

DEVELOPMENTS IN THE FIELD

The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-driven Social Responsibility Model in US Agriculture

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I. Introduction

Across the United States (US), farmworkers and their allies are mobilizing to encourage companies to join a Worker-driven Social Responsibility (WSR) program. On May Day, hundreds marched in support of Migrant Justice's campaign to convince the Hannaford supermarket chain to join the Milk With Dignity program, a WSR program focused on working conditions in the dairy industry.¹ At the most recent annual shareholder meeting of Wendy's, a US-based fast food franchise, several members of the board of directors faced opposition to renewal of their positions in response to what some shareholders perceived as Wendy's inadequate disclosure on its efforts to protect workers in its supply chain.² The opposition forms part of a years-long campaign by the Coalition of Immokalee Workers and its allies to convince Wendy's to join the Fair Food Program, the inaugural WSR program.³

These high-profile examples of corporate resistance to WSR leads one to wonder whether companies grasp the benefits of participation. This is the case especially in US agriculture,

¹ Auditi Guha, 'At May Day Rally in South Burlington, Hundreds Urge Hannaford to Support Dairy Workers', *VT Digger* (1 May 2022), <https://vtdigger.org/2022/05/01/at-may-day-rally-in-south-burlington-hundreds-urge-hannaford-to-support-dairy-workers/> (accessed 25 May 2022).

² Majority Action and Investor Advocates for Social Justice, 'Shareholders and Advocates Push for Boardroom Accountability at The Wendy's Company, Urge Votes Against Board Chair Nelson Peltz and 3 Additional Directors', <https://static1.squarespace.com/static/5d4df99c531b6d0001b48264/t/626700fa8033613bf7f49aa6/1650917626224/Wendy%27s+Exempt+Solicitation+Release+-+April+2022.pdf> (accessed 25 May 2022).

³ Michael Sainato, 'Why Wendy's is the Source of Unrest among US Farm Workers', *The Guardian* (28 April 2022), <https://www.theguardian.com/environment/2022/apr/28/us-farm-wendys-fair-food-program> (accessed 25 May 2022).

the sector that is home to the Milk With Dignity and the Fair Food programs. These well-established WSR programs, with years of published results and endorsements from US federal agencies and human rights observers alike,⁴ provide an ideal focus to consider how participation in a WSR program benefits companies. Suppliers in particular stand to gain from participation, but so far have not emerged as natural allies to the WSR movement.

II. The WSR Model Explained

In the WSR model, rights-holders play the central role in identifying rights violations and managing solutions. Key features of the model include: (1) a code of conduct drafted by workers; (2) on-site, worker-to-worker education on worker rights under the code of conduct; (3) a 24-hour, multilingual complaint hotline backed by investigators with the power to address allegations of code violations; (4) annual audits that include interviews with no less than 50 percent of workers; and (5) legally binding agreements with corporate buyers creating market consequences for violations, along with a buyer-paid premium that goes into worker bonuses and defraying the supplier cost of implementation.⁵ By incorporating workers from program design to the point of remediation, the WSR model goes far beyond traditional social auditing or ‘worker voice’ programs, to a worker-driven model of enforcement.⁶ Indeed, the difference between the models is so great that it is one of kind, not of degree.

Differences Between WSR and Traditional Social Auditing

The United Nations Guiding Principles on Business and Human Rights (UNGPs), in the commentary to Principle 29, propose that operational-level, non-judicial grievance mechanisms (NJGMs) support human rights due diligence by helping to identify adverse human rights impacts, as well as making it possible for companies to remediate harms early and directly.⁷ However, operational-level NJGMs have not yet lived up to this potential.⁸

In standard monitoring processes, social auditing is a temporary commercial transaction, performed by an agency selected and paid for by the supplier. Auditing firms

⁴ Coalition of Immokalee Workers, ‘US Department of Labor Lifts Up Fair Food Program as National Model for Eradicating Forced Labor!’ (10 February 2022), <https://ciw-online.org/blog/2022/02/dolpanel/> (accessed 19 June 2022); U.S. Equal Employment Opportunity Commission, ‘Select Task Force on the Study of Harassment in the Workplace’ (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> (accessed 19 June 2022); UN Working Group on Business and Human Rights, *UNGPs 10+ A Roadmap for the Next Decade of Business and Human Rights* (Geneva: UN Working Group on Business and Human Rights, November 2021).

⁵ Greg Asbed and Steve Hitov, ‘Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility’ (2017) 52:2 *Wake Forest Law Review* 497.

⁶ Opi Outhwaite and Olga Martin Ortega, ‘Worker-Driven Monitoring – Redefining Supply Chain Monitoring to Improve Labour Rights in Global Supply Chains’ (2019) 23:4 *Competition & Change* 378.

⁷ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011).

⁸ Mariëtte van Huijstee and Joseph Wilde-Ramsing, ‘Remedy is the Reason: Non-Judicial Grievance Mechanisms and Access to Remedy’ in Surya Deva and David Birchall (eds.), *Research Handbook on Human Rights and Business*, (Northampton: Edward Elgar Publishing, 2020), 485; May Miller-Dawkins et al, ‘Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms’, *Non-Judicial Redress Mechanisms Report Series*, 2016, <https://corporateaccountabilityresearch.net/njm-report-i-beyond-the-uns-effectiveness-criteria> (accessed 25 May 2022); Office of the High Commissioner for Human Rights, *OHCHR Accountability and Remedy Project III: Enhancing Effectiveness of Non-State-Based Grievance Mechanisms in Cases of Business-Related Human Rights Abuse* (Geneva: OHCH, 2020).

typically operate separately from any operational NJGM and are not answerable to workers. This arrangement leaves auditing firms free to pursue self-interest. Indeed, research has shown that they do so by promoting an agenda of incrementalist soft-law labour governance.⁹

The WSR model, in contrast, provides a framework in which the originally conceived benefits of operational-level NJGMs find their best expression. In the WSR model, as implemented in Milk With Dignity and the Fair Food Program, the same independent, third-party monitor, created specifically for the WSR program, investigates complaints from farmworkers and conducts field audits on farms. This creates a virtuous constant feedback loop, in which complaint resolutions provide for ongoing monitoring and enforcement complemented by the broader investigations and more expansive changes enabled through audits and corrective action plans. As a result, WSR programs are better at enforcement than corporate-established initiatives, resulting in real-life improvements for workers.

III. Benefits of the WSR Monitoring and Complaint Investigation System

The WSR's creation of a dedicated, independent monitoring and complaint mechanism forms the critical infrastructure for program enforcement, supported by the backbone of legally binding commitments by buyers. The threat of market consequences ensures an unusually high level of supplier compliance. In day-to-day operations, the granular relationship between workers and monitors that occurs within the independent monitoring and complaint mechanism drives significant changes on the ground. The advantages of this aspect of the WSR model merit a closer look.

Improved Employer–Employee Relations Through Complaint Resolution

Communication is a key ingredient of effective due diligence, as it allows for early identification and correction of issues. In WSR, the independent monitor improves communication through effective and efficient resolution of workers' complaints, free of retaliation, which in turn builds trust in the system and encourages workers to come forward. For example, in its first three years, the Milk With Dignity program covered approximately 260 workers per year, and complaint resolutions by its independent monitor more than doubled in that time.¹⁰ This is a significant achievement, particularly considering that dairy farm workers live on the farms where they work, and most workplaces have few employees, rendering it difficult to maintain complaint confidentiality. Similarly, over the 10-year history of the Fair Food Program, complaints by workers made to growers, who then report them to the Fair Food Program independent monitor, have increased.¹¹ This suggests that at least part of the workforce now trust in the system enough to call their employer first, without fear of any retaliation.

In addition, independent WSR monitors retain the flexibility to resolve issues between workers and farm management, even absent a finding that a code of conduct violation has occurred. Over the first eight years of the Fair Food Program's operation, in 31 percent of all cases, agreeable resolutions were reached even when no code violations were confirmed –

⁹ Luc Fransen and Genevieve LeBaron, 'Big Audit Firms as Regulatory Intermediaries in Transnational Labor Governance' (2019) 13:2 *Regulation & Governance* 260.

¹⁰ Migrant Justice and Milk With Dignity Standards Council, *2020 Year 3 Report Update* (Burlington: Milk With Dignity Standards Council, 2021).

¹¹ Fair Food Standards Council, *Fair Food Program State of the Program Report 2021* (Sarasota: Fair Food Standards Council, 2021) 20–21.

and this figure increased to 41 percent in the most recent season.¹² Milk With Dignity, for its part, handles enquiries beyond the scope of the code of conduct by providing interpretation or referral services to callers.¹³

Likewise, the short time frames for complaint resolution in the Fair Food Program (51 per cent of cases resolved within 13 days)¹⁴ and the Milk with Dignity Program (6 days median time to resolution in 2019, down to 2 days in 2020)¹⁵ are far superior to other available remedial systems – such as litigation or complaints to regulatory agencies. The efficiency and flexibility of complaint resolution demonstrates increasing cooperation by farm management, which improves employee relations.

Transparent, Measurable Outcomes

Typically, companies' corporate social responsibility disclosures, if made at all, focus on inputs, outputs and activities, rather than on outcomes or results.¹⁶ This is not surprising, as most companies are wary of disclosing data, for fear of the reputational risk that the NJGM was supposed to mitigate. Furthermore, measurement of impact from quantitative data alone can be misleading without an appropriate interpretive framework. A numerical reduction in grievances, for example, could mean workers have fewer complaints or could be due to a lack of access to, or trust in, the NJGM. Similarly, short resolution times might mean that grievances are addressed efficiently, or could point to an overemphasis on timelines versus actual resolution of workers' issues.

In a WSR program, however, companies benefit from detailed, annual reports on program effectiveness. The reports by the Fair Food and Milk With Dignity programs not only include figures of complaint volume and resolution time frames, they also provide data on supplier compliance levels over time, as well as qualitative worker feedback. These provide a robust picture of outcomes that is not possible with typical social auditing, in which auditors may not have access to complaint data, do not have the power to require substantive change, are not connected to the worker community, and do not visit the same suppliers year after year.

In addition, the detailed public reporting on the WSR program's performance, rather than that of each individual farm, strikes a unique balance between transparency and the confidentiality needed to facilitate dialogue-based problem resolution. As a result, both buyers and suppliers in a WSR program can point to detailed indicators of program performance regularly disclosed by the program's monitoring body.

Collaborative Work Towards Improvement Through a Time-Bound Plan

Corrective action plans are the building blocks for improving supplier compliance with a code of conduct. In traditional social auditing, a supplier pays an auditor to perform a 1- to 2-day inspection, which may require corrective actions for follow-up at a later inspection.¹⁷ In the WSR model, however, audit reports serve as the starting point for a conversation. The corrective action plans that follow are co-created with farms to address their unique

¹² Ibid.

¹³ Migrant Justice and Milk With Dignity Standards Council, *Milk With Dignity: First Biennial Report: 2018–2019* (Burlington: Milk With Dignity Standards Council, 2020).

¹⁴ Fair Food Standards Council, *note 11*.

¹⁵ Migrant Justice and Milk With Dignity Standards Council, *note 13*.

¹⁶ UN Working Group on Business and Human Rights, *note 4*.

¹⁷ Institute for Multi-Stakeholder Initiative Integrity, *Not Fit for Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (San Francisco: Institute for Multistakeholder Initiative Integrity, 2020) 134–136.

circumstances. This contributes to supplier buy-in, as does the independent monitors' experience, and the efficiency gains from having a clear plan that sets priorities and realistic timelines for achieving them. It also facilitates farmer investment in real improvements, rather than perfunctory fixes aimed solely at passing a closing audit inspection.

Resilience and Adaptation to Human Rights Issues as They Emerge

In WSR, the ongoing relationship between the monitor, workers and suppliers also serves to identify and address issues that are not yet included in the code of conduct. In this way, the WSR independent monitor benefits from the program's roots in the broader worker community, fostered by the worker-led organizations that created the WSR program. The Coalition of Immokalee Workers, for example, is based in Immokalee, Florida, where it runs a radio station, operates a store with affordable groceries and other staples, and offers regular community events.¹⁸ Migrant Justice, based in Burlington, Vermont, has led several successful statewide legislative initiatives focused on immigrant rights and similarly anchors the dairy farm worker community through regional assemblies and social events.¹⁹

This worker connection contributes to worker knowledge of and trust in the WSR complaint system. It also means the program is nimble in response to issues as they arise. For example, when the Fair Food Program monitor discovered that some recruiters had subjected H-2A guest workers to illegal fees and extortion, it worked with workers to identify a safe recruitment channel and got participating farms to use that channel as their sole recruitment source.²⁰ Similarly, in partnership with several organizations and participating farms, the Milk With Dignity program has applied for grants to replace outdated worker housing with zero-energy modular homes.²¹ Furthermore, both programs responded quickly and effectively to the COVID-19 pandemic, educating workers and farmers on safety measures, ensuring workers were protected with proper personal protective equipment and social distancing, and facilitating worker access to medical assistance.²²

IV. Some Final Thoughts

This piece highlights some of the benefits companies may realize as a result of participating in a WSR program. The Fair Food Program's recent expansion to several new states and crops suggests that more companies are seeing its value. From the perspective of suppliers, WSR has been effective in preventing and addressing human rights violations, particularly in small- and medium-sized enterprises, for which third-party certification, and compliance with human rights standards, is otherwise costly and hard to achieve.

¹⁸ Susan L Marquis, *I Am Not a Tractor! How Florida Farmworkers Took on the Fast-Food Giants and Won* (Ithaca: ILR Press, 2017) 35–36, 66, 70–73.

¹⁹ Teresa M Mares, *Life on the Other Border: Farmworkers and Food Justice in Vermont* (Oakland, CA: University of California Press, 2019) 21–32, 62.

²⁰ Fair Food Standards Council, note 11, 41–42.

²¹ David Thill, 'In Vt., a New Model Emerges to Improve Migrant Farmworker Housing', *Sun Community News* (4 May 2021), <https://suncommunitynews.com/news/88932/in-vt-a-new-model-emerges-to-improve-migrant-farmworker-housing/> (accessed 25 May 2022).

²² Jennifer Blair and Kathryn Babineau, 'Keeping Essential Workers Safe: Migrant Farmworkers and Covid-19 in the Dairy Industry', *Items - Insights From the Social Sciences* (18 November 2021), <https://items.ssrc.org/covid-19-and-the-social-sciences/covid-19-fieldnotes/keeping-essential-workers-safe-migrant-farmworkers-and-covid-19-in-the-dairy-industry/> (accessed 25 May 2022); 'Voices From the Front Lines of America's Food Supply', *The New York Times* (5 January 2021), <https://www.nytimes.com/live/2021/01/05/dining/food-industry-coronavirus> (accessed 25 May 2022).

Yet, despite the successes of the WSR model, its expansion beyond agriculture to pilot programs in the construction²³ and independent film production²⁴ industries, and the recognition it has gained, retail buyers have not widely embraced it. Instead, its proponents have been forced to rely on public campaigns – such as those against Hannaford and Wendy’s – to push for wider adoption. The benefits outlined here may help lead companies and their suppliers alike to embrace WSR as an opportunity to measurably improve their human rights performance – and their management systems overall.

Conflicts of interest. Shauna Curphey served as legal counsel for the Coalition of Immokalee Workers from 2020 to 2021.

²³ Building Dignity and Respect Standards Council, ‘What is BDC?’, *BDRSC Blog*, <https://www.buildingdignityandrespect.org/what-is-bdc> (accessed 20 May 2022).

²⁴ David Robb, ‘Hollywood Commission Partners with Coalition of Immokalee Workers to Combat Sex Abuse at Indie Production Companies’, *Deadline* (25 May 2021), <https://deadline.com/2021/05/hollywood-commission-coalition-of-immokalee-workers-combat-sex-abuse-indie-production-companies-1234763394/> (accessed 25 May 2022).