



Intergovernmental Organisation  
for International Carriage  
by Rail

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Bulletin  
of International  
Carriage  
by Rail

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**3/2003**

111th Year • July - September

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# 3/2003

111<sup>th</sup> year – July - September

## **Bulletin of International Carriage by Rail**

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### **Central Office Communications**

#### **Ratification of the 1999 Protocol**

##### **Germany**

In application of Article 20 § 1 of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and of Article 3 § 2 of the Protocol of 3 June 1999 for the Modification of COTIF (1999 Protocol), Germany deposited its instrument of ratification of the 1999 Protocol with the Provisional Depositary<sup>1</sup> on 5 September 2003.

The 1999 Protocol and thus the new version of COTIF will come into force only after they have been ratified, accepted or approved by more than two-thirds of the Member States of OTIF, i.e. at least 27 States (Article 20 § 2 COTIF 1980). Germany is the 13th State to have ratified the 1999 Protocol.

<sup>1</sup> According to Article 2 § 1 of the 1999 Protocol, OTIF performs the functions of the Depositary Government provided for in Articles 22 to 26 of COTIF 1980 from 3 June 1999 to the entry into force of this Protocol.

#### **List of lines CIV**

(published on 1 May 1985)

**Circular letter from the Central Office Nr. 53 of  
22 September 2003**

*Chapter “Germany”*

Due to the update and the change of the presentation, the chapter has been re-issued.

#### **List of lines CIM**

(published on 1 May 1985)

**Circular letter from the Central Office Nr. 68 of  
22 September 2003**

*Chapter “Germany”*

Due to the update and the change of the presentation, the chapter has been re-issued.

## OTIF Organs

### **RID Committee of Experts working group on chapter 1.9 "Transport Restrictions by the competent Authorities"**

*Würzburg, 23/24 June 2003*

see "Dangerous Goods"

### **RID Committee of Experts working group on tank and vehicle technology**

*Berne, 11/12 September 2003*

see "Dangerous Goods"

## Dangerous Goods

### **RID/ADR Working Group on transport documentation**

1<sup>st</sup> and 2<sup>nd</sup> Sessions

*Hamburg, 10/11 June 2003  
Frankfurt, 22/23 September 2003*

Eight Governments and seven non-governmental international organisations participated in the work of this working group set up by the Joint Meeting in March 2003 (see Bulletin 1/2003, p. 4) to achieve the best possible harmonization of the information to be entered in transport documentation, and thus to facilitate multimodal transport.

#### **Provisions specific to RID**

The possibility of using English only in a transport chain including maritime or air carriage will be the subject of a proposal to the RID Committee of Experts. In this context, the possibility of attaching the maritime document to the consignment note would have to be looked at. Deletion of the particulars concerning the hazard identification number will also be the subject of a proposal to the RID Committee of Experts. With regard to the particulars concerning the consignor and consignee, the RID Committee of Experts will also have to decide whether to take these provisions from CIM into RID itself. It will also have to adopt a position with regard to the particulars saying that the transport

operation is being performed under the terms of a special agreement, as is the case in ADR. The Committee of Experts will also have to examine the need to maintain the "RID" box with a cross in the consignment note. Aligning RID with ADR should also be considered in respect of the particulars concerning the number and type of packages, as well as the total quantity of dangerous goods.

#### **Provisions specific to RID and ADR**

The working group referred to the Joint Meeting the question of whether to delete some of these provisions for the purpose of harmonization with the UN Model Regulations and hence with maritime and air transport.

#### **Provisions specific to maritime and/or air transport**

It will be up to the competent bodies for these modes to take a position on maintaining these provisions. The representative of Germany will discuss this at national level and will submit relevant proposals to these bodies if necessary. The UN Sub-Committee of Experts might have to take a position to seek harmonization.

#### **Harmonization of provisions that differ between the transport modes**

The working group agreed that this harmonization should be carried out by the UN Sub-Committee of Experts. This is already the case in respect of limited quantities and their marking, which are being dealt with in a working group (see p. 52/53). This is a matter concerning particularly the sequence of the information, the proper shipping name, emergency measures and the consignor's declaration. In this general context of harmonization, the representative of FIATA submitted a document to the UN Sub-Committee of Experts showing the differences between the 12<sup>th</sup> and 13<sup>th</sup> revisions of the UN Model Regulations and the modal regulations with regard to the proper shipping name and certain special provisions. In this respect, FIATA suggested to the Sub-Committee that a Joint Meeting working group be set up to iron out these differences.

#### **Definition of consignor and consignee**

In the context of Chapter 1.4 – Safety obligations of the participants – the representative of FIATA proposed in a document to harmonize these definitions in order to resolve the major problems that arise in this context. The working group supported the setting up of another Joint Meeting working group. It was not excluded that

the UN Model Regulations could also be amended for the purpose of harmonization.  
(Translation)

**RID Committee of Experts working  
group on chapter 1.9 "Transport  
Restrictions by the competent Authorities"**

*Würzburg, 23/24 June 2003*

8 Governments and 4 non-governmental international organizations took part in the work of this working group, which was set up at the 39<sup>th</sup> session of the RID Committee of Experts (see Bulletin 4/2002, p. 74) with the aim, *inter alia*, of:

- harmonizing RID Chapter 1.9 with ADR Chapter 1.9 as much as possible;
- limiting national measures for restricting international transport under RID;
- applying standardized risk analyses before introducing national measures, in order to ensure a uniform procedure in the Member States.

The German Ministry of Transport considered that in order to align the rail regulations with the road regulations, it would be wise to get on board, and to navigate on the Main, who better to steer the ship safely to port than Captain "Rein"?

The following is the new text proposed by the working group:

**"1.9 Restrictions on carriage imposed by the competent authorities**

**1.9.1** A Member State may apply to the international carriage of dangerous goods by rail on its territory certain additional provisions not included in RID, on condition that these additional provisions

- are those in accordance with 1.9.2,
- do not conflict with the provisions of 1.1.2(b),
- are contained in the Member State's domestic legislation applying equally to the domestic carriage of dangerous goods by rail in the territory of that Member State,

- do not result in the prohibition of carriage of the dangerous goods covered by these provisions in the territory of the Member State.

**1.9.2** The additional provisions referred to in 1.9.1 are:

- (a) additional provisions or safety-related restrictions on transport using
  - certain structures such as bridges and tunnels,
  - combined transport installations such as transshipment installations,
  - where the transport operation begins or ends in ports, railway stations or other transport terminals.
- (b) provisions according to which the carriage of certain dangerous goods on sections with special and local risks is prohibited, such as sections in residential areas, environmentally sensitive areas, economic centres or industrial zones containing hazardous installations, or to which special conditions, e.g. operational measures (reduced speed, specified journey times, prohibition on trains meeting each other, etc.) apply. Where possible, the Competent Authorities shall establish alternative routes to be used for each prohibited route or each route subject to special provisions.
- (c) exceptional provisions specifying the prohibited or prescribed routeing or provisions to be observed for temporary stops resulting from extreme weather conditions, earthquake, accident, industrial action, civil disorder or military hostilities.

**1.9.3** Application of the additional provisions in accordance with 1.9.2 presupposes that the competent authority provides proof of the need for measures by means of a standardized risk analysis.

**1.9.4** The competent authority of the Member State applying on its territory any additional provisions within the scope of 1.9.2 (a) to (c) above shall notify the Central Office, generally in advance, of

the additional provisions and submit the results of the risk analyses carried out. The Central Office shall bring them to the attention of the Member States."

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The text will be submitted to the next session of the RID Committee of Experts. With regard to 1.9.3, the working group envisaged the development of a guide for standardized risk analyses. UIC could be mandated to prepare such a guide. For 1.9.4, the Secretariat of OTIF, together with CIT and UIC, would draft a model document for competent authorities to notify provisions to the Secretariat.

(Translation)

**Sub-Committee of Experts  
on the Transport of Dangerous Goods  
(UN/ECE)**

23<sup>rd</sup> Session

*Geneva, 30 June – 4 July 2003*

Experts or observers from 27 countries and 23 governmental or non-governmental international organisations took part in this first session of the new 2003-2004 biennium.

The work concerning gases, fireworks and ammonium nitrate emulsions was entrusted to working groups meeting in parallel.

The main subjects dealt with and the decisions taken were as follows:

**Evaluation of the United Nations packaging requirements**

The Sub-Committee was of the opinion that these requirements had considerably increased the safety of packagings and that there was no reason to call them into question as a whole or to envisage an overall revision. Establishing a working group could only be decided on the basis of an advance list of the problems identified.

**Performance testing - reference to standard ISO 16104:2003**

The majority of delegations said that they were opposed in principle to the idea of replacing the requirements of the Model Regulations regarding the testing of packagings by a reference to a standard, considering that

this would be tantamount to transferring responsibility for issuing such rules to a standardization body and losing control of the development of the regulations.

Some delegations considered that it was unproductive to reiterate in the standards the requirements already contained in the Model Regulations. Others felt it would be undesirable to introduce requirements contrary to the Model Regulations, but that it was useful for standards to contain additional provisions which could contribute to a harmonized interpretation of how testing should be carried out. Others considered that, on the contrary, some degree of flexibility should be kept.

Several experts also considered that the difficulty of access to ISO standards and their prohibitive cost both for administrations and for users were not conducive to wide international distribution and implementation of the United Nations Recommendations, and that this factor alone was sufficient to justify maintaining the existing requirements in the Model Regulations.

In view of some comments on the compatibility of the new ISO standard with the Model Regulations, a member of the secretariat said that, for legal reasons concerning the use of the United Nations logo, the ISO standard should not permit packagings to be marked with the UN sign if the requirements of the standard were not in strict keeping with those of the Model Regulations.

The expert from the United Kingdom requested that his proposal should remain on the agenda and that ISO standard 16104:2003 should be distributed to all delegations for further examination at the next session.

The Chairman suggested that the expert from the United Kingdom should submit a new proposal in the light of the comments made if he wished this issue to be re-examined.

**Dangerous goods packed in limited quantities and exempt from the conditions of carriage**

The expert from France introduced the report on the informal working group session which took place at the invitation of his Government in Paris from 25 to 27 June 2003.

The expert from the United States of America expressed concern at the fact that a new informal working group session had been planned at the invitation of Canada in Montreal from 22 to 24 October 2003, because he feared that this new working group might develop, without proper terms of reference or guidance from the Sub-

Committee, completely new provisions which would not take account of existing well-established requirements in force for limited quantities, exempted quantities and consumer commodities. Furthermore he saw no need for the working group to communicate with other modal organizations, since decisions would have to be taken by the Sub-Committee, where these organizations are represented.

Most other experts did not share this view since the Sub-Committee had discussed this question of dangerous goods packed in limited quantities over the past four years, without success. There was still no harmonization between the regulations applicable to the various modes of transport and this situation was causing major problems for international multimodal transport. This showed that the UN Recommendations are not suitable in this respect since they are not effectively implemented worldwide by any mode of transport, except for sea transport where, nevertheless, there are also some variations.

The question as to whether this issue should continue to be dealt with by an informal working group was put to the vote, and since the expert from the United States was the only expert who objected, the Sub-Committee agreed that the informal working group should pursue its work, and that a full day discussion on this issue should be scheduled for the December 2003 session of the Sub-Committee.

### **Substances toxic upon inhalation**

Some delegations approved the principle of specific labelling for substances toxic upon inhalation, mainly because this would be useful for emergency services and for risk analysis when selecting routes.

Others recalled that this principle had recently been rejected by the Sub-Committee and considered that this specific labelling would constitute an unnecessary additional burden for the industry, with no added safety value. They were also opposed to the introduction of a dual system whereby each country would be allowed to impose this specific labelling or not. They were not inclined to take a decision on the basis of this proposal without a precise indication of all the substances that would be subject to this specific labelling.

After extensive discussion on the subject, the Sub-Committee agreed by a vote of 7 to 6 that the expert from the United States of America should pursue his work towards proposing specific labelling for substances toxic upon inhalation and prepare a new

proposal that would take account of the various comments made.

### **Harmonization with the globally harmonized system of classification and labelling of chemicals (GHS)**

The Sub-Committee decided that the GHS would be implemented on a step-by-step basis. The GHS criteria for environmentally hazardous substances had already been introduced into the 13<sup>th</sup> revised edition of the UN Recommendations and should be implemented through international transport legal instruments as from 1 January 2005. The next priority was the harmonization of existing acute toxicity and corrosivity criteria and, if necessary, physical hazard criteria, and this could be done during this biennium.

The next step should be revision of the classification of substances already listed, in order to reflect the GHS criteria, but proposals in this respect would probably be submitted by the industry.

At a later stage, the Sub-Committee could consider whether certain hazards, such as chronic toxicity, etc., which are not taken into account in dangerous goods transport regulations, would also have to be regulated.

### **Harmonization with the IAEA Regulations for the Transport of Radioactive Material**

The Sub-Committee had no comments on these draft amendments, and noted that the series of amendments for 2005 would be agreed by the IAEA Revision Panel in November 2003, subject to endorsement by "TRANSSC" in March 2004. During that period, and mainly before 15 September 2003, which was the deadline for proposals to be submitted to the IAEA Revision Panel, international organizations concerned and governments could convey their comments and proposals to the IAEA.

A final version of the amendments adopted by IAEA will be submitted to the Sub-Committee in July 2004 for integration of corresponding amendments in the parts of the UN Model Regulations dealing with Class 7 material.

### **Sequence of information in the transport document (see Bulletin 4/2002, p. 77)**

At the request of the Sub-Committee, IATA agreed to postpone implementation of a single sequence of information by 2 years, i.e. until 1 January 2007.

### **Guiding principles related to the various parts/chapters of the UN Model Regulations**

The Sub-Committee noted the work being carried out on this rationalized approach for the assignment of packing/tank/IBC instructions to individual substances and on the systematic presentation of the dangerous goods list.

#### **Default classification of fireworks**

(see Bulletin 3/2002, p. 42)

The ad hoc working group made progress with its work, but did not reach a consensus in view of the fierce opposition from the expert from the USA. The group will continue its work at the next session.

(Translation)

### **RID Committee of Experts working group on tank and vehicle technology**

4<sup>th</sup> Session

*Berne, 11/12 September 2003*

(see also Bulletins 3/2002, 4/2002 and 1/2003)

The following States took part in the discussions: Belgium, Czech Republic, France, Germany, Lithuania, Netherlands, Poland, Spain, Sweden, Switzerland and the United Kingdom. UIC and UIP were represented.

#### **Devices to protect against the overriding of buffers**

The working group examined a proposal from Germany for the formulation of a protective aim for devices to protect against the overriding of buffers and for the requirements these devices have to meet. The technical description of these devices should be a matter for standards. The aim is to avoid the loss of product in the event of buffers overriding. The definition of devices to protect against the overriding of buffers allows various measures, such as the prevention of climbing, wide gaps between buffers and tank ends and protection of tank ends.

A representative of the Waggonbau Brüninghaus Company presented a design for protection against the overriding of buffers. A shield protects the tank if both buffers override or if one buffer overrides and also protects it against pieces of equipment. In addition, protection should also be ensured if the wagon derails or overturns. A shield must be capable of distributing

punctiform forces evenly. The attachment points on the tank must be designed in such a way that they are destroyed in the event of an incident, in order to prevent energy being transferred into the tank. In addition, a device to protect against slanting collision should be provided. This is to deflect the colliding wagon in order to avoid penetration.

Following the discussion on this topic, the representatives of Germany and UIP offered to develop a specific proposal on the basis of this proposed formulation for the next session of the RID Committee of Experts. In so doing, the protective aim of effectively preventing the overriding of buffers should not be included for the time being. This proposal should also include a value for the increase in energy absorption capacity. It should be made possible to achieve the aim using various measures (increasing the wall thickness, using other materials, sandwich covers, shield). In order to enable standards to be developed, a date of entry into force before 2007 should not be envisaged. This proposal should first be submitted to the Joint Meeting (13-17.10.2003) so that the working group on standards could clarify where this standardization work should be carried out (CEN, UIC, European Commission in the context of the Technical Specifications for Interoperability).

#### **Derailment detectors**

The Swiss Federal Office for Transport (BAV) held an information session on this subject, looking at pneumatic derailment detectors that had been fitted to rail tank wagons following various accidents in Switzerland.

In the discussion, the representative of Germany criticized Switzerland's unilateral decision to introduce pneumatic derailment detectors, as this could lead to political problems in the event of incidents in those States that had not introduced derailment detectors such as these. Measures such as these had to be decided by the RID Committee of Experts, the body responsible for developing international dangerous goods provisions for rail transport.

The working group recommended unanimously that the following points be discussed at the next session of the RID Committee of Experts (17-21.10.2003):

- the effects on the train formation (uncoupling) of a derailment detector being activated and of the subsequent emergency braking;



- the effects of individual wagons fitted with derailment detectors in mixed train formations;
- the effects of an emergency stop that cannot be overridden occurring on critical sections (tunnels).

If possible, statistics (causes of derailment, frequency of derailments involving dangerous goods wagons) on this subject should also be submitted. There should be a preparatory discussion of these points in the various States.

### **Staff safety training**

The working group examined another proposal from Germany, the aim of which was to ensure a uniform level of training in the Member States of COTIF. Three decisions of principle were to be taken in this respect:

- the place for this new provision;
- group of people;
- training content.

In a document, the representative of Belgium expressed disappointment that only the carrier's staff, and not the consignor's staff, had to undergo such training. One would have to take account of which regulations already existed (e.g. RID 1.4.2.2.1, UIC leaflet 471-3 and RIV Appendix XII).

The subsequent discussion indicated that:

- training provisions should be incorporated into Chapter 1.3;
- minimum requirements should be formulated;
- instruction should be documented;
- the groups should be formulated more flexibly so that specific national features could be taken into account.

The representative of Germany offered to revise his document for the next session of the RID Committee of Experts. In particular, they would try to redefine the groups with the help of the document from Belgium.

### **Devices attached high up on the tanks of tank wagons**

The working group also considered a proposal from Sweden, the aim of which was to reduce the danger of devices on the top part of tanks. The representative of Sweden proposed that a protective aim should be defined for this.

The representative of Sweden was asked to formulate his proposal in such a way that it covered all the transport modes (to include tank vehicles and tank-containers) and to submit it to the tank working group at the next Joint Meeting (13-17.10.2003). In so doing, RID/ADR 6.7.2.5.2, according to which stop-valves must be located as close to the shell as possible, should also be taken into consideration. The proposal should be a closer description of the requirement already contained in RID/ADR, according to which the leakproofness of the service equipment must be ensured even in the event of overturning.

### **Miscellaneous**

In a document, the representative of Belgium expressed his concern that because of the cost implications, the measures adopted for tank wagons would lead to a further modal shift in favour of tank vehicles and tank-containers.

The representatives of Germany and France pointed out that according to Directive 94/55/EC, States are entitled to prescribe the use of rail or waterways for the carriage of certain dangerous goods. The representative of Germany explained that it was also the task of this working group to increase the competitive advantage of the railways by means of safety arguments.

### **Next meeting**

The next meeting of the working group will be held at the end of May/beginning of June 2004.  
(Translation)

## **Case Law**

### **Oberster Gerichtshof Österreichs**

#### **Ruling of 21 December 2000**

#### **1. An accident caused by a passenger**

travelling with Austrian Railways (ÖBB), who, in a couchette compartment, fell backwards onto the sleeping plaintiff (on the bottom bunk) when getting out of his (the top) bunk, occurred during operation of the railway, so ÖBB is in principle liable in accordance with the provisions of the Austrian Rail and Motor Vehicle Liability Act (*Eisenbahn- und Kraftfahrzeug-Haftpflichtgesetz*, EKHG). While the accident is not connected with the specific operational hazards – sudden movement of the train was not among the causes of the injury – it is attributable to the activity of transport: in the same way as the use of seats, the use of bunks in a couchette compartment is part of the railway's typical activity of transport ("other operational hazard").

2. **Relieving ÖBB from liability would imply the exercise of the most extreme possible and reasonable care according to the circumstances of the case. However, since no bottom bunk was available, a particularly careful couchette car guard would at least have placed the top bunk lower or adjusted a middle bunk for the passenger (the main defendant) (who subsequently fell), who, because of his age (born 1919), was looking for a bottom bunk. This would have reduced the risk of a fall and would very probably have prevented the accident occurring, so ÖBB cannot benefit from relief from liability.**

See § 1, 5 paras. 1 and 9<sup>1</sup> of the Austrian Rail and Motor Vehicle Liability Act (EKHG).

#### The facts:

<sup>1</sup> A comparable provision of the CIV UR – Article 26 § 2 – reads: "The railway shall be relieved of liability:

- (a)
- (b)
- (c) if the accident is due to a third party's behaviour which the railway, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent; ..."

On 11 October 1996, the plaintiff, born in 1915 and the main defendant, born in 1919 were passengers on the "Wiener Walzer" holiday train travelling from Vienna to Geneva/Zurich. The plaintiff was sleeping in wagon compartment 8 on the bottom bunk, which was located on the left near the door of the compartment. The main defendant was using the top left bunk. Neither of the two middle bunks was made up and so they were not prepared for use. At about 2.50 a.m., the main defendant attempted to get down from his bunk using the ladder provided on the window side of the compartment. He slipped on the ladder and fell onto the plaintiff, who was thus injured.

The plaintiff requested a compensation payment (*pretium doloris*) of 200,000.- Austrian Schillings and the sum, uncontentious as far as the amount is concerned, of 10,211.- Austrian Schillings (replacement spectacles and taxi journeys), as well as an affirmation that the defendants be jointly liable to the plaintiff for all future consequences of the accident of 11 October 1996. He stated in summary that the secondary defendant had not allocated the main defendant a bottom bunk, despite his request for one. The main defendant was liable for the consequences of the accident by reason of the general principles governing liability in §§ 1294 and 1295 of the General Civil Statute Book (*Allgemeines Bürgerliches Gesetzbuch* - ABGB) owing to negligence. In the knowledge of his physical condition, he had not insisted on a bottom bunk either when booking the bunk in the couchette car or before using it. When climbing down using the ladder, he neglected to take the necessary care. The secondary defendant was liable because despite the main defendant looking for a bottom bunk, none was allocated to him. The guard must have noticed how frail the main defendant was at the time he boarded the train. This was not an unavoidable incident within the meaning of § 9 of the EKHG. The plaintiff had suffered a fracture to the left zygomatic bone and base of the orbita upon which an operation had been performed. A progressive, acute concentric restriction of the field of vision, with atrophication of the left optic nerve, remained as a permanent effect. Psychological compensation should be considered in particular. The plaintiff would not in future be able to pursue either his literary or lecture and travel activities. He would have to rely permanently on help from others. Also in his private life, the plaintiff could no longer read, watch television or enjoy travel for pleasure. This meant that at his advanced age, his enjoyment of life had been taken away. The lifelong active plaintiff, who, following his retirement, had been able to expect an average annual income from publicity and lecturing activities of around 40,000.- Austrian Schillings, had primarily considered this activity as campaign work in relation to the political

line with which he sympathized and had for this reason undertaken both remunerated and unremunerated lecturing and writing activities. The restriction of his field of vision meant these activities had to cease completely. So not only had the plaintiff had to give up further professional activities, but this activity had also to be considered as his only pleasure in his free-time during retirement. This justified an extra 100% on top of the purely physical-related injuries. Because of the permanent effects, deterioration of the plaintiff's condition could not be excluded, indeed it was to be expected, given his age. The focus was on the future effects of the injury, which could not be put right. The secondary defendant had to assume liability not only for the misconduct of the guard it employed, but also for the fact that for the purpose of "making the work easier", it had issued work instructions (concerning adjustments to the couchette compartments) that contradicted the approval notice. An illuminated switch arrangement and a taut safety net would have prevented the accident or lessened its effect. If a net had been stretched out, the main defendant would have fallen into the net rather than directly onto the plaintiff.

The defendants disputed the action and requested that it be dismissed. The main defendant's objection was that he was not to blame for the plaintiff's injuries. The main defendant's fall had been caused by the ladder leading to his bunk being pushed aside by the plaintiff. The alleged injuries and their lasting effects had no causal link with the main defendant's fall. The basis of the approval notice for the rail wagon which was the object of these proceedings was a technical description based on a type plan. The arrangement for four-tier bunks upon which the approval notice was based was set out in this technical description. It is very likely that the accident would have been prevented if the compartment used by the plaintiff and the main defendant had been set out in a "correct 4 bunk arrangement" corresponding to the approval notification.

The secondary defendant's objection was that the accident had not occurred in a train with operational procedures attributable to the secondary defendant. The ladder in the compartment had been hung by both hooks in the support provided for it and had a secure base. The accident was not due to a flaw in the arrangements or to the railway failing in its duty. When purchasing his ticket, the main defendant had not referred to his frailty or insisted that a particular couchette car bunk be booked. It would be stretching the duty of care - which in any case arises from the transport contract - too far if the representatives of the secondary defendant had to satisfy themselves of each passenger's state of health before issuing a ticket. After a lot of effort, the

couchette car attendant had found a passenger who would have been ready to exchange bunks with the main defendant, so that the main defendant would have been able to use a bottom bunk. At this point, the main defendant had already gone to sleep. The couchette car attendant therefore concluded that the main defendant had relinquished his wish to have a bottom bunk. This was an unavoidable incident within the meaning of § 9 of the EKHG because the secondary defendant had exercised all the care required under the circumstances of the case. The couchette car had been arranged correctly. As a result of complaints from customers, the relevant couchette car instructions for couchette compartments had been changed in 1993 by means of service instructions to the effect that when there were four tiers of bunks, the bottom and top ones were to be used. A change over to the middle bunk would only be carried out at a passenger's request.

The court of first instance ordered the defendants jointly to pay 150,211.- Austrian Schillings together with accessory claims and dismissed the additional application for 60,000.- Austrian Schillings as well as the declaratory action. Essentially, the findings were as follows:

The accident in question occurred in a compartment of the "Wiener Walzer" holiday train in which the seats were rearranged into bunks. The compartment was set out as follows: a window is set into the door of the compartment. The compartment had a side window. Both windows were blacked out by roller blinds. If this compartment is not used as a couchette car, it has six seats, three on each side facing each other. The compartment can be so arranged as to provide either four or six bunks. In both cases, reorganizing the compartment is subject to certain regulations. These are available as stickers in the service compartment of the car, and this was also the case in the train in question. If it is intended – as in the case in question – to arrange the compartment with four bunks, the seats are used as bottom bunks while the top bunks are at about the height of the middle of the side window. However, if the compartment is to be arranged with six bunks, the seats are used as bottom bunks, the middle bunks are at about the height of the middle of the side window while the top bunks are above the top of the window frame. Underneath the top bunk there is a large, very sturdy safety net in a small net which can be stretched from one top bunk to the other and which is strong enough to catch a passenger falling from the top bunk. The middle and top bunk can be reached using an aluminium ladder that can be adjusted in front of the compartment window or compartment door, as required. The ladder in the compartment in question was about 50cm away from the

compartment window and was fixed in a slightly sloping position. The fixing and ladder holder were in order. There is a panel of switches above the door. Normal lighting is provided by two fluorescent tubes of 40 watts each, and the night lighting consists of two bulbs giving off a blue light, each of 5 watts. The lighting in the compartment was correctly fitted. At the time of the accident, the night lights (2 bulbs giving off a blue light, each of 5 watts) were switched on.

However, personnel did not adjust the bunks in accordance with the instructions: when four bunks are provided, there may not be a bunk **above** window level. In the case in question, the top two bunks were arranged such that their surface was situated above window level.

Before the journey in question, the main defendant had gone to a travel agency and there ordered a 2<sup>nd</sup> class rail ticket with a couchette, as places in the sleeping car had already sold out. When ordering, he wished to have a bottom bunk, but these were also already sold out. The main defendant therefore accepted a top bunk in the couchette car. Approximately 45 minutes before the train was due to depart, the main defendant was already at the station by the train. He found the couchette car guard and asked him if it would be possible to accommodate him on a bottom bunk in the couchette car. The guard told the main defendant that all the places were reserved. The main defendant then went into the reserved compartment and waited until married couple B appeared. The main defendant asked Mrs. B if it would be possible to exchange places with her husband, which she refused, pointing out his age. About 20 minutes before departure, the main defendant used the ladder to reach the top left-hand bunk he had been allocated. He reached the bunk by climbing up the ladder, which was propped up in a sloping position near the window, and by climbing left into the bunk. The main defendant had taken sleeping powder and fell asleep before departure. After 2.00 a.m., the main defendant awoke. Apart from the night lights, it was dark in the compartment. The main defendant looked down in the darkness to find a light switch. The main defendant had not checked before departure whether it was possible to switch on any lighting near his bunk. He looked for a switch in the dark, but could not find one. The main defendant sat up, turned himself 90 degrees clockwise, his feet hanging down over the edge of the bunk. In this position, the main defendant pushed himself along on his backside left towards the window, where the ladder stood, and tried to locate the rungs of the ladder with his feet. He then felt a rung under one foot and climbed onto the ladder. The main defendant was then going to reach the next rung with his right foot. However, he could not find the second rung, which

made him think the ladder was crooked, but it was evidently upright. It was not possible to ascertain whether the main defendant had held on somewhere else by his hands. After the main defendant could not find the second rung with his right foot, he stepped into nothing and fell backwards to the floor into the gap below between the two bottom bunks. The main defendant then fell backwards to the left onto the sleeping plaintiff, injuring his face.

It is very likely that the accident would not have happened if the couchettes had been properly adjusted. (The question of hanging out a safety net does not arise, as this is not available in a correct four-bunk arrangement). It is also possible that the accident would not have happened if all six bunks had been put out, as in this case, the main defendant would have been able to support himself on the two unoccupied middle bunks when climbing down. As the main defendant tried to leave his bunk using the ladder located on the side of the compartment towards the window, he had not switched on the ceiling lights (80 watts). It is very likely that the accident would also have been prevented if the main defendant had switched on the ceiling lights. The switch for these can be easily reached by a passenger in the top bunk.

Further or ongoing medical treatment of the injury to the optic nerves the plaintiff suffered in the accident is not necessary. There is no tendency towards deterioration. Further medical treatment of the lasting effects (painful paraesthesia in the supply area to the first and second branch of the left abducent nerve) is not necessary either. This also applies to the surgical accident-related consequences (minor paraparesis of the central facial nerve, left-hand side).

The plaintiff had always been active in journalism and as a socio-political writer. He had also continued his journalistic activities for national and foreign magazines and newspapers after his retirement and at the same time, these activities also constituted his spare and leisure time activities. The accident that occurred on 11 October 1996 had resulted in a turning-point in the plaintiff's life. Since then, his memory and ability to concentrate had greatly worsened. He felt very unsure of himself in his daily life, complained constantly of giddiness, and always used a walking stick, which he had not needed before the accident. Above all, his vision had been restricted since the accident and his right field of vision was impaired. If his wife placed something to his right, the plaintiff did not react as he obviously did not see it. Because of the accident, the plaintiff had since received repeated medical treatment both from an optician and from a general practitioner.

In its legal ruling, the court of first instance affirmed fault liability of the main defendant and absolute liability of the secondary defendant. The court's justification for dismissing the declaratory action was that no future injuries were expected; the plaintiff's condition was a permanent consequence of the accident, which would not alter.

The Court of Appeal did not accept the plaintiff's appeal on the main issue or the main defendant's appeal, but accepted the secondary defendant's appeal and the plaintiff's appeal concerning costs and modified the ruling of the court of first instance by dismissing in its entirety the request for payment made to the secondary defendant. It declared that the value of the matter for decision in total exceeded 260,000 Austrian Schillings and that the ordinary appeal was inadmissible.

The Court of Appeal accepted the facts established by the court of first instance and argued as follows in respect of the secondary defendant's claims.

Whether the secondary defendant was liable in accordance with the provisions of the EKHG depended on whether the accident had occurred during operation of the railway. It would be considered an accident during operation of the railway if there were a direct place and time connection with a particular operational procedure or with particular operational equipment. The accident would only have to be connected with the specific operational hazards if it were not related to the transport activity, the condition of the rolling stock and its function. In this specific case, the accident was not connected to the specific operational hazards – sudden movement of the train had not contributed to the cause of the injury – but the accident was related to the transport activity: just as for the use of seats, the use of couchettes in a couchette car compartment was part of the railway's typical transport activity. Therefore, the railway had not been "merely the incidental scene" of the accident: of course the same injury could have resulted in a stationary train, but "another operational hazard" had been the cause of the injury (i.e. the use of the couchettes provided for the transport activity during the night). Therefore, in principle, in accordance with § 5, para. 1 of the EKHG, liability of the secondary defendant would have to have been affirmed. However, according to § 9 of the EKHG, there would be no obligation to pay damages if the accident had been caused by an unavoidable incident, and it would in particular be deemed such an incident if it were related to the behaviour of a third party uninvolved in operations. In the case in question, the plaintiff had been injured by another passenger (the main defendant), who was not involved in operations, not finding the second

rung of the ladder when climbing down from his bunk, falling backwards to the left onto the sleeping plaintiff, thereby injuring his face. An unavoidable incident within the meaning of § 9, para. 2 of the EKHG could therefore be presumed. However, relief from liability in accordance with § 9 of the EKHG would also imply that operating undertakings, keepers and persons expressly involved in operations had exercised the utmost possible and due care under the circumstances of the case. However, the important duty of care should not be overemphasized if full liability without fault, which was not what legislators wanted, were to be avoided. No blame could be attached to the couchette car guard in this case: even taking account of the fact that the main defendant had requested an exchange, even a particularly careful couchette car guard would not have taken any special precautionary measures: if the main defendant had in fact tried to obtain the use of a bottom bunk, but was finally – in accordance with his own couchette booking – satisfied with using the top bunk, it could not be expected of the guard in the couchette car that he should try to prevent the main defendant from using the top bunk. Therefore, it was also irrelevant whether the guard had in the end found somebody who would have been willing to exchange bunks with the main defendant (who had in the meantime gone to sleep). Neither had the main defendant's behaviour caused an unusual operating hazard to which the accident could have been attributed: the accident could equally have occurred in a stationary train.

Finally though, an error in arranging the bunks or failure of the railways to perform could not be presumed either: in connection with this, the plaintiff referred to the "incorrect" adjustment of the couchette compartment. In this respect, the court of first instance had asserted that the accident would very probably not have occurred if the bunks had been "correctly" adjusted. This hypothetical assertion was based on the assumption that if the main defendant had used the middle bunk (instead of the top one), he might have refrained from trying to climb down using the ladder provided and would instead have climbed down directly from the middle bunk onto the floor. But this was of no benefit to the plaintiff's standpoint: without it having to be checked what normative content the secondary defendant's "service instruction" had contained, if any, there was in any case no link with regard to unlawfulness between the adjustment that was not carried out in accordance with the service instruction and the consequences of the accident. Risk-free use of the top bunk would also have to be ensured if the specific couchette car were to be arranged as a six-bunk compartment. The purpose of the secondary defendant's service instruction containing information on the "correct" arrangement of couchettes

could probably not be to avoid accidents such as the one in question: in this case, it would have to be presumed that despite the existence of approval, use of the top bunk was not possible without risk. In addition, it should not be forgotten that in principle, a ladder is provided to climb down from the bunks. If there were any increased risk in using the top bunks, it would be that a passenger could, "theoretically", fall from the top bunk whilst asleep, and of course the risk of injury would be greater if one were to fall from the top bunk than if one were to fall from the middle bunk. It is precisely for this reason that the possibility also exists with a six-bunk arrangement of extending a safety net for the top bunk. In any case, it cannot be assumed that the purpose of the secondary defendant's service instruction was to lessen the consequences of injury resulting from a passenger using the top bunk stepping on another passenger's face. The only purpose of the service instruction – if any – could be to reduce those risks in a four-bunk arrangement that could result from a sleeping passenger falling off the top bunk. But for climbing down from the middle and top bunks, a ladder was provided which, according to what the court of first instance established, was in no way defective. The fact that the main defendant used the ladder without first switching on the ceiling light or did not find the second rung, as a result of which he fell onto the plaintiff and injured him, could not be blamed on an error in arranging the secondary defendant's operational equipment. The secondary defendant had therefore succeeded in proving relief from liability in accordance with § 9 (2) of EKHG, without it being a question of whether the ladder had been moved, and if so, by whom.

The Court of Appeal dismissed the plaintiff's claim concerning rejection of the demand for declaratory action, with the following justification:

According to consistent practice, a declaratory interest is to be affirmed if the possibility remains open that the harmful incident opened the way to future damage or injury. It would be sufficient that an incident which could have opened the way to a specific injury had already occurred or that an injury could arise in future without the further involvement of the person who caused the injury, because the declaratory action serves not only to bar limitation, but also to avoid subsequent difficulties in providing proof, clarifying the question of liability on its merits. In so doing, one would have to take account of the objective foreseeable nature of the occurrence. Conversely, this would mean that a declaratory interest would then have to be negated if objective foreseeability of the occurrence of future injuries was not assured. It is exactly that which should be affirmed here in connection with the injuries

consequent upon the plaintiff: the court of first instance had established uncontestedly that the scarred condition of the optic nerve would remain as a permanent effect with no likelihood of improvement or indeed of deterioration, that further medical treatment of the permanent effects from a neurological point of view was unnecessary, that further medical treatment of the permanent effects from a surgical point of view was unnecessary and that the condition was not expected to deteriorate further. The plaintiff too was unable to demonstrate any definite grounds which would result in future injuries occurring. If he now posited any loss of wage claims as justification for the demand for declaratory action, which he could have earned in the future, he should be reminded that he never called upon this to justify the demand for declaratory action in the first instance. Rather, he had explicitly justified raising the demand for declaratory action by saying that his condition could be expected to deteriorate because of his age and the focus should be on the future consequences of the injury, which could not be made good.

The plaintiff's exceptional appeal brought as a result of incorrect legal ruling against this appeal decision – in so far as the demand for declaratory action brought against both defendants and the demand for payment of an amount of 150,211 Austrian Schillings brought against the secondary defendant was dismissed – is brought with the proposal to amend the disputed ruling such that the court should find for the plaintiff as claimed to the extent of the contestation.

The Supreme Court of Justice admitted the appeal, amended the disputed decision in respect of the claim for payment brought against the secondary defendant by reinstating the ruling of the court of first instance as a partial ruling, set aside the rulings of the first instances in respect of the demand for declaratory action and referred the matter to this extent back to the court of first instance for new decision following the collection of further evidence.

#### **From the grounds for the ruling:**

The appeal is admissible because as a rule, the care provided in accordance with § 9 (2) of the EKHG depends on the particular circumstances of the individual case (Legal information system-justice (RIS-Justiz) RS00111708), but here, the Court of Appeal went beyond the boundary of the scope available to it for making a judgement. The appeal is also justified with regard to the demand for declaratory action simply in the sense of the proposal to quash contained in the amendment proposal.

The appellant asserts in essence that the secondary defendant did not provide the extreme care required under § 9 (2) of EKHG. He had indeed justified bringing the declaratory action by a possible deterioration of his state of health; but the court of first instance should have taken into consideration the impairment of his lecturing and journalistic activities, in the same way that consideration should be given to psychological injury.

The following considerations were formulated on this:

That the accident occurred "during operation" of the railway (§ 1 EKHG) has already been correctly explained by the Court of Appeal (cf. RIS-Justiz RS0058156). The Court of Appeal has also correctly acknowledged that relief from liability in accordance with § 9 of the EKHG presupposes the maintenance of the most extreme care possible and reasonable according to the circumstances of the case (cf. RIS-Justiz RS0058206, RS0058326). Apart from the service instruction established, according to which the top bunks should be arranged at about the height of the middle of the window when using a four-bunk configuration, a particularly careful couchette car guard would at least have arranged the top bunk lower (or adjusted a middle bunk) for the main defendant, who was obviously looking for a bottom bunk because of his age. Contrary to the Court of Appeal's view, this would have reduced the risk of a fall not only whilst asleep but also when climbing into and out of the bunk. According to the observations made by the court of first instance, this would very probably have prevented the accident.

In these circumstances, the secondary defendant cannot benefit from relief from liability in accordance with § 9 of EKHG. Therefore, the court of first instance correctly affirmed the absolute liability of the secondary defendant. Its ruling was accordingly to be reinstated in so far as a partial ruling.

As far as the demand for declaratory action is concerned, the plaintiff claimed possible future loss of earnings as a result of ceasing his journalistic activities, not, however, in connection with the justification of the declaratory interest, but in connection with psychological injury. This aspect of the plaintiff's "organization of his free time" was not sufficiently ascertained. In the opinion of the ruling Supreme Court (Senate), the allegation made by the plaintiff concerning loss of earnings, although made in another context, should at least be debated before a declaratory interest in this respect is negated.

As no final ruling on the plaintiff's declaratory interest (cf. e.g. RIS-Justiz RS0039018, RS0038976) can be delivered on the basis of what has been established, the matter had to be referred back to the court of first instance in respect of the demand for declaratory action, with the initial rulings quashed.

(From: *Zeitschrift für Verkehrsrecht* (Transport Law Bulletin), Vienna, volume 1/2002, pp. 18-21)  
(Translation)

## Miscellaneous Information

### Dr. Kurt Spera – 75 years old

On 5 August this year, Dr. Kurt Spera celebrated his 75<sup>th</sup> birthday. In 1999, OTIF's Administrative Committee appointed him as *Conseiller honoraire* to the Central Office for his services in the further development and modernization of international rail transport law in general and for the organization of OTIF's 5<sup>th</sup> General Assembly in Vilnius in particular.

The Central Office previously published a detailed account of Dr. Spera's life, activities and services on the occasion of his 70<sup>th</sup> birthday (see Bulletin 1998/4). You are referred to that account for further details.

The Central Office wishes Dr. Spera many years of good health in order that his all-round knowledge and indefatigable capacity for work may continue to be available for the development of international rail transport law for as long as possible.

Ad multos annos.  
(Translation)

## Book Reviews

**Frohn Meyer, Albrecht/Mückenhausen, Peter** (editors), *EG-Verkehrsrecht* (EC Transport Law), Verlag C.H. Beck, Munich, 2000, 3<sup>rd</sup> supplement, May 2002

This commentary, which was published in loose-leaf format in 2000 (see review in Bulletin 1/2000), has now been updated for the third time with a comprehensive supplement.

This supplement takes into account the Commission's new transport policy white paper and the entry into force of the European Community's agreement with Switzerland on land and air transport.

With new contributions on the European Community's agreements on land and air transport, the commentary has for the first time been broadened to cover the Community's external relations in the field of transport.

In addition, the new Directive 2002/15/EC of the European Parliament and of the Council on the organisation of the working time of persons performing mobile road transport activities has been taken into account with an extended commentary. Section 119, Council Directive 96/49/EC on the approximation of the laws of the Member States concerning the carriage by rail of dangerous goods, also discusses in detail RID and how it relates to this Directive. The Directive makes RID applicable not just to the carriage of dangerous goods between the Member States, but also to carriage within them. Using RID as the basis for harmonization had the advantage that no new provisions or standards needed to be elaborated at Community level. What was ultimately brought about was an extension of the scope of RID to include domestic transport and hence simplification as compared with the position previously.

Mr. Urs Haldimann, Head of the International and Safety Division in the Swiss Federal Office for Civil Aviation, Berne, is a new addition to the team of editors of this commentary. The team of editors as a whole ensures that this commentary, which has become indispensable, is updated knowledgeably and carefully. (Translation)

**Kunz, Wolfgang** (editor), *Eisenbahnrecht* (Railway Law). Systematic collection with explanations of the German, European and international requirements, loose-leaf work with supplements, Nomos Publishing, Baden-Baden, ISBN 3-7890-3536-X, 14<sup>th</sup> supplement, status as at 1 June 2003.

The base volume appeared in 1994 (see Bulletin 1/1995). The ongoing provision of supplements means that in addition to the necessary updating, the texts and commentaries are made more complete step by step (see Bulletin 1/2003, p. 15).

The collection includes three volumes, two of which are reserved for German law and the law applicable in the

Federal Lander. The third volume covers the categories of "European law", "international law", "recommendations/requirements/tariffs" and "other law".

The 14<sup>th</sup> supplement completes volumes I and II. Urs Kramer's explanations on the *Allgemeines Eisenbahngesetz* (German General Railways Act, AEG) form an important new part. The tasks of the Railway Inspectorate, the rights and obligations of the railways, i.e. rail transport and rail infrastructure undertakings, procedures in connection with putting into service or withdrawal from service and other railway related procedures against the background of the EC's development of legislation in this field are comprehensively described. The last amendment to AEG, which is taken into account in this supplement, dates from June 2002. As new developments are underway, particularly with regard to the law covering access to networks, further amendments can be expected.

Now that Germany has ratified the Protocol of 3 June 1999 for the modification of COTIF (1999 Protocol), the full text of the Protocol, including its Annex, the new version of COTIF and the Act on the 1999 Protocol, is reproduced in the collection. The Act firstly assents to the 1999 Protocol and sets out the national German procedure for bringing into force the decisions of the OTIF organs in accordance with Article 35 §§ 1 to 5 of COTIF 1999. Secondly, it contains amendments to the German Rail Transport Act (EVO) resulting from the new version of COTIF, which will enter into force at the same time as COTIF 1999. The provision in § 17 of EVO (which is referred to, amongst other things, in the explanations on AEG), which has been controversial for a long time, has been replaced by a provision along the lines of Article 32 of CIV 1999, "Liability in case of cancellation, late running of trains or missed connections".

This comprehensive collection of the requirements covering the many legal relationships in the rail sector can serve as an initial rapid overview in aiding the work of experts in administrations, undertakings and associations, both within their own areas of activity and beyond. The newly included brief summary with the titles of Acts and other provisions in alphabetical order will make it easier for readers to use.

(Translation)



**Publications on transport law and associated branches of law, and on technical developments in the rail sector**

*Bulletin des transports et de la logistique*, Paris, n° 2994/2003, p. 443 – Contrat de transport. Notion de livraison (M. Tilche)

*Idem*, n° 2995/2003, p. 463 et 471/472 – Remise au chargement. Tout dire ! (Marchandises dangereuses) Contrat de transport : nullité pour erreur (M. Tilche)

*Idem*, n° 2999/2003, p. 535 – Marchandises dangereuses. Trois arrêtés d'été (N. Grange)

*Idem*, n° 3000/2003, p. 560-562 – Transport par mer. Livraison maritime (A. Chao)

*Idem*, n° 3001/2003, p. 577 – Aérien. Thirty one ! (Convention de Montréal) (M. Tilche)

*CIT Info*, Berne, N° 2/2003, Droit international du transport ferroviaire et droit de la concurrence / Internationales Eisenbahntransportrecht und Wettbewerbsrecht / The international law of rail transport and competition law (G. Charrier)

*CIT Info*, Berne, N° 3/2003, Modernisation de l'AIM / Modernisierung des AIM / Modernising AIM (R. Freise, S. Buchner)

*DVZ - Deutsche Verkehrszeitung*, Hamburg, Nr. 90/2003, S. 2 – Montrealer Abkommen vereinfacht Datenaustausch

*Shipping & Transport Lawyer International*, London, vol. 4 N° 1, p. 29 – A Busy Schedule for International Maritime Law (P. Griggs)

*Transidit*, Rouen, N° 36/2002, p. 21 – Plafonds de responsabilité du transporteur CMR; p. 22 – Convention d'Athènes de 1974

*Transportrecht*, Hamburg, Nr. 7-8/2003, S. 265-280 – Stand der Bahnreform in Deutschland und Europa (R. Freise)