Complaint submitted to the ILO Committee on Freedom of Association

by

Transport Workers Union of Greater New York, AFL-CIO, Local 100,

Transport Workers Union of America, AFL-CIO

American Federation of Labor and Congress of Industrial Organizations,

and

International Transport Workers' Federation,

against

The Government of the United States of America

Introduction

This complaint to the Committee on Freedom of Association is filed by Local 100 of the Transport Workers Union of Greater New York, AFL-CIO ("Local 100") against the government of the United States of America. Local 100 represents more than 38,000 workers, who include virtually all those employed within the public transportation services of New York City.[1] The Transport Workers Union of America ("TWUA"), the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the International Transport Workers' Federation ("ITF") join in this complaint. These organizations are, respectively, the union, the national federation and the global union federation to which Local 100 is affiliated. Through Local 100 as well as other affiliates, the TWUA, AFL-CIO and the ITF have a substantial interest in the rights of transit workers in the public sector, and therefore in the outcome of this appeal.

The complaint focuses on the restrictions imposed on public sector workers' right to strike in the state of New York, under the Public Employees' Fair Employment Act of 1967 (Article 14 of the New York Civil Service Law; better known as, and henceforth, the "Taylor Law"). The Taylor Law bars all strikes in the public sector, and provides or punishment of "illegal" strikes through extensive fines, loss of dues check off, and imprisonment of trade union leaders. This Complaint will establish that the Taylor Law, on its face as well as in terms of its impact, constitutes a serious infringement on internationally-recognized core trade union rights as articulated in ILO Conventions 87 and 98. The analysis of the impact of the law arises out of Local 100's experiences in the context of a 60-hour strike undertaken between December 20 and 22, 2005.

---

1 Local 100 also represents employees of some private bus lines serving the New York City metropolitan area.

Review by the Committee on Freedom of Association

The United States has not ratified Conventions 87 and 98 of the ILO. However, the government is still expected to comply with these Conventions, by virtue of its membership in the ILO. The Committee on Freedom of Association has previously assessed the United States' compliance in fact with these Conventions, in spite of the objections of the United States, noting that its mandate to examine potential violations of trade union rights "stems directly from the fundamental aims and purposes set out in the ILO Constitution."[2] Conventions 87 and 98, adopted in 1948 and 1949 respectively, are generally understood as elaborating, and supervising compliance with, the key founding principles of freedom of association and collective bargaining, as articulated in the 1919 Constitution and applicable to all member states of the ILO, rather than imposing new obligations. In addition, the Committee on Freedom of Association, established in 1951, is charged with supervising those key founding principles of freedom of association and collective bargaining.

We are filing this complaint following the conclusion of substantial litigation in domestic courts regarding the 2005 strike and its consequences for Local 100.[3] There are avenues of appeal that we chose not to explore. While we are aware that the Committee does not consider it a barrier to receivability that we have not exhausted domestic remedies, we would like to explain our decision further.

Courts have not thus far been sympathetic to challenges to the validity of the Taylor Law, or similar restrictions on public sector workers' right to strike, on the basis of guarantees within the United States or New York State Constitutions. The direct predecessor of the Taylor Law, the Condon-Wadlin Act (1947), which made terminations mandatory for public employees who participated in a strike, and allowed reinstatement only if they received no economic benefit from the strike and were placed

---

2 Case No. 2227, Complaint filed against the Government of the United States of America by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), 332nd Report, (Vol. LXXXVI, 2003, Series B, No. 3), para. 600. *See also* Case No. 2460, Complaint filed against the Government of the United States of America by the United Electrical, Radio and Machine Workers of America (UE) supported by Public Services International (PSI), 344th Report, (Vol. XC, 2007, Series B, No. 1), para. 985; Case No. 2524, Complaint filed against the Government of the United States of America by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), 349th Report, (Vol. XCI, 2008, Series B, No. 1), para. 847.

3 *See MTA Bus Co. v. Transport Workers Union*, 12 Misc. 3d 943, 829 N.Y.S.2d 479 (Sup. Ct. Kings Co. 2006) (trial court decision imposing dues deduction forfeiture); *New York City Transit Authority v. Transport Workers Union of America*, 2006 N.Y. Misc. Lexis 4046, (Sup. Ct. Kings Co. 2006) (trial court decision imposing fine, dues forfeiture and contempt sanctions, including imprisonment of Toussaint), *affirmed New York City Transit Authority v. Transport Workers Union of America*, 37 A.D.3d 679 (App. Div. 2d Dept.2007) (imposition of both fine and dues revocation for same strike doesn't violate Constitution's double jeopardy clause); *New York City Transit Authority v. Transport Workers Union Local 100*, 35 A.D.3d 73 (App. Div. 2d Dept. 2006) (upholding fine, finding denial of jury trial for contempt proceeding did not violate 6th and 14th Amendments of U.S. Constitution); *MTA Bus Co. v. Transport Workers Union*, 17 Misc. 3d 1131(A) (Sup. Ct. Kings Co. 2007)(trial court denial of motion to reinstate dues deduction); *New York City Transit Authority v. Transport Workers Union*, 55 A.D.3d 699 (App. Div. 2nd Dept. 2008)(appellate decision on motion to reinstate dues deduction).

on probation for five years, survived numerous challenges in the courts of New York. The New York Court of Appeals, the state's highest appellate court, determined, for example, that heavy monetary penalties imposed on striking ferryboat workers under the Condon-Wadlin Act did not amount to the "excessive fines" and "cruel and unusual punishment" barred by the 8th Amendment of the US Constitution, and Article I, Section 5 of the New York State Constitution.[4] In a case involving teachers, the Court of Appeals affirmed a trial court's decision that the restrictions imposed by the Condon-Wadlin Act on collective political action did not amount to violations of guarantees of the right to petition the government set forth in the 1st Amendment of the U.S. Constitution, and Article I, Section 9.1 of the New York State Constitution.[5]

While the Taylor Law was adopted in part to redress some of the most draconian and sharply criticized provisions of the Condon-Wadlin Act, it is nevertheless profoundly out of keeping with established norms related to trade union rights. Furthermore, like Condon-Wadlin, the Taylor Law has survived judicial challenge. The Court of Appeals has rejected the argument that the differential treatment of public sector and private sector workers created by the Taylor Law strike prohibition violates the commitment to equal protection of the laws in the 14th Amendment of the US Constitution, as well as Article I, Section 11 of the New York State Constitution.[6] Similarly, in a case in which a sanitation workers' union challenged a heavy fine, loss of automatic dues deduction, and the imprisonment of its president following a strike, the Court of Appeals determined that the Taylor Law was not in conflict with the due process of law guaranteed by Article I, Section 6, of the New York State Constitution, and the 14th Amendment of the US Constitution.[7] The same court also affirmed an intermediate appellate court's determination regarding the Taylor Law's 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 a strike,"[8] finding that the requirement does not violate free speech rights under the US Constitution (1st Amendment) or the New York State constitution (Article I, Section 8).[9] As an example of the kind of intrusive judicial intervention provided for under the Taylor Law, in 1999 a New York trial court issued a temporary restraining order that enjoined Local 100, its officers, its members and "any other

---

4 *DiMaggio v. Brown*, 19 N.Y.2d 283 (1967).

5 *Pruzan v. Board of Education of City of New York*, 9 N.Y.2d 911 (1961), *affirming* 25 Misc. 2d 945 (Sup. Ct. N.Y. Co. 1960).

6 *Rankin v. Shanker*, 23 N.Y.2d 111 (1968) (no equal protection violation in failing to provide for trial by jury for public sector employees punished for contempt for violating the Taylor Law's no-strike ban even though trial by jury is afforded to private sector employees and their organizations in like circumstances).

7 *City of New York v. De Lury*, 23 N.Y.2d 175 (1968), *app. dismissed*, 394 U.S. 455, *petition for rehearing denied*, 396 U.S. 872 (1969).

8 Taylor Law § 207 (3)(b).

9 *Rogoff v. Anderson*, 34 A.D.2d 154 (1970), affirmed 28 N.Y.2d 880 (1971).

person whomsoever," from, *inter alia*, "voting to engage in, or otherwise in favor of . . . condoning . . . any strike . . ." and even from ". . .encourag[ing] or support[ing] employees . . . to engage in a concerted work stoppage." By the terms of the same order, any person found to have violated any provision of the order was to be fined $20,000.[10]

However, while the courts have found the Taylor Law to conform to domestic rights norms, we believe that the Committee's opinion could offer urgently-needed guidance to the legislature on the issue of whether the legislation complies with *international* obligations. The Committee could also suggest potential avenues of reconciling policy priorities related to the public services with international principles related to freedom of association and collective bargaining, as codified in Conventions 87 and 98, as it has done in other cases. The Committee's decision will be extremely relevant to any domestic avenues of legislative engagement that we may contemplate, and we request that it proceed without delay to make its recommendations in this matter.

Facts

The language of the Taylor Law grants public sector workers the right to organize, but promptly eviscerates this right through a blanket prohibition on strikes[11] – or, indeed, any "concerted stoppage of work" or even a "slowdown"[12] in the public sector.[13] The Taylor Law, in effect, ensures that public sector workers are denied not only a basic element of the civil right of protest, but also a critical means of realizing economic rights, particularly in situations where employer intransigence brings collective negotiation to a standstill. Both of these aspects of the right to strike – the civil right of protest and the right to exercise economic leverage – were implicated in the events of December 2005.

The collective bargaining agreement between TWU Local 100 and the New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority, which are agencies of the Metropolitan Transportation Authority ("MTA"), was scheduled to expire on December 15, 2005. During negotiations for a new contract, leading up to that date, the employer demanded that the union accept a two-tier system of pension and health care benefits, in which newly hired employees would have substantially inferior benefits to current employees.[14] The MTA did so without any

---

10 *City of New York v. Hall*, Index No. 48154/99, unpublished Order to Show Cause.

11 Taylor Law § 210.

12 Taylor Law § 201(9).

13 In lieu of the right to strike, the Taylor Law provides for compulsory arbitration in the event the state Public Employment Relations Board (PERB) finds that a "voluntary resolution" of a contract "cannot be effected." The right to arbitrate is granted to police, fire and transit employees, but not to any other categories of employees. *See* § 209(5).

14 Among other changes, the Transit Authority sought to raise the retirement age for future employees from 55 to 62, and to require new hires to contribute more towards their pension coverage than incumbent

demonstration that the demand for such concessions was in any way dictated by economic constraints upon the employer. As labor historian Joshua B. Freeman points out,

> What made the MTA demands stunning was that they came at a time when the agency admitted to a billion dollar surplus. During the contract talks, it literally gave money away, lowering subway and bus fares for the Christmas season and sending . . . suburban rail commuter[s] . . .tickets good for free rides.[15]

In fact, according to Local 100 President Roger Toussaint, writing contemporaneously, the entire negotiations were marked by bad faith on the part of the MTA: "they demanded arbitration before even trying to resolve the contract, and hours before the contract expired, the MTA spent its one billion dollar surplus."[16] Other indicators of bad faith in the negotiations include the employers' submission of an economic proposal merely days before the Local 100 contract was to expire, the employer sending representatives with no actual power to negotiate on its behalf, and having the employer representative with plenary bargaining authority appear at negotiations just one hour before the contract was set to expire.[17]

On December 12, 2005, in accordance with the Taylor Law,[18] and acting at the behest of the MTA, the Attorney General of New York State sought an injunction against any potential strike by Local 100, and the following day the court obliged.[19] On December 20, five days after the contract expired, with the MTA continuing to refuse to bargain in good faith, Local 100 went on strike. Less than three days later, the MTA dropped its insistence on slashing the pension benefits of future employees – a precondition that Local 100 had demanded for ending the strike. MTA and Local 100 agreed that some costs of health care benefits would be borne by *all* employees – not just future employees – and the parties arrived at a tentative agreement on a new contract just a few days later.[20]

---

workers. *New York City Transit Authority v. Transport Workers Union Local 100, supra*, 35 A.D.3d at 80-81 (App. Div. 2nd Dept. 2006).

15 Joshua B. Freeman, "Anatomy of a Strike: New York City Transit Workers Confront the Power Elite," 15 *New Labor Forum* (3): 11 (Fall 2006).

16 Roger Toussaint, "TWU Local 100 on Strike," *Transit Worker*, December 20, 2005, http://twulocal100.blogspot.com/2005/12/toussaint-twu-local-100-on-strike.html.

17 *New York City Transit Authority v. Transport Workers Union Local 100, supra*, 35 A.D.3d at 81.

18 Taylor Law § 210(1).

19 *New York City Transit Authority v. Transport Workers Union Local 100, supra*, 35 A.D.3d at 76-77.

20 After the negotiating teams agreed on the terms of a contract, Local 100's members initially rejected it by seven votes. The members later voted overwhelmingly to ratify the contract on the same terms, but the Transit Authority refused to honor their agreement. Eventually, an arbitration panel awarded the contract the parties had agreed to in the negotiations that ended the strike.

It is important to note that at no point during the strike was any threat presented to the health and safety of residents of the metropolitan New York area. The strike was peaceful and orderly, and while many were subjected to a period of inconvenience, even Mayor Michael Bloomberg – an outspoken critic of Local 100 and the strike – admitted to the media that the city was "running and running safely."[21] He also acknowledged that, while many public transit riders were forced to adopt alternative methods of transportation, including private buses, bicycles, and ride-sharing, the strike "fell far short of the all-out chaos that many had feared," and the city was "functioning, and functioning well."[22] Throughout the strike, the New York City Department of Health and Mental Hygiene was easily able to ensure that "[a]ll essential activities [were] operating normally to ensure public health and safety," according to its own press release.[23]

Nevertheless, early on the first day of the strike, even before any reckoning of the consequences, the court deemed the union to be in criminal contempt of the injunction, and imposed a fine of $1,000,000 for every day that the strike endured.[24] On 19 April 2006, the court determined that the union would be fined $2.5 million for its 60-hour strike, that individual employees would lose two days' wages for every day of the strike, and that Local 100 would forfeit automatic dues deduction, as provided for in the Taylor Law in the event of a public sector strike.[25] On April 24 2006, the President of Local 100 was sent to prison, to serve a 10-day sentence imposed for his role in violating the injunction.[26]

The immediate and enduring impact on legitimate trade union activities – those of Local 100, certainly, but also of similarly-situated public sector unions – would be hard to overstate. In terms of the immediate impact on Local 100, the fine was so disproportionately large, in relation to the resources of the union as well as the magnitude of the alleged offense, that it would be fair to speculate that it was designed to cripple or even destroy the union, as well as to deter other unions from contemplating strike action. Similarly, the punitive fine on individual workers could well be

---

21 Timothy Williams and Sewell Chan, "State Mediators' Plan Clears Way to Resolve 60-Hour Ordeal" *New York Times,* Dec. 22 2005, http://www.nytimes.com/2005/12/22/nyregion/22cnd-strike.html.

22 Associated Press, "Judge Fines NYU Transit Union $1 Million a Day," *MSNBC*, Dec. 20, 2005, http://www.msnbc.msn.com/id/10466982. See also Associated Press, "Buses, Subways, on the move again in New York," *CNN Online*, Dec. 23 2005, http://www.cnn.com/2005/US/12/23/nyc.transit.

23 City of New York, "Health Department Conducting All Essential Public Health Activities During Transit Strike," December 20, 2005, http://www.ci.nyc.ny.us/html/doh/html/pr/pr123-05.shtml.

24 *New York City Transit Authority v. Transport Workers Union Local 100, supra*, 35 A.D.3d at 81.

25 *Id.* at 82.

26 *New York City Transit Authority v. Transport Workers Union of America*, 2006 N.Y. Misc. Lexis 4046, at 21 (Sup. Ct. Kings Co. 2006) (trial court decision imposing fine, dues forfeiture and contempt sanctions, including imprisonment of President), *affirmed,* 37 A.D.3d 679 (App. Div. 2d Dept. 2007) (imposition of both fine and dues revocation for same strike doesn't violate U.S. Constitution's double jeopardy clause).

understood as a calculated attempt to undermine support for the union within its rank and file.

In combination with the forfeiture of automatic dues deduction (which, just in the three months immediately after implementation on 1 June 2007, cost the union over $1,000,000 in lost revenue), the financial burden has been severe on Local 100 and its members. When the loss of automatic dues deduction is analyzed in terms of the resources that the union has had to *expend* in order to seek membership dues from individual members, on a monthly basis, the extent of the material impact is clearly devastating. During the 19 months before automatic dues deduction was finally restored on 10 November 2008 – and only upon receipt of an undertaking from the union that it would not go on strike in the future[27] – Local 100 was forced to dedicate a large percentage of staff time and its curtailed budget to dues collection. This was time and money that would otherwise have been available for critical trade union work. The impact on the TWUA was also significant: 30% of Local 100's revenue is passed on to the national, and this constitutes 25% of the TWUA's revenue.

The imprisonment of Mr. Toussaint adds elements of intimidation and harassment to the financial penalties above. However, those who sought this penalty – and the court that granted it – must be understood as part of a broader legal and policy framework in the state of New York which criminalizes legitimate trade union activity in the public sector. The imprisonment of Mr. Toussaint must be understood in the context of a legal process that enables and encourages the singling out of individual trade union leaders for particular punishment, at least in part to deter others.

The provisions of the Taylor Law that call for such punitive measures are vindictive in nature, as attempts to ensure that public sector unions going on strike will be methodically stripped of the capacity to adequately represent their members in the future. The profound chilling effect on other unions, who are made to fear the consequences of vigorous representation of their own members' interests, must also be taken into account. And yet, the importance of the right to strike, and its effectiveness as a tool of last resort – both as a general matter and under these highly specific circumstances – are only highlighted by Local 100's experiences of December 2005: A short, principled, peaceful strike led to the resumption of effective, good-faith bargaining and ultimately, a contract that protected workers' economic and

---

27 In November 2007, a trial court rejected Local 100's request to have its dues deduction right restored, notwithstanding that Local 100 had complied with the Taylor Law § 207(3) by submitting an affidavit from its President stating that Local 100 did not assert the right to strike against any government, on the basis that Mr. Toussaint's affidavit "merely parrots the statutory language in order to comply verbatim with the . . . Order." *MTA Bus Co. v. Transport Workers Union*, 17 Misc.3d 1131(A) (Sup. Ct. Kings Co. 2007). The court held that it would require assurances that the Union would not strike "in the future," and that Local 100's dues check off would only be restored upon submission of affidavits from *each* of the 43 individual members of Local 100's Executive Board (which functions on the basis of majority votes) stating in unequivocal terms that the Union lacks the right to strike. *Id.* On appeal, the court rejected the requirement of an affidavit from each Executive Board member, but interpreted the Taylor Law to require an affidavit stating that the Union had no intention of striking now "or in the future." *New York City Transit Authority v. Transport Workers Union, supra*, 55 A.D.3d 699 (App. Div. 2^{d} Dept. 2008).

occupational interests.

The situation described above and its broader context together constitute severe violations of Conventions 87 and 98 by the United States of America. The government has allowed New York State to pass and to retain legislation that unacceptably restricts trade union rights in the public sector. In concrete terms, the legislation gives employers in the public sector a dramatic advantage in collective bargaining and dispute resolution processes, and allows State and City officials greater latitude to mute the voice of public sector unions. It discriminates against public sector workers by outlawing associational activity which is protected for private sector workers[28] and by permitting court injunctions against public sector associational activity which may not be issued against private sector workers.[29]

Relevant Jurisprudence of the Committee on Freedom of Association

The United States government has failed to meet its obligations under Conventions 87 and 98, by permitting the State of New York to legislate and adjudicate in ways that undermine associational and collective bargaining rights for public sector workers. The Taylor Law, and the penalties imposed on Local 100 under the law for the December 2005 strike, cannot be reconciled with the principles espoused by the Committee on Freedom of Association. As the Committee has noted, "[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests,"[30] and limitations on this right must be scrutinized closely.

The section below addresses the issues that will have to be addressed by the Committee on Freedom of Association in considering this complaint: the legitimacy of the December 2005 strike, the legitimacy of the Taylor Law on its face, and the legitimacy of the penalties that Local 100 faced.

Given the course of events described above, we believe it is clear that the strike called for by Local 100 was fully justified, based on core principles related to trade union rights as well as the nuanced analyses to be found in the Committee's jurisprudence. Local 100 went on strike five days after the expiration of their contract, following a long period of negotiation marked by bad faith on the part of the employer. The strike was clearly related to the "socio-economic and occupational interests" of workers, as the Committee recommends,[31] and was critical to the integrity and stability of the union itself. Furthermore, the MTA employees were neither essential workers nor high-level

---

28 National Labor Relations Act Section 7, 29 U.S.C. § 157. See, e.g., *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270 (1956).

29 Norris-LaGuardia Act Section 4, 29 U.S.C. § 104. See, e.g., *Buffalo Forge v. United Steelworkers of America*, 428 U.S. 397 (1976)

30 Digest of Decisions 2006, paragraph 522.

31 Digest of Decisions, 2006, para 527.

public servants engaged in administration. The Committee defines the former category quite narrowly, only permitting restrictions on the right to strike in essential services "in the strict sense of the term."[32] This refers to services the interruption of which poses a "clear and imminent threat to the life, personal safety or health of the whole or part of the population."[33] The strike described above would not fit this description, whether relying solely on the facts or on the Committee's jurisprudence. By the accounting of State and City officials, as well as the media, the strike did not endanger the safety or health of any segment of the population. And, as a general matter, the Committee has determined that workers in metropolitan transport are not to be considered public officials in the sense intended by the Convention, or as engaged in the provision of essential services "in the strict sense of term."[34]

Thus, the New York State law addressing strikes in the public sector cannot be considered legitimate. It extends its reach beyond a narrowly-defined group of essential workers and/or essential services, to bar *all* workers, in *all* areas of the public sector, from striking. It does not limit itself to the procedural safeguards considered permissible by the Committee – such as requiring that all viable negotiation, conciliation and arbitration processes be exhausted prior to a strike[35] – but instead puts forth a blanket prohibition on all concerted workplace action.

The Taylor Law's provision for interest arbitration in place of the right to strike does not bring it into conformity with the principle of Freedom of Association. The Committee has held that compulsory arbitration is far from being an adequate substitute for the right to strike. In fact, "in as far as compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organize freely their activities..."[36]

To go beyond the events chronicled in this complaint, moreover, even in a hypothetical situation in which the Taylor Law addressed itself to a strike that the Committee on Freedom of Association considered *properly* to have been deemed illegal, the penalties that the law imposes and/or permits would be considered excessive. The Committee has emphasized the importance of "a certain proportionality" – for the sake of harmonious labor relations, if nothing else – " between the sanctions imposed and the offences committed."[37] Suspension of dues check off, excessive fines, imprisonment of

---

32 Digest of Decisions, 2006, para 576.

33 Digest of Decisions, 2006, para. 581. The Committee has further pointed out that to declare a strike illegal in undertakings which are not performing an essential service in the strict sense of the term would cause the prohibition of strikes in that context to lose its meaning (Digest of Decisions, 2006, para. 583)

34 Digestion of Decisions, 2006, para 587.

35 Digest of Decisions, 2006, para 551.

36 Digest of Decisions 2006, para. 565.

37 Canada (Case No. 1526), The Confederation of National Trade Unions (CNTU) and the Federation of Quebec Professional Unions of Nurses (FQPUN), 12 March 1990, Report No. 279, *(Vol. LXXIV, 1991, Series B, No.3)*, para. 266.

trade union leadership and the requirement that unions sign an affirmation that they renounce the right to strike – each of these penalties constitutes a "grave violation" of the norms related to free association and collective bargaining.[38]

Penal sanctions may only be imposed where the union or its leaders have violated strike prohibitions which are themselves in conformity with the principle of freedom of association.[39] As we have already seen, the Taylor Law strike prohibition is not in conformity with that principle. Moreover, the Committee has determined that any penal sanction for a peaceful strike risks being disproportionate irrespective of whether the strike was legal, as a penal sanction is a restriction on the normal exercise of trade union rights, and/or an interference with the internal financial capacities of the union. It has also found that such sanctions may be contrary to harmonious industrial relations. With penalties that have consequences for the finances of the union, there is the possibility that a union's lack of stable income could easily lead to diminished bargaining power, and hence an unproductive relationship with the employer.

With respect to the suspension of dues check off, the Committee has found that halting it even temporarily and even in the case of a strike in an essential service violates Convention 87.[40] The Committee noted, in a case involving striking public utility workers in the Dominican Republic, that

> the measures taken by the authorities to ensure the performance of essential services should not be out of proportion to the end pursued or lead to excesses and, in particular, acts of interference on the part of the authorities which would restrict the right of trade union organisations to organise their administration and activities in full freedom.[41]

The Committee concluded that the cessation of trade union dues check off was "not justified from the point of view of the principle expounded."[42] In a Canadian case, where the government had explicitly raised, in its own defense, that the nurse's union would be able to continue to collect contributions directly from its members, the Committee categorically dismissed the argument, noting the practical barriers to such collection, and adding: "It is thus a real sanction which can deplete the financing sources of the trade union, hinder its operational capacity and reduce the services which it provides to its members."[43] With respect to a complaint from unions in the Republic of Korea, the Committee noted that withdrawal of the check-off facility could lead to

---

38 Digest of Decisions, 2006, paras. 658, 660.

39 Digest of Decisions, 2006, para. 668.

40 Digest of decisions, 2006, para. 669.

41 Dominican Republic (Case No. 1179), The General Workers' Federation, Report: 234 *(Vol. LXVII, 1984, Series B, No. 2),* para. 295.

42 *Id.* at para. 296.

43 Case 1526, para 265.

financial difficulties for trade union organizations, and was not conducive to the development of harmonious industrial relations.[44] The Committee also referred to measures involving the discontinuance of dues check-off as "acts of interference," and asked that the Government "immediately cease."[45]

As for heavy fines imposed on trade unions in the wake of a strike, the Committee cautioned, in a case involving oil workers in Brazil, that the imposition of a fine for exercising the right to strike was problematic, given that "the Government recognizes that the high amount of the fines may make trade union activity impossible."[46] The Committee emphasized that fines "must be proportionate to the seriousness of the infringement committed," and noted that the amounts in that case – "equivalent to a maximum amount of 500 or 1,000 minimum wages per day of abusive strike," in the reckoning of the Committee – "may have an intimidating effect on trade unions and inhibit their legitimate trade union activities."[47] By that rule of thumb, the amount of the fine that courts imposed on Local 100 must similarly be considered disproportionate, potentially intimidating, and liable to inhibit trade union work. This would apply also to the fine on individual workers: a penalty that is above and beyond lost wages for days not worked during the strike would be considered unreasonable. The Committee noted that even the cancellation of excessive fines would not undo the violation, if the cancellation "is subject to the provision that no further strike considered as abusive is carried out."[48] This comment has a particular bearing on the previously-discussed issue – the Taylor Law's requirement that dues check off be restored to a union only if it signs an affirmation renouncing the right to strike.

The Committee has not spoken directly on the question of whether it would be a violation of Conventions 87 and 98 to require unions to submit an affirmation that they will not assert the right to strike before permitting them to represent workers in collective bargaining. (To clarify: this is not a "no strike" provision within a collective bargaining agreement, but a precondition even to negotiating a collective bargaining agreement). We believe, however, that the Committee's jurisprudence on freedom of expression, the principle of non-interference in unions' internal affairs, and the critical importance of the right to strike, lead inexorably to the conclusion that this is clearly a

---

44 Republic of Korea (Case No. 1865), The Korean Confederation of Trade Unions (KCTU), the Korean Automobile Workers' Federation (KAWF), the International Confederation of Free Trade Unions (ICFTU) and the Korean Metal Workers' Federation (KMWF) 14 December 1995, Report No. 346, *(Vol. XC, 2007, Series B, No. 2),* para. 788.

45 Republic of Korea (Case No. 1865), The Korean Confederation of Trade Unions (KCTU), the Korean Automobile Workers' Federation (KAWF), the International Confederation of Free Trade Unions (ICFTU) and the Korean Metal Workers' Federation (KMWF) 14 December 1995, Report No. 346, *(Vol. XC, 2007, Series B, No. 2),* para. 791.

46 Brazil (Case No. 1889) The Single Confederation of Workers (CUT) 28 May 1996, Report No. 306 *(Vol. LXXX, 1997, Series B, No. 1),* para. 173.

47 Case No. 1889, para. 175.

48 *Id.*

violation – the public authorities are, after all, requiring public sector unions to affirm a statement that conflicts with core principles of the Committee.

Finally, the Committee has addressed at great length issues related to the imprisonment of trade unionists for their role in a strike action. The Committee has typically advised against "criminal prosecution and conviction to imprisonment of trade union leaders," for reasons including the potential long-term damage to harmonious labor relations,[49] and has deemed unacceptable any imprisonment for a peaceful strike, regardless of the strike's legality.[50] As the Committee has stated, "such measures entail serious risks of abuse and are a grave threat to freedom of association."[51]

In conclusion, the jurisprudence of the Committee on Freedom of Association indicates that New York State's restrictions on the right to strike, and the penalties imposed on Local 100 for engaging in the December 2005 strike, ought to be considered violations of the guarantees articulated in the Constitution of the ILO, and detailed in Conventions 87 and 98.

Background

This is not the first time that issues related to public sector unions in the United States as a whole have come before the Committee on Freedom of Association. A compendium complaint filed by the AFL-CIO in 1990 addressed federal and state employees, and restrictions on associational and collective bargaining rights.[52] With respect to state and local employees, such as those whose rights are at issue here, the U.S. government's response focused on its limited jurisdiction to deal with public sector labor relations at the state and local level, given the federal structure of the United States and the sovereignty of individual states with respect to many areas of law, including this one. As the Committee noted with respect to the 1990 case, the United States' central argument related to "whether, and to what extent, the federal Government has jurisdiction to regulate public service collective bargaining at the state and local levels." The Committee summarily dismissed this argument, pointing out that

> this is a matter to be decided according to national law and practice. Whilst fully aware of the complex issues involved in that respect, and of the significant impact this may have for all the parties concerned, the Committee recalls that the central issue here is whether the principles of freedom of association are complied with, in

---

49 Case No. 1865, para. 773.

50 Morocco, (Case No: 1490) International Miners' Organisation (IMO), The Organisation of African Trade Union Unity (OATUU), the Democratic Federation of Labour (CDT) Report No:265 *(Vol.LXXII, 1989, Series B, No.2)* para. 239.

51 Digest of Decisions, 2006, para. 671.

52 United States (Case No. 1557), The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Public Services International (PSI), 26-Oct-90, Report No. 284, *(Vol. LXXV, 1992, Series B, No. 3).*

law and in fact, and not whether these rights are guaranteed through national or local legislation."[53]

The Committee asked that " the Government [...] draw the attention of the authorities concerned [...] to the principle that all public service workers other than those engaged in the administration of the State should enjoy [collective bargaining] rights."[54]

We believe that the subsequent lack of attention to promoting a resolution of this issue, at the federal level – as well as other issues related to public sector trade unions at the state and local level – calls for greater engagement by the ILO. We ask in particular for an analysis of the ways in which the federalism argument has allowed the United States to deny responsibility for violations of international human rights norms, while enabling the state or states in question to be insulated from direct jurisdiction and oversight. The federal government has repeatedly sued states and localities for enforcement of international obligations related to taxation of foreign entities, for example, or where the State Department has sought to consult directly with the National Conference of Commissioners for Uniform State Laws in order to implement the treaty obligations of the United States through state-level legislation.[55] It is problematic that in the area of human rights obligations, however, the federal government plays such a passive role that it will claim to have fulfilled its duty merely by passing on the recommendations of a body such as the Committee on Freedom of Association, to the state-level authorities.

We ask the Committee's indulgence for a brief note addressing the individual states' very significant role in meeting the international legal obligations of the United States, and the ways in which that role has come about: through states' responsibilities under the Supremacy Clause of the United States Constitution, certainly, but *also* through the ways in which state bodies have held themselves out to the international community as playing an active part in shaping and interpreting international law. With respect to the latter point, there are even instances of the states passing legislation adopting treaties neither signed nor ratified by the United States government, in the area of jurisdiction in child custody matters, for example.[56] The State of New York has been at the forefront of such initiatives: attitudes towards international norms vary drastically among the states, and we will emphasize that New York State has, more than most others, presented itself as taking international norms seriously, and considering itself bound to respect them. On the basis of this, we argue that New York State has a direct and independent obligation to respect international norms, including but not limited to the decisions of the Committee on Freedom of Association, and that we hope that the Committee will consider it appropriate to craft recommendations with this in mind.

---

53 *Id.* at para. 277.

54 *Id.* at para. 285(a).

55 Julian Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 North Carolina Law Review 457 (2004): 497-498.

56 *Id.* at 502.

As regards the Supremacy Clause, the point is a simple one: under Article VI, Clause 2 of the United States Constitution,

> . . . all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[57]

Thus, courts in New York State should give deference to the decisions of the Committee on Freedom of Association (whose jurisdiction arises out of the Constitution of the ILO, rather than the ratification of Conventions 87 and 98) in the course of litigation. While this principle has been affirmed by the United States Supreme Court, in a line of cases dating back to 1804,[58] it is frequently disregarded.

In terms of practice in New York State, we would like to touch on decisions of state (rather than federal) courts, which have drawn on international rights norms, in one of several ways. State courts have acted, either out of the belief that, to the extent that the norms are codified in ratified treaties, they are simply "the supreme Law of the land;" or, as Professor Julian Ku documents, "state courts applying the doctrine that 'the law of nations is part of the common law' have incorporated customary international law through their independent common lawmaking powers."[59] In other cases, they have been motivated by a sense that the New York State Constitution requires concern for a certain set of international principles, or have used the norms as a set of guidelines for interpreting state-level policy and legislation. We would also like to touch on the role of the legislature, and note the ways in which lawmaking in the State of New York reflects a commitment to broad international human rights norms. Through this brief overview, we emphasize that New York State clearly considers itself bound to respect an international consensus on norms related not just to human rights but more specifically to workers' rights.

For these reasons, the State of New York should therefore be treated as a primary interlocutor by the Committee on Freedom of Association.

With respect to the New York State Constitution, Professor Martha Davis has shaped a detailed analysis of the ways in which provisions related to, for example, health care, were rooted in a concern for international human rights and transnational legal thinking.[60] Even without looking at the history of the framing of the Constitution, it is clear that its language indicates a long-standing commitment to an ample

---

57 U.S. Constitution, art. 6, § 2.

58 *Murray v. Schooner Charming Betsy,* 6 U.S. (Cranch) 64 (1804).

59 Ku, *supra* note 52, at 475.

60 Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 New York University Review of Law and Social Change 359 (April 2006).

conceptualization of rights, with strong echoes of international human rights documents. For example, the New York State Constitution provides,

> Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. [...] employees shall have the right to organize and to bargain collectively through representatives of their own choosing.[61]

A recent report by an independent research group, Opportunity Agenda, documents state court decisions that have cited international human rights law. It is worth mentioning two examples from New York State related to labor rights (specifically, to employment-related discrimination and the right to strike):[62]

- In a 1966 case, *Jamur Productions Corp. v. Quill*, involving the union that has submitted this complaint, a court referred to principles in the Universal Declaration of Human Rights (UDHR) as "precepts of ethical behavior," which "*guide the courts* of this land" but "do not yet entail judicial authority" in dismissing a suit filed by New York State businesses seeking damages from the Transport Workers Union for lost business following a strike.[63]

- In a 1950 case, *Wilson v. Hacker*, the trial court cited the Universal Declaration of Human Rights – arguing that it was "[i]ndicative of the spirit of our times" – in deciding that it could not permit a trade union to compel an employer to fire all of its female workers, who were not eligible to be union members. The provisions cited by the court, Articles 2 and 23, address freedom from discrimination, the right to work, the right to free choice of employment, and the right to form and join a union.[64]

There are a number of other cases in New York State courts, not related to the field of labor, which have addressed the UDHR as actually binding, a source of legal obligation, as the report notes.[65] Nevertheless, we do not argue the issue in this Complaint whether the UDHR is binding customary law. Rather, we cite these cases in support of our argument that the courts of New York state have looked to international sources of law, including international labor standards, for guidance in decisions, including cases which raise issues of labor rights.

With respect to legislation passed by the State of New York, it would be worth mentioning just two examples that are closely related to the current priorities of the

---

61 N.Y. Constitution art. 17.

62 The Opportunity Agenda, "Human Rights in State Courts: An Overview and Recommendations for Legal Advocacy," *The Opportunity Agenda*, 27 (2008), http://opportunityagenda.org/files/field_file/State%20Courts%20and%20Human%20Rights%20(2008%20Edition)_0_0.pdf.

63 51 Misc. 2d 501, 509 (Sup. Ct. N.Y. Co. 1966)(emphasis supplied).

64 101 N.Y.S. 2d 461, 472-3 (Sup. Ct. N.Y. Co. 1950).

65 The Opportunity Agenda, *supra* note 62, at 28.

global trade union movement. Amendments to the Omnibus Procurement Act of 1992[66] made by the Apparel Workers Fair Labor Conditions and Procurement Act,[67] incorporate internationally-recognized core labor standards as principles to guide sweat-free procurement policy. Also noteworthy is the Anti-Human Trafficking Law that was signed in June 2007;[68] much of its language closely tracks the 2000 Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, supplementing the United National Convention Against Transnational Organized Crime.[69]

This background should help explain our position. The United States actually understands New York to be responsible for the implementation of a range of international obligations; New York believes itself to be, and holds itself out to be so responsible as well. Thus, we believe it would be appropriate for the Committee on Freedom of Association to pierce the federalism veil that has typically operated in terms of the United States government's response to state-level violations of the freedom of association principles that form the bedrock of the ILO Constitution, and are elaborated in Conventions 87 and 98, and seek compliance from the State of New York.

Recommendations

We ask, therefore, that the Committee on Freedom of Association recommend amendments to the Taylor Law that would bring it into compliance with international standards related to the regulation of trade union activity. We believe that while any recommendations from the Committee will of course be addressed to the United States, the State of New York has independent obligations to respect international norms, as described at length above, and we ask the Committee to bear these in mind in framing its opinion. Thus, we ask that the Committee recommend that the United States take action to ensure that New York State legislates, and interprets state laws, in accordance with international obligations – both those of the United States, and its own. We ask further that the Committee 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 suffered during the nearly 18 months it was deprived of dues checkoff.

Finally, in terms of recommendations directed solely to the government of the United States, we ask that the Committee reiterate the urgent need to ratify Conventions 87 and 98 at the earliest opportunity. While the United States is already obligated to respect the principles elaborated in Conventions 87 and 98, since these are rooted in the ILO Constitution (which all ILO member states are bound to respect), ratification is

---

66 Laws 1992, c. 844.

67 Laws 2002, c 350, §§ 1 and 2, adding N.Y. Labor Law § 213-a and amending N.Y. Education Law § 6302, Labor Law § 347 and State Finance Law §§ 162 and 165.

68 Laws 2007, c. 74, amending *inter alia*, N.Y. Penal Law to add §§ 135.35 and 135.36.

69 Adopted by General Assembly Resolution 55/25, U.N. Doc. A/RES/55/25 (November 15, 2000), http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf.

important for other reasons. We believe that ratification of these crucial conventions would help the entire fractured system of labor relations in the United States to move towards greater coherence and harmony.[70] It would also enable the ILO's Committee of Experts on the Application of Conventions and Recommendations to intervene with technical assistance, to assist the United States in addressing the practical and policy concerns involved in bringing state-level legislation regarding public sector workers into conformity with international norms. Thus, while the passage of legislation must ultimately take place through democratically-elected representatives, we believe that the ILO's expertise could be critical.

Dated: New York, New York, USA
November 10, 2009

Respectfully Submitted,

Roger Toussaint, President
Transport Workers Union of Greater New York, AFL-CIO, Local 100

James Little, President
Transport Workers Union of America, AFL-CIO

70 For a broader discussion of systemic problems in the U.S. labor relations system, please see Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (2000).