

The decision of the Tariff Board of 12 October 2015 amending the Regulations of 27 May 2015 No. 815 on general application of collective agreements concerning passenger transport by tour bus

Protocol 7/2015

Background

The Tariff Board issued a decision on 27 May 2015 concerning the issue of Regulations on general application of collective agreements concerning passenger transport by tour bus. The Regulations entered into force on 1 October 2015 (Regulations of 27 May 2015 No. 815). The Regulations were originally intended to enter into force on 1 August 2015, but the date of entry into force was amended at the request of *NHO Reiseliv* [the Norwegian Hospitality Association].

Since the decision was issued, the Tariff Board has received a number of enquiries regarding interpretation of the scope of the Regulations. NHO Transport, NHO Reiseliv and the Employers' Association Spekter all consider that the scope of the Regulations should exclude international transport.

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 27 May 2015

In the decision of 27 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 regarding 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 27 May 2015.

The need for clarification

On the basis of the enquiries received, the Tariff Board sees a need for clarification and amendment of the scope of the Regulations.

The decision of 27 May 2015 states that the tour bus market involving foreign carriers can be divided into three categories:

1. international transport, e.g. a foreign bus with foreign passengers drives to Norway from a specific place in another country and then returns to the point of departure with the same passengers (i.e. without taking up passengers in Norway).
2. foreign buses take up passengers, for example at airports, and drive for a period in Norway.
3. foreign buses remain in Norway for longer periods, and take whatever assignments arise (“ad hoc assignments” or “spot market”).

The last two categories are likely to be cabotage.

Pursuant to the current scope provision, the question of these categories will fall under the rules concerning posted workers and the General Application Regulations or will not, in principle, be dependent on whether or not the transport was ordered by a Norwegian client.

The feedback received by the Tariff Board indicates that the wording of the scope provision has given rise to a problematical lack of clarity, and that it can be difficult to determine whether or not specific transport assignments fall under the Regulations.

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 27 May 2015.

A characteristic of many international transport assignments is that only a small part of the transport assignment will take place in Norway. It is therefore 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, while the administrative costs of handling different wages and working conditions for individual drivers may be considerable 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 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 or that begins and ends in the same country but where the passengers embark or disembark in another country.

On the other hand, the Tariff Board does not find that the same considerations are present as regards cabotage. Although it is a condition of cabotage transport that it follows a border crossing, the major part of transport assignments normally take place in Norway in competition with Norwegian undertakings. 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 this type 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 passenger transport by tour bus. The main rule that the Regulations apply to workers who carry out passenger transport in Norway by coach or bus, when operation of the transport does not require a license awarded pursuant to the Professional Transport Act is upheld. It is specified in the provision that the Regulations shall in addition apply to cabotage but not to other international transport.

Comments on the provision

Re section 2 Scope and executive responsibility

The first sentence establishes the main rule that the Regulations apply to workers who carry out passenger transport in Norway by coach or bus when operation of the transport does not require a license awarded pursuant to the Professional Transport Act. Application of the Regulations thus excludes bus transport other than transport by tour bus. The second sentence specifies that the Regulations shall apply to cabotage. Cabotage requires that the transport is carried out by a carrier registered outside Norway.

By cabotage is meant transport where a carrier from one state is engaged in transport between two places within the territory of another state. Pursuant to EEA law, a carrier registered in another EU/EEA member state may carry out temporary passenger cabotage in Norway. No definition is given of what is deemed to be temporary. The right to operate cabotage transport is regulated by Regulation (EC) No. 1072/2009 which is implemented in Norwegian law by section 55 of the Professional Transport Regulations of 26 March 2003 No. 401. It follows from item 17 of the preamble to the Regulation that the Posting of Workers Directive applies to cabotage transport.

Pursuant to the third sentence, the Regulations for international transport shall not otherwise apply although parts of an international transport assignment take place in Norway.

By international transport is meant cross-border transport, typically transport from the home state of the carrier with a destination in another state. Transport commenced and terminated in the same state, but where passengers embark or disembark in another state, is also deemed to be international transport. Often only a small part of an international transport assignment takes place in Norway

Section 1-7 of the Working Environment Act and the Regulations of 16.12.2005 No. 1566 concerning posted employees regulate whether and, in such case, which Norwegian rules apply to foreign undertakings that operate activities in 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.

See otherwise comments on the provision in the decision of 27 May 2015.

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Regulations amending the Regulations of 27 May 2015 No. 815 on general application of collective agreements concerning passenger transport by tour bus

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 in enterprises that carry out passenger transport by coach or bus when operation of the transport does not require a license awarded following competition pursuant to section 8 of the Professional Transport Act. The Regulations also apply to cabotage, i.e. when a foreign transport undertaking operates temporary tour bus transport with embarkation and/or disembarkation in Norway. The Regulations shall not otherwise apply to transport across borders (international transport).

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 and persons taking part in labour market schemes.

II

The amendment to the Regulations shall enter into force immediately.