



October 30, 2009

Mr. Shafiq Qaadri
Chairperson
Standing Committee on Social Policy
c/o Mr. Katch Koch, Committee Clerk
99 Wellesley Street West, Room 1405
Whitney Block, Queen's Park
Toronto, ON
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Dear Mr. Qaadri,

RE: Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009

We thank you for the opportunity to provide submissions to the Committee regarding the amendments to the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("OHSA"), proposed by Bill 168. These submissions are provided on behalf of the Ontario public transit industry as represented by the Ontario Public Transit Association ("OPTA") and the Canadian Urban Transit Association ("CUTA").

Public transit services (conventional and specialized transit services) in Ontario provide over 800 million passenger trips per year, operating in excess of 455 million service hours, 365 days per year and an average of eighteen hours per day. The workplaces, for more than half of the approximately 21,000 transit employees in Ontario, are buses, streetcars and/or other public transit vehicles. It is in this context we provide the following submissions respecting Bill 168.

Submissions

Given the unique nature of public transit service, certain of the amendments to the OHSA proposed by Bill 168 have the potential to hinder the effective, efficient and safe provision of transit services and the growing expectations of and for public transit services in Ontario. All government levels recognize and accept that public transit is a key part of the urban transportation infrastructure, for its environmental value and benefit to the economy and the quality of life in urban centres.

For reasons set out in this presentation, the industry submits that Bill 168 should be amended as follows:

- The right to refuse work related to workplace violence be removed in its entirety from Bill 168;
- Alternatively, that transit workers be prohibited from refusing to work, on workplace violence grounds, while they are operating a transit vehicle;
- In the further alternative, that the right to refuse work on the basis of workplace violence ought to be limited to circumstances where a worker has reasonable grounds to believe that he or she is in imminent danger of physical injury;

- Domestic violence be removed from Bill 168;
- That the transit industry not be subject to the requirement for employers and supervisors to provide personal information about people with a history of violent behavior; and
- That the final requirements of Bill 168 be implemented over an 18 month period consisting of three phases, namely, policy development, hazard assessment and program implementation which would include training. During the 18 month implementation period stakeholders would be supported by detailed guidance material from the Ministry of Labour providing information regarding the interpretation, application and scope of the provisions of Bill 168.

The Transit Sector Is Unique

Public transit, in many respects is a unique industry. Transit employers operate what normally constitute dispersed workplaces in which a significant number of transit employees operate vehicles of various types on surface and underground routes. They provide the public with year-round, conventional (mass) transit defined by its routing and set schedules and specialized services defined for the most part as pre-booked origin to destination service. For many Ontarians, public transit services represent the primary means of transportation. Not only do these characteristics make the services provided unique as compared to other employers in Ontario, but they distinguish the services from those offered by other transportation providers such as taxis and limousines.

The unique nature and important service provided by public transit is already recognized by the OHSA. In particular, paragraph 51(2) (b) of the OHSA specifically permits the scene of a fatal or critical workplace injury to be disturbed to maintain a system of public transportation. Therefore, amending Bill 168 to address the unique nature of public transit services will not be a first and, in our view, is in keeping with the policy considerations underlying the existing exemption.

We would be remiss if we did not clarify that our comments and submissions are not to be construed that the transit industry is unconcerned about workplace violence. On the contrary, the industry has been very proactive in the continued development and implementation of a Violence Response Programs (VRP) which include such elements as violence in the workplace training (specific to the operating environment), tactical communication protocols, operational policies, and the use of technology and equipment all of which support the management and mitigation of violence in the workplace. In addition the industry, in concert with the Amalgamated Transit Union, has sought special sentencing provisions under the criminal code for those who assault a transit employee, which would, in our view, represent effective changes in the area.

The Right To Refuse Work

The proposed extension of the right to refuse work is very problematic for the transit industry given the unique nature of the services we provide. We note that no other jurisdiction in Canada has explicitly extended the right of a worker to refuse work to specifically include workplace violence grounds. In our view, this is not an oversight but recognition that extending the right to refuse work to workplace violence grounds is fraught with problems for both the workplace parties and the regulator. Indeed, of all of the amendments to the OHSA proposed by Bill 168, extending the right to refuse work to include workplace violence grounds has the greatest potential for significant and detrimental impact on the efficiency, effectiveness and overall safety of the delivery of public transit services.

As noted, the majority of transit workers operate transit vehicles. Work refusals by transit vehicle operators are immediately and highly disruptive because:

- passengers on and waiting for an involved transit vehicle are delayed;
- portions of subway or streetcar routes may become impassable by other transit vehicles thereby causing further service delays;
- traffic flow in the area of the refusal may be impeded by an involved transit vehicle;
- additional resources, operators and vehicles, must be engaged to remedy the service interruption;

- the potential distance workplace personnel assigned to investigate the work refusal have to travel
- workplace personnel assigned to investigate the work refusal may be prevented from completing a meaningful investigation should the violent incident give rise to having to involve first responders ; and
- as proposed in Bill 168, provision to leave the workstation (bus) at a stage 1 refusal, without limiting the circumstances in which this could occur, will further add to the disruption to service and problematic and protracted investigations of work refusals.

Extending the right to refuse work to include workplace violence issues creates a meaningful risk that workers will improperly exercise or, worse, potentially abuse the right. Transit employers have already experienced serious service disruptions from work refusals exercised for reasons unrelated to genuine health and safety concerns. Including workplace violence as a ground for a work refusal increases the exposure/opportunity for further unwarranted disruptions. Indeed, the proposed amendment to the OHS Act may mean transit systems experience an increased number of work refusals than other industries because:

- workplace violence cannot be defined in terms of form or location;
- transit services involve a high degree of interaction between workers and the public; and
- transit workers work alone and/or in transit vehicles over which our members exercise a diminished level of control and are less able to immediately respond to incidents of workplace violence.

When coupled with the subjective and low threshold for a worker to initially refuse work (i.e. the worker "has reason to believe" his or her health and safety is endangered versus the reasonable person test applied after the employer has investigated the work refusal), employers in the transit sector may be confronted with workers refusing to work for a variety of reasons based on alleged workplace violence risks.

Transit employers' ability to respond to such abuse by discipline will prove challenging. Current jurisprudence under the OHS Act permits workers to be wrong and, potentially, unreasonable in their assessment of risk. Therefore, disciplining a worker for exercising a health and safety right, even one exercised in bad faith, creates the potential for reprisal allegations which will require our members to bear the costs associated with responding to such allegations.

In addition, the extension of the right to refuse work will also create difficulties for workers who may innocently misapply the right. Under Bill 168, the definition of workplace violence does not include threats of violence. Therefore, the right to refuse work would not be triggered by the threatened use of physical force. This legal distinction may not be readily understood by workers who may find it a difficult concept to reconcile with their right to refuse work upon belief that they are likely to be endangered by workplace violence.

Both the potential abusive and/or innocent misapplication of the right to refuse work have the potential to occupy additional resources from the Ministry of Labour as inspectors would be called upon to determine whether the circumstances of a workplace violence work refusal are likely to endanger. As transit systems provide service outside of traditional business hours, it may be the on-call inspector who is tasked with responding which may mean additional costs are borne by the Ministry of Labour. Should an on-call inspector be required to respond, it could mean a greater delay in resolving a work refusal as the inspector may have to travel some distance to reach the scene of the work refusal.

We would also note that exposing the MOL inspector to a situation where violent action has occurred or is imminent may present a new risk as it may for workplace investigators to the work refusal.

Finally, the proposed change to a refusing worker's obligation to remain on standby could also hinder the efficient resolution of a work refusal exercised on workplace violence grounds. As noted the investigation of a work refusal could become much more difficult and protracted as the worker, and

potentially the workplace, may not be at the involved location. This may make it more difficult to access potential witnesses and would clearly impact the ability to service customers affected by a work refusal.

In our view, the right to refuse work is not the best means of addressing a worker's concerns about workplace violence risks. As previously noted above, there are various mechanisms, contained in our members' VRP, that are more appropriate for addressing a worker's concerns about workplace violence risks. Indeed, other amendments proposed by Bill 168, such as workplace risk assessments, are also more appropriate, as such assessments continue to support development and enhancement of existing mechanisms. We submit that workplace violence incidents are best managed through the immediate response mechanisms as set out in many VRP or, where a worker raises an issue proactively, through the Joint Health and Safety Committee (JHSC). For risks requiring an immediate response, a work refusal will not provide the immediate protection necessary while for proactive concerns the involvement of the JHSC will allow for a considered review and resolution of an issue by the workplace parties.

In light of the foregoing, OPTA and CUTA submit that the right to refuse work should not be extended to workplace violence issues as proposed. Existing VRP already exist to address any risks or incidents of workplace violence. Alternatively, a transit worker should be prohibited from refusing to work on workplace violence grounds while operating a transit vehicle. In the further alternative, the right to refuse work on workplace violence grounds should only be available where the worker has reasonable grounds to believe he or she is in imminent danger of physical injury. In our submission, such changes would recognize the unique nature of transit services while also respecting the intent behind Bill 168.

Providing Personal Information

OPTA and CUTA further submit that Ontario should not amend the OHSA to statutorily compel employers and supervisors to provide personal information about people with a history of violent behaviour to workers. There are a number of reasons for the industry's position. First, the draft provision, contained in subsection 32.0.5(3) of Bill 168, provides no guidance on the type of conduct that would constitute a "history of violent behaviour" that would "likely expose the worker to physical injury" and thereby require an employer and/or supervisor to disclose the information. With the spectre of being judged by hindsight, employers and supervisors will be forced to err on the side of disclosing information regarding people workers may encounter in the course of their duties. This may require transit employers and supervisors to disseminate information about a subject worker to other workers regarding criminal charges or convictions for violent behavior which is minor, isolated, and had no relationship to the workplace. There is also no temporal guidance provided which means that personal information that had previously been kept private by transit sector employers and supervisors must now be disseminated in order to comply with their statutory obligations. More problematic is how one determines and provides such information as it relates to the passengers of the service.

In addition, many transit systems provide special or assisted transportation services for those with physical limitations. Given the special nature of these services our members and their supervisors may become better acquainted with the customer who uses the special services than they would an ordinary transit user. As such, our members may be in the position of providing information about a customer to its workers if they become aware of some prior violent conduct. Naturally, this has the potential to strain the relationship between transit systems and their customers.

One of the implications of this provision is its potential to negatively impact workplace and community morale. We note this potential because Bill 168 restricts the amount of information that may be conveyed by the employer or supervisor to that reasonably necessary to protect a worker. It does not, however, place any restriction on the subsequent dissemination of that information by the receiving worker. As such, personal information provided by the employer in compliance with its OHSA duties could augment workplace or community gossip, thereby straining relationships in our members' workplaces and in the community at large. The potential for the unrestrained dissemination of such sensitive information is antithetical to recognizing it as personal information requiring statutory permission for its dissemination in the first place.

Further, as with the right to refuse work, our submission is that this provision is unnecessary to protect workers from workplace violence. The protection it seeks to afford would be attained through the VRP which provides mechanisms for the immediate response to workplace violence incidents and assess the workplace for violence risks – which would include the risks arising from working with the public.

Domestic Violence

The implementation of Bill 168 would make Ontario the only Canadian jurisdiction to make employers responsible for controlling domestic violence threats. Again, this proposed amendment to the OHSA will present immense challenges to our members because of the nature of their operations. Workers may be working in a location where our members exercise a reduced level of control and are, therefore, not best positioned to respond to such risks. Moreover, Bill 168 requires our members to “take every precaution reasonable in the circumstances” to respond to a domestic violence risk. This is a very high standard and is one that can be applied retrospectively. As such, an alleged domestic violence risk may require transit employers to make significant changes to a worker’s duties and location of work for an indefinite period of time while the “risk” remains. This alone will be very disruptive to operations and that potential disruption is made ever more likely because domestic violence is not a defined term in Bill 168. Given the traditionally broad interpretation applied to the OHSA, in our view, it is likely that domestic violence will come to mean a risk of physical injury from any person known to a worker – essentially anyone who is neither a stranger nor co-worker – which could include a spouse, common-law partner, boyfriend, girlfriend, relative (either blood or marriage), friend, or a person acting on behalf of any of these people. Holding an employer to such a high standard where the potential risks are vast, creates an enormous and unnecessary challenge. Introducing domestic violence into the OHSA is unnecessary given that, as employers, our members are not in the best position to respond to domestic violence risks however they may be defined. That has been, and should remain, the responsibility of the police who have the training and equipment necessary to properly respond to domestic violence wherever it may occur.

Finally, including domestic violence in Bill 168 will require our members to disclose a very personal and private issue to many members of their workplaces in order to comply with their obligation to take every precaution reasonable in the circumstances and to provide personal information regarding workplace violence risks. As noted above, the requirement to disseminate personal information contained in Bill 168 already creates the potential to undermine workplace morale. This becomes even more probable if our members will be required to reveal the intimate details of a worker’s home life to his or her colleagues.

Therefore, we submit that the application of the OHSA should not be extended to include domestic violence risks and this potential amendment should be removed from Bill 168.

Compliance Time Frames

Requirement to have the requirements of Bill 168 implemented within a six month time frame is considered unreasonable particularly when one considers the impact of other legislative requirements that have or are in the process of being adopted e.g. The Accessibility for Ontarians with Disability Act.

OPTA and CUTA proposes an 18 month implementation period consisting of three phases namely:

1. policy development;
2. hazard assessment; and
3. program implementation which includes applicable training.

The 18 month implementation period would be supported by the Ministry of Labour providing detailed guidance materials regarding the interpretation, application and scope of the provisions of Bill 168.

Conclusion

Several of the amendments to the OHSA proposed by Bill 168 will have a significant impact on the transit sector given its unique operations. However, many of these same proposals will detrimentally impact not only transit employers but employers in all sectors. We urge this Committee to consider the negative impact that expanding the right to refuse work, compelling the disclosure of personal information and expanding the application of the OHSA to domestic violence issues will have during its deliberation on Bill 168. None of these changes are necessary given the existing structures in the OHSA, Bill 168 and existing mechanisms.

We trust our submissions have been of assistance to the Committee and, again, thank you for the opportunity to have made them. Should the Committee have any questions about our submissions or require clarification of any points raised, please do not hesitate to contact the undersigned.

Yours truly,



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Chair
OPTA



Larry E. Ducharme
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