



WORKING PAPER

DANGEROUS GOODS PANEL (DGP)

TWENTY-THIRD MEETING

Montréal, 11 to 21 October 2011

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 2013-2014 Edition

OPERATOR ACCEPTANCE RESPONSIBILITIES

(Presented by J. McLaughlin)

SUMMARY

This working paper is intended to continue discussions held at the DGP Working Group of the Whole meeting in Atlantic City (DGP-WG/11, 4 to 8 April 2011) on acceptance (DGP/23-WP/3, paragraph 3.2.43 refers) and definitions for the terms “undeclared” and “misdeclared” dangerous goods (DGP/23-WP/3, paragraph 3.2.6 refers) as they relate to principles of constructive knowledge.

Action by the DGP: The DGP is encouraged to have a broader discussion of operator responsibilities as a part of the acceptance process. As paragraph 1.2 of this working paper describes, requirements appear to be sufficiently enumerated. Accordingly, provisions tentatively accepted at DGP/WG-11 on definitions for the terms ‘undeclared’ and ‘misdeclared’ dangerous goods, related to this issue can be removed, as proposed in this working paper. A proposal for definitions and reporting requirements for undeclared and misdeclared dangerous goods is presented in DGP/23-WP/46.

1. INTRODUCTION

1.1 At the DGP Working Group of the Whole meeting in Atlantic City (DGP-WG/11, 4 to 8 April 2011) there was considerable discussion and support for proposed amendments related to acceptance requirements (DGP/23-WP/3, paragraph 3.2.43 refers) and definitions for the terms “undeclared” and “misdeclared” dangerous goods (DGP/23-WP/3, paragraph 3.2.6 refers). The proposal to introduce new definitions for the terms “undeclared” and “misdeclared” in particular encouraged panel members to consider the burdens imposed upon the operator when dangerous goods are not offered in compliance with the Technical Instructions (DGP-WG/11-WP/53, paragraph 1.3 refers). Nothing in this paper is intended to alter or in any way address a shipper’s responsibility to offer dangerous goods to air carriers in compliance with the Technical Instructions.

1.2 Prior to incorporating the proposals referenced above into the Technical Instructions, the DGP is invited to consider that operator responsibilities are already enumerated in the Technical Instructions. These responsibilities are necessary and in the interests of transportation safety. There are at least two sections of the Technical Instructions that address operator requirements for the acceptance and recognition of dangerous goods, regardless of how they are offered.

1.2.1 Part 7;1, 1.1 of the Technical Instructions reads as follows:

1.1 CARGO ACCEPTANCE PROCEDURES

1.1.1 Operators' acceptance staff must be adequately trained to assist them in identifying and detecting dangerous goods presented as general cargo.

1.1.2 Cargo acceptance staff should seek confirmation from shippers about the contents of any item of cargo where there are suspicions that it may contain dangerous goods, with the aim of preventing undeclared dangerous goods from being loaded on an aircraft as general cargo. Many innocuous-looking items may contain dangerous goods, and a list of general descriptions which, experience has shown, are often applied to such items is shown in Chapter 6.

1.2.2 Part 1;4 (Table 1-4 and Table 1-5) of the Technical Instructions requires that every job function receive training in the recognition of undeclared dangerous goods. This is required for operators who transport dangerous goods (Table 1-4) and operators who do not accept dangerous goods (Table 1-5).

1.3 Collectively, the Technical Instructions place a high burden on operators, one that goes beyond inspecting formally offered dangerous goods for compliance and consistency. Operators who choose not to transport dangerous goods are subject to these provisions in the Technical Instructions, as are employees of any operator working exclusively with unregulated cargo.

1.4 The Technical Instructions and the United States regulations/case law both equate an operator's responsibility in accepting and transporting formally declared dangerous goods with instances where the operator "should have known" or "had reason to know" dangerous goods were being offered. In other words, an operator would be equally responsible for compliance under the Technical Instructions (stowage, loading, inspection for leakage, providing notice to the pilot in command, etc.) in the examples below. The only difference would be that the operator would already be in non-compliance if they were to accept the shipment in Example 2 (as general cargo or dangerous goods).

1.4.1 **Example 1:** UN 1203 (Gasoline) is declared as dangerous goods, and is appropriately marked, labeled, documented, and packaged.

1.4.2 **Example 2:** A packaged is offered as general cargo. The words "gasoline" or "flammable liquid" are written on the package.

1.5 The principle behind this working paper generally, and paragraph 1.4 specifically is referred to in the United States as constructive knowledge. It is synonymous with the idea that an operator "should have known" or "had reason to know" dangerous goods were offered. The rationale is twofold.

1.5.1 First, United States legislation requires air carriers to operate with the highest degree of care. That is, air carriers have a responsibility to assure, to the maximum extent possible, the safety and well-being of their passengers and crew. This is consistent with common carriers in all modes of transportation trusted with the safety of passengers and crew which go beyond non-commercial operations.

1.5.2 A second and closely related rationale for operators to employ constructive knowledge is the high risk inherent in dangerous goods — declared and undeclared. The higher the risk, the higher the degree of care that is needed. As the Supreme Court of the United States has stated, when dangerous products are involved, “the probability of regulation is so great that anyone who is aware that he is in possession of them ... must be presumed to be aware of the regulation”

1.6 For reasons cited in paragraphs 1.5.1 and 1.5.2, a high duty of care is imposed on operators. With this duty of care required, the next question is with what degree of scrutiny must operators apply constructive knowledge principles in order to become aware of (undeclared) dangerous goods? In the United States, courts have held that the duty of care does not exceed that of a “reasonable man” of “ordinary prudence under the circumstances”. The “reasonable person’s” ability to detect undeclared shipments is not that of a dangerous goods expert, but is instead the perspective of a reasonable employee whose training is in compliance with Part 1;4 of the Technical Instructions. For purposes of enforcement, constructive knowledge is the same as having had actual knowledge of an undeclared or misdeclared shipment. That is, a hazardous communication was made to the operator, who improperly accepted (and potentially transported) the shipment.

1.7 What a “reasonable man” with “ordinary prudence under the circumstances” would do is always question of fact, likely to require adjudication in enforcement actions. Clearly a marking of “gasoline” or “flammable when wet” on a shipment would cause a reasonable man with training in the recognition of undeclared dangerous goods to have constructive knowledge that dangerous goods may be present. Items listed in Part 7; 6 (Provisions to Aid Recognition of Undeclared Dangerous Goods) may also contribute to constructive knowledge. Generally, constructive knowledge can be derived from one (or a combination) of the following indicia visible upon acceptance: Transport documentation, markings, labels, placards, packagings (including outside containers and overpacks), and the condition of such packagings. As required in Part 7;1.1.2, operators should “seek confirmation from shippers about the contents of any item of cargo where there are suspicions that it may contain dangerous goods”.

1.8 When a State certifies an air carrier to operate, the operator accepts responsibility to operate not only safely, but in highest degree of care. This degree of care triggers civil aviation administration (CAA) requirements to employ constructive knowledge principles when accepting *any* shipment. That is, an air carrier is as responsible for accepting and transporting dangerous goods when formally declared (actual knowledge) as they are when they a reasonable person trained according to Part 1;4 of the Technical Instructions “should have known” or “had reason to know” of a dangerous goods shipment.

1.9 Proposals such as those made at DGP-WG/11 (DGP/23-WP/3 paragraphs 3.2.6 and 3.2.43) also warrant discussion by DGP in terms of the implications for State enforcement. As evident in paragraph 2, this paper proposes no new language. Therefore, even if States were not to subscribe to constructive knowledge principles, the regulatory standards already in Annex 18 would permit other States to hold operators up to this threshold of safety and bring enforcement actions accordingly. In the United States, constructive knowledge is a legal doctrine. By amending the Technical Instructions to encompass more than Standards and Recommended Practices, these proposals would encroach upon each State’s enforcement prerogative, a prerogative Annex 18 clearly reserves for each State. To retain their enforcement prerogatives, States would be required to file variations, resulting in an even greater burden for operators to navigate between States acceding to these proposals and those seeking to maintain the current language in the Technical Instructions as a regulatory standard.

APPENDIX A

PROPOSED REVISION TO AMENDMENTS AGREED AT DGP-WG/11

Part 7

OPERATOR'S RESPONSIBILITIES

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Chapter 1

ACCEPTANCE PROCEDURES

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1.3 THE ACCEPTANCE CHECK

1.3.1 An operator must not accept for transport aboard an aircraft a package or overpack containing dangerous goods or a freight container containing radioactive material or a unit load device or other type of pallet containing dangerous goods as described in 1.4 unless the operator has, by use of a checklist, verified the following:

...

Remove “[when visible]” (which was proposed at DGP-WG/11 (DGP/23-WP/3, paragraph 3.2.43 refers):

- g) the outer packaging of a ~~combination~~ package ~~or the single packaging is permitted by the applicable packing instruction, and [when visible]~~ is of the type stated on the accompanying dangerous goods transport document and is permitted by the applicable packing instruction;

...

Part 1

GENERAL

...

Chapter 3

GENERAL INFORMATION

3.1 DEFINITIONS

Remove definitions for misdeclared and undeclared dangerous goods (proposed at DGP-WG/11) (DGP/23-WP/3, paragraph 3.2.6 refers):

~~**Misdeclared dangerous goods.** Dangerous goods offered for transport by air where:~~

- ~~— a) they are incorrectly described on the dangerous goods transport document, such that had they been correctly described, they would not be have been acceptable for carriage; or~~
- ~~— b) they are found, after the acceptance check required by 7:1.3, not to have complied with the Technical Instructions.~~

~~**Note.** Non-compliances with the Technical Instructions found during an acceptance check are not required to be reported, although an operator may choose to do so if an issue of significance (e.g. incorrect use of packaging) is detected.~~

~~**Undeclared dangerous goods.** Dangerous goods offered for transport by air without being accompanied by a dangerous goods transport document; information applicable to the consignment provided in electronic form; or where permitted, by alternative documentation.~~

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