



NOTE DE TRAVAIL

GROUPE D'EXPERTS SUR LES MARCHANDISES DANGEREUSES (DGP)

VINGT-TROISIÈME RÉUNION

Montréal, 11 – 21 octobre 2011

Point 2 : Élaboration de recommandations relatives à des amendements des *Instructions techniques pour la sécurité du transport aérien des marchandises dangereuses* (Doc 9284) à introduire dans l'édition de 2013-2014

RESPONSABILITÉS DE L'EXPLOITANT RELATIVES À L'ACCEPTATION

(Note présentée par J. McLaughlin)

SOMMAIRE

(Faute de ressources, seuls le sommaire et l'appendice ont été traduits.)

La présente note de travail a pour objet de poursuivre les débats tenus à la réunion du groupe de travail plénier du Groupe DGP (Atlantic City, DGP-WG/11, 4 – 8 avril 2011) sur l'acceptation (DGP/23-WP/3, § 3.2.43) et sur les définitions des termes « marchandises dangereuses non déclarées » et « marchandises dangereuses mal déclarées » (DGP/23-WP/3, § 3.2.6), dans la mesure où ces sujets se rapportent aux principes de la connaissance par interprétation.

Suite à donner par le DGP : Le DGP est encouragé à tenir un débat plus large sur les responsabilités de l'exploitant dans le cadre du processus d'acceptation. Comme l'indique le § 1.2 de la présente note, les prescriptions semblent être énoncées adéquatement. Par conséquent, les dispositions acceptées sous réserve à la réunion DGP-WG/11 concernant les définitions des termes « marchandises dangereuses non déclarées » et « marchandises dangereuses mal déclarées » peuvent être supprimées, comme le propose la présente note. La note DGP/23-WP/46 propose des définitions et des dispositions en matière de compte rendu applicables aux marchandises dangereuses non déclarées et mal déclarées.

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.

APPENDICE

PROPOSITION DE RÉVISION DES AMENDEMENTS CONVENUS À LA RÉUNION DGP-WG/11

Partie 7

RESPONSABILITÉS DE L'EXPLOITANT

(...)

Chapitre 1

PROCÉDURES D'ACCEPTATION

(...)

1.3 VÉRIFICATION EN VUE DE L'ACCEPTATION

1.3.1 Les exploitants ne doivent pas accepter au transport à bord d'un aéronef un colis ou un suremballage contenant des marchandises dangereuses ou un conteneur de fret contenant des matières radioactives ou une unité de chargement ou autre type de palette contenant des marchandises dangereuses correspondant à la description fournie à la section 1.4 sauf si, au moyen d'une liste de vérification, on s'est assuré que :

(...)

Supprimer « [, s'il est visible,] », amendement proposé à la réunion DGP-WG/11 (DGP/23-WP/3, § 3.2.43) :

- g) l'emballage extérieur d'un colis combiné ou l'emballage unique est autorisé par l'instruction d'emballage applicable et ~~si, s'il est visible,~~ il est du type indiqué sur le document de transport de marchandises dangereuses d'accompagnement et est autorisé par l'instruction d'emballage applicable ;

(...)

Partie 1

GÉNÉRALITÉS

(...)

Chapitre 3

RENSEIGNEMENTS GÉNÉRAUX

(...)

3.1 DÉFINITIONS

Supprimer les définitions des termes « marchandises dangereuses mal déclarées » et « marchandises dangereuses non déclarées » (proposées à la réunion DGP-WG/11) (DGP/23-WP/3, § 3.2.6) :

~~**Marchandises dangereuses mal déclarées.** Marchandises dangereuses présentées au transport aérien :~~

- ~~a) dont la description sur le document de transport de marchandises dangereuses est incorrecte au point que, si elles avaient été correctement décrites, elles n'auraient pas été acceptables au transport ; ou~~
- ~~b) dont on constate, après la vérification en vue de l'acceptation exigée par la section 1.3 de la Partie 7, qu'elles ne respectent pas les présentes Instructions.~~

~~Note. — Les non-respects des présentes Instructions constatés au cours d'une vérification en vue de l'acceptation n'ont pas à être signalés, bien qu'un exploitant peut choisir de le faire si un problème important est découvert (p. ex. l'utilisation incorrecte d'un emballage.)~~

~~**Marchandises dangereuses non déclarées.** Marchandises dangereuses présentées au transport aérien sans être accompagnées d'un document de transport de marchandises dangereuses, des renseignements applicables à l'envoi fournis sous forme électronique ou, lorsque c'est autorisé, des documents de rechange.~~

— FIN —