

## **Testimony of Owen E. Herrnstadt**

### **Chief of Staff and Director of Trade and Globalization, International Association of Machinists and Aerospace Workers, AFL-CIO, before the House Ways and Means Subcommittee on Trade**

**May 22, 2019**

#### **Enforcement in the New NAFTA**

The International Association of Machinists and Aerospace Workers (IAM) represents hundreds of thousands of workers in North America. IAM members work in a variety of industries, including manufacturing, aerospace, electronics, shipbuilding, defense, woodworking and transportation, to name a few. Our members produce, service, assemble and transport products, parts and assemblies that create the global economy. We welcome the opportunity to appear before you today to offer our comments on enforcement in the new NAFTA.

IAM members know how important the North American economy is to our jobs and to our communities. We also know that NAFTA and subsequent U.S. trade agreements continue to fail workers in the U.S., Mexico and Canada. Despite promises that NAFTA would create an estimated 200,000 jobs, over 850,000 lost U.S. jobs are attributed to NAFTA.<sup>1</sup> Nor have workers in the U.S., Mexico and Canada seen the improvements that were promised at the time NAFTA was implemented. Outsourcing of U.S. jobs to Mexico across manufacturing industries continues unabated. Since NAFTA was implemented, work has moved to Mexico in aerospace, auto, electronics, appliances, food processing and other manufacturing industries as well as service industries like call centers. Mexico's aerospace industry alone has grown dramatically, to roughly 40,000 workers at over 300 companies. The failure to establish and enforce strong labor standards in NAFTA is one of the major reasons for the massive outsourcing of U.S. jobs to Mexico.

Effective enforcement of strong labor provisions in trade agreements are critical. If properly drafted, implemented and enforced, they can stop signatory countries from distorting the labor market by unfairly suppressing labor costs. Workers in Mexico have been denied the right to form their own independent and democratic unions and engage in collective bargaining. They have been subjected to workplace discrimination. Forced labor and child labor continues. By preventing workers from enjoying these fundamental human rights, manufacturers in Mexico

---

<sup>1</sup> [https://www.epi.org/publication/webfeatures\\_snapshots\\_20061004/](https://www.epi.org/publication/webfeatures_snapshots_20061004/);  
<https://aflcio.org/testimonies/united-states-mexico-canada-agreement-likely-impact-us-economy-and-specific-industry>

are unfairly subsidized because their labor costs are artificially lower than they would be under fair labor market conditions. These unfair labor market conditions create unfair trade by putting countries that honor fundamental workers' rights at a competitive disadvantage.

Workers have waited over 25 years for NAFTA to be renegotiated. When NAFTA renegotiations were first announced last year, we were hopeful that a renegotiated NAFTA would be based on a dramatically new trade model. The model we urged reflected desperately needed reforms, including robust and effective enforcement of strong labor standards.

Our recommendations regarding enforcement in a revised NAFTA include three general and specific matters:

**First**, enforcement must be adequately funded and staffed, independently administered and monitored, and must provide swift relief for victims of labor rights violations and sanctions for states and employers that violate those rights;

**Second**, since enforcement is meaningless if the substantive standards to be enforced are weak, labor obligations must be based on strong clear standards based on internationally recognized rights and reports established by the International Labor Organization, an arm of the United Nations; and,

**Third**, labor obligations must cover broad sectors of workers and remove obstacles that narrow the types of labor violations that are recognized and actionable under the agreement.

Unfortunately, the many substantive recommendations that we have made during the past year—and for many years before that—to improve the enforcement of strong labor standards were not included in the text of the revised NAFTA. Without serious modifications to address the deficiencies we have identified, the new NAFTA will be as ineffective as the old NAFTA regarding the enforcement of labor rights and we will be forced to oppose the revised agreement. U.S. workers simply cannot wait another 25 years to get NAFTA right.

As noted by the U.S. Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC):

NAFTA 2018's dispute settlement and enforcement provisions are neither "effective" nor "equitable,"... by failing to include additional provisions to ensure that the labor rules are adequately and promptly monitored, remedied, and sanctioned if not remedied, the dispute settlement provisions will be neither effective nor equitable as regards labor. A quarter century of experience has proved that labor rules must receive special attention to ensure swift and certain enforcement. Workers simply do not have the power and influence that global companies seeking to vindicate their trade rights have.

A more detailed discussion of our recommendations and comments regarding the enforcement of labor standards in the revised NAFTA follows.

**1. Provide a meaningful forum for victims of labor violations.**

One of the major problems with the revised NAFTA is that it mirrors other U.S. free trade agreements ( FTAs) by limiting enforcement to state action. This in effect gives parties discretion to ignore legitimate labor complaints. Victims and their representatives must be able to initiate actions that ensure they will receive due process and relief. Employers that violate labor rights must be required to participate in and recognize well-defined enforcement procedures. Further, penalties and sanctions must be strong enough to deter future violations. Relief should not be limited to amounts equaling back pay, which, in countries like Mexico where manufacturing workers can be paid less than \$3.00 an hour, do not serve as an effective deterrent. It is critical the victims themselves receive compensation, instead of governments. In order to achieve deterrence, it is also important that employers committing violations and governments that fail to address violations be sanctioned in a significant manner to deter future violations.

**2. Establish and ensure independent and binding dispute settlement.**

The revised NAFTA does not include a mechanism that establishes an independent secretariat with the authority to enforce the agreement's labor obligations. A fully funded and staffed independent secretariat is needed to ensure credibility and effectiveness of the entire enforcement process.

**3. Signatory countries must be prevented from blocking the dispute settlement process.**

It is especially troubling that the new NAFTA permits any of the parties to prevent the dispute settlement process from going forward by refusing to reach consensus on a state-to-state settlement panel. As my colleague, AFL-CIO Trade Specialist Celeste Drake previously testified before this subcommittee:

The original NAFTA allowed a party being accused of violating the deal to block the dispute settlement process. This proved harmful to working people in all three countries. In subsequent trade agreements, the United States abandoned this failed notion. However,

the new NAFTA revives this failed idea. This means that outsourcing, downward pressure on wages and labor standards and growing inequality are likely to continue.<sup>2</sup>

The AFL-CIO Final Written Submission to the U.S. International Trade Commission's Investigation No. TPA-105-003 further explains:

[T]he final text...leaves no doubt that a single party can block the formation of a state-to-state settlement panel by refusing to hold a meeting of the Free Trade Commission. The text of Article 23.17.8 in the Labor Chapter has been changed to erase any doubt about the ability of a party to block a panel.

#### **4. Strengthen labor standards that are subject to enforcement by including explicit references to ILO rights and reports in the text.**

The Agreement should explicitly include ILO rights and reports, not merely reference the ILO Declaration of Fundamental Principles and Rights at Work. The revised NAFTA allows any party to argue that it needs to meet only the principles of labor rights rather than provide actual labor rights to satisfy its obligations. For this reason, the revised agreement must be explicitly linked to specific ILO's rights and the cases and reports that furnish precise interpretations of them.

Not only has this recommendation been rejected, but negotiators failed to eliminate language, contained in a footnote first incorporated in the Peru Trade Agreement, making it even easier for signatories to argue that they are only obligated to meet certain principles, as opposed to the rights themselves.<sup>3</sup> A revised agreement must make it clear that the ILO rights and accompanying cases and reports define the labor obligations.

Businesses are not satisfied with vague rights and obligations when it comes to their interests and have demanded, and in many instances succeeded in obtaining, specific language in the agreement addressing their concerns. Imagine the businesses response if the revised NAFTA obligated Mexico to honor the principles of protecting intellectual property rights and not the rights themselves? Why should labor provisions, which are directly related to Mexico's suppressed labor rights and resulting low labor costs, be viewed any differently?

---

<sup>2</sup>

<https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Trade%20and%20Labor%20Written%20Testimony%20CDRAKE%203-25-19.pdf>

<sup>3</sup> [https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset\\_upload\\_file73\\_9496.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf)

**5. Parties should not have the discretion to determine what they “consider appropriate” regarding any labor obligation.**

Article 23.9 of the revised agreement reinforces serious concerns over the lack of commitment to honor specific rights. While it addresses discrimination based on sexual orientation, gender identity, and other important matters when it references the signatories’ obligations, it adopts the wording, “that it considers appropriate” undermining enforceability.<sup>4</sup> Furthermore, footnote 13 declares that “existing [U.S.] federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations of this Article”—raising additional questions over interpretation and enforcement.<sup>5</sup>

**6. Labor obligations should be enforced broadly—not only where violations are “in a manner affecting trade or investment between the parties.”**

Even if a labor violation is deemed to violate the principles referenced in the labor chapter, in order to be covered by the agreement, the violations must be “in a manner affecting trade or investment between the parties.” This provision could exclude workers in large sectors from the agreement’s labor obligations. Thousands of teachers, government workers, fire fighters, police, medical workers, and others could arguably left out of the revised NAFTA’s labor obligations.

As explained by the LAC:

[The provision] risks leaving loopholes for wage suppression, particularly by public sector employers that refuse to accord fundamental labor rights to their employees. Mexico has denied workplace rights and freedoms to its teachers, which not only suppresses the wages, benefits, and conditions of those teachers, but also applies downward pressure on wages, benefits, and conditions of similarly skilled working people in Mexico’s private sector, many of whom produce goods or provide services that compete with goods and services of U.S. workers... The failure of one significant set of workers to be able to enjoy their rights can undermine the proper functioning of a market, suppressing demand, both for the goods produced in that country and for the goods produced by other trading partners.<sup>6</sup>

**7. Labor obligations in the labor chapter should include murder and other egregious human rights violations.**

In addition to the requirement that labor violations must be in a manner that affects trade or investment, the agreement includes another significant hurdle to enforcement. The revised

---

<sup>4</sup> [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23\\_Labor.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23_Labor.pdf)

<sup>5</sup> [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23\\_Labor.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23_Labor.pdf)

<sup>6</sup> [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23\\_Labor.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23_Labor.pdf)

agreement requires that a labor violation be *sustained or recurring*. Unfortunately, single egregious acts can and do crush workers' ability and desire to exercise their fundamental human rights to form unions, engage in meaningful collective bargaining, and enjoy other labor rights. The murder of a union activist sends a powerful message to other workers that they face the same fate, should they exercise their right to form a union. The "sustained or recurring" language in Footnotes 8 and 11 of the Labor Chapter represents a step backward from prior FTAs by explicitly stating that "an isolated instance or case" is not covered by the Agreement's labor protections, removing any possible room for discretion. The new standard sets a very high bar requiring that the actions (or inactions) have to occur "periodically and repeatedly," and that they must be "related or the same in nature."<sup>7</sup>

#### **8. Enforcement through side agreements and separate labor action plans are unacceptable.**

Numerous attempts have been made in the past to enforce labor obligations based on understandings, side agreements and action plans, with little success. Any suggestions to enhance the revised NAFTA's enforcement in a separate agreement without changes to provide a robust enforcement process in the agreement itself, should be rejected. Fundamental human rights, including the labor standards defined by the ILO, apply to all workers throughout the world with equal intensity. Side agreements or alternative arrangements like those used in conjunction with current NAFTA (NAALC), the U.S.-Colombia Labor Action Plan, or proposed for Vietnam, Brunei and Malaysia (under the failed Trans-Pacific Partnership agreement) are no substitute for strong labor chapters in a trade agreement.

For more than 25 years, the NAALC has failed to stop Mexico from continually violating workers' rights, nor has the Labor Action Plan with Colombia stopped the murder and death threats against trade unionists and human rights activists. Notably, workers and trade unionists across industries in Colombia report "a deterioration of their rights at the workplace, continued labor intermediation that weakens the power of workers, and an increase in the culture of violence and impunity." More than 680 social leaders and human rights defenders have been murdered since January 2016 and 70 trade unionists were killed between 2016 and 2018. Notably, 172 trade unionists have been murdered since the Colombia FTA went into effect.<sup>8</sup>

Last year, a trade panel ruled that the Guatemalan government had not violated the Central American Free Trade Agreement (CAFTA). The report issued regarding the

---

<sup>7</sup> [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23\\_Labor.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23_Labor.pdf)

<sup>8</sup> <https://aflcio.org/2019/5/16/murdered-trade-unionists-truth-behind-colombias-trade-agreement>

complaint provides a clear demonstration of the ineffectiveness of the labor provisions in our trade agreements:

While the U.S. was able to prove that at eight worksites and with respect to 74 workers Guatemala had not effectively enforced its labor laws by failing to secure compliance with court orders, the report notes that the U.S. could not prove these cases constituted a course of inaction that was in a manner affecting trade.

Negotiators have provided language in a footnote to clarify the interpretation of “in a manner affecting trade,” however the requirement itself remains an obstacle to enforcement action against labor rights violations. It also does nothing to improve the nine years it took to process the initial complaint. Delays in other cases are staggering and include: Bahrain (petition filed in 2011); Dominican Republic (petition filed 2011); Honduras (petition filed 2012); Peru (petition filed 2015); and, Columbia (petition filed 2016)

**9. Enforcement of labor obligations solely through Section 301 trade complaints is inadequate.**

Suggestions that Section 301 trade complaints are adequate to enforce labor obligations in trade agreements, including the revised NAFTA, are misplaced. Trade complaints require the full support of USTR and can take several years to pursue. Further, the imposition of tariffs as a Section 301 remedy does not provide victims with compensation for lost wages or job reinstatement. The remedy would also have questionable deterrent value to parties and private employers who are directly responsible for the labor violations. Most telling, however, is the simple fact that despite having plenty of opportunities to proceed on 301 complaints for labor violations, no USTR has ever pursued such a complaint, let alone pursued one to a successful conclusion. Indeed, USTR quickly dismissed Section 301 petitions filed by the AFL-CIO in 2004 and 2006 regarding violations of worker rights in China without even initiating investigations, despite ongoing and brutal repression of Chinese workers' rights and the fact that independent trade unions are categorically banned.<sup>9</sup>

---

9

[https://ustr.gov/archive/Document\\_Library/Press\\_Releases/2006/July/Statement\\_from\\_USTR\\_Spokesman\\_Regarding\\_China\\_Labor\\_Petition.html](https://ustr.gov/archive/Document_Library/Press_Releases/2006/July/Statement_from_USTR_Spokesman_Regarding_China_Labor_Petition.html)

## 10. Mexico must adopt and enforce fundamental labor rights.

In discussing the need for an effective enforcement provision in the text of the revised NAFTA, Mexico's inadequate labor laws must also be greatly improved. While Mexico is moving in the right direction by targeting protection unions and protection contracts, much work remains. Protection unions and protection contracts must be eliminated. Among other things, implementation will require an extensive education program in order to teach employers and workers the concept of freedom of association and real collective bargaining. It will also require adequate funding and resources to review several hundred thousand protection contracts and eliminate protection unions. In addition, inspectors, adjudication systems and remedies will have to be established, fully funded and, of course, enforced. Mexico must also have to demonstrate that fundamental human rights, including the right to join a legitimate union and engage in meaningful collective bargaining, are respected and enforced prior to receiving full Congressional consideration of the revised NAFTA.

-----

For over 25 years, NAFTA has wreaked havoc on hundreds of thousands of U.S. workers whose jobs have been outsourced to Mexico. The time to overhaul NAFTA's weak labor standards and enforcement provisions are long overdue. Unfortunately, by refusing to incorporate our many recommendations concerning the enforcement of labor standards (and our numerous recommendations for changes in other areas), the current text of the revised agreement continues to fail workers.

Unquestionably, there are some welcome improvements regarding language concerning the right to strike, violence against workers and efforts to improve Mexico's labor laws and eliminate protection contracts. Nonetheless, as stated, the revised NAFTA maintains the fundamental flaws carried over from past trade agreements. Until the recommendations mentioned above are adopted, the revised agreement will continue to fall short in effectively enforcing strong labor standards. Consequently, under the current text, wage suppression for Mexico's workers and the outsourcing of U.S. jobs will continue. As stated by the AFL-CIO, "[T]he labor movement is united in our judgment that the new NAFTA does not yet meaningfully address what is wrong with the original NAFTA."<sup>10</sup> While, we continue to seek

---

<sup>10</sup> <https://aflcio.org/aboutleadershipstatements/trade-must-build-inclusive-economy-all>



revisions to the current text, unless major changes are made we will be forced to oppose the agreement. U.S. workers simply cannot wait another 25 years to get NAFTA right.