
Foot Fault

The media portrayed Nike's recent out-of-court settlement in a sweatshop case as a victory for human rights and a defeat for free speech. They got it wrong.

PETER DREIER AND RICHARD APPELBAUM | September 23, 2003 | web only

Phil Knight, Nike's founder and CEO, just lost a major court battle over his company's allegedly misleading ads about conditions in its overseas factories. Then Nike agreed to pay a \$1.5 million settlement to what the [media called a "worker rights" group](#) that monitors sweatshops. So how did Knight and Nike escape more or less unscathed from the entire episode?

The group in question is called the Fair Labor Association (FLA); it is controlled by the apparel industry, including Nike, which is represented on FLA's 15-member board along with Reebok, Nordstrom, Eddie Bauer, Liz Claiborne and Polo Ralph Lauren. In other words, Nike -- the world's largest athletic shoe company, with annual revenues of \$10.7 billion -- is handing a \$1.5 million check to the fox for guarding the chicken coop. Most major media outlets in the country (and many others throughout the world) reported on the settlement, but [we could find only one](#) -- the *San Francisco Chronicle* -- that didn't miss the irony.

To be sure, the settlement is, in some ways, a victory for labor and consumer rights. During the 1990s, anti-sweatshop activists targeted Nike, exposing dehumanizing working conditions in its contractors' overseas factories, mostly in Asia. In response, Nike announced that it would allow independent monitoring of its factories, but activists were skeptical when the company hired several corporate accounting firms, including PriceWaterhouseCoopers and Ernst & Young -- both of which were seen as beholden to Nike and unlikely to win the trust of workers in the company's supply chain. Moreover, Nike would not agree to make the monitoring reports public. In 1997, *The New York Times* reported in a front-page story that an Ernst & Young account had described the conditions at plants owned by Nike contractors in Vietnam as "dismal." In one such factory, workers were being exposed to toxic fumes at up to 177 times the Vietnamese legal limit.

At first Nike claimed that because it did not own the factories, it was not legally or morally responsible for conditions in them. The company said its business was marketing shoes, not making them. But pressure from human-rights and anti-sweatshop groups in the United States and overseas eventually forced Nike to acknowledge that because it dictates the design, materials and price of the products it purchases from contractors, it is responsible for conditions in its supply chain. Nike then launched a public-relations campaign -- which included advertisements, letters to editors and missives to university officials (with whom Nike does a lot of business) -- to convince consumers that the company had cleaned up its act and was a model employer.

Then, in 1998, Mark Kasky, a San Francisco foundation executive and marathon runner, sued Nike under California's truth-in-advertising law, which allows citizens to sue companies that conduct "false and misleading" advertising. Kasky claimed that the company had lied about working conditions in its factories.

Rather than directly rebut Kasky's allegations, Nike tried to get the suit thrown out on First Amendment grounds, arguing that it had the right to defend itself against claims that its products were produced in sweatshops. This public-relations blitz, Nike argued, was "political" speech, not "commercial" speech, and thus was protected by the Constitution.

The California Supreme Court ruled in July 2002 that Kasky had the right to sue. "When a business enterprise makes factual representations about its own products or its own operations," the court said, "it must speak truthfully."

Nike appealed to the U.S. Supreme Court. The Bush administration; business groups such as the U.S. Chamber of Commerce (represented by Kenneth Starr) and the Business Roundtable; major corporations including Exxon-Mobil, Monsanto, Microsoft, Pfizer and Bank of America; trade associations for the public-relations and advertising industries; 32 large media companies (including The Washington Post Corporation and the Hearst Corporation); and even the American Civil Liberties Union (despite a serious internal dispute over the issue) all weighed in with amicus briefs on Nike's behalf, arguing that the case was a matter of First Amendment freedoms, not workers' rights.

On Sept. 12, the court declined to hear the case. That meant that Nike was facing the prospect of defending itself in the California courts against the *substance* of Kasky's claims rather than on the question of whether Kasky -- who was supported by the Sierra Club, the California AFL-CIO, Public Citizen and 18 states concerned that companies could use false claims to boost sales -- had the right to sue.

With its back to the wall, Nike agreed to the \$1.5 million settlement, staving off a potentially long, costly and embarrassing court fight, which would have included a discovery phase in which lawyers could have sought access to Nike's factories overseas.

Both the small size of the settlement and the choice of the FLA as recipient troubled labor- and human-rights activists. Kevin Danaher, co-founder of Global Exchange, a San Francisco-based group that has sponsored investigations of Nike's Asian factories, said, "A million and a half dollars is pocket change to a company like Nike." Nikki Bas, executive director of Sweatshop Watch, said that amount was "so little that it's shocking. It's a huge

disappointment." A veteran anti-sweatshop activist familiar with the case put it this way: "The settlement is so small that it fails to serve as much of an object lesson for other corporations, which was presumably the whole point of this exercise."

In their reporting on the settlement, newspapers, magazines and Web sites tended to focus on the case's free-speech implications, downplaying Nike's labor practices or the role of the FLA:

"Nike Move Ends Case Over Firms' Free Speech," wrote *The New York Times*. "Nike Settles Commercial Free Speech Case," said the *Seattle Post-Intelligencer*. "Nike settles free-speech case over labor claims," announced a Forbes.com headline on a Reuters story. "Nike Settlement Leaves Corporate Speech Unresolved," proclaimed the *Silicon Valley/San Jose Business Journal*. "Nike Settles With Activist In False-Advertising Case," wrote *The Washington Post*. "Nike Settles Free-Speech Case Over Asian Sweatshop Claims," said FOXNews.com. Nike is located in Beaverton, Ore.; the lead editorial in the company's home-state newspaper, *The Oregonian*, was headlined, "Free speech loses a round."

The media's coverage gave a double victory to Nike, portraying the settlement as a defeat for free speech *and* -- by characterizing the FLA as a watchdog for labor rights -- as a victory for corporate social responsibility.

The New York Times described the FLA as "a Washington group that monitors corporate labor practices abroad and helps educate workers." *The Washington Post* called the FLA a "worker advocacy group." *The Wall Street Journal* identified the FLA as a "worker-rights group." *The Oregonian* labeled the FLA a "factory monitoring organization" that would use Nike's money to "boost monitoring, fix problem factories and fund worker development programs." The Associated Press story -- which was widely reprinted -- defined the FLA as a "worker rights group" and said it "conducts independent monitoring of labor practices." The Bloomberg News syndicate called the FLA "a nonprofit group in Washington founded in 1999 to monitor compliance with a workplace code of conduct to ensure that products aren't made by sweatshop labor."

The *San Francisco Chronicle* was the only major newspaper to challenge the FLA's credibility as an impartial monitoring organization. Jeff Ballinger, formerly director of an AFL-CIO office in Asia, longtime Nike critic and head of a consumer- and labor-rights group called Press for Change, told the *Chronicle* that the FLA is "totally in the pocket of business." The *Chronicle* quoted Global Exchange's Danaher as saying that the FLA was "a corporate front group. Nike got off easy."

Other activists agree. "I'd rather see the settlement money go to unions in Asia than to the FLA," says Jeff Hermanson, a longtime labor activist who has spent the past decade assisting workers in Central America and Mexico, first with the Union of Needletrades, Industrial and Textile Employees (UNITE) and later through the AFL-CIO's Solidarity Center. "What the world needs is more unions, not more monitoring organizations."

The FLA is an industry-dominated watchdog organization that was created in the 1990s by prominent garment manufacturers who were stung by revelations that sweatshops were alive and well, even in the United States. Its principal mission is to certify as sweatshop-free those companies that adhere to its standards and monitoring requirements, thereby enabling member companies to avoid the embarrassment (and possible loss of business) that exposure of working conditions in their factories might bring.

In 1995, two widely publicized incidents brought this message home to Nike and other manufacturers and provided the immediate impetus for the creation of the FLA. Anti-sweatshop crusader Charlie Kernaghan, who heads the National Labor Committee, caused celebrity Kathie Lee Gifford to cry on her nationwide TV program when he testified before Congress and showed up with a teenage girl who -- despite Gifford's initial denials -- was making clothing for Wal-Mart in a Honduran sweatshop under the Kathie Lee label.

That same year, and closer to home, media stories revealed that 72 young Thai workers were laboring in near slavery in the Los Angeles suburbs of El Monte, kept as virtual prisoners for as long as seven years. Unable to leave during the day or night, the mainly female workforce put in 16-hour days, seven days a week; average payment was 69 cents per hour. The workers made clothing for major labels such as B.U.M Equipment and Ocean Pacific -- clothing that was sold by Mervyn's, Montgomery Ward and other major retailers.

Nike had already been embarrassed by bad press about working conditions and pay in its giant Indonesian factories. The company joined Patagonia, Levi's, Phillips-Van Heusen, a handful of other apparel and footwear companies, and some labor unions and human-rights groups to form the Apparel Industry Partnership (AIP), a governmental task force led by President Clinton's secretary of labor (and *Prospect* co-founder), Robert Reich. By the time the AIP had morphed into the FLA, the unions and most of the human-rights groups had quit, convinced that the new organization was too dominated by industry representatives to serve as an honest watchdog. As originally set up, the FLA allowed companies to choose their own monitors, select which of their contract shops would be monitored and keep the results to themselves, on the assumption that once problems were detected they would be quickly corrected.

To many, this idea seemed like a bad joke. Companies would certify that their own hands were clean while avoiding the one thing that might actually bring about change: negative publicity. Unions -- and the student anti-sweatshop movement, which crested during the late 1990s -- weren't buying it.

Campus activists had begun to target the \$2.5-billion college licensing industry, under which Nike, Reebok, Russell Athletic, Champion and other apparel and footwear companies make sweatshirts, T-shirts and caps with a college's logo, in exchange for paying a fee to the college. Eventually, some 200 colleges and universities adopted codes of conduct outlawing the use of sweatshops in their licensing programs. The FLA convinced many college administrators that joining (and paying dues to) the FLA would protect them against campus protests.

But the plan backfired. Groups such as United Students Against Sweatshops (USAS) viewed the FLA as window dressing for the giant apparel firms. Worried that their gains would be lost, students, with the help of UNITE, formed a rival organization, the Worker Rights Consortium (WRC). Unlike the FLA, in which universities were a minority on the governing board and manufacturers had virtual veto power over key decisions, the WRC had no

manufacturers at all on its board. Instead, control over the WRC was shared equally by universities, USAS and an advisory council made up of human-rights groups, labor unions and academics. (Full disclosure: One of us, Richard Appelbaum, is a member of the WRC advisory council.) Instead of certifying manufacturers as sweatshop-free, the WRC would verify working conditions through a combination of random checks and responding to workers' complaints. Its main goal would be to advocate for the workers -- not to certify a particular brand as compliant with a code of conduct.

The FLA has grown to include 178 colleges and universities; the WRC has 112. (About 60 belong to both.) In the past few years, the FLA -- under pressure from university administrators, students and the existence of the WRC -- has become more open in its approach. Its certified monitors are supposed to have no business ties with the manufacturers whose factories they inspect, it calls for some unannounced factory visits and its reports are now made public. But FLA members are only required to have a relatively small percentage of their factories inspected by outside monitors, which means that a majority of a company's plants could be sweatshops -- and the corporation might still receive FLA approval.

So the media, by ignoring both Nike's labor practices and the dubious monitoring techniques of the FLA, missed the real story behind Nike's settlement with Kasky. Through his lawyer, Kasky claimed that Nike had made significant improvements in its factories. Despite the fact that most journalists described him as a "labor activist" or "consumer activist," anti-sweatshop campaigners fault Kasky for having little experience with labor, human-rights or consumer issues. "That's the problem when it's just an individual suing a company on his own, and not being part of a larger movement," said another anti-sweatshop activist. "He's not accountable to a constituency or a coalition. None of the anti-sweatshop or human-rights groups would have agreed to this settlement."

While some human-rights groups acknowledge that Nike has improved wages and health conditions in some of its Asian facilities, the company, says Danaher of Global Exchange, "still has a long way to go to meet the anti-sweatshop movement's call for companies to pay a living wage, allow independent monitoring in all factories and ensure that workers have the right to organize into independent unions." To our knowledge, no news organizations have sought to verify whether Nike has made significant improvements in its overseas factories since Kasky filed his suit five years ago.

As a result, Nike was able to swoosh in and out of court without having to open its overseas plants to media scrutiny. It will leave the task of monitoring its labor practices to the FLA, which now, thanks to Nike, has another \$1.5 million to play with.

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