International Civil Aviation Organization

DGP/25-WP/44
3/9/15

WORKING PAPER

DANGEROUS GOODS PANEL (DGP)

TWENTY-FIFTH MEETING

Montréal, 19 to 30 October 2015

Agenda Item 2: Development of recommendations for amendments to the *Technical Instructions for the Safe Transport of Dangerous Goods by Air* (Doc 9284) for incorporation in the 2017-2018 Edition

REQUEST FOR LEGAL ADVICE ON APPLICABILITY OF ANNEX 18 AND THE TECHNICAL INSTRUCTIONS

(Presented by R McLachlan)

SUMMARY

This working paper seeks further legal opinion from the ICAO legal bureau on the subject of applicability of Annex 18 and the Technical Instructions to persons who do not intentionally handle dangerous goods.

Action by the DGP: The DGP is invited to request the secretary seek further legal guidance from ICAO's Legal Bureau

1. INTRODUCTION

1.1 At DGP-WG/15, the subject of competency based training was discussed (see DGP WG/15-WP/30 and paragraph 3.6.1.5 of the Report of DGP-WG/15). As part of those discussions, it was noted that Part 1; Chapter 4.1.1f) of the Technical Instructions requires freight forwarders to establish and maintain initial and recurrent dangerous goods training programmes. This subject was discussed further during the competency based training working group meeting held in Rio de Janeiro in August 2015.

1.2 In some States, it is understood that this requirement applies to all freight forwarders processing cargo for air transport, whether or not the freight forwarder permits their customers (i.e. shippers, ranging from large companies to small companies and members of the public) to include dangerous goods within that cargo. However, some other States believe that the requirements of the Technical Instructions and Annex 18 can only apply to those freight forwarders who knowingly process dangerous goods.

1.3 Freight forwarders play a vital role in preventing undeclared dangerous goods from being delivered to the airport for loading on an aircraft; typically, undeclared dangerous goods are generally also not packed in accordance with the detailed requirements of the Technical Instructions and therefore pose a higher risk to the safety of an aircraft than dangerous goods that are fully in accordance with the Technical Instructions.

1.4 In the experience of the panel member from the United Kingdom, freight forwarders normally require their customers to describe the contents of the cargo that they wish to ship so that the freight forwarder can complete the relevant cargo documents in order for the cargo to be transported. The freight forwarder will normally receive documents from the shipper such as invoices and packing lists which will accompany the consignment and some freight forwarders will speak to customers by telephone or in person to arrange shipment of the cargo, at which time the type of cargo is also normally discussed.

1.5 If the employees of a freight forwarder that has a policy of not processing dangerous goods have no knowledge of what dangerous goods are nor the type of every-day descriptions of cargo that are clear indicators that dangerous goods may be present in a consignment, then it is not possible for the freight forwarder to advise their customers accordingly nor to intercept them during handling. Knowledge of at least the basic principles of the dangerous goods requirements for air transport are therefore an essential part of preventing undeclared dangerous goods from being included in general cargo.

1.6 Chapter 10 of Annex 18 requires that ‘Dangerous goods training programmes shall be established and updated as provided for in the Technical Instructions’.

1.7 The term ‘freight forwarder’ is not defined in Annex 18, nor are freight forwarders referred to within that document. However, Part 1; Chapter 3.1.1 of the Technical Instructions defines the term ‘freight forwarder’ as ‘a person or organization who offers the service of arranging the transport of cargo by air’. It should be noted that the term ‘handling agent’ is also not defined nor referred to in Annex 18 and some handling agents only handle operators that do not carry dangerous goods.

1.8 Part 1; Chapter 4.1.1 f) of the Technical Instructions specifically requires initial and recurrent dangerous goods training programmes to be established and maintained by or on behalf of freight forwarders.

1.9 Currently, Table 1-4 of the Technical Instructions indicates the content of training courses for most categories of personnel. Category 3 relates to ‘Staff of freight forwarders involved in processing dangerous goods’; Category 4 is for Staff of freight forwarders involved in processing cargo or mail (other than dangerous goods) and Category 5 is for Staff of freight forwarders involved in the handling, storage and loading of cargo or mail.

1.10 When this subject was discussed at DGP-WG/15, the secretary suggested the need for legal advice on the matter and this was subsequently sought from the ICAO Legal Bureau in June 2015. A copy of this request is at Appendix A.

1.11 The response was subsequently received from the Legal Bureau and forwarded to the members of the competency based training working group meeting since it was important for their discussions. A copy of the advice is at Appendix B.

1.12 Unfortunately, as commented on by some other members of the competency based training working group, whilst the advice referred to paragraph 2.1.1 (General Applicability) of Annex 18, much of the response was based on the text of Paragraph 2.6 of Annex 18, on the basis that the

latter contains a recommendation on the surface transport of dangerous goods. There was no reference to Chapter 10 of Annex 18 in the response.

1.13 It is suggested that paragraph 2.6 of Annex 18 is unrelated to the question submitted to the Legal Bureau in that it purely recommends that where dangerous goods are prepared in accordance with the Technical Instructions, States should enable them to also move by surface transport as part of their journey. This is because in some instances the requirements for the other transport modes differ from those of the Technical Instructions and not permitting their movement would interrupt shipments of dangerous goods unnecessarily.

2. ACTION BY THE DGP

2.1 The DGP is invited to discuss the advice from the ICAO Legal Bureau and request the Secretary to seek further advice in light of the information in this working paper.

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APPENDIX A

REQUEST FOR LEGAL GUIDANCE FROM THE AIR NAVIGATION BUREAU (17 JUNE 2015)

INTER-OFFICE MEMORANDUM

Ref.: SP 34/1 - CSS56422

To: D/LEB

JUN 17 2015

cc: DD/SAF

From: D/ANB

Subject: **Request for Legal Interpretation on Scope of Annex 18**

At the Dangerous Goods Panel (DGP) working group meeting in April 2015 it was decided there was a need for legal advice in relation to training of entities involved with handling non-dangerous goods cargo. It was queried if requiring training for these entities was beyond the scope of Annex 18 — *The Safe Transport of Dangerous Goods by Air* and the *Technical Instructions for the Safe Transport of Dangerous Goods by Air* (Doc 9284). A working group by correspondence has requested that a formal legal interpretation be provided on the above issue (see the Attachment to this memorandum for the specific question together with background information).

I would be most grateful if you could provide us with such an interpretation by 3 July 2015. This will then permit further consideration by those DGP members tasked with finalizing the training requirements for submission to DGP/25.

Stephen P. Creamer

Enclosure:

Question regarding scope of Annex 18 and the *Technical Instructions for the Safe Transport of Dangerous Goods by Air* in relation to training

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ATTACHMENT

The Dangerous Goods Panel (DGP) has been reviewing training requirements and amending them to reflect a competency based approach. This has resulted in some panel members questioning the inclusion of freight forwarders and other persons in the cargo/mail/passengers' baggage supply chain that do not handle dangerous goods. At DGP/19 in 2003, the ICAO Legal Bureau advised that, in their preliminary view, the Technical Instructions could address any persons who might be involved in the transport of dangerous goods, and that could be interpreted as including cargo acceptance staff who did not normally accept dangerous goods but who should nevertheless be on the lookout for dangerous goods processed as general cargo. The relevant extract from DGP/19 is presented below. Based on this advice, freight forwarders not handling dangerous goods were included into the Table 1-4 (dangerous goods training table) of the Technical Instructions.

The DGP requests that the ICAO Legal Bureau provide a formal legal interpretation that persons employed by entities, such as freight forwarders and ground handling agents, that process general cargo and mail (but not declared dangerous goods) are within the scope of Annex 18 and the Technical Instructions with respect to the requirements related to the provision of dangerous goods training. There is a universal desire within the Dangerous Goods Panel to continue to require freight forwarders involved in the consolidation and consignment of air cargo to be trained in dangerous goods.

EXTRACT FROM DGP/19 REPORT

2.4.2 Application of training programmes (DGP/19 WP/44 and DGP/19-WP/50)

2.4.2.1 It was recalled that, at the last working group meeting, an ad hoc Working Group had been formed to facilitate discussion on various proposals to modify Table 1-4. Based upon the outcome of the ad hoc Working Group's discussion a further proposal for the modification of Part 1; 4 and Table 1-4 in relation to dangerous goods training programmes was now being made.

2.4.2.2 At the ad hoc Working Group, concern had been raised with regard to the inclusion of additional categories of staff, who have no responsibility for handling dangerous goods, and the jurisdiction of the Technical Instructions in this area was questioned. It was noted that the Technical Instructions in 1; 4.1.1 requires that dangerous goods training programmes be established and maintained by or on behalf of persons with various responsibilities in processing cargo (not necessarily involving dangerous goods). Of those persons, two groups, c) (agencies which perform, on behalf of the operator, the act of accepting, handling, loading, unloading, transferring or other processing of cargo) and f) (agencies other than operators involved in processing of cargo) are identified as "processing cargo". In addition the Panel, at DGP/18 had determined, with the addition of Category 9 Cargo acceptance staff (other than dangerous goods acceptance staff), that persons handling only non-dangerous goods must also undertake dangerous goods training. On that basis it was believed that it had already been established that the Technical Instructions have the jurisdiction to require dangerous goods training for persons handling non dangerous goods where the training will act to reduce the likelihood of undeclared or 'hidden' dangerous goods getting onto an aircraft. Table 1-4 had also been revised to put all freight forwarder personnel together, followed by operator/ground handling agent personnel, including security screeners, which was considered to be a more logical and useful arrangement. The revised Table 1-4 was presented for the meeting's review.

2.4.2.3 The meeting was advised that, in the preliminary view of the ICAO Legal Bureau, the Technical Instructions could address any persons who might be involved in the transport of dangerous goods, and that could be interpreted as including cargo acceptance staff who did not normally accept dangerous goods but who should nevertheless be on the lookout for dangerous goods travelling as normal cargo.

2.4.2.4 The meeting reviewed the proposed new Table 1-4 and made some amendments to it to improve its clarity. In particular, a new column relating to the training requirements for security screeners was added and the training requirements relating to general packing requirements and packing instructions were combined.

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APPENDIX B

LEGAL INTERPRETATION FROM ICAO LEGAL BUREAU

From: LEB
Sent: 9-Jul-15 11:44 AM
To: Office of the Director ANB
Cc: Petras, Christopher; Radu, Catalin; Rooney, Katherine; CSS Inbox
Subject: RE: Request for Legal Interpretation on Scope of Annex 18 The Safe Transport of Dangerous Goods by Air- by 3 July 2015

Reference is made to your IOM of 17 June 2015 requesting our interpretation of Annex 18, The Safe Transport of Dangerous Goods by Air (4th ed., 2011), with respect to whether prospective Standards/Technical Instructions that have been recommended (but not yet drafted) by the Dangerous Goods Panel (DGP) working group for the training of persons employed by entities, such as freight forwarders and ground handlers, which process general cargo and mail not declared as dangerous goods, are within the scope of the Annex.

We note that paragraph 2.1 (General Applicability), subparagraph 2.1.1, of Annex 18 states that "[t]he Standards and Recommended Practices of this Annex shall be applicable to all international operations of civil aircraft." We further note that paragraph 2.6 (Surface Transport) sets forth the recommendation that "States should make provisions to enable dangerous goods intended for air transport and prepared in accordance with the ICAO Technical Instructions to be accepted for surface transport to or from aerodromes." (emphasis added) The question of whether prospective Standards/Technical Instructions for training of persons handling non-dangerous goods are within the scope of Annex 18 is best considered with the foregoing provisions in mind.

Certainly, if the would-be targets of the training or the entities that employ them are involved in international civil aircraft operations, then under subparagraph 2.1.1, the prospective Standards/Technical Instructions recommended by the working group would appear to fall squarely within the scope of Annex 18. Likewise, consistent with paragraph 2.6, training requirements with respect to personnel/entities involved in the surface transport of dangerous goods could plainly be considered as a Recommended Practice. However, the would-be targets of the training and/or the entities that employ them in this case are involved in surface transport of non-dangerous goods. Thus, insofar as the prospective training here relates to the handling of non-dangerous goods intended for air transport and, specifically, the identification of unmarked dangerous goods in the air transport supply chain, it may be considered as falling within the overall scope of the Annex; however, in light of the fact that application of Annex 18 is currently extended to surface transport on the basis of the recommendation in paragraph 2.6, any such training requirements should similarly be in the form of Recommended Practices, as opposed to a Standards or Technical Instructions.

For your consideration, please.

John Augustin
D/LEB

— END —