

CASE NO. 2741

REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENTS

**Complaint against the Government of United States presented by
– the Transport Workers Union of America AFL–CIO (TWUA) and
– the Transport Workers Union of Greater New York, AFL–CIO, Local 100 (Local
100)**

Allegations: The complainants allege that state legislation bars all strikes in the public sector, imposes excessive penalties on illegal strikes and severely restricts the right to bargain collectively of transport workers in the public sector through compulsory arbitration

740. The complaint dated 10 November 2009, is contained in a communication from the Transport Workers Union of Greater New York, AFL–CIO, Local 100 (Local 100) and the Transport Workers Union of America, AFL–CIO (TWUA). The complainants subsequently provided additional information on 16 December 2009 and 14 March 2011.

741. The Government sent its observations in a communication dated 15 April 2011.

742. The United States has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), or the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

743. In their communication dated 10 November 2009, Local 100 and TWUA state that the Public Employees' Fair Employment Act of 1967 (Article 14 of the New York Civil Service Law, known as the "Taylor Law") bars all strikes in the public sector through a blanket prohibition on strikes or "any concerted stoppage of work" or even a "slowdown" in the public sector (sections 201(9), 209(5) and 210). The complainants further point out that the Taylor Law provides for compulsory interest arbitration in place of the right to strike and excessive penalties for illegal strikes including imprisonment of trade union leaders, heavy fines and suspension of dues check off. The Taylor Law also includes a requirement that unions seeking to represent public sector workers in collective bargaining must affirm in writing that the union "does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such strike" (207(3)(b)). According to the complainants, these provisions of the Taylor Law constitute a serious infringement of ILO Conventions Nos 87 and 98, both on its face and as applies to a 60-hour strike undertaken by Local 100 between 20 and 22 December 2005.

744. The complainants state that they filed the present complaint following the conclusion of substantial litigation in domestic courts regarding the 2005 strike and its consequences for Local 100. The complainants indicate that they are aware that they have not exhausted domestic remedies but chose not to explore certain avenues of appeal, considering courts have thus far not been sympathetic to challenges to the validity of the Taylor Law or

similar restrictions on public sector workers' right to strike. They refer to a number of judicial decisions showing that the Taylor Law has survived numerous judicial challenges as the courts have found it to conform to domestic rights norms, including the United States and New York State constitutions.

745. Local 100 represents more than 38,000 workers, who include, virtually all those employed within the public transportation services of New York City. The 20–22 December 2005 strike took place in the context of the negotiation of a new contract between TWUA and Local 100 and agencies of the Metropolitan Transportation Authority (MTA) in New York City following the expiration of the collective bargaining agreement scheduled on 15 December 2005. According to the complainants, the entire negotiations were marked by bad faith on the part of the employer which was demonstrated, among others, by the following indicators. First, the complainants allege that the employer demanded the union acceptance of a different system of pension and health-care benefits (to the detriment of newly hired employees) in the absence of economic constraints on the employer. According to the President of Local 100, writing contemporaneously: “they demanded arbitration before even trying to resolve the contract, and hours before the contract expired, the MTA spent its 1 billion surplus”. The complainants also indicate that the employer submitted an economic proposal merely days before the Local 100 contract was to expire, sent representatives with no actual power to negotiate on its behalf, and had the employer representative with plenary bargaining authority appear at negotiations just one hour before the collective agreement was set to expire.

746. On 12 December 2005, three days before the set expiration date of the collective agreement, the Attorney General of New York, acting at the behest of the employer, sought an injunction against any potential strike by Local 100 pursuant to section 210(1) of the Taylor Law, which provides that no public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike. The injunction was granted on 13 December (*New York City Transit Authority v. Transport Workers Union Local 100*, 35 A.D.3d).

747. On 20 December, five days after the contract expired, with the employer continuing to refuse to bargain in good faith, Local 100 went on strike. The complainants state that at no point during the strike was any threat presented to the health and safety of residents of the metropolitan New York area and that the strike was peaceful and orderly. On 22 December, the employer dropped its demand. The parties arrived at a tentative agreement on a new contract a few days later according to the complainants. The employer however refused to honour the agreement and eventually an arbitration panel awarded the contract the parties had agreed in the negotiations that ended the strike.

748. The complainants further indicate that during the first day of the strike, the court deemed the union to be in criminal contempt of the injunction and imposed a fine of \$1 million for every day that the strike endured. On 19 April 2006, the court determined that the union would be fined \$2.5 million for its 60-hour strike and that individual employees would lose two days' wages for every day of the strike. Local 100 would also forfeit automatic dues deduction as provided for in the Taylor Law.

749. The complainants state that the fine, in combination with the forfeiture of automatic dues deduction (which, just in the three months immediately after implementation cost the union over \$1 million in lost revenue) created a severe financial burden on Local 100 and its members. They claim that the material impact was devastating as the union had to expend in order to seek dues from individual members and devote a large percentage of staff time and of its budget to this task during the 19 months before automatic dues deduction was finally restored on 10 November 2008 (only upon receipt of an undertaking from Local 100 that it would not go on strike in the future). It also resulted in a significant loss

of revenue for TWUA as 30 per cent of Local 100's revenue is passed on to the national level, representing 25 per cent of the TWUA revenue.

750. Additionally, the complainants indicate that, on 24 April 2006, the President of Local 100 was sent to prison to serve a ten-day sentence imposed for his role in violating the injunction (*New York City Transit Authority v. Transport Workers Union of America*, 2006 N.Y. Misc. Lexis 4046 (Sup. Ct. Kings Co.2006) affirmed 37 A.D.3d679 (App.Div 2d Dept.2007)).

751. The complainants state that the sanctions imposed on the union following the strike were so disproportionate that it would be fair to speculate that it was designed to cripple and even destroy the union as well as deter other unions from contemplating strike action. Similarly, the complainants argue that the punitive fine on individual workers could well be understood as a calculated attempt to undermine support for the union. Furthermore, the prison sentence adds to the elements of intimidation and harassment alongside the financial penalties resulting in stripping the capacity of the union to adequately represent their members in the future and in a chilling effect on other unions.

752. In their communication of 16 December 2009, the complainants indicate that the collective bargaining agreement, signed by two sub-agencies of the employer after the strike of December 2005, expired on 15 January 2009. Although negotiations for a new contract had begun months before, the parties were unable to reach agreement on all terms. A second collective bargaining agreement with another sub-agency of the employer expired on 31 March 2006, and the parties were unable to reach an agreement more than 2.5 years later. On 6 January 2009, a joint declaration of impasse was submitted to the Public Employment Relations Board (PERB) with the aim of seeking interest arbitration under section 209 of the Taylor Law with respect to both agreements. Hearings were held in April, May and June 2009 involving the submission of substantial testimonial and documentary evidence by the parties. On 9 June 2009, the panel issued an award for the sub-agency of the employer covering the period from 1 April 2006 to 31 March 2009, a period that had already elapsed in its entirety. On 11 August 2009, the panel issued an award for the workers of the three sub-agencies with respect to terms and conditions of employment for the period running until 15 January 2012. The complainants indicate that the employer made no effort to implement the award despite a decision of New York State Supreme Court enforcing the award in all respects. The complainants state that, one year after the expiration of the collective agreement, they were still looking forward to the possibility of years of litigation following the compulsory arbitration process and expressed concerns on the implications of such deliberate delays in concluding a collective bargaining agreement.

753. The complainants ask the Committee to recommend that the United States take action to ensure that New York State legislates, and interprets state laws in accordance with international obligations. The complainants further asked the Committee to recommend redress for Local 100, at a minimum through a reimbursement of the fines imposed on the union as well as on individuals, and a payment to assist the union in recouping losses during the nearly 18 months it was deprived of dues check off. They also urged the Committee to reiterate the urgent need to ratify Conventions Nos 87 and 98 at the earliest opportunity for the Government of the United States.

754. Finally, in a communication of 14 March 2011, the complainants point out that legislative attacks on the right to freedom of association are emanating from at least 20 states and that this nationwide assault on the right to collective bargaining directly implicates the issues in this case as those who seek to ban public sector bargaining are seeking to delegitimize internationally protected trade union activity in the public sector. Failure to address

restrictions by the states on the right to freedom of association has resulted in a national crisis according to the complainants.

B. The Government's reply

755. In a communication dated 15 April 2011, the Government states that the national public sector unionization rate is currently 36.2 per cent and has remained relatively constant over the past several decades.

756. The Government further states that the United States' unique, decentralized and diverse system of government is rooted in the United States Constitution which establishes a federalist regime in which the national Government exercises only those powers the Constitution expressly affords to it. All other powers are reserved to the 50 states or to the people themselves. These principles have been reaffirmed many times including by Executive Order (EO) 13132, which specifically prohibits federal agencies from submitting to Congress legislative proposals that would "interfere with functions essential to the States' separate and independent existence" (section 5(a)). The Government indicates that state and local labour-management relations are often seen as "essential functions" of states and local governments "separate and independent existence". The regulation of labour relations in the United States respects the constitutionally-mandated distribution of power among the national, state and local governments. When Congress enacted the National Labor Relations Act (NLRA), it specifically excluded state and local government employers from the scope of the law, thereby deferring to principles of federalism.

757. Labour laws in each state reflect the balance of employer and employee rights that has been struck by each state's governing bodies. While each state has chosen a somewhat different regulatory approach, most have constitutional provisions or legislation that expressly guarantees the right to freedom of association for public employees. The Government indicates that 25 states and the District of Columbia have enacted comprehensive labour laws for the majority of public employees which cover inter alia methods of resolving a bargaining impasse. Thirty-five states have public employee relations boards which are usually quasi-judicial administrative agencies charged with administering the collective bargaining statutes of public employees and provide a forum for labour-management dispute resolution. In addition, almost every state provides a dispute resolution system with mediation, arbitration and/or fact-finding procedures to assist with labour-management disputes and contract negotiations.

758. As regards New York State, the Government states that it has the highest unionization rate in the country at 24.2 per cent (in the public and private sector). The Government indicates that the Taylor Law governs public sector labour-management relations at every level of government and that it provides public employees with important rights, including the right to organize and the right to be represented by employee organizations. Public employee unions also have the right to collectively bargain with their public employers to determine the terms and conditions of their employment.

759. The Government states that, while the Taylor Law prohibits public employees from engaging in a strike, it established a three-member PERB, a neutral, independent agency charged with administering a dispute resolution system for public employees (section 209). The Taylor Law provides general mediation and fact-finding procedures for all covered employees and even contains special binding arbitration procedures for transportation workers when the PERB certifies that a contract negotiation cannot be voluntarily resolved (section 209(5)). The Government also states that the State of New York has enacted an "agency-shop" statute that also allows for automatic dues deductions for state and local employees covered by a collective bargaining agreement.

760. The Government points out that New York City and its transit workers have been parties to collective bargaining agreements for more than 40 years, including an agreement that ran from 16 December 2002 through 15 December 2005. Negotiations of the terms of a successor agreement began in October 2005, and continued up until Local 100 elected to strike on 20 December 2005. According to the Government, the complainants did not invoke the Taylor Law’s dispute resolution system before the strike declaration and the strike was declared after only 1.5 months of negotiations and without the statutorily provided mediation or binding arbitration which had proven successful in the past.

761. The United States recognizes that the authority of its national government is constrained by its democratic federal system, and limits the authority of the national government to modify directly state labour–management relations laws such as the Taylor Law. The Government, nevertheless, indicates that the United States does take challenges to such laws seriously and accordingly will continue to promote the principles of freedom of association and collective bargaining throughout the country. The national government states that it has recently undertaken prominent activities to further these principles including through the Federal Mediation and Conciliation Services (FMCS). The FMCS provides a number of services for use in the public sector at both the federal, state and local levels, including the dispute resolution in collective bargaining processes. The Government also points out that it set examples in its management of labour–management relations in the federal sector, particularly with the signature and ongoing implementation of EO 13522 and EO 13496 by President Obama. EO 13522, which was signed on 9 December 2009, established a cooperative and productive form of labour–management relations throughout the executive branch. It created the National Council on Federal Labour-Management Relations to advise the President and required all federal agencies to create labour–management forums, to increase collaboration and monitor improvements in areas identified by participants to the forum and, finally, it established several pilot projects in which certain executive departments will bargain over certain issues. Implementation of EO 13522 is already under way. EO 13496 was signed on 30 January 2009 and requires federal government contractors and their subcontractors to post, in conspicuous places in and about workplaces where contracted work is performed, notices to employees about their rights under the NLRA. The Government indicates that it will continue to promote these important principles at the federal and state levels.

C. The Committee’s conclusions

762. *The Committee notes that the allegations made by Local 100 and TWUA concern state legislation restricting the right to strike of public transport workers, and its application in a strike undertaken by Local 100 between 20 and 22 December 2005. More specifically, the complainants refer to the Public Employees’ Fair Employment Act of 1967 (Article 14 of the New York Civil Service Law, known as the “Taylor Law”) which bars all strikes in the public sector through a blanket prohibition on strikes or “any concerted stoppage of work” or even a “slowdown” in the public sector (sections 201(9), 209(5) and 210). The complainants further point out that the Taylor Law provides for compulsory interest arbitration in place of the right to strike and excessive penalties for illegal strikes including imprisonment of trade union leaders, heavy fines and suspension of dues check off. The Taylor Law also includes a requirement that unions seeking to represent public sector workers in collective bargaining must affirm in writing that the union “does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such strike” (section 207(3)(b)).*

763. *The Committee takes due note of the Government’s response which states that, while the Taylor Law prohibits public employees from engaging in a strike, it does establish a dispute resolution system for public employees through the PERB and general mediation*

and fact-finding procedures, including special binding arbitration procedures for transportation workers. The Government also indicates that the complainants did not use this dispute resolution system, which has been successful in the past, before going on strike.

764. *The Committee observes in this respect, that the complainants allege that the entire collective bargaining negotiations were marked by bad faith on the part of the employer who demanded arbitration before even trying to resolve the dispute. According to the complainants, indicators of bad faith include the fact that the employer spent its 1 billion surplus hours before the expiration of the collective agreement but made no concessions in the negotiations, sent representatives with no actual power to negotiate on its behalf, and sent a representative with plenary bargaining authority just one hour before the collective agreement was set to expire. The Committee further observes that, according to the Government, the complainants did not invoke the Taylor Law dispute resolution framework before a strike declaration.*

765. *The Committee recalls that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 935]. The Committee further recalls that any intervention by the public authorities in collective disputes must be consistent with the principle of free and voluntary negotiations; this implies that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent and recourse to these bodies should be on a voluntary basis, except where there is an acute national crisis [see **Digest**, op. cit., para. 1004]. The Committee requests the Government to encourage the parties to take all steps for good faith bargaining in the future.*

766. *As regards the use of prior arbitration procedures, the Committee observes that, in the Taylor Law, these procedures are set out in a framework in which all strike action in the public service is fully prohibited. In addition, the complainants have set out their overall concerns as regards the respect and implementation of final awards in their allegations concerning a later arbitration procedure resulting in two awards issued by the PERB, of which one, issued on 11 August 2009, has not been implemented by the employer to date, despite a favourable decision from the New York Supreme Court. The Committee observes that the Government has not provided any information on the lack of enforcement of the PERB arbitration award of 11 August 2009, and trusts that it will take all necessary measures to effectively enforce the decision of the Supreme Court concerning the implementation of the award. The Committee requests the Government to keep it informed of steps taken.*

767. *As regards the overall prohibition of strike action in the public service under the Taylor Law, the Committee recalls that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests [see **Digest**, op. cit., para. 521]. While the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population), the Committee recalls that the transportation sector, including metropolitan transport, does not constitute an essential service in the strict sense of the term [see **Digest**, op. cit., paras 576 and 587].*

768. *The Committee notes, however, that a minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met or that facilities operate safely and without interruption [see **Digest**, op. cit., para. 607]. Respect for the obligation to maintain a minimum service of the underground railways' activities to meet the minimal needs of the local communities is not an infringement of the principles of freedom of association [see **Digest**, op. cit., para. 617]. The Committee recalls that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [see **Digest**, op. cit., para. 612]. Furthermore, the Committee recalls that in the absence of agreement between the parties, the establishment of minimum services should be handled by an independent body [see **Digest**, op. cit., paras 613 and 618].*

769. *The Committee, in light of the principles above and notwithstanding the existence of the dispute resolution framework, considers that the restrictions of the right to strike in the transportation sector as set out in the Taylor Law are not in conformity with the principles of freedom of association. While noting the Government's reference to the Federalist system of constitutional government, the Committee nevertheless requests the Government to take steps aimed at bringing the law into conformity with freedom of association principles so that only (1) public servants exercising authority in the name of the State and (2) workers of essential services in the strict sense of the term may be restricted in their right to strike. The Government may, however, if it so desires, consider providing for a negotiated minimum service in the public transportation sector, in line with the principles enumerated above.*

770. *The Committee further notes that, pursuant to the Taylor Law, sanctions were imposed upon the complainants following the strike for violating an injunction granted by the Attorney General of New York, acting at the behest of the employer, against any potential strike. Local 100 was fined \$2.5 million for a 60-hour strike and forfeited automatic dues deduction for 19 months while its President was sent to prison to serve a ten-day sentence. Strikers were also subjected to individual fines through deductions of two days' wages for every day of strike. The Committee further observes that the peaceful and orderly nature of the strike undertaken by Local 100 has not been disputed in the Government's reply.*

771. *The Committee duly observes that the sanctions imposed were related to the violation of an injunction granted on the basis of section 210(1) of the Taylor Law, which does not permit any strike action in the public service and, in the case at hand, is contrary to the principles of freedom of association.*

772. *The Committee recalls that, like the Committee of Experts on the Application of Conventions and Recommendations, it considers that criminal sanctions should not be imposed on any worker for participating in a peaceful strike and therefore, measures of imprisonment should not be imposed on any account: no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike [see **Digest**, op. cit., para. 672 and 358th Report, Case No. 2742, para. 279].*

773. *In these circumstances, the Committee expresses its deep concern at the seriousness of the penal and financial sanctions imposed on Local 100 in relation to a strike that lasted less than three days. The Committee considers that these penalties are likely to have had a significant damaging effect on the financial resources of the union and may have hindered its activities as well as its capacity to adequately represent its members and have had an intimidating effect on the right to organize. Moreover, the Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, op. cit., para. 475]. In the present case, the Committee considers that the withdrawal of the check-off facility cannot be justified. Finally, in respect of individual workers, while taking note that salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles [see **Digest**, op. cit., para. 654], the Committee considers that additional sanctions, such as deductions of pay higher than the amount corresponding to the period of the strike, amount in this case to a sanction for the exercise of legitimate industrial action. The Committee therefore urges the Government to take measures without delay to ensure that the union is fully compensated in respect of the sanctions and the withdrawal of check-off and to take steps for the compensation of Mr Toussaint for his ten-day detention and the additional sanctions imposed against the striking workers. The Committee urges the Government to keep it informed of developments in this respect.*

774. *Finally, the Committee welcomes the initiatives taken by the Government at the federal level to promote collective bargaining in the public service and trusts that it will take the necessary measures to promote full respect for freedom of association principles throughout the country. The Committee urges the Government to keep it informed of developments in this respect. The Committee invites the Government to consider taking the necessary measures for the ratification of Conventions Nos 87 and 98.*

The Committee's recommendations

775. *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

(a) While noting the Government's reference to the Federalist system of constitutional government, the Committee nevertheless requests the Government to take steps aimed at bringing the state legislation, through the amendment of the relevant provisions of the Taylor Law, into conformity with freedom of association principles so that only (1) public servants exercising authority in the name of the state and (2) workers of essential services in the strict sense of the term may be restricted in their right to strike.

(b) The Committee therefore urges the Government to take measures without delay to ensure that the union is fully compensated in respect of the sanctions and the withdrawal of check-off and to take steps for the compensation of Mr Toussaint for his ten-day detention and the additional sanctions imposed against the striking workers. The Committee urges the Government to keep it informed of developments in this respect.

(c) The Committee expects the Government to take all necessary measures to effectively enforce the decision of the Supreme Court with regard to the PERB arbitration award.

(d) Noting the initiatives at the federal level to promote collective bargaining in the public service, the Committee trusts that the Government will continue taking measures to promote full respect for freedom of association principles throughout the country.

(e) The Committee urges the Government to keep it informed of developments in respect of all above recommendations.

(f) The Committee invites the Government to consider taking the necessary measures for the ratification of Conventions Nos 87 and 98.