

The decision of the Tariff Board of 11 May 2015 concerning the issue of Regulations on general application of collective agreements concerning freight transport by road

This matter derives from a claim by the Yrkesorganisasjonenes Sentralforbund (YS) [Confederation of Vocational Unions]/Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] of 29 April 2014 and concerns general application of the Haulage Vehicle Agreement between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Confederation of Vocational Unions (YS)/Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] for the other part.

On 5 January 2015, the Norwegian Confederation of Trade Unions (LO) submitted a claim for general application of the Agreement concerning Freight Transport of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Norwegian Confederation of Trade Unions/ Norsk Transportarbeiderforbund (NTF) [Norwegian Transport Workers' Union] for the other part. The claim refers to dialogue between the involved unions in LO and YS, and that there is agreement that it would be appropriate for LO to claim general application of its corresponding agreement with the same contracting party. The two agreements are identical, and LO's claim refers to and concurs in the grounds submitted by YS.

The claims apply to general application for the whole of Norway.

1. Introduction

The Act of 4 June 1993 No. 58 relating to general application of collective agreements, etc. (The General Application Act) entered into force at the same time as the EEA agreement in 1994. The purpose of the Act is:

“...to ensure foreign employees terms of wages and employment which are equivalent to those of Norwegian employees, and to prevent distortion of competition detrimental to the Norwegian labour market.” See section 1.

A claim for general application must relate to a nationwide collective agreement and be submitted by an employees' or employers' organisation which is party to the agreement and is entitled to submit nominations pursuant to section 39, first paragraph, of the Labour Disputes Act (employers' associations with a membership of not less than 100 employers who employ in all not less than 10 000 workers and trade unions with a membership totalling not less than 10 000 workers). It follows from section 4, first paragraph, final sentence, of the General Application Act that other entities may submit claims for general application, but that such entities may not require a decision from the Tariff Board on a claim for general application. If general considerations so indicate, the Tariff Board may make decisions concerning general application on its own initiative.

The decision of the Tariff Board will apply as the minimum terms for all persons who perform work within the scope of the decision, for Norwegian unionised and non-unionised workers, for foreign workers employed in Norwegian undertakings and for workers temporarily posted in connection with provision of services.

The Regulations of 16 December 2005 No. 1566 concerning posted workers were issued pursuant to section 1-7 of the Working Environment Act. In accordance with section 2 of the Regulations, Norwegian statutory provisions concerning further specified terms of work and employment shall apply to posted workers. This applies, inter alia, to health, safety and environment, wages and working hours. If posted workers are covered by the scope of a decision pursuant to the General Application Act, the provisions concerning terms of wages and employment made generally applicable shall also apply to the posted workers (see section 2, second paragraph, of the Regulations). The Regulations implement the Posting of Workers Directive¹ in Norwegian law.

The Norwegian Labour Inspection Authority and the Petroleum Safety Authority Norway oversee compliance with the General Application Regulations (see section 11 of the General Application Act). Regardless of any duty of secrecy, the supervisory authorities shall have access to all necessary information, and shall issue orders and make any other decisions necessary for implementation of the General Application Regulations. All contractors shall also be informed of orders and other decisions made by the supervisory authorities. The Norwegian Labour Inspection Authority and the Petroleum Safety Authority Norway may impose fines for infringement of the regulations (see section 11, second paragraph, of the General Application Act and section 18-10 of the Working Environment Act), and may also report infringements to the police.

Pursuant to the Regulations of 22 February 2008 No. 166 on the obligation to provide information, the obligation to ensure compliance and the right of inspection, orderers, contractors and suppliers who enter into contracts with subcontractors are obliged to provide information concerning terms of wages and employment in accordance with the General Application Regulations. Pursuant to the Regulations, main contractors are moreover obliged to ensure that workers employed by contractors and subcontractors have terms of wages and employment in compliance with the General Application Regulations. The Norwegian Labour Inspection Authority and the Petroleum Safety Authority Norway oversee compliance with the obligation to ensure compliance. Furthermore, elected union representatives at main contractors shall have the right to inspect terms of wages and employment of workers employed by contractors and subcontractors in order to establish whether the General Application Regulations have been complied with. Information concerning lack of compliance shall be provided to the Norwegian Labour Inspection Authority or the Petroleum Safety Authority Norway. The elected union representative is obliged to maintain secrecy concerning the information except in relation to the supervisory authorities.

The General Application Regulations provide a joint and several liability for pay and holiday pay (see section 13 of the General Application Act). This means that

¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

contractors and subcontractors may also be liable for the pay and holiday pay of the employees of their subcontractors. The parties to a collective agreement made generally applicable have an extended right to implement a boycott if a decision concerning general application is not complied with by an undertaking. The employer or any person managing the undertaking in the employer's stead may also be liable to fines if the decision is not complied with. In addition, affected workers or their trade unions may institute private prosecution.

The relationship to EEA law

The general application arrangement involves laying down in regulations of specific terms of wages and employment. Regulations concerning general application apply to all persons who perform work in Norway, including foreign undertakings that post workers in Norway in connection with temporary provision of services (see the Regulations concerning posted workers). General application may thus restrict foreign undertakings' potential for providing services in Norway. This gives reason to consider whether the general application arrangement contravenes article 36 of the EEA agreement, which in principle prohibits all restrictions of the freedom to provide services across national borders. However, it follows clearly from case law that restrictions of the freedom to provide services are nevertheless permitted if justified on overriding reasons of public interest, are capable of fulfilling the purposes they pursue and are not more extensive than necessary for fulfilment of these purposes. In a number of cases, the European Court of Justice has found regard for protection of workers and regard for fair competition to be overriding reasons of public interest that may justify restrictions of the freedom to provide services. The balance between the freedom to provide services and regard for protection of workers is further regulated in the Posting of Workers Directive. It follows from article 3 (1) of this Directive that general application is a permitted method for establishing minimum terms.

The EFTA Surveillance Authority (ESA) has considered the Norwegian general application arrangement in relation to EEA law, and has concluded that the arrangement is in compliance with Norway's obligations pursuant to the EEA agreement. The Supreme Court arrived at the same conclusion in the shipyard case (Norwegian Supreme Court Reports 2013, page 258).

In keeping with this, the Tariff Board finds the general application arrangement as such to be in compliance with EEA law.

The General Application Act gives relatively wide powers to the Tariff Board for deciding general application of collective agreements. The Posting of Workers Directive sets limits specifying which terms of wages and employment can be provided in individual general application regulations with effect for posted workers. This means that the Tariff Board, when issuing the various the Regulations, must ensure that its provisions are not more extensive than is permitted by the Posting of Workers Directive.

The Posting of Workers Directive obliges EU/EEA member states to make their national provisions concerning further specified terms of wages and employment applicable to undertakings established in other member states when these undertakings post their own employees to carry out temporary services (see articles 1 and 3). The European Court of Justice has interpreted article 3 (1) (a–f) of the

Directive as an exhaustive list, so that it is only terms of wages and employment specified here that shall and may be made applicable to foreign service providers.

The Tariff Board furthermore refers to the decision of the Supreme Court in the shipyard case (Norwegian Supreme Court Reports 2013 page 258), where the Supreme Court addressed the question of whether general application of provisions in the collective agreement for the maritime construction industry concerning overtime pay, compensation for the disadvantage of living away from home and coverage of travel, board and lodging expenses are in compliance with EEA law. The Supreme Court concluded that general application of these terms of wages and employment is permitted. It follows from the judgment that the Supreme Court's assessments are also relevant in sectors other than the maritime construction industry.

2. The claim from the Confederation of Vocational Unions

Background

In its claim, the Confederation of Vocational Unions referred by way of introduction to the concern voiced by central actors in the transport sector regarding the increase in recent years in the number of cases of social dumping in the sector. The confederation referred particularly to the considerable differences in wage levels between EU countries, and to the fact that foreign companies operating cabotage in Norway use drivers from the countries where they are registered on the terms of wages and employment that apply in their home countries. This is stated to apply particularly to companies from Poland and the Baltic countries, and that the home countries' terms of wages and employment are used regardless of how much and how long the foreign drivers work in Norway. Reference is made to average hourly wage costs well under a fifth of the average wage costs in the sector in Norway and far less than the minimum wage laid down in the collective agreement for haulage vehicle drivers in Norway. Reference is also made to Romanian drivers, for whom the average wage costs are 90 per cent lower than in Norway and under a fifth of the minimum wage laid down in the Haulage Vehicle Agreement.

What is general application requested for?

The Confederation of Vocational Unions has requested general application of the minimum wage rate for distribution/short-distance transport with effect for both long-haul transport and short-distance distribution.

Long-haul transport has a separate wage system in the collective agreement that allows for variations in calculation of working hours on the basis of a fixed average, which in practice makes it possible to guarantee minimum wages according to short-distance distribution rates to long-haul transport drivers too. For this reason, the Confederation of Vocational Unions has not seen a need to request general application for the special wage system for long-haul transport.

The Confederation of Vocational Unions has also requested general application of the subsistence allowance rate to be paid in connection with transport assignments involving planned overnight stays.

General application has not been requested for the collective agreement's nuisance compensation for evening and nightwork and work on public holidays.

It follows from the claim that the Confederation of Vocational Unions holds the view that a general application decision in the form traditionally made by the Tariff Board would be in compliance with EEA law.

3. The Tariff Board

The Tariff Board is appointed and composed pursuant to the provisions of section 3 of the General Application Act. The Board is appointed by the King for a period of three years, and has five permanent members; a chairperson and two more neutral members, one member from the Norwegian Confederation of Trade Unions (LO) and one from the Confederation of Norwegian Enterprise (NHO). The Tariff Board was last appointed for the period from 1 June 2012 to 31 May 2015, and with regard to this matter has had the following composition:

- Judge Johan Kr. Øydegard (chair)
- Professor Steinar Holden
- Advocate Terese Smith Ulseth
- Head of Department Knut Bodding (LO)
- Advocate Margrethe Meder (NHO)
- Negotiator at YTF, Lin Andrea Gulbrandsen
- Secretary General of NLF, Per Madsen.

The Ministry of Labour and Social Affairs has responsibility for providing the Tariff Board's secretariat, and secretaries for this matter are Deputy Director General Eli Mette Jarbo and Senior Advisers Bodil Stueflaten and Ingrid Finsland.

The Tariff Board is an independent public administrative body, and the procedure of the Board is subject to the provisions of the Public Administration Act (see section 9 of the General Application Act). A decision concerning general application is almost without exception provided in the form of Regulations (see section 2, first paragraph, (c), of the Public Administration Act). In addition to the general provisions of the Public Administration Act, the special provisions of the Act concerning regulations shall apply, particularly chapter VII. The requirement regarding clarification of cases provided in section 37 of the Public Administration Act entails that Regulations must be circulated for consultation before they can be issued, nevertheless so that such review may take place in consultation meetings (see section 9 of the General Application Act).

The travaux préparatoires of the General Application Act require that the Tariff Board shall only make a decision concerning general application to the extent necessary for fulfilment of the purpose of the Act (Proposition No. 26 (1992–93) to the Odelsting, page 22).

4. The requirement regarding documentation

4.1 General

Pursuant to section 5 of the General Application Act, the Tariff Board may make a decision if it is documented that foreign workers perform or may perform work on terms that, based on a total assessment, are less favourable than those that apply

pursuant to nationwide collective agreements for the trade or industry concerned or what is otherwise normal for the place and occupation concerned.

The documentation requirement was somewhat amended by the Act of 19 June 2009 No. 42 without any intention of amending current law. The travaux préparatoires to the amendment act (Proposition to the Odelsting No. 88 (2008–2009) on amendments to the General Application Act, etc. (joint and several liability, etc.)) therefore refer to previous travaux préparatoires for further guidance concerning the contents of the documentation requirement. The requirements for accepting a case for consideration are stated in section 4, while the requirement regarding documentation prior to making a decision in a case is stated in section 5. Prior to the clarifications provided in the Act in 2009, it followed from the practice of the Board that the threshold for accepting a case for consideration was lower than that for fulfilment of the documentation requirement enabling the Tariff Board to make a decision.

Pursuant to the Act, it is sufficient that it is shown to be highly probable that, in the collective agreement area concerned, there are foreign workers with terms of wages and employment that are not equivalent to those enjoyed by Norwegian workers. A requirement of qualified probability cannot be applied. It is required that it appears to the Board to be more probable that the conditions of the Act are satisfied than that they are not. However, the Board's assessment must be based on concrete information that the Board, following an overall assessment, finds that it is able to adopt as a basis.

It is not a requirement of the Act that intervention by the Board shall be dependent upon the foreign workers' terms of wages and employment being substantially less favourable than those of comparable Norwegian workers, that the difference shall be unfair or that such discrimination shall apply to a large number of workers. However, if the problem appears slight, the Board may, following an overall assessment, find that a decision concerning general application does not appear necessary for promotion of the purpose of the Act.

In the Proposition to the Odelsting No. 26 (1992–93) it was assumed that the Tariff Board may make decisions not only in those cases where concrete examples show that problems have already arisen but also in cases where it can be assumed that such problems are imminent. In such cases, it will be sufficient that such a development appears highly probable. This is also reflected by section 5 of the General Application Act, where it is stated that the Tariff Board may make such a decision if it "is documented that foreign employees perform or may perform work on terms that, based on a total assessment, are less favourable than those that apply pursuant to nationwide collective agreements for the trade or industry concerned, or what is otherwise normal for the place and occupation concerned." For further information on the documentation requirement, see Proposition No. 88 to the Odelsting No. 88 (2008-2009), chapter 3.2, page 19 ff.

In principle, it is the party that claims general application of a collective agreement that is required to provide sufficient information for the Board to find grounds for initiating its own investigations. However, in practice, it is, almost without exception, the employers who possess the relevant documentation. Workers and their organisations do not have access to information concerning the terms of wages and

employment of other employees, and are dependent on the cooperation of the employers in obtaining such information. If the employer does not cooperate, it is not possible for the employees' organisation to document in writing the information that may have been received orally.

The employer and any person managing the undertaking in the employer's stead are obliged to provide information to the Board (see section 10 of the General Application Act). Failure to comply with this obligation is a punishable offence (see section 15 of the General Application Act). If the employer fails to cooperate in providing information concerning the case, the Board will proceed on the basis of the documentation provided by the employee side. Whether insufficient documentation is to be accorded such significance in individual cases, must be dependent on a concrete overall assessment.

The Tariff Board finds that a large number of foreign workers have been registered in Norway. This particularly concerns workers from Poland and the Baltic countries. Reference is also made to the existence of regulations concerning general application in the building and construction sector, the maritime construction industry, the agriculture and horticulture sectors, private cleaning services, the fish processing industry and the electrical trades.

4.2 The documentation enclosed with the claim

All the documentation that accompanied the claim was enclosed with the Tariff Board's request for comments.

The claim refers to the lack of any comprehensive study and comparison of the terms of wages and employment of haulage vehicle drivers in Norway. A number of small investigations, individual studies and cases cited in the media have therefore been enclosed, as well as an EU study², which reveals that there are strong pressures on terms of wages and employment in transport companies in the EU and that a number of companies are involved in social dumping. Although the study does not include Norway, it is nevertheless stated to be relevant since European drivers and companies are engaged in freight transport in Norway.

On the basis of available data, YTF has prepared wage statistics showing considerable variation between EU countries with regard to wage levels and terms of employment in the sector. Particularly great variation is found between Eastern European countries and Norway.

Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] carried out an interview survey at Svinesund during the period from 1–3 July 2014, where they questioned over 500 haulage vehicle drivers on their way into Norway concerning their terms of wages and employment. Most of the informants were foreign workers, many from the new EU countries, particularly Poland. According to YTF, the survey showed, that the foreign drivers had far less favourable wage conditions than were usual in Norway. Of those questioned, 23.2 per cent earned EUR 1 000 or less per

² European Parliament, Directorate General for Internal Policies: Social and working conditions of road transport hauliers. A study from 2013

month, which corresponds to a monthly wage of NOK 7 300 or less. The survey also showed that 41 per cent of the Norwegian-registered vehicles had foreign drivers.

The claim refers to and presents investigations and media reports showing it to be normal that foreign workers who drive in Norway receive the terms of wages and employment that are normal in their home countries. It is referred to as normal for drivers to earn EUR 1 000 per month. Cases are also referred to where drivers cannot afford to buy food in Norway, but must bring food with them from their home countries, and where employees of the Public Roads Administration have had to buy food for drivers who have been stranded in Norway owing to a lack of equipment or for other reasons because the driver has had no money.

In 2013, the Ministry of Transport and Communications appointed a Working Group on Cabotage with representatives from relevant organisations and road transport authorities. The report on cabotage on Norwegian roads was issued on 26 March 2014. Despite the lack or deficiency of official statistics, there was agreement, on the basis of the sources used by the working group, that cabotage is on the increase in Norway. However, the members of the working group had differing views concerning the consequences of unlawful passenger and freight cabotage. The members from Norsk Transportarbeiderforbund (NTF) [Norwegian Transport Workers' Union], Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] and Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] regard freight cabotage as the foremost threat to the Norwegian road haulage sector. These members and the members from Spekter and NHO Transport stress the disparities in the terms of wages and employment between Norwegian and foreign passenger and freight transporters, and hold the view that these disparities result in a loss of market shares and Norwegian jobs. The representative from NHO Logistikk og Transport [the Norwegian Logistics and Freight Association] also believed cabotage traffic to be on the increase, but that it was modest compared with the total domestic transport market, and that the current domestic market is not significantly disturbed by cabotage.

FAFO Paper 2013:16: *Arbeidsforhold i vegsektoren* [Employment conditions in the road transport sector], prepared by the Institute of Applied Social Science and the Institute of Transport Economics in cooperation, concludes that there is broad agreement between the employer and employee sides and the Norwegian Labour Inspection Authority that some parts of the land-based transport sector face a number of challenges as a result of changes in rules and increased international competition during the last 20 years. The report was prepared on the basis of a pilot project set up to investigate employment conditions in the road transport sector. According to the report, it will be important to conduct a deeper analysis of the areas raised in the report in order to establish a point of departure for considering the need for measures to create a common view of the world between the parties in the sector.

5. Consultation round

5.1 Request for comments

On 14 January 2015, the Tariff Board circulated for comments the draft regulations on general application of the collective agreement concerning freight transport by road to the parties to the collective agreement, other representatives of the social partners, certain affected ministries and other organisations considered likely to be interested in

contributing input to the question of whether there is a basis for general application and to the draft regulations. The request for comments was published on the Internet.

In the consultation paper, the Board made it clear that it had not reached any conclusions regarding whether the conditions for general application were met in this case. The Board made it known that the consultation round would be able to provide further information and thus provide a better basis for a decision on this matter.

Replies were received from the following commenting bodies:

- Arbeidsgiverforeningen Spekter [Employer's Association Spekter]
- Arbeidstilsynet [Norwegian Labour Inspection Authority]
- Fagforbundet [Norwegian Union of Municipal and General Employees]
- Finansdepartementet [Ministry of Finance]
- Landsorganisasjonen i Norge (LO) [Norwegian Confederation of Trade Unions]
- Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association]
- Norsk Industri [Federation of Norwegian Industries]
- Næringslivets Hovedorganisasjon [Confederation of Norwegian Enterprise]
- NHO Logistikk og Transport [Norwegian Logistics and Freight Association]
- NHO Transport
- Parat
- TIA Norge [Truckers International Association Norway]
- The Ministry of Transport and Communications (no comments received)
- Unio [Confederation of Unions for Professionals]
- Virke [The Enterprise Federation of Norway]
- Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees]
- Justis- og beredskapsdepartementet [Ministry of Justice and Public Security] (no comments received)

5.2 Comments of the commenting bodies – summary

The Norwegian Confederation of Trade Unions (LO) has no comments beyond what is stated in the claim.

Yrkestrafikkforbundet (YTF) [the Union of Norwegian Transport Employees] supports the claim from the Norwegian Confederation of Trade Unions concerning application of their corresponding agreement. Reference is also made to the report of the Institute of Applied Social Science/the Institute of Transport Economics "*Arbeidsforhold i gods og turbil*" [*Working Conditions in the Road Transport Sector*], which was published after the claim was submitted, and which draws attention to considerable wage differences between Norwegian and foreign goods vehicle drivers. The report also refers to Germany's introduction of a minimum wage for all work performed in Germany, including cabotage and international transport.

YTF supports the Tariff Board's proposed regulations. It refers to the fact that general application makes low-wage competition unlawful, and is thus a major instrument for combating the development of an asocial and unregulated labour market. Sufficient resources must be set aside for enforcement.

Parat supports the Confederation of Vocational Unions' claim for general application.

Unio [the Confederation of Unions for Professionals] supports the claims for general application, and finds the grounds and the documentation submitted to be sufficient. Unio wishes prevention of a two-tier labour market, where foreign drivers on transport assignments in Norway work more or less unregistered and on unacceptable terms of wages and employment. A clear framework is therefore needed to regulate this employment. In Unio's view, general application forms part of such a framework, and plays an important role in combating extremely low wages in the exposed sectors. Unio believes that it will be possible to carry out effective controls at border crossings, lay-bys, ports, large freight forwarding centres, etc.

The Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] supports the proposed general application on certain conditions. If the minimum wage rate and the subsistence allowance rate are to function as intended, effective control measures will be necessary. In NLF's view, the obligation to ensure compliance and joint and several liability must be laid down in regulations. A register should be implemented enabling the Norwegian Labour Inspection Authority and other authorities to conduct effective controls of contractors and foreign undertakings.

In the view of NHO, protection of foreign workers is the guiding principle behind the general application arrangement, and pure competition considerations cannot form the basis for general application. According to NHO, the documentation is too weak. It points out that international transport is carried out by *mobile*, rather than *posted* workers. It draws attention to the challenges involved in exercising controls in connection with a general application decision. If there is no real possibility of follow-up, the Board should not make such a decision. NHO calls for a broader assessment of the EEA law aspects of a general application decision.

In *NHO Transport's* view, there is no doubt that a number of drivers have unacceptable terms of wages and employment in connection with assignments in Norway. NHO Transport wishes well-ordered conditions in the Norwegian freight transport sector, and supports general application of the wage conditions in the Haulage Vehicle Agreement. On the basis of current legislation, general application appears to be the only available instrument for creating more equal conditions of competition. However, the positive attitude of NHO Transport to general application in the goods transport sector is subject to two conditions: (1) that effective enforcement and sanctions are ensured and (2) that the scope of the general application is limited to international transport. It is assumed that the outlined wage models and specific minimum rates are also included in any general application regulations so that the current wage system for long-haul transport can be upheld. We also request the Tariff Board to conduct a closer assessment of the justification for the laying down in regulations of coverage of subsistence expenses and requirements regarding lodging.

NHO Logistikk og Transport [the Norwegian Logistics and Freight Association] advises against making the wage rates for haulage vehicle drivers generally applicable. It is the view of the Association that pure competition considerations cannot be a basis for general application. The Association also questions whether Norway is at all entitled to make Norwegian wage rates for foreign drivers generally

applicable. Foreign drivers are not *posted* to Norway; they are *mobile* workers. The documentation for this matter is too weak. The cabotage market is limited. A deficiency of the claim is that no account is given of how transport in and to and from Norway is organised. Most international assignments involve spending only a few hours in Norway, and it would be unreasonable and impractical to impose general application for this part of the journey. Owing to low unionisation, only a few Norwegian drivers have standard wage rates subject to the collective agreement.

Norsk Industri [The Federation of Norwegian Industries] concurs in the statement from Næringslivets Hovedorganisasjon [the Confederation of Norwegian Enterprise].

TIA Norge (Truckers International Norway) advises strongly against general application. TIA Norge recommends that a broadly composed committee be set up to investigate the whole issue of cabotage and social dumping in order to put an end to disgraceful conditions in the sector.

In the view of the Virke [the Enterprise Federation of Norway], it has not been documented that the conditions for general application are met. The Federation points out that proportional and appropriate restrictions can be permitted when there are overriding reasons of public interest. Virke does not find it proved that there are overriding reasons in this case, and does not consider general application to be an appropriate measure in this sector.

The Employer's Association Spekter does not support general application in the sector. It points out that it is not documented that foreign drivers are to any great extent employed in Norwegian companies on less favourable terms of wages and employment than Norwegian drivers. The general application proposal therefore appears primarily to be motivated by considerations regarding competition regulation. Enforcement of general application would be very demanding. It is also pointed out that the matter has EEA law aspects (see the paper from BA-HR).

The Norwegian Labour Inspection Authority considers that general application would provide the agency with an effective instrument for controlling foreign drivers and for preventing them from being subjected to less favourable terms of wages and employment than Norwegian drivers. Experience of inspections carried out in cooperation with the Norwegian Public Roads Administration and contact with Norwegian actors and organisations in the sector indicate increasing competition from foreign actors and undertakings using employed or hired drivers with far less favourable terms of wages and employment than are usual in Norway. General application would enable the agency to oversee whether orderers of transport and forwarding companies have established routines documenting compliance with the obligation to provide information, and whether arrangements have been established to control compliance with the general application regulations. The authority has comments on the draft regulations.

The Ministry of Finance points out that, in sectors with a low level of unionisation, general application may result in an increase in the wage level in non-unionised enterprises, and this would also apply to Norwegian workers. The Ministry of Finance draws attention to poor quality and a major lack of relevant statistics, which are pervasive features of the sector and which the Tariff Board should be particularly

aware of when assessing whether general application is an expedient measure for the problems revealed. The Ministry also draws attention to the challenges regarding control and compliance.

The Ministry of Justice and Public Security and the Ministry of Transport and Communications submitted no comments.

6 Other documentation

6.1 Fafo-report 2014:58 Arbeidsforhold i gods og turbil [Working Conditions in the Road Transport Sector]

The report was prepared by the Institute of Applied Social Science (Fafo) and the Institute of Transport Economics (TØI). The purpose of the project was to provide more knowledge on the challenges and problems facing the road transport sector, and to indicate necessary future measures. As in the case of the pilot project (Fafo-paper 2013:16), the report of this project concluded that there is broad agreement between the employer and employee sides that the land-based transport sector has faced a number of challenges as a result of increased international competition during recent decades. Both employers and workers in the sector are concerned about irresponsible use of foreign labour by undertakings in order to put pressure on terms of wages and employment.

7. The Tariff Board's assessments and conclusion

The Tariff Board is concerned to ensure that general application shall not be more extensive than necessary for fulfilment of the purpose of the General Application Act and to stay within the framework of EEA law.

On the basis of an overall assessment of the documentation enclosed with the claim and other information concerning this matter, the Tariff Board's majority, the members Øydegard, Holden, Smith Ulseth, Bodding, Gulbrandsen and Madsen find it substantiated that foreign workers who perform freight transport by road in Norway have terms of wages and employment which, based on a total assessment, are less favourable than those that apply to Norwegian workers. On the basis of the facts adopted, the majority find that general application is a necessary and appropriate measure for safeguarding the purpose of the Act. The conditions for general application for these groups are thus met (see section 5 of the General Application Act).

The Tariff Board's minority, the member Meder, does not support general application, and finds reason to draw attention to some salient factors.

The minority points out that the Tariff Board may decide on general application "if it is documented that foreign workers perform or may perform work on terms that, based on a total assessment, are less favourable than those that apply pursuant to nationwide collective agreements ..." (see section 5 of the General Application Act). The Tariff Board must therefore make a discretionary assessment of the question of general application. In this assessment, the extent of the work affected by section 5 will be a major factor. In the view of the minority, the Tariff Board must assess whether a decision will function according to intentions, and whether it is necessary

and proportional. In the present case, this assessment is particularly important owing to the distinctive character of the transport sector, where the work and its performance is by its nature mobile. It is not for the most part a question of posting of labour by foreign undertakings.

The member Meder holds the view that, for the reason stated above, there is no basis for general application. The guiding principle of a general application decision is to protect foreign workers who reside in Norway for a period. Although it may be argued that foreign drivers work in Norway on less favourable terms than those laid down in the current Norwegian collective agreements, the Tariff Board has little concrete knowledge of the extent and duration of such work. It is not clear what proportion of foreign drivers are engaged in international transport, which the decision is not in principle intended to affect (see the comments of the majority under "Scope"). Nor has it been possible to clarify the extent of cabotage (see also the quotation from the report of the Cabotage group 2013 (referred to in 4.2.)). However, it must be assumed that the legal right to cabotage is very limited. Moreover, the existing official statistical data shows that the extent is also very moderate, less than 2% (SSB 2012). Nor does the purpose of general application arrangements indicate general application out of regard for cabotage of short duration. As regards the conditions of foreign drivers employed in Norwegian undertakings, this does not seem to be of major importance to this claim.

In the view of the minority, a mutual understanding between the direct parties to the collective agreement that the sector has challenges cannot be ascribed decisive weight since the available documentation is so uncertain. It is moreover significant that NHO Logistikk [the Norwegian Logistics and Freight Association], which must be assumed to have considerable insight into the sector, does not share the interpretation presented in the claim. Furthermore, the minority wishes to stress that competition considerations cannot be the guiding principle for general application, and refers in this context to the statements concerning loss of market shares, etc. in the report on Cabotage quoted in 4.2.

The minority also wishes to stress strongly obvious challenges that lie in control of terms of wages and employment, and not least the challenges associated with enforcement of any orders issued. Several commenting bodies have drawn attention to this, including bodies that support general application. The Norwegian Labour Inspection Authority also points out challenges associated with enforcement, although the authority is positive to general application. The minority wishes otherwise to stress that control responsibilities cannot be passed on to private actors, and are expected to be carried out through the obligation to ensure compliance, etc.

Following an overall assessment, the minority holds the view that there are no grounds for general application in this case.

The minority also points out that the collective agreement's wage system in connection with long-haul transport requires a standard wage model with different rates for active and passive service. One of the actors on the employer side, NHO Transport, states explicitly that its support of general application is conditional upon the upholding of this model. In the view of the minority, it is fundamentally inappropriate to divert from the wage and wage system of the collective agreement

concerned, and in previous decisions the Tariff Board has been reluctant to do so, partly owing to potential wage pressure. However, the minority affirms that the direct parties to the collective agreement and parties to parallel agreements have not called attention to the risk of wage pressure.

Scope

The claims concern freight transport by road. However, the collective agreements on which the claims are based lack a clause specifying the scope of application. Since general application is not to be practised to a greater extent than necessary, the Tariff Board finds that the Regulations shall only apply to freight transport carried out by means of lorries and similar vehicles. In the Regulations, this is expressed by excluding transport carried out by vehicles with a gross vehicle weight of less than 3.5 tonnes. Courier services and goods delivery by means of passenger cars and light goods vehicles thus fall outside the scope of the Regulations.

The Tariff Board has furthermore considered the extent to which freight transport carried out by foreign undertakings in Norway shall be subject to the General Application Regulations. When foreign undertakings perform freight transport in Norway, it is normally in the form of cabotage or international transport.

By cabotage is meant transport where a transporter from one state is engaged in transport between two places within the territory of another state. Pursuant to EEA law, a transporter registered in another EU/EEA member state may carry out a maximum of three cabotage operations following an international journey to the host state, using the same vehicle and within a period of seven days following delivery of the international carriage in the host state.

By international transport is meant cross-border transport, typically transport from the home state of the transporter with a destination in another state.

In principle the Tariff Board does not wish international transport to be covered by the Regulations, both because it is not deemed appropriate and because it may in practice be difficult to control compliance.

The question regarding application of the General Application Regulations to foreign undertakings was particularly considered in the request for comments. The Tariff Board found there that the Posting of Workers Directive defines the framework for when terms of wages and employment may be made applicable to foreign undertakings performing services in Norway, and that the General Application Regulations which have been provided in compliance with the Directive are also in compliance with article 36 of the EEA agreement. Furthermore, the Tariff Board found that both cabotage and international transport in principle fall under the Posting of Workers Directive, provided that the individual transport assignment actually constitutes a transnational provision of services as defined in article 1 of the Posting of Workers Directive.

The Posting of Workers Directive applies to all undertakings in EU/EEA member states that, in connection with provision of services, post workers to another member state. According to article 1, the Directive applies when undertakings either post workers to the territory of a Member State on their account and under their direction,

under a contract concluded with a service recipient in another EU/EEA member state, or post workers to an establishment or to an undertaking owned by the group in the territory of another EU/EEA member state, or, being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of another EU/EEA member state. In all cases, it is required that there is an employment relationship between the undertaking making the posting and the worker during the period of posting.

The condition that the service provision must be subject to a contract concluded with a service recipient in the host country entails that both cabotage and international transport may fall under the Posting of Workers Directive in some cases and outside it in other cases. It is important to note that the condition regarding a service recipient is associated with the recipient of the transport service and not the recipient of the goods. Whether the transport service is categorised as cabotage or international transport is thus not decisive for the question of whether or not the Posting of Workers Directive is applicable. Against this background, the Tariff Board finds that it is not possible from a legal point of view to define the scope of the General Application Regulations solely on the basis of whether cabotage or international transport is involved.

The Tariff Board is concerned that the General Application Regulations must comply with the framework of EEA law. In this connection, the Tariff Board will refer to the proceedings instituted against Germany by the European Commission on the basis of the claim that the German minimum wage provisions are applied in the transport sector to a greater extent than allowed by the Posting of Workers Directive.

In order to ensure that the General Application Regulations do not exceed the limits imposed by the Posting of Workers Directive, the Tariff Board finds that the scope provision of the Regulations must cite the legal definition of posting of an employee provided in section 1-7 of the Working Environment Act.

In practice, cabotage assignments normally involve service provision on the basis of a contract with a service recipient in Norway, and thus fall under the definition provided in the Posting of Workers Directive as well as the General Application Regulations. This is normally the case when the transport assignment takes place between two places in Norway. However, cabotage assignments may also take place between two places in Norway although the orderer of the transport is established in another state. This may apply to undertakings that only act as agents in the provision of freight services. In connection with international transport assignments, there is more often no recipient of the transport service in Norway. In addition, international transport entails that the transporter spends relatively little time on Norwegian roads. However, this depends on where the border is crossed and on where the destination for the transport assignment is located.

The Tariff Board is aware that this way of formulating the scope of the Regulations may result in cases of doubt regarding whether a transport assignment falls under the Regulations. However, this is not viewed as particularly more marked than in other areas of the Norwegian labour market. The crucial factors are how the transport assignment is organised and who the recipient of the transport service is. It has been taken into account that the Norwegian Labour Inspection Authority is very familiar

with the assessment that must be made pursuant to section 1-7 of the Working Environment Act. In connection with supervision of compliance with the General Application Regulations, the Norwegian Labour Inspection Authority is authorised by section 11 of the General Application Act to demand information deemed necessary for performance of its inspection. Pursuant to Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market, implemented in Norwegian law by means of section 53 of the Professional Transport Regulations, certain documentation requirements are specified both for inbound international transport and subsequent cabotage assignments. The Tariff Board takes into account that the Norwegian Labour Inspection Authority may make use of this documentation in connection with its inspection activities.

In line with the Tariff Board's practice in previous cases, the General Application Regulations will not apply to apprentices and persons taking part in labour market schemes.

Wages

The Haulage Vehicle Agreement and the Agreement concerning Freight Transport distinguish between two types of transport: long-haul transport and short-distance distribution. Long-haul transport is defined as journeys involving planned overnight stays, and has a separate wage system in the collective agreements specifying different wage rates for active and passive service. However, in practice, this wage system entails that long-haul transport drivers are also guaranteed a minimum wage in accordance with the short-distance distribution rate. This is the reason why general application has only been claimed for the wage rate for short-distance distribution.

The Tariff Board has based its decision on the claim, and has given general application to the minimum wage rate for short-distance distribution for all workers who perform freight transport by road with vehicles with a gross vehicle weight of over 3.5 tonnes (see section 2 of the Regulations).

Subsistence allowance

The Board's majority, the members Øydegard, Holden, Smith Ulseth, Bodding, Gulbrandsen and Madsen point out that the subsistence allowance rate is intended to cover the drivers' additional costs associated with stays away from home. The subsistence allowance constitutes a major part of the remuneration of the drivers entitled to this allowance, also in the case of Norwegian workers. It is necessary to make the subsistence allowance rate laid down in the collective agreements generally applicable in order to ensure equal treatment of foreign and Norwegian drivers. The subsistence allowance rate is the only one of several special allowances in the agreements that have been made generally applicable.

The minority, the member Meder, observes that the purpose of general application must be to ensure an acceptable level as regards terms of wages and employment. General application of such an allowance is not perceived as necessary on the basis of the purpose of the Act.

8. Regulations on general application

8.1 Further information concerning the regulations

The Regulations have been drafted along largely the same lines as other General Application Regulations. At the same time, the Tariff Board would point out that relatively few provisions are made generally applicable by these Regulations.

In consistency with the claim, the Tariff Board has given general application to the agreement's minimum wage provision and a provision concerning subsistence allowance. However, the scope of the Regulations is narrower than was requested (see above under the Board's assessments and conclusions).

The Tariff Board finds that general application of these provisions of the agreement lies within the framework of what terms of wages and employment can be made generally applicable in accordance with the Posting of Workers Directive.

8.2. Comments to the individual provisions

Chapter I Introductory provisions

Re section 1 The basis for general application

In consistency with the claims from the Confederation of Vocational Unions and the Norwegian Confederation of Trade Unions, the Regulations have been laid down on the basis of the identical agreements: the Haulage Vehicle Agreement of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Confederation of Vocational Unions and Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] for the other part and the Agreement concerning Freight Transport of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Norwegian Confederation of Trade Unions/ Norsk Transportarbeiderforbund (NTF) [Norwegian Transport Workers' Union] for the other part. The Regulations concern few specific agreement provisions, but are nevertheless based on the agreements.

Re section 2 Scope and executive responsibility

The Regulations shall apply to all workers who perform freight transport with vehicles over 3.5 tonnes gross vehicle weight. The Regulations also apply to workers in foreign undertakings provided that the transport assignment is organised in a manner involving posting of workers as part of a temporary service provision, as defined in section 1-7 of the Working Environment Act. This requires that the recipient of the transport service is located in Norway. However, this does not apply in cases where the worker is posted to a company within the same group or is posted from a foreign temporary employment agency. Both cabotage and international transport may pursuant to this fall within the scope of the Regulations.

The Regulations will not apply to transport of the undertaking's own goods. The reason for this is that the agreements made generally applicable do not apply to such cases, and it is desirable that the Regulations and the agreements have the same scope in this area.

It is the employer that is subject to legislation pursuant to the Regulations.

Exceptions have been made for apprentices and persons taking part in labour market schemes.

Chapter II Terms of wages and employment

Re section 3 Provision concerning wages

The minimum wage rate given general application would apply to all drivers in Norway who fall within the scope of section 2, whether this concerns long-haul transport or short-distance distribution (see item 7 above concerning wages).

Working hours for transport are defined in accordance with section 5 of the Regulations of 10 June 2005 No. 543 concerning working hours for drivers and other workers in the road transport sector. A driver's working day consists of various different elements. In addition to driving time, there may also be time spent cleaning the vehicle, time spent carrying out technical maintenance and waiting time in connection with loading and unloading, etc.

Re section 4 Wage adjustments within the duration of these regulations

If the rates laid down in the agreement are amended within the duration of the regulations the Board may decide new minimum wage rates. The Board finds that amendment of the rates laid down in the Regulations normally takes place at the request of the parties.

Re section 5 Subsistence allowance

In connection with transport assignments involving planned overnight stays, subsistence allowance shall be paid in accordance with the rates approved at any time by the Norwegian authorities for tax-free subsistence allowance. Overnight stays are deemed to be planned if it is necessary to spend nights away from home as a result of instructions or in compliance with the requirements of the Regulations of 2 July 2007 concerning driving time and rest periods for drivers of road haulage and passenger transport vehicles in the EEA. The amount approved by the tax authorities for daily tax-free subsistence allowance is currently NOK 307. One-third of the subsistence allowance rate shall be paid for each eight-hour period commenced, a total of three-thirds for each 24-hour period.

Chapter III Derogation etc.

Re section 6 Derogation

This provision clarifies that which also follows from section 6, final paragraph, of the General Application Act that the terms of wages and employment laid down in these Regulations are minimum terms. If workers who fall within the scope of the Regulations already enjoy better terms according to individual agreements, collective agreements or other statutes or regulations that apply to the employment relationship, it is these terms that shall apply. It is further specified that terms of wages and employment shall, taken as a whole, be in compliance with the Regulations. This entails that employment relationships with terms of wages and employment that in one or more regards deviate from these regulations may nevertheless be in compliance with the regulations if, following a concrete assessment of all aspects of the employment relationship, it is concluded that, when taken as a whole, the terms are at least as favourable as the terms that follow from these regulations.

Chapter IV Commencement, etc.

Re section 7 Commencement and expiry

Regulations may as a rule enter into force at the earliest one month after the date they are published in the Norwegian Law Gazette (see section 39 of the Public Administration Act).

These regulations enter into force on 1 July 2015. From this date, they will apply to all undertakings and employment relationships that fall within the scope of the regulations, i.e. undertakings that have less favourable terms of wages and employment than apply pursuant to these regulations will be obliged to remunerate their employees in accordance with the new terms from this date.

The regulations shall cease to apply one month after the Haulage Vehicle Agreement 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Confederation of Vocational Unions (YS)/Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] for the other part and the Agreement concerning Freight Transport of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Norwegian Confederation of Trade Unions/ Norsk Transportarbeiderforbund (NTF) [Norwegian Transport Workers' Union] for the other part, are replaced by new agreements, or if the Tariff Board makes a new decision concerning general application on the basis of the same agreements.

Oslo, 11 May 2015,

Johan Kr. Øydegard

Steinar Holden
Ulseth

Terese Smith

Knut Bodding

Margrethe Meder

Lin-Andrea Gulbrandsen

Per Madsen

Regulations on general application of collective agreements concerning freight transport by road

Issued by the Tariff Board on 11 May 2015 pursuant to section 5 of the Act of 4 June 1993 No. 58 relating to general application of collective agreements, etc. (the General Application Act).

Chapter I. Introductory provisions

Section 1. The basis for general application

These regulations are laid down on the basis of the Haulage Vehicle Agreement of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Confederation of Vocational Unions and Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] for the other part and the Agreement concerning Freight Transport of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Norwegian Confederation of Trade Unions/ Norsk Transportarbeiderforbund (NTF) [Norwegian Transport Workers' Union] for the other part.

Section 2. Scope and executive responsibility

The Regulations apply to workers who carry out freight transport by road, using vehicles with a gross vehicle weight over 3.5 tonnes. For workers in enterprises established outside Norway, the Regulations only apply to the extent that the transport is a service provision pursuant to the Working Environment Act section 1-7 (*Posted workers*).

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

The employer and any person managing the undertaking in the employer's stead who perform tasks as referred to in the first paragraph shall ensure that the provisions of these regulations are complied with.

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

Chapter II. Terms of wages and employment

Section 3. Provision concerning wages

Workers who perform work in accordance with section 2, shall receive a minimum hourly wage of NOK 158,32.

Section 4. Wage adjustments within the duration of these regulations

The Tariff Board may amend the rate laid down in section 3 as a result of wage revisions.

Section 5. Subsistence allowance

In connection with transport assignments involving planned overnight stays, subsistence allowance shall be paid in accordance with the rates at any time approved by the authorities for tax-free subsistence allowance. One-third of the subsistence allowance rate shall be paid for each eight-hour period commenced.

Chapter III. Derogation etc.

Section 6. Derogation

The Regulations shall not apply if, pursuant to agreement or to the national law, the worker is covered by terms of wages and employment that otherwise apply to the employment relationship, which, taken as a whole, are more favourable.

Chapter IV. Commencement, etc.

Section 7. Commencement and expiry

These regulations enter into force on 1 July 2015.

These regulations shall cease to apply one month after the Haulage Vehicle Agreement of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Confederation of Vocational Unions and Yrkestrafikkforbundet (YTF) [Union of Norwegian Transport Employees] for the other part and the Agreement concerning Freight Transport of 2014 between Norges Lastebileier-Forbund (NLF) [Norwegian Hauliers Association] and its member enterprises bound by the agreement for the one part and the Norwegian Confederation of Trade Unions/ Norsk Transportarbeiderforbund (NTF) [Norwegian Transport Workers' Union] for the other part, are replaced by new collective agreements, or if the Tariff Board makes a new decision concerning general application of the collective agreements.