to strike, we still have a business to run! We're not gonna shut the business down!⁷⁴

4. Repeatedly warning that “things could get worse” if workers choose union representation:

- In collective bargaining there are no guarantees. You could end up with the same, more, or less than what you have.... You may get something a little more of one thing, but less of something else, or maybe none of something else ... is it worth the gamble to end up with more, to end up with the same, or less, of different things. That goes for the pay, benefits, the whole package....⁷⁵
- In collective bargaining associates will end up with the same, more, or less than what they had.⁷⁶
- You could come away from that process with exactly what you have right now and still pay union dues, you could end up with more, or you could end up with less than you have in the total package that you have right now plus paying union dues.⁷⁷
- No one can predict the results of collective bargaining. You can end up with the same, you can get more, and you can get less.⁷⁸
- There is of course no obligation on the part of the employer to contract or to continue all existing benefits.⁷⁹

D. Communication Imbalance

Another element in U.S. labor law that runs afoul of international standards is the overwhelming imbalance of communication power between management, on one side, and workers and their unions on the other side. Employers are in complete control of communication with employees at all times inside the workplace, and they take every opportunity to make clear their desire to be “union-free.” For many employees, such statements create a threshold of fear about getting involved with a trade union. The employee thinks, “My employer hates unions; if I support a union my employer will find an excuse to fire me; therefore I will keep my head down and not get involved in union organizing.”

Amazon used its control of communication with employees to hold hundreds of captive-audience meetings without any “equal time” (or any time at all) accommodation for workers to hear from union representatives.⁸⁰ In contrast to this one-sided control of communication, trade unions and union advocates inside the workplace have no power to compel employees to hear their views. Pro-union

⁷⁴ Transcript of Captive-Audience Meeting, BHM1, October 25, 2021, on file with author.

⁷⁵ Transcript of Captive-Audience Meeting, BHM1, October 22, 2021, on file with author.

⁷⁶ Transcript of Captive-Audience Meeting, BHM1, October 18, 2021, on file with author.

⁷⁷ Transcript of Captive-Audience Meeting, BHM1, January 16, 2022, on file with author.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Noam Scheiber, “Mandatory Meetings Reveal Amazon’s Approach to Resisting Unions: The company has held hundreds of meetings with workers to discourage them from supporting a union in two upcoming elections,” *The New York Times*, March 24, 2022, at <https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html>.

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 already face 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 mandatory captive-audience meetings 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 a case arising in the United States, the Committee on Freedom of Association ruled that ILO Conventions 87 and 98 require employers to "guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization."⁸¹ A genuine freedom of association policy would embody this ILO standard, allowing union representatives' access to the workplace in non-work areas and on non-work time to meet with workers about organizing.

E. "Thugs" and Off-Duty Police

On March 30, 2020, Amazon fired Christian Smalls, the African-American leader of the JFK8 union organizing effort, claiming that Smalls violated company COVID protocols. Following Small's firing, high-level executives, including Jeff Bezos, had a meeting discussing the company's anti-union strategy and response to the media blowback for firing Smalls.⁸² In an internal email recounting the meeting, Amazon's General Counsel David Zapolsky explained the company's strategy to shift the public focus to Smalls to discredit the union organizing.⁸³ Zapolsky wrote that Smalls is "not smart, or articulate, and to the extent the press wants to focus on us versus him, we will be in a much stronger PR position than simply explaining for the umpteenth time how we're trying to protect workers." Zapolsky released a statement expressing regret over the tenor of his comment. In response to statements from several U.S. Senators characterizing Zapolsky's comment as "racist," an Amazon spokesperson later asserted that Zapolsky had not been aware that Smalls is African-American.⁸⁴

Additionally, an NLRB complaint has alleged that an Amazon anti-union consultant told workers at the Staten Island warehouse that union organizing would fail because union organizers were "thugs."⁸⁵ The

⁸¹ International Labor Office Governing Body, 284th Report of the Committee on Freedom of Association, 254th Session, Geneva, November 1992, Case No. 1523 (United States), at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2901959.

⁸² Paul Blest, "Leaked Amazon Memo Details Plan to Smear Fired Warehouse Organizer: 'He's Not Smart or Articulate,'" *Vice News*, April 2, 2020, at <https://www.vice.com/en/article/5dm8bx/leaked-amazon-memo-details-plan-to-smear-fired-warehouse-organizer-hes-not-smart-or-articulate>.

⁸³ Jay Greene, "Top Amazon Executive Sought To Divert Focus To Fired Worker Amid Workplace Safety Criticism, Email Shows: Amazon's Top Legal Official Questioned The Former Warehouse Worker's Intellect In A Discussion Of How To Deflect Criticism Of The Company's Record," *The Washington Post*, April 2, 2020, at <https://www.washingtonpost.com/technology/2020/04/02/amazon-executive-fired-worker/>.

⁸⁴ Karen Weise and Kate Conger, "Gaps in Amazon's Response as Virus Spreads to More Than 50 Warehouses," *The New York Times*, April 5, 2020, at <https://www.nytimes.com/2020/04/05/technology/coronavirus-amazon-workers.html>.

⁸⁵ Lauren Kaori Gurley, "Amazon Told Workers Union Organizers Are 'Thugs,' Labor Board Investigation Finds," *Motherboard Tech by Vice*, January 27, 2022, at <https://www.vice.com/en/article/jgmdv7/amazon-told-workers-union-organizers-are-thugs-labor-board-investigation-finds>; Josh Eidelson, "Amazon Illegally Threatened Staff,

term “thug” is commonly perceived as a racially-charged code word, particularly when people in power use the term to discredit those organizing for justice.⁸⁶

Amazon’s firing of Christian Smalls and other employees prompted an Amazon vice president for web services to resign, saying, “Firing whistleblowers isn’t just a side-effect of macroeconomic forces, nor is it intrinsic to the function of free markets. It’s evidence of a vein of toxicity running through the company culture. I choose neither to serve nor drink that poison.”⁸⁷

In Bessemer, Amazon contracted with a security firm to hire off-duty police officers, in uniform and using marked police vehicles, to station themselves at parking lots and employee entrances and to patrol the perimeter of the warehouse every 30 minutes.⁸⁸ A majority of the workers at the Bessemer facility are African-American. For some workers, a constant police presence at the workplace can be intimidating. Such police presence presumably sends a message that union activity and union supporters bring a threat of violence to the workplace, implying that employees should steer clear of the union and its supporters involved in organizing to avoid harm.⁸⁹

F. The Striker Replacement Threat

Statements that a company will replace workers who exercise the right to strike raises a complex area of both U.S. labor law and international labor standards. In the U.S., employers may permanently replace workers who strike for economic gain (“economic strikers”) but can only temporarily replace workers whose strike is provoked by an employer’s unfair labor practice (“unfair labor practice strikers”).

ILO standards allow temporary replacement of strikers so that employers can maintain operations but oblige employers to restore strikers to their jobs when the strike ends, regardless of motivation for the strike. The Committee on Freedom of Association has ruled that the permanent striker replacement feature of U.S. labor law violates ILO Convention 87.⁹⁰

U.S. Labor Board Alleges,” *Bloomberg News*, January 27, 2022, at <https://www.bloomberg.com/news/articles/2022-01-27/amazon-illegally-threatened-staff-labor-board-complaint-alleges>.

⁸⁶ “The Racially Charged Meaning Behind the Word ‘Thug’,” *National Public Radio*, April 30, 2015, at <https://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug>; Safia Samee Ali, “Not by accident’: False ‘thug’ narratives have long been used to discredit civil rights movements,” *NBC News*, September 27, 2020, at <https://www.nbcnews.com/news/us-news/not-accident-false-thug-narratives-have-long-been-used-discredit-n1240509>.

⁸⁷ Mihir Zaveri, “An Amazon Vice President Quit Over Firings of Employees Who Protested,” *The New York Times*, May 4, 2020, at <https://www.nytimes.com/2020/05/04/business/amazon-tim-bray-resigns.html>; Tim Bray, “Bye, Amazon,” accessed April 28, 2022, at <https://www.tbray.org/ongoing/When/202x/2020/04/29/Leaving-Amazon#p-3>.

⁸⁸ Testimony of Amazon loss prevention manager describing the hiring and use of off-duty Bessemer police officers at NLRB Region 10, “Official Report of Proceedings,” *Amazon.com Services LLC and Retail, Wholesale and Department Store Union*, Case No. 10-RC-269250, May 18, 2021, pp. 1235-1236 (on file with the parties and the NLRB; not available on-line). It should also be noted that such use of off-duty police is a form of public subsidy to Amazon, since taxpayers paid for officers’ uniforms, weapons, and vehicles.

⁸⁹ Tamara Lee et. al., “Amazon Uses Power of Police to Subdue Workers and Enforce Obedience,” Rutgers University, February 22, 2022, at <https://smlr.rutgers.edu/news-events/smlr-news/study-amazon-uses-power-police-subdue-workers-and-enforce-obedience>. The February 22 report is an interim report, part of a nationwide study of Amazon’s use of local off-duty police and other local government institutions to assert corporate power and control at the workplace.

⁹⁰ International Labor Organization, Committee on Freedom of Association, *Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*,

In a captive-audience meeting at the BHM1 warehouse in Bessemer, Alabama, an Amazon representative told workers:

So what that means is, you're in negotiations, a strike's ordered because they're trying to put pressure on the company, the company doesn't still go because if we hire replacement workers the business is still running, that's what's happening in Tuscaloosa right now with the mine workers....⁹¹

Amazon representatives made additional, similar statements in this and in other captive-audience meetings.⁹² These statements do not tell workers that the company will permanently replace them if they exercise the right to strike—only that management will likely replace them during a strike, without explaining whether they will be temporarily or permanently replaced.

Whether by design or not, Amazon's threat to replace striking workers is ambiguous. Management does not say, "We will permanently replace you if you strike, because this is allowed under U.S. labor law." Nor does management say, "We will temporarily replace you if you strike and take you back when the strike ends, in line with ILO standards, because our freedom of association policy promises compliance with international standards when national law is weaker."

And for many workers, the message is clear: if you strike, you will lose your job. This warning may have had special force in Bessemer, where Amazon pointed to the use of replacement workers in a lengthy, still ongoing strike at the Warrior Met Coal company in Tuscaloosa, just 30 miles from Bessemer.⁹³

V. Amazon's Breaches of U.S. Labor Law

A. Amazon's Conduct in the First Bessemer Election

Amazon has clearly contravened international standards in its anti-union campaigns, whether or not management's conduct discussed above violated U.S. labor law. But Amazon has also contravened U.S. law.

The NLRB has two procedural tracks for dealing with employer or union conduct that might run afoul of the NLRA: 1) examining objections to conduct affecting results of an NLRB election, and 2) investigating unfair labor practice (ULP) charges. On the objections track, a party can file objections that the other side's conduct spoiled conditions for a fair election. If the objections are upheld, the NLRB can set aside the election and order a new one. On the ULP track, a party can file charges of unlawful conduct such as anti-union coercion or discrimination against union supporters that can lead to remedial measures such as a cease-and-desist order or reinstatement with back pay.

paragraph 92, Report No. 278, Case No. 1543 (1991), at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902035.

⁹¹ Transcript of Captive-Audience Meeting, BHM1, October 22, 2021, on file with author.

⁹² *Id.*; Transcript of Captive-Audience Meeting, BHM1, October 25, 2021, on file with author.

⁹³ William Thornton, "Warrior Met Coal strike reaches one year mark, possibly longest in Alabama history: 'We didn't want to do this'," *AL.com State News*, March 31, 2022, at <https://www.al.com/news/2022/03/warrior-met-coal-strike-reaches-one-year-mark-possibly-longest-in-alabama-history-we-didnt-want-to-do-this.html>; Michael Corkery, "What One 'Brotherhood' of Coal Miners Learned From a Year Above Ground," *The New York Times*, April 2, 2022, at <https://www.nytimes.com/2022/04/02/business/alabama-coal-mine-strike-amazon.html>.

Amazon's conduct caused the NLRB to set aside the results of the first election in Bessemer held in February 2021.⁹⁴ Because of the Covid-19 pandemic and other considerations, the February election had been conducted as a mail-in ballot rather than an in-person vote by the thousands of workers employed at the facility.

The NLRB hearing officer's recommendations focused on Amazon's unilateral move to have the United States Postal Service install a mailbox at the warehouse entrance for workers to deposit their mail-in ballots. While at first impression this may seem innocuous, the NLRB hearing officer's report detailed the objectionable nature of this move ("CBU" stands for "Cluster Box Unit"—the technical name for a mailbox):

...[T]he Employer's unilateral decision to cause the United States Postal Service (USPS or Postal Service) to install a generic unlabeled mail collection box less than 50 feet from the main entrance to its facility, at a location suggested by the Employer and immediately beneath the visible surveillance cameras mounted on the Employer's main entrance ... destroyed the laboratory conditions and justifies a second election....

The Employer argues that the USPS installed the CBU, not the Employer. As discussed below, this is mere scapegoating ... as the evidence established that the Employer used its considerable influence to compel the USPS to authorize and install a mailbox.... The CBU was installed in accord with the timeline devised by the Employer, and with great haste. The CBU was installed in a location selected by the Employer.

... [T]here was sufficient evidence that employees reasonably believed their activities were being tracked. The Employer, who routinely monitors employee movement and admittedly maintains 1,300 surveillance cameras at its facility, acknowledges that it maintains video surveillance cameras on the front of its facility. A number of these cameras admittedly faced the location the Employer chose for the CBU....

... [B]y causing the USPS to install an unmarked CBU to collect ballots, and encouraging employees to cast their ballots using this CBU, the Employer engaged in objectionable conduct. This recommendation is based upon the manner in which the mail receptacle was installed that created the impression that the Employer could unilaterally establish procedures for the election, and cast doubt on the Board's authority and control over the election procedures. It further considers the Employer's exclusive control over the location of the CBU in the immediate view of its surveillance cameras. The situs of the CBU created the impression that the Employer was surveilling employees' Section 7 activities, and the inclusion of the Employer's campaign propaganda on the tent leading to the CBU further instilled the impression that the Employer had created its own voting location without any authorization from the Board....

Under the circumstances, where the authority of the Board was compromised by the conduct of a party, and that same conduct impacted employees and was coupled with other transgressions that interfered with employee free choice, a free and fair election

⁹⁴ Noam Scheiber, "Union Vote at Amazon Warehouse in Alabama Is Overturned by Regional Labor Office," *The New York Times*, November 29, 2021, at <https://www.nytimes.com/2021/11/29/business/amazon-bessemer-alabama-election.html>.

was impossible. Under the circumstances, I recommend that a second election be ordered.⁹⁵

As noted at the outset of this assessment, the vote count in the second election held March 31, 2022, in Bessemer was 871 votes in favor of representation by the RWDSU and 993 votes against representation.⁹⁶ However, there were 416 challenged ballots which, if ultimately counted, could affect the results. Hearings on the voting eligibility status of employees who cast challenged ballots are pending.

B. Unfair Labor Practice Charges, Complaints, and Settlement Agreements under the NLRA

Before moving to specific unfair labor practice cases involving Amazon, it is critical to understand the NLRB's procedures for pursuing ULP cases. When they believe an employer has unlawfully interfered with organizing rights, workers and unions can file a ULP "charge" with the NLRB regional office. The charge by itself is an allegation.

Upon receipt of a charge, the regional office launches an investigation to determine whether the charge has "merit." The investigation includes interviewing and taking affidavits from workers who filed charges and from potential witnesses. The investigation also involves consulting extensively with the employer, giving the employer an opportunity to rebut any charges through written position statements and to have the Board agent interview and take affidavits from witnesses on the employer's behalf.

Based on these investigations and evaluations of the evidence, the NLRB regional office decides whether a charge has merit. If so, it issues a "complaint" against the employer and sets the case for trial before an independent NLRB administrative law judge, normally several months in the future.

The NLRB is scrupulous in evaluating charges, finding merit, and issuing complaints. A majority of complaints are withdrawn or dismissed before a complaint is issued (usually withdrawn when the regional office tells the charging party that it will not issue a complaint, and dismissed when the charging party does not withdraw the charge and no merit is found).⁹⁷ When the regional office finds merit in a charge, it makes intensive efforts to settle the case before issuing a complaint, as well as after issuing a complaint but before trial.

Most meritorious cases are settled before issuing a complaint, after the regional office notifies the employer that it is going to issue the complaint. Settlement agreements do not punish employers for unlawful conduct. They simply require the employer to post a notice promising "WE WILL NOT" repeat unlawful conduct, and to take any remedial action such as offering reinstatement to workers unlawfully fired for union activity.

⁹⁵ NLRB Region 10, "Hearing Officer's Report on Objections," *Amazon.com Services LLC and Retail, Wholesale and Department Store Union*, Case No. 10-RC-260250, August 2, 2021, at <https://www.alreporter.com/wp-content/uploads/2021/08/Hearing-Officers-Report-in-Amazon-Case-No.-10-RC-269250.pdf>.

⁹⁶ Press Release, "Region 10-Atlanta Announces Results of Bessemer Amazon Ballot Count," NLRB, March 31, 2022, at <https://www.nlr.gov/news-outreach/region-10-atlanta/region-10-atlanta-announces-results-of-bessemer-amazon-ballot-count>.

⁹⁷ NLRB, "Disposition of Unfair Labor Practice Charges Per FY," at <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/disposition-of-unfair-labor-practice>.

C. Amazon and Settlement Agreements

Like many employers, Amazon has often made settlement agreements with the NLRB when faced with a ULP complaint finding merit in charges of unlawful conduct. The 2016 NLRB case mentioned briefly in the introduction to this assessment (page 6) involved 22 alleged unlawful actions in all at an Amazon facility in Chester, Virginia, which only came to public notice thanks to a *New York Times* exposé of the case in 2021.⁹⁸

In the notice to workers posted in the workplace pursuant to the settlement agreement, Amazon said:

- WE WILL NOT tell you that any gains that the [union] achieves for you in one component of compensation will be offset by an equal reduction in other components of compensation.
- WE WILL NOT tell you that you will have to go on strike to obtain a contract if the [union] has not obtained a contract after representing you for one year.
- WE WILL NOT tell you that Amazon will not allow a union to represent its employees.
- WE WILL NOT suggest that your support for the [union] is incompatible with continued employment at Amazon.
- WE WILL NOT threaten to freeze everything, including annual wage increases, because you support or select the [union].
- WE WILL NOT engage in surveillance of you while you are engaging in activities in support of the [union].
- WE WILL NOT interrogate you about your activities on behalf of or support for the [union].
- WE WILL NOT equate your support for the [union] with conduct consisting of bullying or intimidation.
- WE WILL NOT threaten to get supporters of the [union].
- WE WILL NOT threaten you with the loss of your job if you support the [union].

And a dozen more promises not to violate workers' organizing rights.⁹⁹

In the end, the *Times* reported:

The employee notice was a hollow victory for workers. The National Labor Relations Board, the federal agency that negotiated the settlement with Amazon, has no power to impose monetary penalties. Its enforcement remedies are few and weak, which means its ability to restrain anti-union employers from breaking the law is limited. The settlement was not publicized, so there were not even any public relations benefits. Amazon was the real winner. There have been no further attempts at a union in Chester.¹⁰⁰

⁹⁸ David Streitfeld, "How Amazon Crushes Unions: In a secret settlement in Virginia, Amazon swore off threatening and intimidating workers," *The New York Times*, March 16, 2021, at <https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html>.

⁹⁹ *Id.*; A *New York Times* photo of Amazon's NLRB settlement agreement posted notice is available at <https://static01.nyt.com/images/2021/03/21/business/00amazon-union2/00amazon-union2-superjumbo.jpg>.

¹⁰⁰ *Id.*

In December 2021, Amazon reached yet another settlement agreement with the NLRB regional director arising out of unfair labor practice charges in different parts of the country. Most of them involved management’s application of unlawful rules interfering with workers’ communication among themselves in support of union organizing in non-work areas on non-work time, which is “concerted activity” protected by the NLRA.¹⁰¹

The settlement agreement’s required notice outlines Amazon’s breaches of the NLRA. Pursuant to the agreement, Amazon posted in workplaces nationwide a notice saying:

- WE WILL NOT, in retaliation for your engaging in union or protected concerted activities or otherwise, create, maintain, or implement any rules or policies that limit your access to non-working exterior areas of our facilities in the United States, such as our policy that restricts your access to non-working areas beyond 15 minutes of the start and end of your shifts.
- WE WILL NOT, in retaliation for your engaging in union or protected concerted activities, tell you that you are in violation of the above-stated policy or any other off-duty policy by asking you to leave the premises because you were in the facility in non-work areas such as the breakroom or onsite medical unit during non-work time, while we allow other off-duty employees who are not participating in union or protected concerted activities to access those same areas.
- WE WILL NOT tell you that you cannot be on our property, or that you need to leave our property 15-minutes after the end of your shift, or threaten you with discipline or that we will call the police, when you are exercising your right to engage in union or protected concerted activities by talking to your co-workers in exterior non-work areas during non-work time.
- WE WILL NOT ask you about your union activity or about protected concerted activity, including by asking you why you are talking to your co-workers during non-work time on or off of our property.¹⁰²

D. A Judge’s ULP Ruling and New Unfair Labor Practice Complaints

Assessing Amazon’s infringement of workers’ rights under U.S. labor law is a moving target. NLRB Administrative Law Judge Benjamin Green ruled on April 18, 2022, that Amazon unlawfully fired Gerald Bryson from the JFK8 warehouse because of his union activity. The judge ordered the company to offer reinstatement to Bryson and make him whole for lost wages.¹⁰³

¹⁰¹ Rachel Lerman, “Amazon Agrees To Make It Easier For Workers To Organize Unions On-Site In Settlement With Labor Board: Amazon Has Faced Increased Unionization Efforts From Warehouse Workers In Recent Years,” *The Washington Post*, December 23, 2021, at <https://www.washingtonpost.com/technology/2021/12/23/amazon-settlement-labor-board/>.

¹⁰² NLRB, Settlement Agreement, *Amazon.com Services, LLC*, Cases 13-CA-275270, 13-CA-276695, 13-CA-279376, 29-CA-78982, 29-CA-282693, and 29-CA-284417 (December 22, 2021), at <https://apps.nlr.gov/link/document.aspx/09031d458362d819>.

¹⁰³ Aaron Gregg, “Judge Orders Amazon to Reinstates Fired Worker, Pay Lost Wages,” *The Washington Post*, April 19, 2022, at <https://www.washingtonpost.com/business/2022/04/19/amazon-union-worker-nlr-staten-island/>.

Amazon fired Gerald Bryson in April 2020 for alleged misconduct arising from a verbal argument with another employee about Covid conditions and about the union.¹⁰⁴ Here is what the administrative law judge said about the discharge:

The evidence ... failed to indicate that the Respondent [Amazon] conducted a good-faith investigation of the April 6 incident....

The Respondent, it appears, preferred not to obtain information from someone who was protesting with Bryson even though that person was likely in the best position to explain what happened. An employer cannot manufacture the loss of an employee's Section 7 protection by engaging in an ostrich-like, head in the ground, investigation that seeks to avoid evidence which might disclose information mitigating the employee's misconduct. Such an investigation does not yield a "good-faith" belief that the employee engaged in misconduct....

The Respondent's failure to conduct a good-faith investigation is also evidenced by the fact that two managers prepared discharge language before Bryson was interviewed regarding the incident. I agree with the General Counsel's assertion that the Respondent rushed to judgement and was more concerned about justifying the discharge of Bryson than conducting a good-faith investigation to determine what actually occurred....

The Respondent's rush to judgement and skewed investigation designed to blame only Bryson for the April 6 argument provides such circumstantial evidence that the Respondent wanted to discharge Bryson for his protected concerted activity instead of fairly evaluating the incident...

The evidence indicates that the Respondent's stated reason for discharging Bryson was a pretext for his protected concerted activity.... I find that the Respondent violated Section 8(a)(1) of the Act by discharging Bryson because of his protected concerted activity.¹⁰⁵

Amazon immediately announced it would appeal the administrative law judge's decision to the full five-member Board in Washington,¹⁰⁶ a process that normally takes one to two years to run its course. Ironically, the NLRB's earlier move seeking a federal court injunction ordering Bryson's immediate reinstatement is Amazon's primary objection to the union victory in the JFK8 election, saying it swayed workers' votes in favor of the union. Amazon objects to the union's election win because the NLRB sought to reinstate a worker whom management unlawfully fired.¹⁰⁷

In January 2022, the NLRB regional office, after a careful investigation, found merit in an unfair labor practice charge against Amazon at the JFK8 warehouse in Staten Island, NY, and issued a complaint

¹⁰⁴ Note that it took two years for the case to reach a decision at the administrative law judge level, and it is still subject to appeal. The problem of delay is endemic in the U.S. labor law system, almost always to the advantage of management who use delaying tactics to stifle worker organizing.

¹⁰⁵ NLRB, Decision of Administrative Law Judge Benjamin Green, *Amazon.com Services LLC and Gerald Bryson*, Case No. 29-CA-261755, April 18, 2022, at <https://apps.nlr.gov/link/document.aspx/09031d4583739076>.

¹⁰⁶ Aaron Gregg, "Judge Orders Amazon to Reinstated Fired Worker, Pay Lost Wages," *The Washington Post*, April 19, 2022, at <https://www.washingtonpost.com/business/2022/04/19/amazon-union-worker-nlr-staten-island/>.

¹⁰⁷ "Amazon Appeals Union's Historic New York Election Victory," *Bloomberg Law*, April 8, 2022, at <https://news.bloomberglaw.com/daily-labor-report/amazon-appeals-unions-historic-new-york-election-victory>.

against the company. This is the case, as noted earlier (page 22), in which an Amazon consultant called union supporters “thugs.”¹⁰⁸

The NLRB complaint alleged further unfair labor practices including promising to fix employees’ problems if they opposed the union, interrogating them about their involvement with the ALU, and confiscating union literature and telling union supporters they were not allowed to hand it out. Amazon said it would contest the complaint, and the case will go to trial before an NLRB administrative law judge.¹⁰⁹

In early May 2022, the NLRB regional office said it found merit in more unfair labor practice charges filed by the ALU against Amazon for management actions at the JFK8 warehouse during the runup to the March election. According to news reports confirming the merit finding, the Board office targeted the company’s use of captive-audience meetings, threats to withhold benefits from employees if they voted to unionize, and inaccurately telling workers they could be fired if the ALU won the election and they failed to pay union dues.¹¹⁰

The NLRB indicated it would issue a complaint on these charges unless the case is resolved through a settlement agreement. An Amazon official said, “these allegations are false and we look forward to showing that through the process.”¹¹¹ The statement suggests that, as with the January 2022 Board complaint, the case will have to go before an Administrative Law Judge for a decision, with possible years more of legal appeals.

VI. Election Objections at JFK8 and the LDJ5 Election

A. JFK8

Amazon has refused to accept results of the NLRB election at the JFK8 warehouse on Staten Island, where employees voted by a solid majority in favor of representation by the Amazon Labor Union (ALU). Instead, Amazon reverted to its prized “direct relationship” mantra: “We’re disappointed with the outcome of the election in Staten Island because we believe having a direct relationship with the company is best for our employees.”¹¹²

Amazon filed objections to the JFK8 election and initiated a legal process that could delay collective bargaining for years if Amazon pursues it.¹¹³ The maneuver is well-known to U.S. labor advocates as a so-

¹⁰⁸ Lauren Kaori Gurley, “Amazon Told Workers Union Organizers Are ‘Thugs,’ Labor Board Investigation Finds,” *Motherboard Tech by Vice*, January 27, 2022, at <https://www.vice.com/en/article/jgmdv7/amazon-told-workers-union-organizers-are-thugs-labor-board-investigation-finds>.

¹⁰⁹ Josh Eidelson, “Amazon Illegally Threatened Staff, U.S. Labor Board Alleges,” *Bloomberg News*, January 27, 2022, at <https://www.bloomberg.com/news/articles/2022-01-27/amazon-illegally-threatened-staff-labor-board-complaint-alleges>.

¹¹⁰ Noam Scheiber, “Labor regulators find merit in accusations by unions at Amazon and Starbucks. Workers had accused the companies of unlawful behavior during recent union campaigns,” *The New York Times*, May 6, 2022, at <https://www.nytimes.com/2022/05/06/business/economy/nlr-amazon-starbucks.html>.

¹¹¹ *Id.*

¹¹² Amazon, “Statement from Amazon on Staten Island Union Vote,” April 1, 2022, at <https://www.aboutamazon.com/news/policy-news-views/statement-from-amazon-on-staten-island-union-vote>.

¹¹³ Rachel Lerman, “Amazon Filing Outlines Plans to Fight the New York Union Vote,” *The Washington Post*, April 8, 2022, at <https://www.washingtonpost.com/technology/2022/04/08/amazon-union-vote-objections/>. On May 1, the NLRB said that the Phoenix regional office would hold a hearing on Amazon’s objections because the Brooklyn

called “technical refusal to bargain,” hoping that a conservative federal court will overturn an NLRB order to recognize and bargain with the union. Here’s how it works:

1. The NLRB regional director denies the employer’s objections to the election and orders the company to recognize and bargain with the union;
2. The employer appeals the decision to the five-member NLRB in Washington, and the full Board upholds the regional director’s decision, again ordering the company to bargain with the union;
3. The Board’s ruling is not appealable to the courts, but the employer defies the Board’s ruling and refuse to bargain—this is the “technical refusal to bargain” because (as management sees it) this is the only way to obtain court review of the Board’s ruling;
4. The employer’s defiance creates a new Unfair Labor Practice of refusal to bargain under Section 8(a)(5) of the NLRA;
5. Since the facts are not in dispute, the case goes directly to the five-member board again for a decision in the unfair labor practice case;
6. The Board now finds that the employer unlawfully refused to bargain, and again orders bargaining;
7. The employer appeals the NLRB unfair labor practices decision to a federal circuit court, hoping to find a conservative-majority three-judge panel that will overrule the Board and order a new election.

This entire process can take four to five years or more to run its course. It is important to understand that, in contrast to management’s ability to exploit the “technical refusal to bargain” ploy, unions have no ability to appeal an NLRB decision denying their objections to an election. Management gets two bites at the apple: the NLRB and federal courts, while unions’ only recourse is to the NLRB.

If Amazon follows this management playbook, they can delay the process for several years. In many cases, employers string out the “technical refusal to bargain” strategy to frustrate workers who are eager to get to the bargaining table and to undermine workers’ support for the union, perhaps leading to a move to have the union decertified. Such a cynical and devious course of conduct, should Amazon pursue it, completely betrays any promise of respect for workers’ freedom of association.

B. LDJ5

Contrary to its freedom of association policy, Amazon stepped up its interference with workers’ organizing efforts with the ALU at the LDJ5 warehouse on Staten Island in the period leading up to an NLRB election April 25-29.¹¹⁴ This 1500-employee facility is less than one-fifth the size of the main JFK8

regional office, which would normally have jurisdiction in the matter, sought an injunction to reinstate Gerald Bryson, which Amazon contended affected the results of the election. Jeffrey Dastin, “Amazon to get hearing that could overturn New York union vote, labor board official says,” *Reuters*, May 1, 2022, at <https://www.reuters.com/business/amazon-get-hearing-that-could-overturn-ny-union-vote-labor-board-official-says-2022-05-01/>.

¹¹⁴ Lauren Kaori Gurley, “Amazon Cracks Down on Organizing After Historic Union Win: The fiercely anti-union company has doubled down on its anti-union efforts at a Staten Island warehouse, LDJ5, that is scheduled to begin a union election on April 25,” *Vice News*, April 13, 2022, at <https://www.vice.com/en/article/epx9jp/amazon-cracks-down-on-organizing-after-historic-union-win>; Gwynne Hogan, “Amazon Organizers Gear Up For 2nd Union Vote While First Hangs In The Balance,” *Gothamist News*, April 20, 2022, at <https://gothamist.com/news/amazon-organizers-gear-up-for-2nd-union-vote-while-first-hangs-in-the-balance>.

site where a majority voted in favor of the union in March, so Amazon could focus even more pressure on workers there.

Management applied the same anti-union communication methods, but was able to reach more workers through captive-audience meetings in smaller groups to hammer home its warnings of negative consequences if employees chose union representation. One report said the company “has spent millions on consultants to talk to workers, sometimes roaming warehouse floors with employees” at the LDJ5 warehouse.¹¹⁵

On May 2, the NLRB announced the results of the LDJ5 election: 618 votes against union representation; 380 votes in favor of the union.¹¹⁶ Amazon’s pressure-packed, fear-inducing anti-union campaign at the smaller warehouse got management’s desired result. As one worker who voted against the union told a reporter, management’s messaging “convinced him his wages might go down if the warehouse unionized.”¹¹⁷

VII. Recommendations

Amazon needs to go back to the drawing board to produce a credible freedom of association policy—and then implement it.

A. Essential Elements of a Freedom of Association Policy

Here are key elements of a freedom of association policy consistent with international labor standards:

- Initial grounding in the hallmark international human rights instruments—the Universal Declaration on Human Rights and the two Covenants that flow from the Declaration;
- Specific reference to and reliance on ILO Conventions 87 and 98;
- Commitment to accept decisions of the ILO Committee on Freedom of Association and Committee of Experts interpreting the content of the Conventions;
- Recognition and application of freedom of association clauses in the UN Guiding Principles and the UN Global Compact, the OECD Guidelines on Multinational Enterprises, and the ILO Tripartite Declaration;
- Commitment to the principle of non-interference with workers’ exercise of the right to freedom of association. At a minimum, a policy should emphasize:
 1. Not hiring anti-union consultants to wage campaigns against workers’ organizing efforts;
 2. Not forcing workers into anti-union captive-audience meetings;

¹¹⁵ Nitasha Tiku, Reed Albergotti, Greg Jaffe and Rachel Lerman, “From Amazon to Apple, tech giants turn to old-school union-busting,” *The Washington Post*, April 24, 2022, at <https://www.washingtonpost.com/technology/2022/04/24/amazon-apple-google-union-busting/>.

¹¹⁶ Rachel Lerman, Greg Jaffe and Anna Betts, “Amazon workers vote against unionization in New York,” *The Washington Post*, May 2, 2022, at <https://www.washingtonpost.com/technology/2022/05/02/amazon-union-vote/>.

¹¹⁷ Haleyula Hadero, “Amazon, union face off in a rematch election in New York,” *The Washington Post*, May 1, 2022, at https://www.washingtonpost.com/business/amazon-union-face-off-in-a-rematch-election-in-new-york/2022/05/01/c5158b98-c94e-11ec-b7ee-74f09d827ca6_story.html.

3. Not creating anti-union websites or using company communication systems to convey anti-union messages;
 4. Not disparaging, deriding, or imputing corrupt motives to unions or union representatives;
 5. Not telling workers that they could lose pay and benefits if they form a union; and
 6. Not telling workers management will replace them if they exercise the right to strike.
- Commitment to honor the ILO standard on union representatives' access to the workplace to discuss organizing with workers in non-work areas on non-work time;
 - Following the policy statement with a concrete, operational due diligence process in line with the UN Guiding Principles to ensure implementation of the policy, including a process for remediation when the policy is violated;
 - Negotiation of a “framework agreement” or other instrument on freedom of association with national and global unions whose affiliates represent Amazon workers or to whom Amazon workers have turned for assistance in organizing.

B. Comparative Freedom of Association Policies

Amazon does not have to invent the wheel to adopt a credible freedom of association policy. Multinational companies and unions have created several model policies that Amazon can look to for guidance. For example, the UK-based multinational transportation company First Group, which is the largest private school bus operator in the United States, negotiated a freedom of association policy with U.S. unions that sets forth a goal of supporting freedom of association and “to refrain from management conduct, whether written or verbal, which is intended to influence an employee’s view or choice with regard to labor union representation.” Specifically, the policy states:

- During union organizing campaigns, management shall support the employee’s individual right to choose whether to vote for or against union representation without influence or interference from management.
- Management shall not act in any way which is or could reasonably be perceived to be anti-union. This includes refraining from making derisive comments about unions, publishing or posting pamphlets, fliers, letters, posters or any other communication which should be interpreted as criticism of the union or advises employees to vote “no” against the union.¹¹⁸

The UNI global union and Copenhagen-based multinational security firm ISS A/S negotiated a freedom of association policy specifying:

- ISS agrees that ISS workers and workers providing services to ISS facilities are able to exercise rights to union membership and collective bargaining. All workers shall have the right to form and join trade unions (ILO Convention 87).
- ISS and the union jointly affirm that these union membership and collective bargaining rights can be exercised within the ISS without fear of retaliation, repression, or any other form of action or discrimination.

¹¹⁸ First Group America, *Freedom of Association Policy*, at https://teamster.org/wp-content/uploads/2018/12/fs_foapolicy_2015-2020.pdf.

- When a UNI-affiliated union notifies ISS of its intention to organize, the parties will designate representatives to negotiate a recognition and recruitment policy based upon the following basic principles:
 1. Representatives of the union will be allowed unaccompanied access to meet with workers and outline the benefits of union membership (including the right to distribute union recruitment material);
 2. Meetings with workers shall be allowed at a mutually agreeable time, in agreed upon areas and shall be conducted in a non-disruptive manner;
 3. ISS will agree to an ongoing mechanism for informing new employees about the possibility of union membership, such as distributing union recruitment material in connection with induction meetings and/or training of new employees;
 4. ISS will remain positive in the face of union organizing activities. Local ISS management will issue a written statement which says ... workers are free to meet the union' representatives, attend meetings and freely determine their own decision to join or not to join a union without fear of any form of recrimination;
 5. The union will be recognized as the representatives of employees as long as it satisfies the minimum legal requirements for recognition under applicable law ... using the most expeditious process permitted under law.¹¹⁹

ISS A/S and UNI agreed to hold twice-yearly meetings between senior-level company and union representatives to ensure the smooth implementation of the agreement.¹²⁰

These and other agreements between companies and trade unions provide ample precedent to guide Amazon in crafting a new and authentic freedom of association policy. But Amazon should not be content to borrow concepts from other companies. It should be the same leader in the arena of workers' rights that it has been in the global marketplace.

¹¹⁹ In the United States, this means recognizing the union when a majority of workers have signed cards authorizing the union to represent them in collective bargaining.

¹²⁰ ISS A/S and UNI global union, *ISS-UNI Global Agreement* (2008), at <https://uniglobalunion.org/wp-content/uploads/ISS-Global-Agreement-English.pdf>.

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