

Criminal Law and Institutional - Managerial Aspects of Ensuring Safety in Rail Traffic. Selected Problems

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This article offers insights into criminal law aspects of rail accidents on the ground of 4 E theory. The authors show correlations between offences against safety in transport and criminal repercussions of this incidents. The concept of a rail disaster is scrutinized and the role of prevention in the process of ensuring safety is highlighted. In the further part of the article the readers' attention is turned to the role and methods of managing a public institution which acts as the National Security Agency (NSA) in rail transport. The article discusses some ideas for the NSA management modernising process as well as the viability of developing the concept of New Public Management and logistics in offices of public administration.

Keywords: Rail disaster, New Public Management, Lean Management, Quality, National Security Agency (NSA).

1. INTRODUCTION

Safety in traffic, as a generic and autonomous subject, is under the protection of criminal law. As such, this is stipulated under XXI Chapter of the binding Penal Code¹. Without doubt, it is indispensable to fight back against negative incidents in transport in order to ensure safety - and protection of health and life in particular - for every person, and for any property. On the other hand, any breach of rules and regulations adopted in transport may lead to, taken into account both the current volume of traffic and advances of motorization, incidents bearing serious hazard risk. Therefore, the rightfulness of prosecuting either the perpetrators of such incidents or the role of criminal law in ensuring safety must not be questioned. Obviously, the criminal law is not the only active agent in the discussed field. It is important to undertake the whole-system actions - according to 4 E concept - in the following four fields: *education* (education in traffic regulations of all participants, regular additional training in vehicle driving, e.g. a rail vehicle), *engineering* (extension of infrastructure), *emergency* (extension of life-saving system), and finally, *enforcement*

(inspections and punishing the incidents that violate traffic regulations, e.g. those of rail traffic). There are numerous and varied occurrences of disrespect for the mentioned legal right. They may be activated by direct traffic participants (engine drivers, dispatchers, assistant stationmasters, motorists, pedestrians, bikers) or by people who are outside the traffic, yet affect it in a direct way (passengers, third parties, e.g. a person running across the railway). All this may trigger different types of behaviour which meet criteria of a crime against safety in transport. Therefore it is not feasible to discuss here all the problems which potentially may occur in the area in question. The aim of the article is, first, to present, on the ground of 4 E theory, the issue of criminal liability for offences against safety in transport, then, to justify the need for institutional changes in the management of the National Security Agency (NSA) with reference to rail transport in Poland and finally, to propose changes in the institution responsible for supervising safety in rail transport. Due to broadness of the subject, the discussion on the topic has been limited to selected problems.

¹ 6 June 1997 Act. Penal Code, (Journal of Laws 1997, No. 88, item 553, as amended)

2. OFFENCES AGAINST SAFETY IN TRAFFIC

Despite the reservation made above, attention must be put at least to these types of offences against safety in traffic which may occur in rail traffic. These are, among others: causing a disaster in traffic (art. 173 of p.c.), producing a direct danger of disaster (art. 174 of p.c.), driving a vehicle under the influence of an intoxicant (art. 178a of p.c.), allowing a mechanical vehicle to take part in the traffic in a condition which endangers the safety or allowing a person being drunken, under the influence of an intoxicant or having no licence to drive (Art. 179 of p.c.), fulfilling acts related directly to ensuring the safety of mechanical vehicle traffic while being drunken or under the influence of an intoxicant (art 180 of p.c.).

Furthermore, it must be mentioned here that also some petty offences will refer to incidents in rail traffic; they may be related to the following acts: acts consisting in lawless setting up, devastation, damaging, removing, activating or deactivating of a signal sign or premonitory or protective device (art. 85 § 1 of c.p.o.²) or driving vehicle after the consumption of alcohol or another similarly intoxicating substance (art. 87 of c.p.o.), and finally, petty offences which are covered by the provisions of article 65 of 28 May 2003 Act on rail transport³.

3. RAIL DISASTER

Until 11 September 2006 the term of a rail disaster had been understood as defined in 2003 Act on Rail Transport. Article 17 section 4 of the said Act states that a rail disaster is a rail crash resulting in casualties (both fatalities and the injured) or substantial material losses, whereas a rail accident is an event which involves either a crash or running onto someone or something, derailling, or trains collision. The substantial material loss was defined as damage exceeding the worth of €50 000.

Above reference to the, now void, definition of rail disaster is aimed at emphasizing the interpretation differences when the term is analysed from the perspective of criminal law. The statutory interpretation diverged from the one of art. 173 of the penal code. The latter one allows for

a lot more events, nonetheless, it poses certain difficulty for interpretation.

Above all, within the doctrine of criminal law itself one comes across divergent standpoints. Although there is unanimity of opinions in that a disaster is a sudden event, the disagreement refers to pinpointing the effects which must follow the perpetrator's acts if he or she is to be held accountable for causing the disaster. According to one standpoint, such effects should lead to death or physical injuries of a few people, and, at the same time, either life or health of many others should be endangered or the magnitude of property should be at risk⁴. According to another viewpoint, there is no need for an event to bring about or personal harm to be called a disaster. What matters is the occurrence of a specific event, which will result either in direct hazard risk of death and loss of health for a number of people or in hazard risk for the magnitude of property⁵.

Seemingly, none of the above views seems fully convincing. This is because, if one adopts the former viewpoint, then the qualified type of a disaster becomes unnecessary - the one that consists in causing a disaster in traffic with resulting death of a person or severe detriment to the health of many people (§ 3 – if the perpetrator acts intentionally; § 4 – if the perpetrator acts unintentionally). It is beyond doubt, though, that such qualified type of disaster does occur and it was established by adding the mentioned consequence. Hence, the assertion that a disaster, in the meaning of art. 173 § 1 of p.c., is an event, resulting in death or health detriment of a few people, seems ungrounded. The claim seems even more surprising, when the proponents of this interpretation persist with the resultant death of a few people, considering the explicit wording, in the mentioned qualified types, of the death of one person.

The other standpoint raises different kinds of doubt. With the assumption that a disaster is an event, resulting in direct danger of life or health, for many people or threat for the magnitude of property then, what would be the rationale behind art. 174 of p.c., which stipulates that any person

² Code of petty offences, 2013 Journal of Laws, item 482, as amended.

³ 2007 Journal of Laws, No. 16, item 94, as amended.

⁴ R. A. Stefanski in: A. Wąsek (ed.), Penal Code. Specific part. Comments to articles 117-221. Vol. I., 2006, p.526.

⁵ G. Bogdan in A. Zoll (ed.), Penal Code. Specific part. Comments to articles 117-277. Vol. II, 2006, pp. 448-449.

who causes a direct danger of disaster in traffic is liable to a penalty?

The existence of all the following provisions – an offence of causing a direct danger of disaster (art. 174 of p.c.), an offence of causing a disaster (art. 173 § 1 & 2 of p.c.) and an offence of causing a disaster with the consequence of the death of a person or severe detriment to health (art. 173 § 3 & 4) – indicates that there is a connection between causing direct threat of disaster and causing a disaster with the consequence of death or severe detriment to the health of many people. Could occur there a situation in which there is an event – objectively dangerous – resulting solely in the threat of life or serious detriment to the health of many people or the threat to the magnitude of property? In other terms, apart from insignificant injuries, no one dies nor sustains severe detriment to health. Such situation can be illustrated by an actual event of freight trains collision in Białystok in 2010. In that event two freight trains collided. In the aftermath, the collision caused the fuel leakage from one of the train engines, its ignition and, eventually the explosion of two petrol tankers which made a part of the train. So, a very dangerous event occurred then, which means that such an event cannot be qualified as an act of merely bringing down a direct threat of disaster. However, considering the lack of casualties or people who sustained severe detriment to the health in that collision, again there is no possibility to qualify it as a disaster in the meaning of art. 173 § 3 or 4 of p.c. Nonetheless, the event occurred, and it could have cause such consequences. Undeniably though, considerable damage was done because the losses amounted to a few tens of millions of zlotys. Moreover, it should be mentioned that the event under discussion, due to its extent, cannot be qualified merely as a traffic accident (art. 177 of p.c.).

Summing up, it must be stated that the proposed definition of a disaster, which requires for an event to be defined as such only if its consequences are, apart from endangered life or health of many people or property to a considerable degree, also death of particular people, is inconsistent. What is more, it would preclude perpetrators from being held liable for bringing about events of the aforementioned kind. Therefore, it is justified to adopt the assumption that the liability for causing a disaster as set out under art. 173 § 1 of p.c. need not be preconditioned by such consequences as either death of at least a few people or severe detriment to the health of many others.

Another important problem in the area of traffic offences is a proper way to establish who should be held liable for causing the event. It must be remembered, though, that both traffic accidents and disasters happen as a consequence of the course of varied events which also include the acts of different people. Approaching this problem, the authors enter a very difficult area of chain causation in criminal law. Namely, there are several theories which, when applied, will produce divergent results. There is no time nor place here to introduce and discuss the mentioned theories in depth, nevertheless, the Supreme Court's stance is worth making reference to, as it sheds light on the issue. Namely, the Supreme Court confirms that a disaster does usually come across as a result of a series of events, yet, from criminal viewpoint, it puts critical importance on this one circumstance without the occurrence of which other circumstances would not suffice to contribute to the disaster⁶. This standpoint, rightly adopted, lifts liability of those who are responsible for indirect causes of disasters. However, as we know, State Commission for Investigation of Railway Accidents reports on an array of causes the occurrence of which makes one believe that, firstly, they should never have occurred, and secondly, their influence on the eventual disaster is undeniable. An accurate reflection of the discussion is provided by the 2010 disaster which happened on 13 July on the railway between Kępice and Korzybie in the Pomeranian voivodship. Its direct cause was identified as one of the trains' start without required permission. Furthermore, the investigation conducted by the Commission revealed a number of omissions, such as lack of communication devices to enable the exchange of messages and commands between the train engine driver and the assistant station master and, on top of that, no emergency stop system. The Commission further reported that the trains were pulled by wrong locomotives and operated by inadequate traction staffing. Although these irregularities could not lead to the imposition of liability for disaster on people who had let the trains on the track, yet, gross professional negligence as revealed above meets the criteria of a crime under art. 179 of p.c. which stipulates that any person who, in breach of a particular duty, allows a mechanical vehicle to take part in the traffic in a condition which endangers the safety in

⁶ Supreme Court Ruling of 17 Feb 1954, ref. II K 49/54, New Law 1954, No. 5-6, p. 165.

the traffic is liable to a penalty. It seems reasonable, in case of an accident or a disaster in the traffic, to consider the liability of those who were on traffic duty at the time of the event and check whether such people fulfilled their duties as set out under separate regulations, and whether they did not breach the provisions stating which particular vehicles could not be set in motion or whether they had physical and mental capacity to drive the engine.

4. APPLICATION OF PROPER CRIMINAL SANCTIONS

Prevention, though marginalized nowadays, still has an important role to play in criminal law. The doctrine splits it into two varieties; the first one should prevent further offences through the imposition of a penalty that is expected to affect the legal awareness of the perpetrator, in such a way, that he or she will not break the law any more (specific prevention). The other variety, which is called general prevention, is supposed to affect legal awareness of the general public. Here, the prosecution itself and its inexorable imposition of penalty is meant to deter potential perpetrators.

A characteristic feature of traffic offences is that they are mostly committed unintentionally. This means that a perpetrator breaches particular precautions, such as safety regulations in the rail traffic. Thus, prevention of unintentional offences should contain following elements: raising awareness in potential offenders, eradication of negative (hazardous to safety), instances of their behaviour and finally, instillation of required patterns of behaviour which should act against the occurrence of danger. In the view of the foregoing there should be a strong demand for adequate penalty for the perpetrators of traffic offences. One of the punitive measures imposed on such perpetrators, which, strangely enough is far from being in common use, should be the ban on driving vehicles, including rail vehicles. The statistics produced by the Ministry of Justice reveals that there is a remarkable disproportion between convictions for offences against safety in the traffic (in particular against art. 173-177 of p.c.), and the imposition of ban on driving vehicles. And yet, this is the most straightforward way to disqualify traffic offenders from driving profession. Moreover, if the ban exceeds the period of 6 months, the perpetrator will have to reapply for the driving licence, then complete the driving course and finally, verify his or her approach to respect

traffic regulations. This punitive measure, considering the commonness of the use of vehicles nowadays, and furthermore, with reference to professional drivers such as train engine drivers, may be a sufficient punishment. It leads to loss of work or the loss of professional licences. As such it should be in wider use and, above all, in well-grounded cases and with the legal presumptions fulfilled, it should replace the principal penalty prescribed by law for a given offence.

5. INSTITUTIONAL AND MANAGERIAL ASPECTS OF SAFETY ON THE RAIL TRANSPORT MARKET

Adherence to safety regulations in the rail transport is overseen by a public institution. Public management, due to coordinated actions directed at the creation of public values and the fulfilment of public interests, may be defined as actions which should ensure proper goals setting process in public institutions. And public interest, in turn, means safety. One of significant paradigms of public management are a public institution's numerous interactions with its environment. The latter comprises a number of contexts, such as political, economic, legal, technical and technological, and last but not least, safety. Beyond any doubt, the Office of Rail Transportation is a public institution. It acts in the public interest, which in turn is inseparable from the railway transport safety. This derives from the very core of the technical regulation. It may be defined as a part of economic regulation. The utmost objective of economic regulation is to ensure the observance of safety principles in the transportation traffic on the competitive market. Nonetheless, technical regulation should be independent by its very nature. Independence of a public institution represented, for instance, by the President of the Office of Rail Transportation in the capacity of the National Security Agency in the rail, has a few dimensions⁷. These are among others: terms in office, possibility to recall an official from the office only in statute-determined cases, financial autonomy, structural autonomy, independence of judgement, and finally, freedom to, though in accordance with the safety canons, introduce products, systems of traffic control, traction vehicles, etc. Technical regulation must be

⁷ M. Antonowicz: Regulatory strategy for the market of rail transportation, (2008), ed. by T. Skoczny "Management Problems" No. 1 pp. 11-38

independent in its decisions. It means that decisions taken by "Technical Regulator" must not be influenced either by any regulated contractor or a public office. Both the institutional and personal contexts are indispensable to maintain accuracy and effectiveness of technical regulation, stability of the regulation rules. Such stability should refer, for example, to terms in office of one-person offices or to the existence of the institutions of collegiate character such as in the British regulator. Regulatory offices, and particularly the technical ones, belong to expert administrative offices (specialised), in which the knowledge and professional experience are necessary to confine the information and technical advantage of the administered entities. From the institutional perspective two approaches may be considered, namely the extensive approach and the effective one. The former is based on the establishment of the independent technical regulator – German model (allowed by 2012 auditing directive with reference to the rail transport)⁸ together with significant upsizing in the new NSA and close cooperation with the market contributors. It is characterized by considerable advances in the staff technical skills, high level of competence and flexible organisation structure adjusted to technical and technological requirements of the market. All this means the establishment of a public office which is highly specialised and qualified in the railway transport. The latter – the effective approach - is based on the application of process approach or net approach in the functioning of a public body such as the Office of the Rail Transportation. This approach is directed at an employee and a client of the service within technical regulation. Besides, it is based on the theory of consistent and continuous improvement of administrative processes as well as on the restructuring of the Office of the Rail Transportation in the capacity of NSA. This is reflected in chart No. 1. Still, the introduction of the effective approach requires the employment of the following tools⁹:

1. Raising awareness among employees concerning necessity of changes in administrative processes and job environment;

2. Engagement of employees in perfecting of processes and tasks at their workstations, in their team work, and in the client's perspective;

3. Auditing of the organization structure and administrative processes in the area of technical regulations;

4. Introduction of the pull system in the administrative environment, which means adjustment of the supply of resources to the fluctuating demand for tasks – flexibility of resources, shifting to other tasks, flexible office structures, for example can-do type of organisation; As a matter of fact, this means heading for the lean concept based on stability, standardization, continuous perfection and visual management;¹⁰

⁸Directive of the European Parliament and of the Council establishing a single European railway area, Strasbourg 2012

⁹ T. Sobczyk: Lean Office and Lean Administration – Office process, 2012, KAIZEN No. 1/2 pp. 36-39

¹⁰ D. Locher: Lean in the office and services, MT Business 2011 p. 18

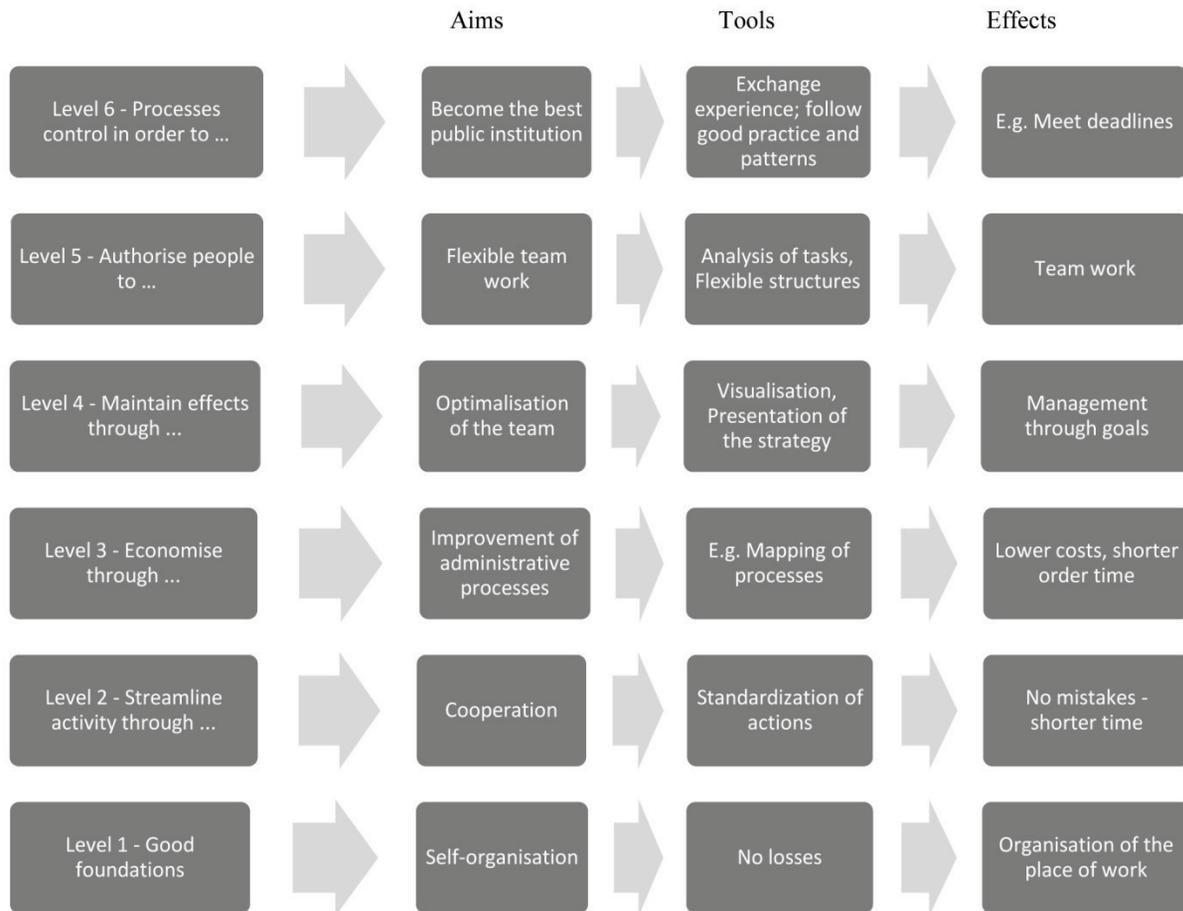


Chart 1. Model of improved management of administrative processes in NSA

Proposal for Improvement based on “The Model for Effective Management of Administrative Processes in NSA”

Source: Authors’ own based on M. Kanus, 2012, Office Mismanagement, KAIZEN No. 1 / 2 p. 27

5. Standardisation of actions and activities (process mapping, value mapping, setting time parameters for activities, elements of the visualisation of aims, of tasks progression and time, e.g. information charts)

6. Participation of supervisors in streamlining activities (initiative, education, bottom-up programmes based on the employees’ suggestions, eradication of time wastage).

7. Introduction of the system concerning quality management, e.g. FMEA method, to NSA¹¹.

With such an approach, the role of logistics in offices of public administration rises. It is crucial for them to liaise with other entities within the frame of supply chains operating in economy¹². A public institution such as the Office of the Rail Transportation is an important link for many

business entities. It is for instance, a permit for use of given goods, and in fact it generates demand for these goods. The ultimate role of the regulation in general is to protect clients of transportation services, i.e., passengers of rail transportation as well as corporate clients of rail freight transportation, including their safety. Also, clients of rail transport services must have satisfied their need for safety. The regulation is in its nature of pro-consumer character. In the system approach, a public regulatory institution is an immanent institutional element of the rail market structure due to the fact that its decisions, taken in the public interest, directly lead to interference with the rail market mechanism, and affect safety of other rail market players’ operations. The effectiveness of managing the National Authority for Security in the rail transport may be conditioned by many factors, such as, for instance, the use of specific management methods and the mechanisms – typical for the regulated sector, by proper communication with the environment, by organisational efficiency, transparency of decision

¹¹ M. Budgol: Quality management in offices of public administration, Difin 2011 pp. 120-154

¹² C. Szydłowski, 2011, Logistics in offices of public administration, Acta Universitatis Lodzianensis No. 262 p. 482

model, clarity and concreteness in the system perspective of the proposed changes – decisions, based on comprehensible theories and causalities. Further factors may include taking into account the enquirers' values as well as offering the clients proper equivalents which will meet their needs. Finally, instances of offence and subsequent penalties with their harshness for particular entities and then, further effort connected with the resumption of technically proper operations of the rail traffic – all these affect effective management of National Security Authority. Evaluation of the regulator's operations should be normally carried out from the perspective of efficiency and effectiveness. Its importance to ensure the efficient and secure functioning of the rail market as well as secure operation of the rail traffic is undeniable. This is why, in order to streamline its spending of public money and guarantee higher effectiveness, it is worth considering to introduce managerial approach to the administration of the technical regulator in rail transport. Due to the fact that the regulator's decisions refer to entities of both private and public ownership, such managerial approach should be understood as market-driven management, with the assumed adaptation of methods and techniques, typical for private sector, to the management of the "Regulator", a public office. Especially weighty is the attitude of a public institution to safety. Ideally, a public institution should tend to improve safety,

Table 1. Traditional and modern management of public sector

CATEGORY	Traditional public management	New public management (NPM)
1. Structure	Centralised, supervised by ...	Divided between units organised around particular services, e.g. transport sectors
2. Inter- and intra-relations of administrative bodies	Unspecified, open - ended	Based on contracts, e.g. state – infrastructure administrator, inter-organisational cooperation
3. Operation	Emphasis on ethics of management, without fundamental changes in organisation or structure	Adaptation of management methods from the private sector as regards the instruments and organisation forms
4. Financing	Fixed or ever-increasing	Cuts in financial reserves, effective expenditures, tasks related budgeting
5. Management style	Important role of politicking and knowledge or regulations	Transparency of management and application of procedures towards entrepreneurs
6. Results oriented	Use of presumed and secret standards	Need for clearly defined, outlined and measurable goals
7. Control	Control of procedures, rules and legitimacy of expenditures, less frequent control of properness of activity; institutionalised control, e.g. NIK (Supreme Audit Office)	Control of effects and results. Orientation at results (improvement in safety in rail transport)

Source: Based on: H. Krynicka: Concept of new management in public sector. Following K. Opolski, P. Modzelewski: Quality management in public services Warsaw 2004 p. 35

New concept focuses mainly on the market driven activity, public partnership, effectiveness and achievements, flat organisation structure, external audit, competent supervision. The service of ensuring safety in the rail transport should

following questions: How to manage a technical regulator? What should be the state’s role in the process of improving safety in rail transport? The model we should be heading for is presented in the Table 2 below.

Table 2. Management models in public administration

Specification	Bureaucratic model	New management model (NPM)	Good management of public institution (NSA)
Management practice	Hierarchy	Market	Net and process management
Norm	Administrative law	Contracts	Conventions, legal instruments, safety rules, standards
Management style	Bureaucratic – administration	Managerial – management	Partnership, consultations with the interested parties
Types of relations	Domination and subordination	Competition and cooperation	Equality and interdependency, inter-organisational cooperation
Goals	Perpetuation of the established order	Forcing changes in the market and market contributors	Development of compromise among market players in aid of improved safety
Activity orientation	Procedures	Effects	Meeting clients’ needs for efficient transport system and safe transportation services
State organisation	Monocentric system	Autonomous systems	Public-spirited society, professionalism and competence of an institution of technical regulation

Source Authors’ own based on: J. Czaputowicz: Management in public administration in the age of globalisation, Civil Service No. 11/2005

concentrate on secure rail traffic direction with the use of secure systems and the guarantee of safety for the recipients of transportation services. Furthermore, it should result in effective solutions for ensuring safety of the system character. Despite that, no one should feel discharged from the pursuit of the ways and methods of good management, based on clear answers to the

Above all, effective management of a public institution, then, business culture oriented at the satisfaction of the clients’ needs for safe rail services provision, efficiency, and last but not least, flexibility in response to expected changes on the market – all these will decide about social reception of a public institution in the capacity of NSA.

6. SUMMARY

The issue of safety has become the field of vital inquiry by the so called safety logistics which deals with events brought about by reasons resulting from actions, negligence and omissions from a person. In case of rail disasters it is particularly important due to indispensability of procedures and undertakings as regards particular threat. For the sake of safety it is vital that NSA should liaise with other market entities. NSA, as a link in the chain of safety system in the rail transport, has a large role to play by setting safety standards or, for that matter, influencing the culture of establishing the principles of safety and of technical and technological progress in the rail transport. Therefore, effectiveness of NSA management, its specialist competencies, clear and transparent activities as well as the systems of controlling if and how the established safety rules are followed - all these contribute to greater productivity and effectiveness of the rail transport. To recapitulate, the above discussion leads to the following conclusions:

- Firstly, in case of a rail disaster or a rail accident, it is right to consider liability of people who control the trains in the traffic or people who issue permissions to use devices and products in the rail transport, by checking if they properly fulfilled their duties as provided under separate regulations or if these people did not disregard the regulations which either ban certain vehicles from the traffic or ban driving under the influence.
- Secondly, prevention, raising awareness and education in safety which contribute to overall safe actions.
- Thirdly, the role of NSA should be reinforced in its competencies, tasks, decisions, and finances because the effects of omissions in these fields may mean threat for the man, the economic environment, or the natural environment and result in absolutely incalculable losses. This argument may be well illustrated by the rail disaster in Canada on 6 July 2013. Prevention, upgrading line infrastructure, modernity in trains traffic operating and directing, application of appropriate procedures, self-awareness and improvement of work processes on job positions connected with safety in the rail traffic – these are some of the key conditions to ensure as well as to control the observance of safety regulations in the rail traffic.

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