Welcome to this Edition of TT Talk, number 21 in the series.

Content

1. An item for ports and terminals - Benchmarking initiative from ICHCA

John Nicholls, the TT Club's Director of Loss Prevention, writes:

The International Cargo Handling Co-ordination Association (ICHCA)'s International Safety Panel now has a scheme whereby cargo handling companies can obtain an accident benchmark for their type of work. The TT Club, as a Panel member, has been involved in building this scheme and believes that its port and terminal members can benefit from joining in this project.

In order for this benchmarking scheme to be usable, figures for 2000 and 2001 will be needed from ports and terminals around the world. The Club, as a member of ICHCA, wants to assist the Panel in collecting as much data from as many ports and terminals as possible. The raw data supplied will be treated in total confidence by the third party neutral body collecting this data (Circlechief AP) and used solely for global benchmarking. The final data will only be supplied to those organisations that take part by supplying the initial data.

In developing the scheme, the Panel has tried to make data collection as simple as possible. For example, for container operations, the two pieces of information which need to be supplied are:

a) Measure of personal injury - the number of persons absent from work for more than one day as a result of accidents at work.

b) Measure of work carried out - the total number of TEUs, or units for Ro-Ro operation, or tonnes for breakbulk and bulk operations, handled in the same period.

Where operations are carried out at more than one geographic location, these figures should ideally be supplied separately for each location. The way it works is that each response will be calculated as the number of injuries per 100,000 containers/units/tonnes handled. All berths are treated as being the same. The total number of responses will be added up and an overall rate calculated. This becomes the benchmark which will be sent to all those who participate.

ICHCA is currently seeking contributions from all types of ports or terminals for the years 2000 and 2001. All participants will be sent a benchmark figure at the end of the exercise.

The Club strongly supports this initiative and urges Club Members to take part.

All contributions should be sent no later than 31 July 2002 to:

Mike Compton, Principal, Circlechief AP, Suite 2, 85 Western Road, Romford, Essex RM1 3LS, UK
fax + 44 1708 734877 or e-mail mike@portsafety.demon.co.uk.

2. TT Club challenges draft California legislation on Intermodal Chassis

The TT Club, through its counsel in San Francisco, Sam Delich of Flynn, Delich & Wise, is challenging draft legislation - currently under consideration in the California State Senate under Senate Bill No.1507 - that would have a significant impact upon terminals operating chassis pools and negate some of the important provisions of the Uniform Intermodal Interchange and Facilities Access Agreement (UIAA).

Under pressure from trucking interests, anxious to reduce the amount of time drivers spend in container terminals examining chassis prior to hooking them to their tractor units, the legislators are proposing to switch the burden of 'pre-flight' inspection of the chassis from the haulier (who has that burden at present under Federal law) to the terminal, requiring it to sign, under penalty of perjury - a criminal offence, that the requisite survey has been performed.

The draft legislation also proposes to void, on the grounds of public policy, any hold harmless or indemnity provision in a contract between a haulier and the owner or lessee of the chassis, concerning defects in the physical condition of that chassis. This would run directly contrary to current industry practice, as set out in the UIAA.

In the representations made on behalf of the Club to the Chairman of the Californian Senate Committee on Transportation, Sam Delich emphasises the dangers of removing from the haulier the responsibility for checking the condition of the chassis prior to leaving the terminal. He says:
"A far more prudent and safer procedure is to adhere to the present regulatory scheme, under which a motor carrier must inspect the equipment and should refuse interchange of equipment that is not roadable or where there is not adequate time or facilities to do the required inspection."
He also emphasises the disruption to current business practice that the voiding of indemnities would entail.

In support of the efficacy of the present system, Sam says:

"The TT Club has insured equipment providers for chassis liabilities for over twenty years in North America. In that time, it has defended its members in excess of five hundred lawsuits concerning roadway accidents involving a motor carrier pulling equipment provided by the Members of the TT Club. In virtually all of these cases, the accidents were caused by the fault of the motor carrier and its driver or the driver of another vehicle, not the intermodal equipment. Less that one percent of these cases involved a defect in the equipment which arguably contributed to the accident, together with the fault of the motor carrier and its driver."

In other words, 'if it ain't broke, don't fix it!

Future editions of TT Talk will follow the progress of this legislative initiative. It is of great potential importance for the Club's terminal operator and container operator Members alike.

3. When does negligence amount to recklessness? Answer: it depends where you are...

a) The position in Germany

The Dabelstein & Passehl Law Office in Germany reported the following case to the International Law Office website at:

http://www.internationallawoffice.com/ld.cfm?Newsletters__Ref=4679

"A recent decision of the German courts confirms that, in cases where a consignment is lost, the freight forwarder will be considered to have acted 'recklessly' under the new Section 435 of the German

Commercial Code if it fails to put forward facts to clarify the circumstances of the loss and the measures it took to avoid it.

A freight forwarder paid just EUR 373 when faced with a EUR 33,745 claim for the unexplained loss of a computer during transportation. In doing so, it relied on the contractual limitation of liability, based on two SDRs per kilogram. Underwriters argued that, pursuant to Section 435 of the German Commercial Code, the freight forwarder was barred from invoking any statutory or contractual limitations of liability because it had caused the loss recklessly and with the knowledge that such damage would probably occur.

The appeal court in Cologne has recently upheld the decision of the court of first instance in favour of the underwriters. [In effect, the freight forwarder was obliged to adduce evidence of its systems and procedures and precautions taken to avoid loss. In the absence of evidence that it had taken due care, the court presumed that the forwarder was reckless and the recklessness had caused the loss.]

This is one of the first court cases dealing with the burden of proof for recklessness under Section 435. It ends any doubt which existed about whether the principles applying to the burden of proof in relation to recklessness would be carried over from previous legislation into Section 435 of the commercial code. [The case confirms that it is not for the claimant to prove recklessness, but for the forwarder to disprove it.]

In the March 2002 edition of Barlow Lyde & Gilbert's Aviation News, Simon Phippard, a partner in the firm commments:
"This is not the first occasion we have heard of this line of authority under German law, which would be of similar application in the air carriage context. Neither the Montreal Additional Protocol No. 4 nor the Montreal Convention apply in Germany, so carriers operating there need to ensure they are able to prove they have good security in place."

b) The position in Finland

The Finns, on the other hand, adopt a more practical and, in your Editor's opinion, commercial approach.
The Maritime Advocate On-Line Newsletter of 25 March 2002, contained the following report.

"Disappearing act
How wilful is wilful misconduct? In Finland, apparently, the courts take a very strict view, holding that, for misconduct to be wilful, or for negligence to be gross, it has to approach intention and to reflect an unscrupulous and careless attitude.

The Supreme Court in Finland was recently asked to determine whether a carrier was guilty of gross negligence when a parcel it had transported from Denmark to Finland disappeared after arriving at a terminal in Finland. Under the CMR convention, the carrier was not entitled to limit its liability if the damage was caused by wilful misconduct.

The Supreme Court found the goods had probably disappeared because the parcel was confused with other goods and delivered with those goods to another destination. This, said the court, did not show that the carrier had acted with gross negligence. So the carrier was entitled to limit its liability to the maximum amount based on the weight restriction in CMR and the Finnish road carriage of goods act."

To read a fuller account of the case, see the report on the International Law Office website at:

http://www.internationallawoffice.com/Ld.cfm?i=1030849&Newsletters__Ref=4713

from its Finnish correspondents, Ahola & Sokka Law Firm Ltd.

4. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information on any topic, or have any comments you would like to make, then e-mail the Editor at tt.talk@ttclub.com. We look forward to hearing from you.

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