

The decision of the Tariff Board of 12 October 2015 amending the Regulations of 11 May 2015 No. 554 on general application of collective agreements concerning freight transport by road

Protocol 6/2015

Background

On 11 May 2015, the Tariff Board issued a decision concerning the issue of Regulations on general application of collective agreements concerning freight transport by road. The Regulations entered into force on 1 July 2015 (Regulations of 11 May 2015 No. 554).

Since the decision was issued, the Tariff Board has received a number of enquiries regarding interpretation of the scope of the Regulations. These enquiries have come both from Norway and from abroad. *NHO Logistikk og Transport* [the Norwegian Logistics and Freight Association] and the Employers' Association *Spekter* have each submitted legal opinions regarding the scope provision. On 9 September 2015, the Tariff Board also held a meeting with *NHO Logistikk og Transport* and the Employers' Association *Spekter*. The meeting was attended by representatives from the transport and logistics company *Freja* and from *Bring Norge*.

Section 2, first paragraph, second sentence, of the Regulations has proved particularly problematical, with regard both to interpretation of the provision and to how it is to be complied with and enforced in practice. The provision is worded as follows: *For workers in enterprises established outside Norway, the Regulations only apply to the extent that the transport is a service provision pursuant to section 1-7 of the Working Environment Act (Posted employees).*

The assessment of the Tariff Board in the decision of 11 May 2015

In the decision of 11 May 2015, the Tariff Board stated that it did not in principle wish international transport to be covered by the Regulations, both because it was not deemed appropriate and because it would in practice be difficult to control compliance.

The Tariff Board was also concerned that the Regulations should comply with EEA law, including that they should lie within the framework of the Posting of Workers Directive. This was the background for the design of the Regulations with regard to the extent to which they should apply to employees of companies registered abroad. The Tariff Board assumed that, in view of the adopted wording, most cabotage in Norway would in practice be covered by the Regulations while most international transport would fall outside the scope.

See otherwise the decision of 11 May 2015.

The need for clarification

On the basis of the enquiries received, the Tariff Board has considered whether there is a need for clarification and amendment of the scope of the Regulations. The enquiries refer particularly to a lack of clarity arising from the Tariff Board's statement in its letter of 29 June 2015 to *NHO Logistikk og Transport* that the Regulations shall apply if the recipient of the international transport service carries

out a certain degree of activity in Norway. Reference is also made to the administrative consequences of different wage systems, etc. for undertakings in connection with the calculation of wages and working conditions for the part of the assignment that is carried out in Norway. Input from *NHO Logistikk og Transport* refers to a number of specific cases where it is not clear whether the Regulations apply to the part of a transport assignment that is carried out in Norway. The Employers' Association *Spekter* expresses concern that the structure of the Regulations and the lack of clarity as regards the scope, may at worst endanger Norwegian jobs. As an example of this, they point particularly to the situation of *Bring Norge*.

The Tariff Board has not addressed the content of these statements. However, like many enquiries regarding whether or not specific transport assignments fall under the Regulations, these statements call attention to a problematical lack of clarity given rise to by the scope provision. At the meeting of 9 September, the parties maintained that this lack of clarity had also resulted in the withdrawal of serious players from the Norwegian market so as to avoid the risk of practising the rules incorrectly.

The purposes of the General Application Act are to ensure foreign workers wages and working conditions equivalent to those of Norwegian workers and to prevent distortion of competition detrimental to the Norwegian labour market (see section 1 of the Act). In this matter, the majority of the Tariff Board has found that the documentation presented in connection with processing of the matter indicates that general application of the collective agreements is necessary for safeguarding the purposes of the Act, cf. item 7 of the decision of 11 May 2015.

A characteristic of many international transport assignments is that only a small part of the assignment takes place in Norway. It is unlikely that generally applicable wages for the part of the assignment that takes place in Norway would normally provide a significant improvement in the drivers' total wages and working conditions. At the same time, the Tariff Board has attached importance to the fact that handling different wages and working conditions for individual drivers may involve considerable administrative costs for the transport undertakings.

The Tariff Board finds reason to refer to the travaux préparatoires of the General Application Act¹, which state that it is not the intention of the Act to cover international transport. Although the statement in the travaux préparatoires predates the adoption of the legislation concerning posting of workers, and the extent of the Act was thus not assessed in the light of the Directive, the Tariff Board nevertheless considers that a certain weight should be given to the statement.

The purposes of the General Application Act concur to a large extent with those of the Posting of Workers Directive, i.e. to ensure fair competition and measures guaranteeing respect for the rights of workers, cf. item 5 of the preamble to the Posting of Workers Directive.

¹ Proposition No. 26 (1992-93) to the Odelsting on an Act relating to general application of collective agreements, etc., page 19

The system of the Posting of Workers Directive, which aims to regulate situations where workers are posted to a country to carry out assignments, is inappropriate for what is normally associated with international transport, i.e. transport assignments that begin in one country and end in another. Often only a small part of an international transport assignment takes place in Norway, and as mentioned above, it is unlikely that generally applicable wages for the part of the assignment that takes place in Norway would normally provide a significant improvement in the drivers' total wages and working conditions. When viewed in connection with the administrative burdens this necessarily involves for the foreign transport enterprises and the challenges regarding supervision, the Tariff Board finds that EEA law does not preclude limiting the scope of the general application decision to exclude international transport, i.e. transport assignments that begin in one country and end in another. In this connection, it is relevant to bear in mind that the European Commission, ESA and several EU member states have already raised the issue of the scope of the Posting of Workers Directive for this type of transport assignment. This lack of legal clarity may in itself justify limiting the scope of the Regulations to exclude international transport. The Tariff Board also attaches importance to the input provided by employers' organisations and actors in the sector indicating that the lack of clarity that has arisen as regards the extent to which international transport is covered by the Act is disadvantageous to Norwegian undertakings.

Following an overall assessment of the requirements regarding necessity and proportionality, the Tariff Board therefore finds it appropriate to limit the scope of the Regulations to exclude international transport that begins in one country and ends in another.

On the other hand, the Tariff Board does not find that the same considerations are present as regards cabotage and combined transport (for a more detailed description of these transport types, see below). Although it is a condition of cabotage transport that it follows a border crossing, the major part of both transport types normally takes place in Norway in competition with Norwegian undertakings. Particularly in the case of combined transport, the part carried out in Norway may take place over a considerable time and distance. Information received by the Tariff Board indicates that such transport may also have a somewhat permanent organisation, so that the workers actually reside or stay in Norway for longer periods. The purposes of the Act, to ensure foreign workers wages and working conditions equivalent to those of Norwegian workers and to prevent distortion of competition detrimental to the Norwegian labour market, thus indicate that it is necessary and proportional to make Norwegian wages and working conditions generally applicable to both of these types of transport assignment.

Conclusion

On this basis, the Tariff Board has decided to amend the scope of the Regulations on general application of collective agreements concerning freight transport by road. The main rule that the Regulations apply to workers who carry out transport in Norway by means of vehicles with a gross vehicle weight of over 3.5 tonnes, i.e. ordinary national transport, is upheld. It is specified in the provision that the Regulations shall in addition apply to cabotage and combined transport but not to other international transport.

Comments on the provision

Re section 2 Scope and executive responsibility

The first paragraph, first sentence, establishes the main rule that the Regulations apply to workers who carry out freight transport by road in Norway by means of vehicles with a gross vehicle weight of over 3.5 tonnes. The second sentence, (a) and (b), specifies that the Regulations apply to cabotage and combined transport. Such transport assignments may be carried out in Norway by transport undertakings registered outside Norway provided that this is in connection with transport across borders. The Regulations shall not otherwise apply to international transport (see the second paragraph) although parts of an international transport assignment take place in Norway. It is thus only where the international transport is followed by cabotage or combined transport in Norway that the Regulations apply.

By cabotage is meant transport assignments following an international shipment to Norway which in their entirety take place in Norway. The right to operate cabotage transport is regulated by Regulation (EC) No. 1072/2009 which is implemented in Norwegian law by section 53 of the Professional Transport Regulations of 26 March 2003 No. 401. Pursuant to these rules, a haulier registered in another EU/EEA member state may carry out a maximum of three cabotage operations in Norway on the condition that this occurs following an international journey using the same vehicle and within a period of seven days following delivery of the international carriage in Norway. It follows from item 17 of the preamble to the Regulation that the Posting of Workers Directive applies to cabotage transport.

By combined transport is meant transport across borders where a relatively limited road transport begins or ends with transport by sea or rail. Combined transport assignments are regulated by Council Directive 92/106/EEC, which is implemented in Norwegian law by the Regulations of 11 August 1995 No. 716 on implementation of common provisions concerning domestic transport in the EEA Agreement. All hauliers permitted to operate international transport between EU member states also have the right to operate combined transport. It is not a condition that the haulier is registered in the state where the transport takes place or fulfils any national requirements of that state regarding hauliers. Typical locations for such transport assignments are seaports and railway stations.

Section 1-7 of the Working Environment Act and the Regulations of 16 December 2005 No. 1566 concerning posted employees regulate whether and, in such case, which Norwegian rules apply to foreign undertakings that post workers to Norway. Wages and working conditions in accordance with general application regulations are among the rules that may apply. These rules implement the Posting of Workers Directive in Norwegian law. The Tariff Board finds that, except in exceptional cases, the rules concerning posted workers apply to cabotage and combined transport. It is the responsibility of the supervisory authorities to address this issue in specific cases.

Pursuant to the second paragraph, the scope of the Regulations excludes transport across borders (international transport) apart from what follows from the first paragraph. By international transport is meant typical transport assignments that begin in one state, normally the home state of the haulier, and end in another state. This

mainly applies to foreign transport companies that carry goods to or from a specific location in Norway. Typically, only a small part of the total transport journey takes place in Norway.

The Tariff Board observes a risk of circumvention of the rules, e.g. by transport undertakings establishing themselves immediately outside the Norwegian border and operating international transport in such a way that most of the activity takes place in Norway. The Tariff Board assumes that such situations would be handled by the Norwegian Labour Inspection Authority or other Norwegian authorities.

See otherwise the comments on the provision in the decision of 11 May 2015.

Oslo, 12 October 2015

Johan Kr. Øydegard

Steinar Holden

Giuditta Cordero-Moss²

Knut Bodding

Margrethe Meder

Lin Andrea Gulbrandsen

Per Madsen

²Did not attend the Tariff Board's meeting of 12 October 2015, but submitted written input.

Regulations amending the Regulations of 11 May 2015 No. on general application of collective agreements concerning freight transport by road

Issued by the Tariff Board on 12 October 2015 pursuant to section 5 of the Act of 4 June 1993 on general application of collective agreements, etc. (the General Application Act).

I

Section 2 of the Regulations shall read as follows:

Section 2. Scope and executive responsibility

The Regulations shall apply to workers who carry out freight transport by road by means of vehicles with a gross vehicle weight of over 3.5 tonnes. The Regulations shall also apply to:

- a) cabotage, i.e. transport assignments between locations in Norway following transport across the Norwegian border and*
- b) combined transport, i.e. transport on Norwegian roads that begins or ends with transport across the Norwegian border by rail or sea.*

The Regulations shall not apply to transport across borders (other international transport).

The Regulations shall not apply to transport of the undertaking's own goods.

The employer and any person managing the undertaking on the employer's behalf who carries out assignments as referred to in the first paragraph shall ensure compliance with the provisions of the Regulations.

The Regulations shall not apply to apprentices or persons taking part in labour market schemes.

II

The amendment to the Regulations shall enter into force immediately.