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WORKER RIGHTS CONSORTIUM ASSESSMENT TEXTILES OPICO (EL SALVADOR)

FINDINGS, RECOMMENDATIONS, AND STATUS

July 31, 2017



I. Executive Summary

The following is a report of the findings and recommendations of the Worker Rights Consortium's (WRC's) investigation of alleged violations of El Salvador's labor law and university and buyer codes of conduct at Textiles Opico, a factory located in San Juan Opico, El Salvador. Textiles Opico, which employs approximately 1,500 workers, was formerly disclosed as a supplier of university licensed apparel to Team Beans and currently produces non-collegiate apparel for a number of firms, including Lululemon, REI, Academy Sports, Castelli, and Dick's Sporting Goods, which sources adidas-licensed product from the factory. Textiles Opico is a Participating Supplier of the Fair Labor Association (FLA); at least one firm whose product is manufactured at the factory, adidas, is also a Participating Company of the FLA.

In January 2017, the WRC received a complaint from a Salvadoran garment workers union, the Sindicato de Trabajadoras, Trabajadores, Sastres, Costureras y Similares (Sitracos), alleging violations of freedom of association. The WRC investigated these claims and found that the company had, as part of a larger staff reduction, targeted members of the union for termination. As outlined in the report, the WRC found that these discriminatory dismissals constituted a serious repeat violation of freedom of association by Textiles Opico. This is not the first time that Textiles Opico has attempted to undermine workers' associational rights; the FLA found, in May 2013, that the factory had discriminatorily terminated five leaders of the same union.

This report includes a factual summary of the events surrounding the discriminatory layoff of employee union members at Textiles Opico, the WRC's findings and analysis concerning violations of freedom of association that the factory management committed in relation to the layoff, and specific recommendations for remedial actions that were shared with the factory and with its buyers necessary to restore compliance with applicable labor standards.

Specifically, the WRC's investigation found that Textiles Opico management:

- Violated an agreement with the union to consult with the union and provide workers with advance notice of layoffs.
- Selected workers for dismissal discriminatorily, based on their status as union members rather than for any legitimate economic reason.
- Refused to permit employees who are union members to be represented by union officers at the time of their dismissals, despite the request of these workers for such representation and management's previous agreement to permit this.

After sharing the findings and recommendations with both the factory and the buyers, the WRC engaged with all parties to seek redress to the violations. During the three months of engagement with factory buyers, the factory shared additional information with the WRC with regard to the selection criteria that it used in determining which workers would be let go during the layoff.

However, this information did not provide new evidence supporting the company's claim that the dismissals were not discriminatory, but rather served to further confirm the WRC's initial findings that the union members were dismissed in retaliation for their union activities.

To date, Textiles Opico has refused to take the remedial action necessary to correct these violations. The WRC urges all buyers to press Textiles Opico to fully remedy the violations, including reinstating all workers subjected to wrongful termination.

II. Methodology

The findings outlined in this report are based on the following sources of evidence:

- Offsite interviews with ten terminated union activists;
- Interviews and communications with leaders of the Sitrasacosi union and leaders of the plant-level affiliate to this union at Textiles Opico;
- Written communications with Textiles Opico owner and President, Juan Zighelboim;
- A review of factory documents, including an agreement between the union and the management with regard to a process for dismissals in the case of economic layoffs and documents provided by the factory with regard to the selection of workers for dismissals;
- A statistical analysis of the layoffs of union members and other employees at the factory conducted by an expert in labor and employment relations at Pennsylvania State University; and
- Review of relevant Salvadoran and international labor law.

III. Findings

A. Background Information

Workers at Textiles Opico formed a factory-level union affiliated with the Sitrasacosi garment workers union in March 2013. According to an investigation conducted later that year by the FLA, shortly after the union's founding, the factory management discriminatorily terminated five employees who were leaders and members of the union inside the plant as part of a broader illegal campaign of antiunion retaliation. Significantly, the FLA's investigation noted that, at the time, the factory management falsely claimed that it had terminated the five employee union members on account of poor job performance and not their associational activities.

As part of the remediation of the serious freedom of association violations at the factory during this time, Textiles Opico agreed not only to reinstate the five illegally terminated union leaders and members, but also to develop a process for handling future workforce reductions in a nondiscriminatory manner. In this procedure, which the company adopted in 2014, Textiles

Opico agreed that, should the factory need to reduce its workforce for economic reasons and “in order to avoid subjective criteria” in the selection of workers to be laid off, management would lay off employees in this order: (1) those most recently hired, (2) those with the lowest level of professional qualifications, and (3) those with lowest production.¹ This policy also requires the company to consult with and share the list of employees who are to be laid off with Sitrasacosi representatives and to inform the affected workers themselves two weeks prior to the date on which the layoff is to take effect.² Finally, the policy requires the company to give any employee who receives notice of layoff 24 hours to appeal the company’s action, and, if the affected worker is a union member, to allow the union to represent her in this process. According to the policy, the company is required to respond to the employee’s appeal within three days, during which time the company will permit the employee to continue working her regular hours at the factory.³

On Friday, January 20, 2017, Textiles Opico’s management met with Sitrasacosi plant-level union leaders and outside union representatives, at the company’s request, to discuss a recent increase in El Salvador’s legal minimum wage.⁴ During the meeting, factory management informed the union that, due to increased labor costs from the minimum wage increase, it would be necessary for the company to lay off workers.

When the union asked the factory management when the layoffs would begin, the management – in violation of the procedure it had committed to, which explicitly requires 15 days advance notice of any layoff to the workers and, therefore, to the union – responded that the layoffs would take effect immediately. The company also violated this procedure with respect to notice to the affected workers, as even before the meeting ended, the factory’s human resources department had already begun informing workers of their dismissal. Workers who were dismissed at this time later reported to the WRC that they were called to meet with human resources department staff in the factory’s chapel, at which time they were notified that they were being laid off.

¹ Textiles Opico S.A. de C.V., *Procedimiento para Terminación de Contrato* (Procedure for Contract Termination) (stating that the criteria to be applied in selecting workers for layoff are “[l]ength of service, low level of professional qualification, lowest performance levels.”).

² Id. (stating that “[Textiles Opico’s] General Management will initiate a direct dialogue with worker representatives in union organizations that exist in the company ... [in order to] “together analyze options that will avoid or minimize the negative effects of a staff reduction.”).

³ Id.

⁴ The Salvadoran government implemented a significant minimum wage increase on January 1, 2017, raising garment workers’ minimum monthly salaries from \$210 per month to \$295 per month. See *La Prensa Gráfica*, “Aprueban Aumento al Salario Mínimo Sin La Participación de la Empresa Privada” December 15, 2016, <http://www.laprensagrafica.com/2016/12/15/aprueban-aumento-al-salario-minimo-sin-la-participacion-de-la-empresa-privada>.

While the company had committed to an appeals process including union representation in the case of such layoffs, the company denied workers access to union representatives during the January layoffs. According to the procedure the company had agreed to, the management was required to consider workers' appeals of the layoff, permit them union representation, and suspend their layoffs pending the appeals' resolutions. When workers asked for their union representative to be called, however, they reported that the factory's human resources manager, Herbert Guandique, told them that there was no need to call the union representatives because "the union already knows about the layoffs and the union is in agreement." According to one employee who requested union representation in these meetings, Guandique added, "If you are waiting for someone from the union to come, you are wasting your time because the union already knows what is happening and it can't do anything to help you."

The human resources manager's statement to these workers was false and misleading, since, as discussed above, the factory management did not provide advance notice to the union of the terminations and union officials had not agreed with the company's action. For six months following the layoffs, Textiles Opico's management refused to discuss its layoff of the 75 employees with worker representatives.

In all, the factory laid off 75 employees on January 20 out of a total company workforce of 1,547 (4.8% of the workforce). Of the 75 workers who were laid-off, 28 (37%) were union members, some of whom had been employed at the factory for more than 10 years.

The Sitrasacosi union reported that, at the time the layoff occurred, approximately 130 of the plant's employees (8.4%) were members of the union. The layoff eliminated the jobs of 22% of the union's members.

Twenty-three of the workers who were laid off were employed in the factory's "Maintenance of Installations" department, which represented this department's entire workforce. Of this group of 23 workers, 13 (56%) were union members – by far, the highest percentage of union members of any department in the factory. Prior to the layoff, workers in this department had brought multiple grievances to the company, via their union representatives, concerning the factory's failure to provide them with safety shoes, as is required under Salvadoran law.⁵

The factory management claimed that these workers were laid off because the company decided to outsource its entire maintenance operation, reporting to the WRC that building and construction services provided by the maintenance department were no longer needed and that the decision to eliminate the department was made in order "to keep [the company's maintenance] costs variable as opposed to fixed."

⁵ Salvadoran Labor Code, Article 314(2) and Salvadoran General Law on the Prevention of Risk in the Workplace, Article 38.

Of the 52 workers who were laid off from other departments at the factory, 15 (29%) were union members. However, in this group, the layoff affected only 3.4% of the total number of workers while 13% of the union's membership was among this group.

The factory management claimed that it selected these workers for layoff based on an individualized evaluation of their quality of work, production rate, attendance, and behavior and not on the basis of whether or not a worker was a union member. With the exception of the production rate, however, these were not the same factors that the company had previously committed to use in selecting employees for layoff—which were length of service at the factory and professional qualifications.⁶

B. Retaliatory Layoff and Termination

As discussed below, the WRC's investigation of the January 20 layoff found that Textiles Opico deliberately and discriminatorily targeted employees who were union members through its selection of individual workers for layoffs and its elimination of the factory's maintenance department, the most-unionized group of employees in the factory. Discriminatorily terminating union members under the guise of economic layoffs has been specifically identified by the ILO Committee on Freedom of Association, the highest international body authorized to interpret this right, as a violation of this fundamental workplace right, as protected under ILO Conventions 87 and 98.⁷

Retaliation against workers on account of their associational activities also violates the Salvadoran Constitution,⁸ as well as the country's Labor Code,⁹ which prohibits an employer from "directly or indirectly discriminating against workers based on their union status or retaliating against them for the same reason."¹⁰ The FLA Workplace Code of Conduct and Benchmarks for Compliance, which Textiles Opico and at least one of its buyers have committed to uphold, also clearly states that employers shall not discriminate against union members in employment-related decisions.¹¹ Several buyer codes of conduct also require that factories respect workers' associational rights.

⁶ Textiles Opico S.A. de C.V., *Procedimiento para Terminación de Contrato* (Procedure for Contract Termination) (stating that the criteria to be applied in selecting workers for layoff are "[l]ength of service, low level of professional qualification, lowest performance levels.>").

⁷ International Labour Organization, "Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO", Para 796 ("The application of staff reduction programmes must not be used to carry out acts of anti-union discrimination.>").

⁸ Salvadoran Constitution, Article 47, states "[W]orkers ... have the right to freely associate to defend their respective interests"

⁹ Article 204 of the Salvadoran Labor Code states that workers "have the right to freely associate... forming professional associations or unions."

¹⁰ Salvadoran Labor Code, Article 30.

¹¹ Fair Labor Association, "FLA Workplace Code of Conduct and Compliance Benchmarks," Compliance Benchmark FOA.5.1, Revised October 5, 2011, states "Employers shall not engage in any acts of anti-union discrimination or retaliation, i.e. shall not make any employment decisions which negatively affect workers based

This prohibition on antiunion terminations also extends to cases where, as in the case of Textiles Opico's maintenance workers, such retaliation is accomplished by subcontracting jobs of employees who are union members. According to the ILO's Committee on Freedom of Association, "Subcontracting accompanied by dismissals of union leaders can constitute a violation of the principle that no one should be prejudiced in his or her employment on the grounds of union membership or activities."¹²

Prima facie evidence of antiunion discrimination in a layoff of workers who are union members exists when (1) the employer demonstrates a hostile motive or animus toward employees' union membership and activities and (2) the layoff disproportionately affects employees who were union members. If so, the burden is on the employer to produce sufficient and credible evidence showing that workers were selected for layoff for a valid economic reason rather than because of their union membership.

In this case, the available evidence points strongly toward Textile Opico's layoff of Sitrasacosi union members being discriminatory in both motive and effect and factory management has failed to meet its burden of showing a nondiscrimination justification for its course of action.

1. Textiles Opico's Hostile Motive for Layoff of Employee Union Members

The evidence of Textiles Opico's hostile animus towards workers at the factory who are union members is strong and consistent. As already noted, the FLA's prior investigative report of Textiles Opico concluded that factory management responded to the original formation of a union by workers at the plant with the same discriminatory action charged in this instance – termination of employees associated with the union on false grounds of poor productivity.

Textiles Opico management's hostility toward employees' membership in the union continued up to and including the January layoff. To cite but one example, one of the laid-off workers reported that, prior to his discharge, a company manager stated to him: "I know you are part of the union.... You are so stupid. I don't know why you are giving your money to other people [by paying union dues]. Think of how you could use the money you give to them."

In addition, in the very process of implementing the layoff, Textiles Opico's management displayed its hostility toward dealing with the union or affording employees union representation. As discussed, the company had agreed, as part of the remedial measures it was required to take for its *previous* violations of freedom of association, that, in any future layoff, the company would provide workers and their union representatives with 15 days advance notice

wholly or in part on a workers' union membership or participation in union activity, including the formation of a union, previous employment in a unionized facility, participation in collective bargaining efforts or participation in a legal strike."

¹² International Labour Organization, "Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO," Para 790.

and would give employees who were union members the right to appeal their layoff with union representation.

Instead of following this consultative process, however, Textiles Opico's management initiated the layoff as a *fait accompli* without any meaningful notice to workers or union representatives, baldly misrepresented the union's position on the layoff to affected employees, and flatly denied laid-off workers who were union members the right to representation or appeal.

2. Disparate Layoff of Union Members and Lack of Business Justification

The January 20 layoffs also disproportionately affected employees who were union members. The factory laid off 4.8% of its entire workforce (75 employees out of 1,547), but 22% of workers who are union members were laid off (28 out of 130).

Of all workers who were laid off, 37% (28 out of 75) were union members, even though union members only comprised 8.4% of the factory's overall workforce (130 out of 1,547 employees).

a. Targeted Elimination of the Factory's Most Unionized Department

As discussed, as part of the January layoff, Textiles Opico completely eliminated the plant's "Maintenance of Installations" department, the work area in the factory that had, by far, the highest percentage of union members among its workers. As mentioned above, more than half of the workers in the maintenance department were members of the union (13 out of 23, or 56%).

Workers report that this department was established in 2009. Workers interviewed by the WRC reported that they had been working for the department for up to five years.

Textiles Opico's management was well aware that the maintenance department included many union members. Prior to the layoff, union members in this department also had brought grievances to the company, including the recent request for necessary safety shoes noted above. Since Textiles Opico demonstrated clear hostility to union members, and knew that the maintenance department was a center of union activity, and since the elimination of this department disproportionately affected such workers, the burden is on the factory's management to show that it made this decision for nondiscriminatory reasons.

Textiles Opico's owner, Juan Zigelboim, told the WRC after the layoff that the reason for subcontracting the maintenance department's work was that its employees were no longer needed at the factory, given that the company had recently completed certain construction projects, including an extension of plant facilities.

This claim contradicts the explanation originally given for the department's elimination by the factory's Human Resources Director, Herbert Guandique, who told workers at the time of their layoff *not* that their job duties were no longer needed, but, instead, that the company had decided to have these duties performed by an outside subcontractor. Guandique reportedly told workers,

“The company has decided not to have a maintenance department and we will subcontract with another company to do the work that you do.” The managers’ inconsistency in explaining the company’s reason for eliminating the maintenance department undermines the credibility of management’s claim that this decision was motivated by legitimate business concerns and suggests, instead, that both these explanations are simply pretexts for antiunion retaliation.

More recently, in a June 19 letter to a buyer, the factory has reaffirmed that the work was subcontracted and stated, “having outsourced the department has given us the cost-cutting benefits sought.” Acknowledging that some of these functions are still required, the company has stated that it has reduced the number of workers performing these tasks and their hours, as well as outsourcing the work. The fact that Textiles Opico has acknowledged that these functions are still being performed underscores the fact that it would have been possible to retain the same personnel.

Even leaving aside these shifting explanations, neither of the justifications the company has presented for eliminating its maintenance department is credible. The maintenance employees testified that their job duties did include construction projects at the factory, but also included other maintenance services including plumbing, gardening and maintenance of outdoor recreational facilities, carpentry, interior and exterior painting, floor cleaning, minor roof repairs, interior cleaning of the building and the cafeteria, maintenance of the ceiling, and other functions. Workers also reported that the department had existed since 2009, and that at least one of the workers was employed for five years in the department; this contradicts the factory’s claim that this was an arrangement intended only for a short-term construction project.

Workers still employed at the factory report that the work carried out by the maintenance department continues to be performed at the factory, but is now done by nonunionized subcontractors. Furthermore, the maintenance workers interviewed by the WRC reported that additional construction projects were initiated in January 2017, including new construction in the administrative offices, removal and replacement of the floor in the packing department, expansion of the daycare center and the school, construction of a store room, and remodeling of the cafeteria, but that Textiles Opico shifted these assignments to an outside company at this time.

Textiles Opico has provided no information to suggest that the discharge of the maintenance department employees was based on a legitimate business reason rather than being retaliatory, as the *prima facie* evidence strongly indicates. While it is possible that the amount of new construction has decreased, it is clear from worker testimony that both new construction and the diverse other tasks performed by this department continue to the present day. Even if there were additional reasons to eliminate the department, it is implausible that the fact that the department housed a disproportionate number of active union members played no part in the company’s decision-making. This conclusion is informed by the fact that Textiles Opico has a track record of hostility to, and retaliation against, the union and its members, and chose to conduct the

layoffs in a manner that violated a protocol intended to prevent retaliation or discrimination in the layoff process.

The WRC finds, therefore, that the justification for eliminating the department that Textiles Opico has cited simply represents a pretext for a decision motivated by retaliatory animus against the department's workers for their high level of union membership and activity. The evidence indicates that the company eliminated this department in order to retaliate against workers' union activities, a very serious violation of their right of freedom of association.

The WRC also notes that even if, as the company purports, the elimination of the maintenance department was not discriminatory by design, the company's decision to – in violation of its agreed-upon protocol, and as part of a layoff that disproportionately impacted union members across the board – eliminate a department that constituted 10% of the union's membership has a significant impact on the freedom of association climate at the factory. Given both the freedom of association violations involved in this particular layoff, and the factory's history of retaliation against union members, the elimination of this department contributes to a chilling effect which serves to discourage all workers in the factory from participating in the worker organization and exercising their right to freedom of association. It is reasonable for workers at Textiles Opico, observing the history and the dynamics of this particular termination, to conclude that if workers in a particular module or department unionize, or speak out about safety risks as the maintenance workers did, they are at risk of being terminated or seeing their entire team eliminated.

b. Discriminatory Selection of Other Union Members for Layoff

The WRC found that, aside from the elimination of the factory's most unionized department, the company also deliberately targeted union members elsewhere in the factory for layoff. While Textiles Opico claimed to be generally unaware of which workers among its employees are union members, statements by company managers belie the credibility of this assertion. Workers testified to the WRC that factory supervisors openly expressed their knowledge of their status as union members. As already mentioned, one laid-off worker related that a manager previously had told her directly, "I know you are part of the union." Another worker who was subsequently laid off reported that her supervisor had said to her in the months prior to her dismissal, "I am not afraid of you just because you are a member of the union."

Not including the dismissal of the maintenance employees, the factory laid off 3.4% of the overall remaining workforce (52 employees out of 1,524), but 12.8% of the non-maintenance workers who were union members (15 out of 117). Of all non-maintenance workers who were laid off, 29% (15 out of 52) were union members, even though union members only comprised 7.7% of the factory's non-maintenance workforce (117 out of 1,524 employees).

As a result, all other things being equal, employees in this group who were union members were nearly *five times more likely* to be selected by the company for layoff than nonunion employees. Employees who were *not* union members faced only a 2.6% chance of being laid off (37 nonunion workers laid off out of 1,407 total nonunion employees), while employees who *were* union members faced a 12.8% chance of being laid off (15 union members laid off out of 117 total union members).

The WRC commissioned a statistical analysis of this data by a labor and employment relations expert at Pennsylvania State University who concluded that, absent other factors, the chances that Textiles Opico deliberately targeted union members for layoff are greater than 99.99%. In other words, unless Textiles Opico were able to provide credible evidence to show that the union members who were laid off actually had other characteristics – aside from their membership in the union – that caused the company to select them for layoff, it is undeniable that the company engaged in antiunion discrimination.

As discussed, the company's claim is that its management selected workers for layoff based on their quality of work, production rates, attendance, and behavior. However, in light of the analysis above, this claim is only credible if the company had produced evidence that the union members who were selected for layoff had significantly worse records on these issues, on average, than prevailed among the factory's workforce as a whole. Before reaching initial findings, the WRC sent a request to the factory for such information, which Textiles Opico initially failed to provide. The company did, on April 19, provide information about the selection process for the layoffs but, as detailed in the next section, the new information from the company did not alter the WRC's findings.

In addition, following the prior FLA investigation, the factory management had committed in writing to use a specific set of purely objective factors in selecting employees for any future layoff – productivity, length of service at the factory, and professional qualifications. With respect to the January 2017 layoff, however, the company admitted that it violated this commitment and did not follow this procedure. Instead, it claimed to have selected employees for dismissal based on almost entirely different factors – not only productivity, but also attendance, quality of work, and behavior.

The two new factors on which the company initially said it relied for selecting workers for layoff (quality of work and behavior) are notably more subjective than those the company had previously agreed to use in such cases (length of service and professional qualifications). The fact that the business justification the company has proffered for its selection of employees for layoff relies mainly on subjective factors, offered without explanation for their use and in violation of a written agreement to the contrary, further undermines the company's claim that its actions were not discriminatory.

Finally, as noted already, the prior FLA investigation of Textiles Opico documented that the factory's management has a proven history of using false claims that union members had inferior job performance as a pretext for discriminatory dismissal of such employees. Given the company's track record not only of antiunion animus, but also misrepresentation, the management's claims in this case cannot be assumed to be credible – on the contrary, they can only be accepted if supported by substantial objective evidence. Accordingly, as *prima facie* evidence shows that the January layoff was, in motive and effect, discriminatory to workers who were union members, and since Textiles Opico's management failed to provide any evidence to the contrary, the WRC's conclusion is that the layoff violated workers' associational rights.

3. *Subjective Selection Criteria*

The information that the company provided to the WRC revealed that the criteria that Textiles Opico claimed to have used to select workers for layoff were far more subjective than those it had previously committed to use.

The WRC asked Textiles Opico for any evidence that would demonstrate conclusively that the layoff was conducted (1) according to objective criteria that were (2) applied in an objective manner.

Of the 10 criteria which the company purports to have used, three were subjective on their face and easily skewed by a supervisor's opinions regarding a worker's union membership – “respect for colleagues and superiors,” “teamwork,” and “following directions.” As noted in the initial findings, prior to the layoff, company supervisors had made statements to workers indicating that the supervisors were aware of which employees were union members and expressing their hostility of the union.

The company supervisors were motivated and well-positioned to apply these criteria in a manner that targeted such employees for layoff. In this respect, it must also be again noted that Textiles Opico has a prior history of terminating employees for union activity under the guise of economic layoff.

Moreover, some criteria that would *seem* to be objective were, in fact, applied by management in a highly subjective manner, creating the *appearance* of an objective process without using truly objective criteria. For example, a fourth category – “production goals” – appears on its face to be an objective criteria based on the production output of the worker. However, the WRC found that this criteria was also subjectively determined. The worker's score was based on a “yes” or “no” response from supervisors to the question, “During the past six months, has the worker contributed to the compliance of production goals assigned to his/her team by adequately making use of available resources (time, materials, machinery, etc.)?”

Since production quotas at Textiles Opico are assigned to teams of employees (“modules”) rather than to workers individually, this assessment was necessarily a qualitative one by supervisors, rather than a number based on quantitative data. In sum, nearly half of the factors determining whether an employee was selected for layoff involved subjective judgments by supervisors, rather than the application of objective criteria.¹³

4. Denial to Employees of Union Representation

Textiles Opico also violated associational rights of employees who are union members by denying their request to be represented by the Sitrasacosi union when the company announced that their jobs would be eliminated and failing to meaningfully consult with union representatives concerning the layoff. As discussed, the company explicitly refused to accede to requests from employees who were union members for such representation, even though it had had previously committed in writing to do so. Moreover, the company also violated its commitment to provide 15 days prior notice to workers and to engage in consultation with union representatives before any layoffs – announcing the layoffs to union representatives, instead, as a *fait accompli*.

El Salvador’s Labor Code clearly states that it is a fundamental right of every union “to represent its members.”¹⁴ ILO Convention 135, which has been ratified by El Salvador and, therefore, is binding as a matter of law, also requires that union representatives be “enable[d] ... to carry out their functions promptly and efficiently.”¹⁵ Finally, the FLA’s standards state that, particularly in case of “changes ... likely to result in temporary or permanent layoffs,” employers are required to “consult any workers’ representatives as early as possible with a view to averting or minimizing layoffs.”¹⁶ All these standards were violated when, during the January layoff, Textiles Opico managers deliberately denied workers who were union members access to union representation and failed to provide meaningful notice or consultation to the union with respect to this action.

5. Violation of Commitments in Labor-Management Agreement

Textiles Opico further violated workers’ right to freedom of association and collective bargaining when, in contravention of explicit commitments it had made to the Sitrasacosi union and its workers, the factory’s management failed to: (1) provide 15 days prior notice of the layoffs, (2) permit union members to appeal the layoffs’ discriminatory nature, or (3) select

¹³ The other criteria that the company claims to have applied were length of service, number of written warnings, absenteeism, late arrivals, “AQL” (which appears to be a standard for quality), and the number of machines the worker could operate.

¹⁴ Salvadoran Labor Code, Article 228(c).

¹⁵ ILO Convention 135 (Workers Representatives).

¹⁶ Fair Labor Association, “FLA Workplace Code of Conduct and Compliance Benchmarks”, Compliance Benchmark ER.32.3, Revised October 5, 2011, http://www.fairlabor.org/sites/default/files/fla_complete_code_and_benchmarks.pdf.

employees for layoff according to the objective factors it had committed to use in any workforce reduction.

The company pointed out that it initially requested to meet with the union on January 12, but that the union was not able to meet with managers until January 20. However, Textiles Opico's request to meet with union representatives on January 12 neither constituted 15 days notice of layoff nor excuses the management's failure to provide the notification to workers and their representatives that its agreement with the union required.

First, the factory management did not indicate that the intended subject of the January 12 meeting was a layoff – instead, managers told union representatives the reason for the meeting was to discuss the recent increase in the minimum wage. Second, even if it was unable to meet in-person with the union's officers on January 12, the company could have easily complied with the notice requirement simply by providing this information to the union in the form of a written letter or other communication.

Third, even if the company had met with the union on January 12, even if it had not implemented the layoff immediately at that meeting (which seems likely, since this was its actual course of action on January 20), but, instead, had waited until January 20 to do so, this would have provided only eight days' notice – not the 15 days' notice that the company's agreement with the union required.

Finally, any issue with respect to the timing of the meeting at which the company initially informed the union of the layoff is irrelevant to the company's subsequent violation of its commitments to permit employee union members to appeal the layoff's discriminatory effects or use the agreed-upon objective factors in selecting employees for layoff. Textiles Opico failed to provide any justification for its failure to abide by its agreement with the union with this respect to these commitments.

The ILO's Committee on Freedom of Association has stated that compliance with this right requires “[m]utual respect for the commitment[s] undertaken in collective agreements,” and that such commitments “should be binding on the parties.”¹⁷ Textiles Opico violated this standard when it failed to meet the written commitments it had previously made to the union.

During the course of the WRC's engagement with Textiles Opico, the company has offered no non-retaliatory business explanation for *why* the company failed to follow its own agreed-upon policy and criteria for layoff in this case. The abandonment of an agreed-upon and established written policy in favor of previously unannounced criteria, that the company adopted on an *ad hoc* basis, strongly support the conclusion that the management irregularly chose these criteria and procedures in order to help the company attempt to mask the retaliatory nature of the layoff.

¹⁷ Ibid, Para 939.

IV. Recommendations for Corrective Action

On March 15, 2017, the WRC shared with factory buyers its findings and outlined a series of recommendations necessary to correct the violations of Salvadoran law, international labor standards, and applicable codes of conduct. The WRC recommended that the buyers require their supplier, Textiles Opico, to promptly take the following remedial actions:

- 1) Offer immediate reinstatement to the 28 union members terminated on January 20, 2017, including the 13 union members who were part of the factory's maintenance department. Workers who accept reinstatement must be reinstated immediately to their original positions, with no loss of seniority.
- 2) Provide full back pay to all 28 of these workers, regardless of whether they accept the offer of reinstatement. This back pay should cover the period from the date of their dismissal to the date of reinstatement or, if they choose not to return to the factory, the date on which this offer is made. Back pay should be calculated based on each worker's average weekly earnings over the 12 weeks prior to his or her dismissal, including all bonuses, incentives, and overtime pay.
- 3) Issue a written statement to all Textiles Opico workers, to be written in consultation with and subject to the approval of Sitrasacosi and the WRC, stating the following: i) workers at Textiles Opico have the right to join and/or participate in any union of their choosing; ii) the factory management will in no way interfere with nor take any adverse action of any kind against any worker on account of this choice; and iii) any manager or supervisor who attempts in any way to coerce or threaten any worker because of his or her choice to join and/or participate in a union will be subject to meaningful discipline, up to and including termination. Every line and/or department supervisor should read this statement aloud to the employees under his or her direct supervision and a typed copy of the statement, on factory letterhead, should be provided to every employee and posted on factory notice boards. Sitrasacosi and WRC representatives should be provided access to the factory to observe these proceedings.
- 4) Contract with an independent organization, agreed upon by the Sitrasacosi union and the WRC, to provide managers and supervisors with training on compliance with freedom of association under Salvadoran law and international standards. Informational sessions should be offered by the same organization for all workers, in groups of no more than 100 workers and without the presence of management, so that the workers can be made aware of their associational rights under these standards and have the opportunity to ask questions.

- 5) Resume immediately monthly meetings between representatives of Sitrasacosi and Textiles Opico management during which members of the plant-level union and their representatives can confer with decision-making members of the factory's management in order to address and remedy workplace concerns.

VI. Company Response

Textiles Opico has not committed to fully remedy its violations of workers' rights. In two separate communications, Textiles Opico stated that it was unwilling to fully comply with the recommendations outlined by the WRC to the factory and its buyers.

With regard to each of the recommendations, in letters dated May 22, 2017, and June 19, 2017, the factory committed to the following:

1. Reinstatement of Terminated Union Members

While Textiles Opico has agreed to offer the 15 dismissed production workers the right to return to work, it has refused to reinstate the 13 dismissed maintenance workers either to their initial positions or to other positions in the factory.

As noted above, Textiles Opico has claimed that these workers' positions are no longer needed, although the company has also acknowledged that certain work has been subcontracted out. While workers currently employed at the factory report that the type of work performed by the maintenance workers is indeed continuing, and is being performed by subcontracted workers, the WRC has noted that if the need for employees in the maintenance department has decreased, these workers could be reinstated to other areas of the factory. The factory has stated that the former maintenance workers "lack the finesse and dexterity to be trained as sewing operators for example." It is not clear whether this is based on any assessment of the individual workers or a blanket assessment of the department. Textiles Opico did not address the possibility of finding employment for this group of 13 workers in other areas of the factory, such as in the storeroom, the shipping department, general services, or in the cutting department.

The WRC notes that these 13 former maintenance workers constitute only 0.8% of the total workforce of the factory; even if these workers require retraining, this will not constitute a significant burden on the employer.

The WRC continues to recommend that all 28 workers be offered reinstatement.

2. Back Pay for Terminated Union Members

The company has refused to provide full back pay. It has offered to pay the workers a smaller amount equaling two months' wages.

The WRC continues to recommend that the workers be provided back pay for the full period that they were off the job. Workers should not suffer a financial loss as a result of the factory's failure to comply with its own protocol for dismissals and its obligations to respect workers' freedom of association.

3. Freedom of Association Statement

The company stated that it was willing to comply with this recommendation and to work with the union to prepare the text of the statement. If carried out appropriately, this will satisfy the recommendation.

The WRC notes that this remedial element, along with the training component, will be meaningful only if undertaken after the terminations have been rectified. While freedom of association statements and trainings can serve a key role in restoring freedom of association at the factory, they ring hollow when workers terminated in retaliation for associational activities are still off the job. Workers are unlikely to believe an employer statement that they are free to exercise their associational rights when they can see that their coworkers have been terminated for exercising that freedom, and remain off the job.

4. Freedom of Association Trainings

The company agreed to the terms of this recommendation. If carried out appropriately and, as noted above, in conjunction with remediation of the terminations, this will satisfy the recommendation.

5. Resumption of Regular Labor-Management Dialogue

The company agreed to the terms of this recommendation; an initial meeting has taken place and a second meeting is scheduled for August 10.

V. Brand Engagement

On March 15, 2017, the WRC shared its initial findings and recommendations with all of the buyers at Textiles Opico. The university licensee, Team Beans, responded to the WRC by stating that it no longer had a business relationship with Textiles Opico. This was consistent with testimony obtained from the workers and factory management in the course of the investigation.

Dick's Sporting Goods, on behalf of itself and its business partner adidas, has engaged with the factory and the WRC with limited results. Dick's successfully pressed Textiles Opico to provide information requested by the WRC in the course of the investigation, and has engaged with the factory regarding remediation. Dick's has not, however, succeeded in pressing the factory to fully remedy the violations.

While Lululemon, REI, and Castelli responded to the WRC's correspondence, they have not taken any meaningful action to correct the violations. Academy Sports did not respond.

VII. Status and Recommendations

Textiles Opico cannot be considered to be in compliance with Salvadoran law, international standards, and applicable codes of conduct until all workers who were terminated in retaliation for union activity have been reinstated with full back pay. As noted above, the additional remedies, such as freedom of association statements and trainings, cannot counteract the atmosphere of fear that is created by management's retaliatory termination of union members. All of the terminated workers must be reinstated with back pay before other measures, including dialogue, can be effective. This remedy is straightforward, easy to effect, and poses a minimal burden for a factory of this size.

In the past, Textiles Opico has agreed to engage in appropriate remedial measures only after receiving a strong message from its buyers. The WRC urges the factory's buyers to press the factory to promptly take all necessary remedial action.