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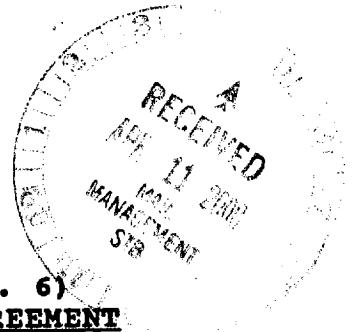
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SURFACE TRANSPORTATION BOARD

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SECTION 5a APPLICATION NO. 61 (Sub-No. 6)
NATIONAL CLASSIFICATION COMMITTEE -- AGREEMENT

OPENING COMMENTS OF
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
AND THE HEALTH AND PERSONAL CARE DISTRIBUTION
CONFERENCE, INC.

National Small Shipments
Traffic Conference, Inc.

The Health and Personal Care
Distribution Conference, Inc.

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 1105
1750 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 393-5710

Their Attorney

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**OPENING COMMENTS OF
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
AND THE HEALTH AND PERSONAL CARE DISTRIBUTION
CONFERENCE, INC.**

The National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and The Health and Personal Care Distribution Conference, Inc. ("H&PCDC") (collectively, the "Shipper Conferences") hereby submit their opening comments in this phase of this proceeding.

I. INTEREST OF THE SHIPPER CONFERENCES

NASSTRAC is an association whose primary focus is the transportation of many different types of commodities in less-than-truckload and package volumes. Its regular membership consists of several hundred shippers of freight. H&PCDC is similar to NASSTRAC in its primary focus, but smaller, because its members are all shippers of pharmaceuticals, cosmetics and related commodities.

Both of the Shipper Conferences have participated frequently in proceedings before the National Classification Committee ("NCC") of the National Motor Freight Traffic Association, Inc. ("NMFTA"). In addition, both Conferences have been active participants in past phases of this proceeding, as well as in prior proceedings involving ICC and STB oversight of the NCC and classification issues, and of the rate bureaus, class rates, and general rate increases.

II. FREIGHT CLASSIFICATION, RATEMAKING AND
ANTITRUST IMMUNITY

The shipper members of the Conferences are vitally interested in this proceeding because of the integral relationship between freight classification as performed by the NCC and rate setting by motor carriers, especially by the large LTL trucking companies that transport most Conference members' freight. Freight rates determined by market forces are important not just to these and other shippers, but to the economy as a whole, and any distortion or avoidance of those market forces must be minimized.

The carrier practices under consideration in this proceeding and in the STB's companion proceeding on rate bureau reform,^{1/} in which the Shipper Conferences are also active participants, are so antithetical to market-based ratemaking as to be conducted behind the shield of antitrust immunity. These practices are the last remnants of the late and unlamented era of pervasive regulation.

ICC regulation of the motor carrier industry was the product of the Motor Carrier Act of 1935. Unlike the railroad industry, which was regulated in the original Interstate Commerce Act primarily to rein in abuses of rail monopoly power, trucking companies have never been classic monopolies. On the contrary, motor carriers were regulated during the depths of the Great Depression in order to protect the carriers from excessive

^{1/} Section 5a Application No. 118 (Amendment No. 1), et al., EC-MAC Motor Carriers Service Organization, Inc., et al.

competition, and to reduce the resulting corner cutting, fly-by-night operations, and carrier failures.

Between 1935 and 1980, licensed motor carriers operated with the characteristics of regional cartels. Attempts by new companies to commence trucking operations, or by existing companies to extend operations, were vigorously resisted. Rates were largely agreed upon among competitors and raised through collective action by the carrier members of regional rate bureaus.

Many of these practices were clearly anticompetitive, and would have been violations of the antitrust laws if they had not taken place under agreements entered and approved by the ICC pursuant to Section 5a of the Act, a predecessor of current 49 U.S.C. Section 13703. However, carrier actions that are strictly in accordance with such agreements, as approved and conditioned by the ICC or the STB, receive immunity from the antitrust laws.

The purpose of classification is to assign commodities with similar transportation characteristics to the same categories, called Classes. The purpose of this exercise is to facilitate carrier ratemaking. See, e.g., Overnight Transportation Co. v. United States, 266 F. Supp. 88, 90 (E.D. Va. 1967).

The Classes are determined primarily by a commodity's density, though other transportation characteristics have also been considered in particular instances. Various commodities with densities below 1 pound per cubic foot would all probably be assigned Class 500. Various commodities with densities of from 9

pounds per cubic foot to 10.5 pounds per cubic foot are assigned Class 100.

Thousands of commodities and their classifications are collected in the National Motor Freight Classification (the "NMFC" or the "Classification"), and assigned among the NMFC's eighteen Classes (from Class 50 for the densest commodities to Class 500 for the least dense). To minimize gaps, the NMFC also includes generic classifications. For example, in addition to many specifically named chemicals and their classes in the Chemicals Group, the NMFC also contains an item for Chemicals NOI ("not otherwise identified" or "not otherwise indexed"), which are assigned Class 100.

Attached hereto as Appendix A is a page from the most recent NMFC showing various items and classes, including Chemicals NOI. Attached as Appendix B is a page from the Index of Articles. To determine the Class of, say, chewing gum, the reader would turn to Item 39980 in the NMFC, and learn that chewing gum in various types of packaging is assigned Class 65. Also assigned to Class 65 are commodities as different as loose bedstead rails, vegetable tallow in bales, books NOI, aluminum baseball bats, instant coffee, and many others.

The benefit of this system is that carriers do not need to make separate decisions about how much they want to charge to transport gum, bedstead rails, tallow, books, baseball bats and coffee between any two points. They simply need to decide how much they want to charge to transport commodities in Class 65 between those two points. The same is true for the thousands of other

commodities in Class 65 and in the other 17 Classes. Motor carrier ratemaking is simplified.

However, in the era of pervasive regulation preceding 1980, this system also facilitated lock-step pricing by carriers, who often charged identical rates and took identical general rate increases -- across the board increases in their entire rate structures. To some extent, this problem persists.

Motor carrier rate bureaus would publish class rates, reflective of the relationship among the commodity Classes in the NMFC, and they continue to perform this function today. In the examples cited above, if the class rate between two points for commodities in Class 100 was \$100, the class rate between the same two points for commodities in Class 500 would be \$500, and the class rate for Class 65 items would be \$65.

Classification determinations are made by members of the NCC, all of whom are representatives of trucking companies. Class rates are set by the rate bureaus, whose members are also trucking companies. While the NCC has often asserted that its determinations are objective and unaffected by profit considerations, there is a direct link between Classes and class rates. As illustrated in the example above, the class rate for a commodity in Class 500 is five times the class rate for a commodity in Class 100, and the class rate for a commodity in Class 65 is 65% of the class rate for a commodity in Class 100. Reclassifying a commodity from Class 100 to Class 500 leads to a quintupling of the applicable class rate.

Because of their antitrust immunity, the motor carrier members of the NCC and the rate bureaus have been allowed to agree on commodity classifications and agree on rates for the classes without fear of prosecution for price fixing. Rather, their activities were made subject to regulation by the ICC, and now the STB, before which shippers and shipper representatives like the Conferences could and did file complaints and protests.

In 1980, Congress enacted the deregulatory Motor Carrier Act of 1980. Among other changes, this Act reduced or eliminated barriers to entry into the trucking industry. As a result, existing carriers obtained nationwide operating authority, and thousands of new trucking companies entered the industry, competing for shippers' freight with lower rates and better service. Competition largely replaced regulation as the driving force in motor carrier ratemaking. Congress adopted "an approach emphasizing market discipline, in contrast to public utility-style ratemaking, as the principal regulator of motor carriers." Central & Southern Motor Freight Tariff Assn. v. United States, 757 F.2d 301, 311 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985). The result revolutionized the trucking industry.

The trucking industry prior to 1980 was dominated by cartels that resisted competition and the service improvements that competition brings. Today's trucking industry is characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness to customers that is far in excess of what railroads and water carriers manage to

provide. In the 20 years since 1980, more efficient carriers and more efficient shippers, working together, have produced a more efficient distribution system benefiting the entire American economy.

There is an obvious inconsistency between the new policy of deregulation and competition in the trucking industry resulting from the Motor Carrier Act of 1980, and collective freight classification and rate setting with antitrust immunity by the NCC and the rate bureaus. As stated in the legislative history of the Act:

No issue has received more attention during the debate before the Committee than whether this immunity should be allowed to continue. The debate centered on whether there continues to be a reasonable public quo in return for the collective ratemaking quid of the Reed-Bulwinkle Act.^{2/}

Though Congress decided to preserve antitrust immunity for the NCC and rate bureaus, it also required changes. Rate bureaus would no longer be allowed to consider or discuss individual carriers' single line rates, and the right of independent action of member carriers was enhanced, in order to get away from uniform, noncompetitive ratemaking. Notably, Congress recognized shippers' fears that freight classification would be misused as a device for indirect rate increases, and stated:

^{2/} House Report No. 96-1069, reprinted in 1980 U.S. Code Cong. & Ad. News 2283, 2309.

Concern has been expressed that permitting rate bureaus to continue their function with respect to proposing changes in commodity classifications would allow carriers in some way to indirectly do what they will not be able to do directly after January 1 or July 1, 1984; namely, set single-line rates collectively. That is not the Committee's intent.^{3/}

Compliance with the new strictures against collective action influencing individual carriers' single-line rates was not immediate or ungrudging. See, e.g., Clark & Reid Company v. United States, 851 F.2d 1468 (D.C. Cir. 1988), and Niagara Frontier Tariff Bureau, Inc. v. United States, 780 F.2d 109 (D.C. Cir. 1986). Nevertheless, many trucking companies gradually learned to set their own rates in the new competitive marketplace.

However, this generally did not involve abandoning the old system of class rates tied to commodity classifications. The trucking industry preserved the NMFC and NCC classification determinations as well as rate bureau class rates (although some carriers adopted their own, individually determined class rates). Competitive pricing took the form of a system of discounting off the class rates. For an extended discussion and analysis of this development, see Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, 7 I.C.C. 2d 388 (1991).

The system of class rates and discount rates had its defenders, who argued that these arrangements simplified

^{3/} Id. at 2310.

ratemaking, and permitted shippers to compare rate quotations easily. If Carrier A and Carrier B offer discounts of 50% and 45% off the same baseline set of class rates, it can be assumed that Carrier A's services will be less expensive than Carrier B's, other things (such as service and ancillary charges) being equal.

However, this system also demonstrated drawbacks. Chief among them was that the system of class rate tariffs and separate discount rate tariffs, coupled with the filed rate doctrine, led to the undercharge epidemic. Bankrupt carriers (or carriers that had gone out of business and no longer valued the goodwill of their shipper customers) frequently sought to deny, challenge or repudiate the discount rates they were forced to charge to attract shippers' business in the competitive marketplace, in hopes of retroactively substituting the much higher class rates.

Another drawback of this system is that it has preserved the incentive of the NCC and the rate bureaus to take advantage of their antitrust immunity to increase carrier revenues by increasing Class ratings in the NMFC, and class rates in the rate bureaus' tariffs.

When Carrier A, in the example above, obtains a shipper's business based on a quoted 50% discount, it may be difficult for the carrier to persuade the shipper to accept a 45% discount when Carrier A wants to raise its rates. A direct rate increase is unnecessary, however, if the class rates underlying the 50% discount rates are increased by the rate bureau that publishes those class rates. The shipper's rates may go up indirectly and

without actual notice. And if the shipper does notice the increase, Carrier A can claim that the increase resulted from rate bureau action for which it is not responsible.

Similarly, if a shipper's principal cargo is reclassified from Class 100 to Class 125 by the NCC, the class rates for those shipments will go up by 25%. Discounts may temper the increase reflected on individual carrier freight bills, but the result remains a rate increase. And any inquiries by a shipper who notices the change may be met with the explanation that the increase was not Carrier A's idea; it resulted from modification of the NMFC by "objective" trucking industry classification specialists.

Knowledgeable shippers often try to protect themselves against these "stealth" rate increases with contracts that lock in agreed rates, and they try to avoid increases based on commodity reclassifications through the use of freight-all-kinds or "FAK" classifications. For example, the contract may provide that all freight will be rated as if it were Class 65, regardless of variations among individual commodities or changed Class ratings adopted by the NCC. However, the effectiveness of such protections is generally temporary. Sooner or later (normally, at least annually), contracts or contract rates are renegotiated. When they are, increases in class rates and reclassifications of commodities to higher class ratings will almost invariably be cited as grounds for a rate increase, if the increase has not been implemented already through the discounted class rate pricing system.

Periodically, of course, the prices of service providers, like the prices of wholesalers or retailers of goods, need to be raised, to cover cost increases or to enhance profits. The trucking industry is certainly not unique in wanting to make more money. Nor is it necessarily unique in sometimes raising rates indirectly, or claiming the rate increase results from decisions made by others, or circumstances beyond the carriers' control.

What is unique about the trucking industry is its ability to raise rates through commodity reclassifications and/or class rate increases with antitrust immunity. The purpose of these proceedings, which the Shipper Conferences support, is to determine whether the public interest requires the imposition of additional conditions on the NCC and rate bureaus, in order to eliminate or minimize any exercise of the trucking industry's extraordinary collective rate-making authority that is not justified in today's deregulated marketplace.

III. IN CONSIDERING THE ISSUES PRESENTED, THE BOARD SHOULD EMPHASIZE THE NEED TO DETER ABUSES OF CARRIER ANTITRUST IMMUNITY

Antitrust immunity with respect to pricing is rare in American law, and is narrowly construed when it exists. See, e.g., Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973). Traditionally, antitrust immunity has existed only where, and to the extent, that the need for implementation of antitrust policies has been displaced by effective regulation. E.g., Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922).

Since enactment of the Motor Carrier Act of 1980, there has been relatively little regulation of motor carrier rates and terms of service, including freight classification matters, by the ICC and STB. The presumption has been that free market remedies -- i.e., shippers' ability to use different carriers -- would be adequate to resolve most problems.

Prior to 1994, when the Trucking Industry Regulatory Reform Act,^{4/} and 1996, when the ICC Termination Act of 1995^{5/} took effect, recourse to the ICC and the Board to challenge the reasonableness of carriers' filed rates, including individual carriers' rates, was available. Today, however, with the general demise of filed rates, STB jurisdiction over the reasonableness of carrier rates is more restricted. In fact, there is no recourse to the Board as to many motor carrier rates, according to the holding in a recent undercharge case, Miller v. WD-40 Co., 29 F. Supp. 2d 1040 (D. Minn. 1998).

The logic underlying exemptions from the antitrust laws -- that they are warranted to the extent that they are supplanted by regulatory remedies -- is highly relevant to this proceeding. The end result of many actions by NCC and the rate bureaus is individual carrier rate increases based on class rate increases published by rate bureaus acting alone, or class rate increases by rate bureaus based on NCC commodity classification increases. And if regulatory recourse as to such rate increases is limited or

^{4/} Pub. L. No. 103-311, § 201 et seq., 108 Stat. 1683 (1994).

^{5/} Pub. L. No. 104-88 (1995), 49 U.S.C. § 10101, et. seq.

nonexistent, the antitrust immunity under which these actions are taken requires reexamination.

In the past, the Shipper Conferences have called for termination of antitrust immunity for NCC and the rate bureaus. We continue to believe that immunity is no longer needed for any legitimate and beneficial operations of NCC and the rate bureaus. At a minimum, however, it is imperative that antitrust immunity be withdrawn or curtailed to the extent that NCC and rate bureau actions affect the rate structure of the motor carrier industry in ways that are anticompetitive.

There are, of course, disputes between shipper and carrier interests about where to draw the line between beneficial and anticompetitive activities by NCC and the rate bureaus. An alternative to engaging in such line-drawing would be to terminate immunity, and let the boundaries of lawful collective action be defined through litigation. However, the Shipper Conferences recognize that the Board has expressed a preference for conditioning rather than eliminating the antitrust immunity of NCC and the rate bureaus. However, if antitrust immunity is to be preserved, it must be conditioned in such a way as to insure that the carrier members of NCC and the rate bureaus cannot "game" the system.

There is nothing unfair about real reform of NCC and the rate bureaus. On the contrary, in this era of less shipper recourse to regulatory remedies, the absence of real reform can put shippers in an untenable position. Collective carrier decisions to raise rates

or reduce service quality (or both) made with antitrust immunity, can become motor carrier "norms" that find their way into tariffs and contracts throughout the industry.

The downside of real reform for carriers, in contrast, is almost nonexistent. If motor carriers are unwilling to accept the conditions the Board adopts in these proceedings, they have two alternatives. First, they can act collectively without antitrust immunity. Second, they can act individually, since individual decisions about prices and terms of service in a competitive marketplace rarely run afoul of the antitrust laws.

IV. PROBLEMS WITH NCC ACTIONS UNDER CURRENT PROCEDURES AND RECOMMENDED CHANGES

In earlier phases of this proceeding, the NCC has argued that there is nothing wrong with the status quo, and that no reforms are needed. The Shipper Conferences expect to hear more of the same. Even if NCC's conduct had been impeccable, the potential for abuse of the NCC's antitrust immunity would warrant reform, given the importance of marketplace solutions to trucking issues, the inherent conflict of interest of motor carriers collectively classifying freight in a rate structure based on class rates, and the limited role of regulation. But NCC's conduct has not always been impeccable. NCC commodity classification decisions have too often been made without effective shipper participation, and have too often served as a vehicle for carrier rate increases.

Freight classification does not have to work this way. Ideally, the categorization of freight would in fact be objective

and fair, and the results would generally be accepted as legitimate by carriers and shippers alike. However, this is not an accurate description of the system today, and no single "fix" will close the gap between the actual and the ideal. Reform is needed in a number of areas.

A. Notice and Access to Data

The first problem shippers face in dealing with the NCC concerns access to the data and reasoning underlying classification proposals. Shippers are at an obvious disadvantage when they do not know the basis for NCC proposals.

There are several aspects of this issue. The first aspect concerns access by shippers to documentation in NCC files, and access to the NCC Staff analyses underlying proposals. Until recently, shippers were essentially kept in the dark as to all but the most summary and conclusory details of NCC's rationale for classification decisions.

The second aspect of this issue concerns the way reclassification proposals are initiated. The overwhelming majority are initiated at the request of motor carriers. The third aspect, which influences many features of the NCC classification process, is the fact that NCC members have an incentive to approve increased classifications. NCC Staffers work for the trucking industry, the information they collect comes primarily from the trucking industry, and the NCC members who decide classification issues are trucking company representatives, who benefit from

increases in Class ratings through the trucking industry's rate structure.

Some examples of the system in action may clarify these issues. In 1999, the NCC proposed to increase the Class rating of rubber hose. This was the third time such an increase had been attempted in 10 years. On the first attempt, in 1990, the NCC sought to collect data on the density of rubber hose from shippers, and received some shipper responses to its inquiries. Shippers also participated in the 1990 NCC proceeding and were able to get the reclassification proposal disapproved.

Under the NMFC provision in question, Item 100120, rubber hose with a density of 6 pounds per cubic foot or more carries a Class 70 rating. This is a "catch-all" item in the Classification, in that rubber hose shippers are able to ship industrial hoses of a variety of densities under a single Class rating. Under the NCC Density Guidelines, rubber hose with a density of 6 pounds per cubic foot ("pcf") would normally move under Class 150, hose at 15 pcf would be assigned Class 70, and hose at 38 pcf would be assigned Class 50. The catch-all provision simplifies shipments of the mixed hose orders many customers desire.

In 1996, the NCC again proposed a higher class rating on rubber hose. This time, no effort was made by NCC to obtain the facts about rubber hose shipments from shippers, even though the shippers that had opposed the reclassification 5 years earlier were "parties of record" whose names were on file with NCC. Fortunately, key shippers again learned of the proposal, appeared

before the NCC (at considerable inconvenience and expense) and again headed it off.

In 1999, the NCC tried again. Once more, the NCC Staff made no effort to contact shippers regarding the central issue of density. Why did they revive this proposal? Although NCC staffers met with counsel for the rubber hose manufacturers (and the Rubber Manufacturers Association), the only documentation for the proposal that the NCC was willing to turn over to shippers was a 1-page sheet purportedly summarizing the transportation characteristics of hose. Whatever documentation NCC had that underlay the summary sheet was withheld from shippers, who therefore could not satisfy themselves that the data were accurate, or representative, or had been properly analyzed.

According to the NCC's summary, the density range for hose shipments was 5.8 pcf to 13.2 pcf. But a few telephone calls to manufacturers established that shipments of hose ranging up to 50 pcf are not unusual. Further questioning revealed what had happened. It turned out that individual truckers had submitted forms complaining about hose shipments at Class 70 that were below the 15 pcf density that corresponds to Class 70 in the Density Guidelines. These truckers evidently felt that the Class ratings on these shipments should be increased, producing higher class rates and higher discount rates.

There is an obvious problem of bias in this system. The less dense shipments were seen as grounds for a complaint to NCC headquarters. Needless to say, truckers did not complain when they

hauled 38 pcf hose (normally a Class 50 item) at Class 70, nor did they argue for a lower Class rating, and lower class and discount rates. For the trucking industry, there is an inherent incentive to identify and seek increased commodity Class ratings, and an inherent disincentive to seek decreased Class ratings, resulting from the link between Class ratings, class rates, and actual discount rates in the marketplace.

To prevent problems like this in the future, the NCC should be ordered to require that carrier proponents of reclassifications must appear at the meeting at which the proposal is to be considered, at least when there is shipper opposition. This will permit shippers to address carrier concerns directly, without the filter of Staff action.

In this instance, and in many other instances, this upward bias in the NMFC was exacerbated by the failure of NCC to contact shippers and by its unwillingness to disclose file data to shippers. Indeed, it would appear that the NCC could simply have responded to the truckers submitting "low density" forms that their calls for reclassification were unfounded. However, shippers were told that this is not the way the system works. But if the Staff cannot turn down carrier proposals, that is all the more reason to require the presence at NCC meetings of the carriers that seek changes.

Because millions of dollars were at stake, representatives of rubber manufacturers again made the trip to Alexandria, bringing their studies and catalogs, and argued against the same

reclassification proposal for the third time in a decade. To its credit, the NCC Panel again disapproved the proposal (though the STB's announced intention to require NCC reform, which was brought to the Panel members' attention by shipper counsel, may have helped produce this vote).

The point is not, however, that shippers "won" on this occasion. The point is that an unjustified classification change was proposed not once, but repeatedly, based on biased data collected only from the trucking industry by NCC Staffers who work for the trucking industry, and who refused to provide shippers with any explanation for the proposal beyond a 1-page summary sheet.

If rubber manufacturers had not been vigilant, or had not been able to drop their day-to-day responsibilities and gather density data from actual shipment records on extremely short notice, this proposal would have been approved. There can be little doubt that many equally meritless classification increase proposals are approved, resulting in higher class rates and higher actual rates. Gathering information in this way, and concealing it in this way, and excluding shippers from the analytical process, simply do not produce fair results.

More recently, informal discussions took place between NCC and shipper representatives concerning the need for additional shipper access to data about NCC proposals.^{6/} Although some progress was

^{6/} It is the expectation of the Shipper Conferences that further discussions between shipper and carrier representatives will take place as these NCC and rate bureau reform proceedings go forward.

made, more is needed, as demonstrated by the NCC's recent proposal to increase Class ratings on several hundred poisonous materials. Most of these commodities currently range from Class 55 to Class 100, but the NCC wants to rerate them up to Class 200, Class 250 or Class 300.

In accordance with the relationship between Classes and class rates discussed above, these reclassifications would lead to increases of 200%, 250% and 300% in the class rates on these commodities even if all poisons were rated at Class 100 today. The increases are even greater for lower-rated poisons. Needless to say, there was vigorous shipper opposition to this proposal, and shippers sought data as to the basis for such an extraordinary reclassification. When the matter came to a vote, shippers' arguments were brushed aside and the proposal was approved with a minor amendment. (Numerous appeals have been filed.)

There was, however, a modest improvement in shipper access to data. Instead of giving shippers a 1-page summary of the transportation characteristics of poisons, the NCC produced an 80-page Analysis of Proposal (actually, 11 pages of analysis and 70 pages of attachments), which was said to be the same Analysis that was given to the NCC Panel members who were to vote on the proposal. Although this was a step in the right direction, the Analysis was not provided to shippers until a few business days before the NCC Panel meeting on February 7, 2000. And, as with the

rubber hose summary, shipper access to underlying data was denied.^{2/}

Shippers must have earlier and more complete access to the data and analysis underlying NCC reclassification proposals. There is no excuse for keeping shippers in the dark until the last minute about the basis for reclassification actions, particularly when the adverse impact on freight rates is so significant, or when shipper opposition is already a matter of record.

Moreover, shippers need access to the raw data, not just the NCC Staff's distillation, so that the extent, the credibility and the consistency of the data, and the conclusions drawn therefrom, can be assessed by shippers. Self-serving conclusions drawn from an indeterminate number of submissions by only one side (the trucking industry) as to these issues is flatly inconsistent with continued antitrust immunity.

Fair notice and access to data for shippers need not be unduly burdensome. Many proposals are uncontested, and this may continue in the future (particularly if other reforms suggested below are also adopted). However, when shippers or shipper representatives request full access to all relevant data as to a proposal (or a research project or analysis or any other Staff work that might lead to a reclassification proposal), full access must be provided and must be provided early enough to permit analysis and data collection by shippers. If this necessitates deferring

^{2/} The poisonous materials issues is discussed further below under "Standards for Classification."

consideration of a proposal to a later meeting, the matter should be deferred.

Claims by NCC of the need to protect confidential sources provide no basis for concealment of data in NCC files. NCC must not be allowed to decide classification issues on its own with antitrust immunity and conceal the factual basis for its decisions from shippers. Antitrust immunity is disfavored in American law, and procedural safeguards are a critical requirement. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

In any event, procedures could be adopted such as protective agreements like those used in rail rate cases, shipper access to file documents could be provided only after the names of the document providers have been concealed, or data could be restricted to attorneys and consultants. In these ways, shippers could obtain a better understanding of the rationale for NCC positions without undue disclosure of confidential information, as the Board recognized in its February 11, 2000 Decision in this proceeding (at page 4, n. 7).

The problem of inadequate notice to shippers could be addressed in a number of ways. The NCC could provide earlier notice of its projects on its website. It could also create a mailing list on which shippers and shipper representatives who are interested in particular commodities could arrange to be listed. Then, the NCC could provide notice to known interested parties whenever the Staff takes any action that might lead to a classification change for that commodity. This notice should not

be limited to actual proposals, but should also include other research projects or informal studies or analyses. These less formal actions often lead to proposals, but shipper notice and input at the proposal stage may be too late to affect the outcome.

B. Standards for Classification

Fair notice and full access to data are necessary reforms, but will not, by themselves, produce a National Motor Freight Classification that is fair. Without fair standards for classification and fair decisionmaking, additional shipper notice and data access alone cannot lead to real reform.

Over the years, the transportation characteristics on which classification decisions are based have been simplified and narrowed. In the ICC's decision in Investigation into Motor Carrier Classification, 364 I.C.C. 906 (1981), the Commission pared an older list of fifteen transportation characteristics down to four: density, stowability, handling and liability. 364 I.C.C. at 911-913. See also Investigation into Motor Carrier Classification, 367 I.C.C. 243 (1983), a subsequent decision in the same docket, aff'd sub nom. National Classification Committee v. United States, 765 F.2d 1146 (D.C. Cir. 1985). The following description of the four remaining factors is based on the ICC's 1981 and 1983 decisions.

Of these four factors, density is acknowledged to be the most important. In fact, the ICC noted the existence of a classification called the Coordinated Classification which (unlike the NMFC) based commodity classification solely on density. It has

sometimes been suggested in the years since 1981 that such a basis for freight classification is preferable to the multi-factor approach of the NMFC. As pointed out earlier in these comments, transportation characteristics that are not covered in NCC classification determinations can be covered by individual carriers in their ratemaking decisions.

Stowability, the second of the four characteristics underlying NCC determinations, refers to unusual package shapes and weights. An irregularly-shaped package might take up additional space in a trailer. Unusually heavy or light packages might need to go under or over other packages, respectively.

Handling refers to the use of special equipment or special care and attention in loading, unloading, or handling shipments across platforms.

Liability, generally regarded as the least important characteristic, refers to the risk that a shipment may contaminate other shipments, or may explode or experience spontaneous combustion. Also included under "liability" are susceptibility to theft and perishability.

Plainly, fair classification must be based on fair standards. Moreover, the standards must be intelligible to affected shippers. However, the NCC's current application of the stowability, handling and liability considerations is subjective, and the density guidelines are antiquated and skewed in carriers' favor.

Stowability, Handling and Liability

The main problem with the stowability, handling and liability standards is that they are a "black box." The NCC can cite these alleged characteristics in support of upward reclassification of freight and "justify" whatever result it desires.

This problem is illustrated by the recent poisonous materials proceeding, in which, as explained above, the NCC identified hundreds of poisonous materials, most of which were rated Class 55 to Class 100, and rerated them up to Class 200, 250 or 300.

According to the NCC Staff Analysis provided (belatedly) to shippers, this proposal was based almost entirely on the considerations of stowability, handling and liability. (The NCC's own Analysis found that the poisons in question have an average density of 27.3 pcf, which would warrant a Class 65 rating, far below the proposed Class 200, 250 or 300 reclassifications.)

Presumably, the NCC concluded that poisonous materials have stowability, handling and liability problems that increase the costs of transporting such commodities. As the ICC pointed out in Investigation into Motor Carrier Classification, supra, "Classification should assist, not impede, cost-based pricing." 364 I.C.C. at 910. And the Commission went on (id. at 916) to observe:

Objective standards must be established, and articles must be classified according to these standards. Ratemakers and shippers must be able to ascertain why articles receive one rating rather than another. Shippers complain that the reasons for a particular classification are so vague as to be virtually

unappealable. The reasoning behind a given classification must be clear, unambiguous and available to shippers.

Shippers looked in vain for any clarification or quantification of the significance of the stowability, handling and liability problems alleged to be presented by poisonous materials. What we found instead did not appear to support the result. For example, the Analysis cited the reclassification of hazardous petroleum products, but that reclassification was merely from Class 65 to Class 85. A 30% increase in a commodity's Class rating is far from insignificant, but that reclassification is dwarfed by the reclassification of a Class 70 poison such as barium nitrate to Class 200.

There was no real effort by the NCC to substantiate, by evidence or by principled analysis, the extraordinary increase in class ratings, class rates, and discount rates threatened for poisons by this proposal. What the Analysis contained instead was anecdotal "evidence" and non sequiturs like two references to the 1984 Union Carbide plant accident in Bhopal, India (which did not involve transportation). The most recent federal crash data (for calendar 1998), which showed zero releases of poisons in fatal accidents and releases in only 1.1% of non-fatal accidents, were ignored. Also ignored was the fact that many carriers collect modest hazmat surcharges, suggesting that NCC's reclassification is unnecessary and excessive.

In any event, shippers find it difficult to believe that there is a significant difference in the costs of transporting similar

(or identical) containers of water (Class 55 under NMFC Item 59380), liquor (Class 100 under NMFC Item 111450) and "motor fuel anti-knock mixtures" (Class 100 under current NMFC Item 50260, but recently reclassified by the NCC to Class 200). A 55 gallon drum would appear to present similar handling requirements regardless of its contents.^{8/}

The Shipper Conferences recognize that the details of shippers' dispute with the NCC over poisonous materials may have to be pursued in a protest at some future date. However, this particular NCC proceeding illustrates the NCC's ability to use vague references to stowability, handling and liability in order to justify whatever result they want to achieve. With no access to underlying data and analysis, no understanding of why poisons classification ratings were raised by 100-345 points rather than 10 or 15, and no evidence of any cost increases resulting from transportation of poisonous materials, shippers' frustration should be understandable. Massive rate increases on hundreds of commodities are being effectuated by the NCC (through the mechanism of discounted class rates tied to commodity classification) by

^{8/} Further evidence of the flimsiness of the NCC's rationale comes from its disclosure that shippers can ship many of the poisons in questions at Class 70 by releasing their value to \$2.15 per pound per package under NMFC Item 60000. If limiting carrier cargo liability is enough to entirely offset the alleged burdens of stowability, handling and liability, those burdens cannot be very significant. Indeed, this feature of the proposal raises the question whether NCC's real goal is to promote limited liability through collective action, in violation of 49 U.S.C. § 14706(c)(1)(C).

members and employees of the trucking industry applying subjective and unintelligible standards with antitrust immunity.

The less objective the standards, the more necessary it is for shippers to have full access to notice and data, and to have an effective voice in the decision-making process (as discussed in more detail in a later section of these Comments). If, on the other hand, other shipper reforms are not to be adopted, it may be necessary to eliminate the considerations of stowability, handling and liability from the classification process, and let these factors be addressed by individual carriers and shippers through the ratemaking process.^{9/}

Density

Freight classification based on density has the virtue of being more objective than classification based on stowability, handling and liability. However, shippers have a number of concerns about the NCC's application of density-based classification.

One concern, already noted above in connection with the rubber hose proceeding, involves the fact that when a catch-all item is in effect, carrier complaints about less dense shipments may trigger reclassification proposals even if the average density of the covered commodities fully justifies the overall class rating.

^{9/} In this connection, it should be noted that in its 1981 decision in Investigation into Motor Carrier Classification, the ICC observed that it had received relatively few complaints about the Coordinated Classification, which was based solely on freight density.

In the rubber hose proceeding, the NCC proposed an alternative approach, under which rubber hose would move under a progressive scale of 11 subcategories of densities and class ratings.^{10/} This is similar to the approach adopted by the NCC in response to the STB's July 15, 1999 decision in Docket ISM 35007, granting shippers' protest as to such a density progression for shipments of cloth, fabric and piece goods. The STB recently approved this resolution on the ground that the shippers there had failed to substantiate their claims of administrative burdens.

The Shipper Conferences certainly agree that an 11 step density progression is more fair than a 9 step progression that penalizes lower density shipments with no corresponding reward for higher density shipments. However, there remain two problems with this approach.

First, for many shippers (including shippers of industrial rubber hose), the use of a density progression imposes

^{10/} Under this approach, a complex scale like that set forth below would replace a catch-all provision like Class 70 for rubber hose of 6 pcf or more:

In boxes, crates or drums, subject to Items 170 and 171 and having a density in pounds per cubic foot of:

Sub 1	Less than 1	400
Sub 2	1 but less than 2	300
Sub 3	2 but less than 4	250
Sub 4	4 but less than 6	150
Sub 5	6 but less than 8	125
Sub 6	8 but less than 10	100
Sub 7	10 but less than 12	92.5
Sub 8	12 but less than 15	85
Sub 9	15 but less than 22.5	70
Sub 10	22.5 but less than 30	65
Sub 11	30 or greater	60

administrative burdens that far outweigh any benefits of more precise matching of class ratings and commodity densities.

The administrative burdens arise where customers request shipments including a mixture of rubber hoses of many different sizes and densities. Under the density progression approach, the shipper would be required either to separately package hoses of different densities (which the manufacturers' customers do not want), or else be penalized under the NMFC's mixed shipment rules. Under those rules, a package containing numerous commodities with different class ratings (which customers do want) is assigned "the rate or class provided for the highest classed article in ... the package." NMFC Item 640, Section 3(a).^{11/} A copy of Item 640 is attached as Appendix C.

In other words, if a shipper sends a customer a package of various types of rubber hose, which includes light hose and heavy hose per the customer order, that package will be rated on the basis of the lightest hose it contains, not on the basis of its actual average density. This rule is irrational and unfair, and the STB should order it changed.

Another problem with density-based classification as practiced by the NCC today concerns the non-linear nature of the Density Guidelines. Because the Density Guidelines forms the basis for the density progression set forth above in footnote 10, that

^{11/} There is an exception for shipments unitized on pallets, but it has cumbersome requirements and will not always apply.

progression suffers from the same non-linearity. The current NCC Density Guidelines are set forth below:

**NATIONAL CLASSIFICATION COMMITTEE
DENSITY GUIDELINES**

Minimum Average Density (in pounds per cubic foot)	Class
50	50
35	55
30	60
22.5	65
15	70
13.5	77.5
12	85
10.5	92.5
9	100
8	110
7	125
6	150
5	175
4	200
3	250
2	300
1	400
Less than 1	500

In a nutshell, while the ratings are lower for denser freight than for less dense freight, rewards for increasing density at the denser end of the scale are small and the penalties for decreasing density at the less dense end of the scale are high.

As explained earlier, Class 100 is the base rating. A shipment carrying Class 200 will generally bear a class rate double the Class 100 level, and a shipment at Class 50 will bear a class rate one-half the Class 100 level. Note, however, that a shipper shipping at Class 200, and therefore paying double the Class 100 class rate, experiences this density penalty for shipping

commodities with a density of 4-5 pcf, or one half the 9-10 pcf density corresponding to Class 100.

Under a linear density scale, one would expect that a comparable density benefit would accrue to a shipper shipping commodities with a density double the 9-10 pcf density of Class 100. That is, a linear scale would assign Class 50 (and class rates of 50% of the Class 100 level) to commodities with a density of 18-20 pcf. However, shipping at double the Class 100 density level only produces a Class rating of Class 70, and a 30% reduction below Class 100 class rate levels. In order to enjoy a density benefit comparable to the density penalty of Class 200, the shipper must tender freight with a density of 50 pcf or more, which is more than 10 times the density of Class 100 freight.

The current Density Guidelines currently operate in a way that penalizes shippers on both sides of the Class 100 baseline. Class ratings (and class rates) rise quickly for less dense (and presumptively less desirable freight), but class ratings (and class rates) decline far more slowly for more dense (and more desirable) freight. This amounts to heads, the carrier wins (when the shipper tenders less dense freight), and tails, the shipper loses (when it tenders more dense freight).

The Shipper Conferences cannot blame the NCC for coming up with Density Guidelines whose non-linearities operate to the carriers' advantage. The current NCC Density Guidelines are an only slightly changed version of the railroad density guidelines that were adopted for motor carriers more than 50 years ago. See

Investigation into Motor Carrier Classification, 346 I.C.C. at 906, 906-907:

The ratings adopted were the same as those published in the rail classification, principally because the motor carriers thought that rail competition would not permit a different rating system. The classification is known as the National Motor Freight Classification (NMFC). New England Motor Carrier Rates, 8 M.C.C. 287, 292-93 (1938).

A review of the ICC's decision in Incandescent Electric Lamps or Bulls, 44 M.C.C. 501 (1945), shows that the class ratings and corresponding densities for commodities of less than 10 pcf have hardly changed since 1945. See the density table at 44 M.C.C. 513, where a 9 pcf commodity corresponds to "first class" (comparable to today's Class 100), while a 4.5 pcf commodity is rated "200 percent of first class" (comparable to the Class 200 that applies today to a 4.5 pcf commodity).

Of course, the fact that the current Density Guidelines have a long history dating back to the rail classification is hardly a reason to preserve the Guidelines under today's conditions. And shippers regard the NCC Density Guidelines as overdue for adjustment. The non-linearity of the Density Guidelines has already been discussed. It is also worth asking whether changes in the trucking industry warrant reconsideration of the Density Guidelines.

The 1945 version of the Guidelines from Incandescent Electric Lamps was adopted based on standard trailer capacities at the time. This was approximately 1100 cubic feet for a 22-foot trailer, or

1500 cubic feet for a 30-foot trailer. See 44 M.C.C. at 513 and 507. Notably, however, the ICC observed (44 M.C.C. at 513) that in an earlier decision (Bell Potato Chip Co. v. Aberdeen Truck Line, 43 M.C.C. 337 (1944)), a rating of 1 and 1/2 times the first class rate (Class 150 in today's parlance) had been adopted for potato chips having an average density of 4.4 pcf, even though the standard classification for 4.4 pcf in the approved density table would call for a rating of 200 percent of Class 1 (Class 200 today). 44 M.C.C. at 513.

What explanation was given for this inconsistency? The potato chip shipments in question moved in larger trailers with a capacity of 1700 cubic feet. The ICC thus regarded lower than standard class ratings as appropriate for commodities moving in larger than standard trailers.

By this same reasoning, the current Density Guidelines are excessively high. Today's 48 foot and 53 foot trailers have capacities of 3700 cubic feet and 4000 cubic feet respectively, as compared with 1100-1500 cubic feet for standard trailers in 1945. As trailer capacity increases, the cost per pound or hundredweight or cubic foot of providing transportation services decreases, as the ICC recognized in 1945.

There is another basis for regarding the current Density Guidelines as due for adjustment. The NCC itself has admitted that the average density of all commodities has declined. In the Reply Comments filed February 26, 1998 by the NCC in an earlier round of this same proceeding, NCC Witness Foley stated (V.S. at 7):

[I]nformation assembled by the NCC shows that the average densities of freight moved by our member carriers declined from 12.68 pounds per cubic foot (p.c.f.) in 1976; to 11.50 p.c.f. in 1982; to 10.06 p.c.f. in 1987 to 8.62 p.c.f. in 1996.

This across the board reduction in density has presumably resulted from substitution of lighter materials (e.g., plastic for metal or glass) in numerous commodities, as well as from size reductions. The NCC appears to have conducted a series of four density studies in 1976, 1982, 1987 and 1996. The Shipper Conferences have requested copies of these studies but these requests have been refused.

When an individual commodity declines in density in relation to similarly classified freight, it may well be appropriate to rerate that commodity up to a higher rating. Assume, for example, that typewriters formerly had the same Class rating as computer monitors, kitchen chairs and framed mirrors, because all had similar densities. Assume further that typewriters became 25% less dense because of the use of plastic casings. If only typewriters became less dense, it might make sense to reclassify them into a higher Class rating along with, say, frying pans, serving trays and duffel bags.

But suppose that all of the foregoing commodities have become 25% less dense, and that typewriters therefore still warrant a lower class rating than frying pans, serving trays, and duffel bags because the density of typewriters remains higher than the density of those commodities, and comparable to the density of the less

dense computer monitors, kitchen chairs and framed mirrors that are manufactured and shipped now.

In this example, if the Density Guidelines are not adjusted, the NCC will be able to single out typewriters (or computer monitors, chairs or mirrors) for reclassification upward, even though these commodities should actually continue to carry the same Class rating based on their similar density.

The situation is analogous to the IRS tax tables and the ICC's Rail Cost Adjustment factor. These are indexes, as are the NCC Density Guidelines. However, the tax tables are periodically adjusted, to prevent "bracket creep", and the RCAF is periodically rebased, and modified to reflect productivity gains. For similar reasons, the NCC Density Guidelines should be "rebased" to reflect the reduction in average densities for all commodities.

With such rebasing, the proper relationships among commodities and their Class ratings will be preserved. Without such an adjustment, the NCC will be able to reclassify virtually any commodity into a higher Class rating merely by citing that commodity's reduced density. The fact that the commodity's density has not fallen vis-a-vis other commodities will be ignored, and the result will be a steady stream of upward reclassifications leading inexorably to rate increases. In 1999, NASSTRAC filed a formal request with the NCC for just such an adjustment. The full NCC denied the request, but the issue needs to be addressed by the STB.

The Shipper Conferences do not object to the classification of freight based on density, or even to the use of density guidelines

or a density scale, so long as the guidelines are fair and current. This is not the case with the NCC's Density Guidelines, or with its density progression approach when the same commodity has varying densities. Nor does the NMFC's mixed shipment rule, which assigns artificially low densities to mixed packages, make sense.

Given the widely-accepted importance of density in freight classification, and given the complex problems cited herein which necessitate a closer and more detailed examination of this issue, the Board may wish to consider establishing a sub-docket of this proceeding in order to examine the changes needed to make density-based classifications more objective and fair. Because density is the only freight characteristic that is both accepted as important by all parties, and amenable to application in a straightforward and objective manner, such a sub-docket could produce important reforms that would go far toward eliminating classification disputes.

C. Decisionmaking

As important as fair notice, fair access to data and fair standards are, they are not enough. The interests of the decisionmakers and their Staff must also be considered.

As long as there has been a motor carrier classification, it has been controlled by the trucking industry. Information is gathered, research is performed, and proposals are prepared by the NCC Staff, whose members are employees of the National Motor Freight Traffic Association. All members of the NMFTA are trucking companies.

The NCC itself is made up of the representatives of 100 carrier members of the NMFTA. The NCC Panels that vote on classification proposals in the first instance (and decide whether proposals should be docketed) are made up of NCC members. Appeals from NCC Panel decisions go to the full NCC, which also makes general policy decisions. And, of course, it is the NCC that decides what standards to apply in evaluating density, stowability, handling and liability, and decides what notice and access to provide to shippers.

The Shipper Conferences acknowledge the presence of qualified people on the NCC Staff and among the NCC members, and we do not doubt that many carrier representatives try to perform their duties fairly and objectively. In addition, NCC Staff members have often been helpful and courteous when contacted by shippers and shipper representatives seeking information.

The NCC maintains a helpful website, and has taken some steps in the direction of fuller disclosure to shippers of analyses underlying classification proposals, as noted above. We can even concede that many NCC classification actions are not controversial, and that decisions on issues like packaging standards can benefit shippers and carriers alike (although there would appear to be little need for antitrust immunity for such actions).

The fact remains that the trucking industry benefits financially when commodities are reclassified into higher Class ratings, for reasons that have already been explained. Higher class ratings mean higher class rates which almost invariably lead

to higher actual rates for the vast majority of shippers paying discounted class rates. Even shippers who have gone to the trouble of compiling their own individual class rate "tariffs" or schedules experience rate increases when the NCC increases commodity classifications.

As with the rate bureau class rate increases at issue in the STB's parallel rate bureau reform proceeding, EC-MAC Motor Carriers Service Association, Inc., et al., not all shippers are hit equally hard when commodities are reclassified upward. Small and unsophisticated shippers are less likely than large and knowledgeable shippers to have the bargaining leverage and awareness of carrier ratemaking to negotiate for contract provisions mitigating the resulting rate increases.

However, the NCC certainly does not give major shippers any special consideration. The poisonous materials proceeding will lead to rate increases for many large companies that manufacture and ship industrial chemicals, solvents, pesticides, etc. Shipper arguments were rejected in short order by the NCC Panel that approved that proposal. Nor was the opposition of the rubber industry and its leading trade association enough to deter three attempts by the NCC to reclassify rubber hose.

Because of the conflict of interest that is inherent when the freight classification process -- from information gathering to final decisions -- is controlled by the trucking industry, all the other reforms discussed herein will fall short of complete reform

unless shippers are given the right to participate in the decisionmaking process.

At this time, the Shipper Conferences do not ask the Board to give shippers equal representation with carriers on the NCC. However, no representation is unacceptable. The Shipper Conferences suggest that a third of the seats on NCC Panels be reserved for shippers. This would enable shippers to defeat ill-advised proposals that fail to obtain the support of two-thirds of the carrier members. It would also enable the shipper representatives to familiarize themselves (and other shippers) with the inner workings of the NCC and its Staff.

It may be that this degree of shipper representation will prove inadequate, and that a 50-50 shipper/carrier mix will be necessary, or that it will make sense to turn the entire freight classification process over to an objective and neutral body such as a consulting firm, a university, or a committee within the STB. For the time being, however, the Shipper Conferences are prepared to accept a continued majority voice in freight classification for the NCC, as long as other reforms discussed herein are adopted.

D. Appeals

Today, shippers whose arguments are rejected by the trucking company representatives on an NCC Panel (which will typically consist of approximately 12-18 NCC members) have the right to appeal the Panel decision. However, the appeal will be heard by an even larger group of trucking company representatives -- the full NCC. Because of the inherent conflict of interest discussed above,

this arrangement must be changed. While it is true that shippers can protest NCC actions at the Board, shippers would prefer to have an appellate mechanism that will obviate or minimize the need for protests.

The Shipper Conferences therefore urge the establishment of an arbitration option for affected shippers that are dissatisfied with NCC Action. Arbitration should be optional rather than mandatory. The disappointed party (which might sometimes be a carrier) should be able to seek arbitration as an alternative to a protest. If the disappointed party does seek arbitration, the NCC should be required to participate.

The Shipper Conferences recommend that the applicable rules be the then current rules of the American Arbitration Association, to avoid disputes over arbitration procedures.

E. Classification Changes Should be Made Only When Supported by Changed Circumstances

One of the most frequent shipper complaints about the NCC classification process is that the NCC frequently proposes changes in classifications when there has been no indication of any problem with the existing classification.

If a commodity is carrying an excessively low Class rating, there should be some indication of the problem in the marketplace, such as carrier reluctance to accept the freight, or carrier requests for an upward adjustment in the rate structure based on the discounted class rates. However, in case after recent case, the NCC has taken it upon itself to reclassify freight which

carriers in the marketplace plainly consider attractive, given their vigorous solicitation of shippers' business.

When freight that is plainly desirable at its current classification to carriers is subject to an upward reclassification by the NCC, shippers naturally suspect that the NCC is acting, sua sponte or at one or more member carriers' request, to promulgate an indirect rate increase. At a minimum, shippers feel that there should be an obligation on the part of the NCC to demonstrate the existence of changed transportation circumstances purportedly justifying a change in freight classification.

The imposition of such a requirement in this proceeding would go a long way toward addressing shippers' fears of manipulation of the current system of freight classification and class rates by the NCC.

The Shipper Conferences are aware that the ICC applied such a requirement in the context of a protest in its decision in Classification Ratings on Poisons, NMFC, 9 I.C.C. 2d 1331 (1993), only to be reversed in National Motor Freight Traffic Ass'n. v. ICC, 51 F.3d 297 (D.C. Cir. 1995). However, the court did not hold such a requirement to be prohibited by statute. Rather, it held that the Commission could not require the NCC to show changed circumstances supporting changed freight classifications for poisons "so long as the Commission elsewhere accepts comparisons with similar commodities as support for a classification". 51 F.3d at 301. (The court cited, as support for the proposition that

the ICC used comparisons in other classification decisions, a 1970 rail case.)

The court's decision leaves the door open for the STB to decide in this proceeding that the rule in future NCC classification proceedings for all commodities will be that there must be a showing of changed circumstances justifying a commodity reclassification, or else the NCC must demonstrate why this requirement should not apply.

F. The NMFC Bill of Lading

In its Decision in this docket served February 11, 2000, in which the Board granted in part and denied in part the requests for reconsideration filed by the NCC and the American Trucking Associations, the Board held that antitrust immunity should be preserved for the collective establishment of bills of lading. The Board explained (Decision at 5) that this result appears called for in light of the provisions of the Motor Carrier Safety Improvement Act of 1999.

In that same Decision, however, the Board observed that Congress did not give NCC the right to adopt any bill of lading collectively, and the Board said it would continue to entertain complaints above the terms of any bill of lading that NCC may produce. In particular, the Board reiterated its policy that "any liability limitation imposed by a bill of lading should be effected in a way that gives the shipper actual notice of the arrangement being undertaken." Decision at 6-7.

The Shipper Conferences regard the current NMFC bill of lading as an improvement over previous versions. (Though called the "Uniform" bill of lading, it is not a prescribed bill of lading like that used by the railroad industry, and the Shipper Conferences will therefore use the term "NMFC bill of lading" or "NMFC bill".) Shipper representatives were involved in negotiating the NMFC bill, but there were limits to the concessions that could be obtained from the carrier participants in the negotiating sessions.

In many respects, the NMFC bill is unobjectionable. The main area of shipper concern involves limitations of carrier liability, and a little background may help explain the issues.

Limitations of carrier liability have a long and contentious history. (For an overview, see Bills of Lading, 52 I.C.C. 671 (1919).) The rule for most of the period of motor carrier regulation was that carriers were essentially insurers of the safety of freight entrusted to their care, subject to certain well-established exceptions (Act of God, act of the public enemy, etc.). When freight was lost or damaged in transit, the rule was that the carrier was liable for the shipper's full actual loss, which generally meant invoice price or replacement cost, and never less than the latter.

The sole exception to this rule was the ability of shippers to declare a "released value" of the freight, which would generally be lower than the actual value. In exchange for the shipper's agreement to cap the carrier's liability at a set level (e.g., \$5

per pound), the carrier would transport the freight at a reduced rate. There was a section of most bills of lading for shippers to use in establishing a released value for their shipments, and no carrier could publish released values or released rates without ICC approval. See former 49 U.S.C. § 20(11).

Under these rules, it was understood that no released value would apply unless affirmatively agreed to by the shipper. That is, a blank released value section on a bill of lading was understood by shippers and carriers to mean that the shipment was moving at full value, and the carrier's liability was unlimited (unless one of the established exceptions applied).

Deregulation led to changes, even though the Carmack Amendment was preserved, first as 49 U.S.C. § 11707, and today as 49 U.S.C. § 14706. In 1980, the provisions of the Act dealing with released value were shifted to 49 U.S.C. § 10730, and different rules were established for railroads and motor carriers. For motor carriers, released values were still required to be reasonable, but carriers were no longer required to obtain ICC approval before publishing released value provisions in their tariffs.

This new ability by motor carriers to craft released value provisions without advance regulatory approval led to the creation of a trap for the unwary shipper that came to be known as the "inadvertence clause." Buried in carrier tariffs and therefore unknown to most shippers, inadvertence clauses purported to reverse the normal presumption that freight moving under a bill of lading with no released value declared by the shipper is a full value

shipment. The inadvertence clause provided that where the shipper left the released value section on the bill of lading blank, the shipment would be deemed to be subject to a specified released value, or sometimes to the lowest released value in the NMFC or other applicable tariff. See Item 172 of the NMFC, a copy of which is attached hereto as Appendix D.

Efforts to get the ICC to declare inadvertence clauses inherently unreasonable were unsuccessful. However, this conflict between the old rule and the carriers' new approach led to confusion among shippers, and to conflicting court decisions, as shippers cited the unfairness of these secret limitations of carrier liability, and carriers cited the filed rate doctrine and the legal fiction that shippers must be presumed to know every provision of carriers' tariffs.

See, for example, Hollingsworth & Vose Co. v. A-P-A Transport, 158 F.3d 617 (1st Cir. 1998), in which the court upheld a ten cent per pound released valuation (so low as to make it a waste of time to file a claim) based on the combination of the bill of lading and the tariff of a last minute substitute carrier. Cf. Toledo Ticket Co. v. Roadway Express, Inc., 133 F.3d 439 (6th Cir. 1998), in which the court rejected similar arguments, holding that the shipper must have a fair opportunity to choose between two or more levels of liability. 133 F.3d at 442. The court went on to explain:

[A] carrier will comply with the fair opportunity to choose requirement if its notice to the shipper sets out the levels of

coverage from which the shipper can choose and includes a clear statement that by opting for a lower shipping rate the carrier's liability for loss will be limited.

We cannot accept Roadway's argument that the effect of the quoted language from its bill of lading is that if a shipper fails to declare a released value for its goods, then Roadway enjoys the option of choosing to insure the goods at the lowest released value. In the first place, the language simply does not say as much. Further, even if the obtuse language of the bill of lading could be construed as affording someone an option, surely Roadway has the option reversed. Under the statutory scheme, the carrier is liable for the full value of lost goods unless the shipper agrees to a lower value. The option to limit recovery for loss belongs to the shipper, not the carrier.

133 F.3d at 443. Plainly, the approach the Sixth Circuit found unfair for Roadway becomes even worse when implemented for the trucking industry as a whole through collective action with antitrust immunity.

In the Trucking Industry Regulatory Reform Act of 1994 and the ICC Termination Act of 1995, Congress abrogated the filed rate doctrine, with a very small number of exceptions (the NMFC being one). As a result, the filed rate doctrine foundation for limited carrier liability was eliminated, although carriers continue to prevail in some court cases due to the failure of many courts to understand this change in the law.

However, Congress was made aware, by shippers and carriers, of this dispute. In the ICCTA, it directed the Department of Transportation to conduct a study of loss and damage issues, including issues "related to limitation of liability by carriers"

49 U.S.C. § 14706(g). DOT's final report was issued in September 1998.

DOT concluded that the main function of bills of lading is to serve as a receipt for freight tendered by shippers to carriers. On the issue of limited liability, DOT expressed the view that liability limitations should only apply as the result of arms length negotiations between shippers and carriers, in keeping with the free market policies under which the motor carrier industry is expected to operate today.^{12/} In other words, DOT concluded that shippers should be subject to limited carrier liability only where the shipper is notified of the limitation and has the ability to accept or reject the liability limitations.

The current NMFC bill of lading purports to comply with this requirement by including a Note stating "Liability limitation for loss or damage to this shipment may be applicable. See 49 U.S.C. § 14706(c)(1)(A) and (B)." The problem is that the cited statutory sections do not resolve the fundamental dispute between shippers and carriers over whether a blank released value section means the shipment is moving at full value or limited liability.

^{12/} As the DOT Report put it (at page 43):

In actual practice the bill of lading has become a receipt for the goods. In keeping with the philosophy of deregulation, any documentary details required by statute or treaty should be as few as possible. They should only be sufficient to indicate the applicable, uniform legal regime leaving the parties free to formulate their own document.

The Shipper Conferences do not oppose limitations of carrier liability that are negotiated freely between individual shippers and carriers. Many Conference members have agreed to such liability limitations. Nor do the Conferences believe that any particular form of bill of lading must prevail in the context of arms length transactions in the competitive marketplace. Carriers will have their preferred bills of lading, and shippers will have theirs. Even inadvertence clauses may need to be tolerated, deceptive as they are, so long as they appear only in individual carrier tariffs.

However, the NMFC bill of lading is not a product of the competitive marketplace. It has been approved by the trucking industry, acting collectively with antitrust immunity. In addition, many carriers take the position that its status as the "Uniform" bill makes it somehow official or required (a misrepresentation that is reinforced by other provisions of the NMFC).

To forestall the imposition of liability limitations on shippers without their knowledge, the Shipper Conferences urge the Board to require modification of the NMFC bill of lading to state clearly that shipper agreement to limited carrier liability will not be presumed if the released value section of the bill of lading is left blank.

In addition, Item 172 of the NMFC, establishing collectively set released values under an inadvertence clause and purporting to approve similar provisions in other tariffs, should be deleted.

This section appears to be in direct violation of 49 U.S.C. § 14706(c)(1)(C), which provides:

No discussion, consideration or approval as to rules to limit liability under this subsection may be undertaken by carriers acting under an agreement approved pursuant to section 13703.

There are other respects in which collectively established bills of lading and related NMFC rules should be modified. First, the NMFC (or "Uniform") Straight Bill of Lading states at the top "Received, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request ... the property described below...." This is the language that makes the bill of lading a receipt for freight, which DOT called the principal function of bills of lading.

This language is a major improvement over the earlier language (which still appears in many bills of lading), which states "Received subject to the classifications and lawfully filed tariffs in effect on date of the issue of this Bill of Lading." Shippers and carriers should not be bound by "the classifications and lawfully filed tariffs in effect" unless they agree to be bound by those documents. Indeed, there is an obvious danger of conflicts and disputes if carriers and shippers negotiate an agreement or contract, and then use a bill of lading (which is traditionally

also considered a "contract of carriage") that purports to make classifications and tariffs applicable.

The advantage of the "Received subject to" language in the Uniform Straight Bill of Lading quoted above is that it cross references both "individually determined rates and contracts", if they are applicable, and classifications and tariffs, if they are applicable. This formulation should be used in all NMFC bills of lading, with one change. The words "in writing" should be deleted because the statute no longer requires written contracts. 49 U.S.C. § 11401(b). (The only statutory requirement for a writing is if the contract contains a waiver of provisions of the Act.) Thus, all NMFC bills of lading should include the following language:

RECEIVED, subject to individually determined rates or contracts that have been agreed upon between the carrier and the shipper, if applicable, otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper on request....

Finally, the Shipper Conferences object vigorously to the NMFC's treatment of shipper provided bills of lading. Item 360 of the NMFC, a copy of which is attached as Appendix E, states in Section 1(a) that "Rates subject to the provisions of this Classification are conditioned upon the use of the appropriate bill of lading required by this rule."

Item 360 goes on to provide in Section 1(h) and Note 2 that consignors (i.e., shippers) may elect to furnish their own bills of

lading, but that if they do, the shipper's bill of lading must comply with all the terms and provisions of the bills of lading adopted collectively by the trucking industry.

There is no excuse for motor carriers with antitrust immunity to be allowed to undermine and nullify shipper bills of lading in this fashion. Individual carriers may refuse to accept a shipper's freight under a bill of lading that they find objectionable, in which case the shipper will have to decide whether to use a different carrier or modify its bill of lading. But these provisions of the NMFC clearly go far beyond the limits of acceptable collective action.

G. The Need for a Moratorium on Reclassification

The desire of the Board for Reform of NCC procedures is clear, and the NCC has known for years that many shippers find the status quo unacceptable. Nevertheless, the NCC continues to engage in commodity reclassifications. In fact, the Shipper Conferences suspect that the NCC's decision to go forward when it did with its massive poisonous materials reclassification was a deliberate attempt to evade the reforms that are likely to result from this proceeding.

It is almost a certainty that the appeals of the Panel decision will be rejected prior to completion of this proceeding, since the appeals are scheduled to be heard by the full NCC on May 1, 2000. Therefore, a shipper protest of the NCC's poisonous materials reclassification may be inevitable. However, to avoid

further instances of reclassifications that are expedited in order to be considered under the current procedures, the Board should declare a moratorium on reclassifications prior to implementation of the reforms adopted herein, or a moratorium on reclassifications opposed by shippers.

Such a condition would encourage the NCC to implement the new conditions expeditiously, or at least do no more harm until the Board's reforms are in place.

V. CONCLUSION

The reforms called for by the Shipper Conferences will not interfere with the legitimate functions of the NCC, or undermine the usefulness of the NMFC. On the contrary, they are designed to guarantee that the fairness and objectivity of NCC freight classification determinations are a reality rather than a hollow claim.

If the NMFC and collective action on classifications and on bills of lading are to be preserved, with antitrust immunity intact, it is imperative that the current vulnerability of the system to anticompetitive conduct by carriers be minimized. Without the changes, shippers will continue to mistrust the NCC; with these reforms, shippers and carriers alike will be better able to deal with one another in ways consistent with the goal of an open, efficient and fair transportation marketplace. For the foregoing reasons, continued antitrust immunity for the NCC should

be conditioned on implementation of the Shipper Conferences' suggested reforms.

Respectfully submitted,


John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 1105
1750 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 393-5710

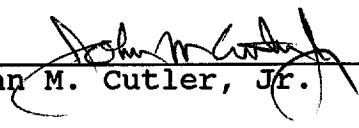
Attorney for National Small
Shipments Traffic Conference,
Inc., and The Health and Personal
Care Distribution Conference, Inc.

Dated: April 11, 2000

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CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of April, 2000 caused copies of the foregoing document to be served on all parties of record by first class mail, postage prepaid.



John M. Cutler, Jr.

NATIONAL MOTOR FREIGHT CLASSIFICATION 100-Z

INDEX TO ARTICLES

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NATIONAL MOTOR FREIGHT CLASSIFICATION 100-Z

RULES

ITEM 595

MAXIMUM CHARGES

In no case shall the charge for any shipment from and to the same points, via the same route of movement, be greater than the charge for a greater quantity of the same commodity in the same shipping form and subject to the same packing provisions at the rate and weight applicable to such greater quantity of freight.

ITEM 640

**MIXED SHIPMENTS
AND
ARTICLES CLASSIFIED BY WEIGHT OR QUANTITY**

Sec. 1. Single shipments, subject to one rate or class, will be charged at the actual or authorized estimated weight and at the rate or class applicable, subject to the minimum charge in carriers' tariffs.

Sec. 2. Single shipments subject to two or more rates or classes, when differently classed articles are separately packaged, will be charged at the actual or authorized estimated weight, and at the rate or class applicable to each, subject to the minimum charge in carriers' tariffs (see Note 6).

Sec. 3. (a) Except as provided in Sec. 3. (b), the charge for a package (see Note 1), or pallet, platform, rack or skid meeting the requirements of Item 265, containing or bearing differently classed articles, shall be at the rate or class provided for the highest classed article in or on the package, pallet, platform, rack or skid. All the articles need not be specified on the shipping order or bill of lading, but only one of the articles taking the highest rate or class must be specified; in such instances the following notation must also appear on shipping order and bill of lading: 'And other articles classed the same or lower,' which may be abbreviated to 'RS or L' (see Note 6).

Sec. 3. (b) When articles subject to different classes in packages, containers or shipping forms authorized in the applicable classification description for such articles are securely unitized on lift truck pallets, platforms, racks or skids meeting the requirements of Item 265, they will be charged for at the actual weights of the separate articles, in the authorized packages or shipping forms used, at the applicable classes (see Notes 3 and 5) subject to the following:

(1) Bill of lading and shipping order must specify the separate articles and the total weight of each article so unitized. Bill of lading and shipping order must bear the notation: 'The above contained on (insert number) pallets (platforms, racks or skids, as the case may be).'

(2) Each shipment must have affixed thereto a packing slip listing the separately identified articles and the total weight of each such article unitized thereon.

(3) The weight of pallets, platforms, racks, skids, unitizing material or packing devices as required by Paragraph 3(b)(5) must be shown on shipping order and bill of lading and will be charged for at the lowest class applicable to any article or articles comprising not less than 5 percent of the weight unitized on such pallet, platform, rack or skid.

(4) Any article in a shipment which is not unitized on pallets, platforms, racks or skids must be separately listed on the bill of lading and shipping order and will be charged for at the class applicable to such articles.

(5) When unitization to pallets, platforms, skids or racks is by container of box-type fibreboard construction, packing devices must be used in any unoccupied space between inner packages and inside top of outer container. Packing devices used must be of sufficient strength and design to prevent collapse of the outer container when top loaded with other freight.

Note 1—The term 'package' has the same meaning as the definition for 'in packages' in Item 650, Sec. 5.

Note 2—Not currently used.

Note 3—Articles unitized in outer containers meeting the requirements for complying boxes and secured on lift truck pallets, platforms, racks or skids, meeting the requirements of Item 265, will be subject to the classes applicable to the same articles when tendered in boxes.

Sec. 4. When the description for an article specifies an individual minimum weight per package or piece (see Note 4, Sec. 6), no provision being made for packages or pieces weighing less than the specified individual minimum, the total charge for a number of packages or pieces of a lesser weight shall be the same as would accrue on a like number of similar packages or pieces, each of the specified individual minimum weight.

Sec. 5. When the description for an article in bundles specifies an individual minimum weight per bundle, no provision being made for the article 'loose,' a single loose article or piece weighing as much as or greater than the specified individual minimum weight per bundle, shall be charged for as a bundle.

Sec. 6. When an article is differently classed according to different weights of shipping packages or loose pieces (see Note 4), the total charge for a number of packages or pieces of a lesser weight shall be no greater than the charge for a like number of similar packages or pieces each of greater weight. This section does not apply where different classes are published in individual items according to the density (pounds per cubic foot) of articles or shipping packages.

Note 4—The term 'Shipping packages or loose pieces' refers to the shipping package or loose piece of freight and does not refer to the inner container or articles enclosed in a shipping package.

Sec. 7. Each package or piece of freight which weighs less than the individual minimum weight provided in the description must be charged for at such individual minimum weight in accordance with Secs. 4 or 6 of this Item, and each package or piece of freight which equals or exceeds the specified minimum weight must be charged for at actual weight.

Sec. 8. Unless otherwise provided, where a provision makes reference to specific mixtures based on an allowance or restriction by count, weight or percentage, such provision will not apply when the allowance or restriction is exceeded, as in the case of a maximum allowance, or is not met, in the case of a minimum requirement. In instances where the maximum allowance is exceeded or the minimum requirement is not met, the provisions of Secs. 1 through 7 are applicable.

Note 5—When the billed weight is higher than the actual weight, the resulting deficit weight will be charged for at the rate applicable to the lowest classed article contained in the shipment.

Note 6—When the billed weight is higher than the actual weight, the resulting deficit weight will be charged for at the rate applicable to the lowest classed article contained in the mixed packages comprising the shipment provided the shipper also specifies such lowest classed article on the bill of lading and shipping order at time of shipment.

NATIONAL MOTOR FREIGHT CLASSIFICATION 100-Z

RULES

ITEM 171-Concluded

A commodity which is classified per item 156600, naming 'Plastic Articles, NOI, other than expanded,' is shipped in a package which measures 40" x 48" x 54" and has a cubage of 60 cubic feet. The package weighs 300 pounds, thus the actual density (weight divided by cubic feet) equals 5 pounds per cubic foot (pcf).

Commodities with densities of 5 pcf are classed per sub 4 of item 156600 (4 but less than 6 pcf) which provides a class 150. The next lower class of 125 is provided in sub 5 of item 156600 (6 but less than 8 pcf).

To bump, the actual cubage of 60 cubic feet must be multiplied by 6 (the lowest density named in sub 5) to determine a declared weight for billing purposes of 360 pounds.

In each instance where the provisions of this rule are utilized, the shipper must show on bills of lading and shipping orders at time of shipment the:

- (1) actual cube,
- (2) actual weight,
- (3) density group (sub) embracing the actual density,
- (4) declared density, and
- (5) resultant weight for billing purposes (declared weight) of the package(s) or piece(s) for which density is being bumped.

ITEM 172

LIMITATION OF CARRIER LIABILITY WHERE VALUE IS NOT DECLARED BY SHIPPER

Where item 62820, 63025, 70080, 88140, 99400, 107830, 116030, 136500, 164900 or 196420 of this Classification applies, and shipper fails to declare a value as required by those provisions, the shipment will not be accepted, but if the shipment is inadvertently accepted, the carrier's liability shall be limited as follows:

ITEM NO.	DESCRIPTION	VALUE LIMITATION
62820	Radio, Radio-telephone or Television Transmitting or Transmitting and Receiving Sets or other Radio Impulse or Wireless Audio (Sound) Impulse Transmitting or Transmitting and Receiving Sets, separate or combined	\$10.00 per pound
63025	Semiconductors, viz.: Devices, NOI; Diodes; Rectifiers; Thermistors; Transistors	\$20.00 per pound
70080	Flatware, Dresserware or Holloware, sterling silver; or Flatware, Dresserware or Holloware, with sterling silver parts, such as backs, covers, frames, handles or tops	\$ 5.00 per pound
88140	Glassware, NOI	\$19.00 per pound
99400	Hides, Pelts or Skins, dressed or tanned or not dressed nor tanned, NOI, dry	\$ 7.50 per pound
107830	Jewelry, costume or novelty, made of materials other than solid or filled precious metals, not mounted nor set with precious stones	\$ 5.00 per pound
116030	Machines, Systems or Devices, data processing, or units that form components of data processing machines, systems or devices, including Facsimile (FAX) Machines, or Parts thereof, NOI; or Electronic Telephone Switching Systems or components for such systems	\$ 5.00 per pound
136500	Metal, NOI, or Metal Alloys, NOI	\$ 5.00 per pound
164900	Radioactive Materials, Articles or Isotopes	\$ 5.00 per pound
196420	Watches or Watch Movements	\$10.00 each

Where the provisions of other tariffs apply, and those provisions specify a limitation of the carrier's liability absent a release or value declaration by the shipper, the carrier's liability shall be limited to the extent provided by such applicable provisions when the shipper does not make the requisite or specified release or value declaration.

NATIONAL MOTOR FREIGHT CLASSIFICATION 100-Z

RULES

ITEM 360

BILLS OF LADING, FREIGHT BILLS AND STATEMENTS OF CHARGES

Sec. 1. Issuance and Requirements.

Sec. 1 (a). Rates subject to the provisions of this Classification are conditioned upon the use of the appropriate bill of lading required by this rule. Articles which are precluded by law from being loaded or transported in the same vehicle must be tendered on separate bills of lading.

Sec. 1 (b). When property is transported subject to the provisions of this Classification, either domestic or export, the acceptance and use of the Uniform Straight Bill of Lading or the Straight Bill of Lading - Short Form are required.

Sec. 1 (c). The Uniform Straight or Straight Bills of Lading are to be used for any shipment not consigned to the order of any corporation, firm, institution or person.

Sec. 1 (d). Not currently used.

Sec. 1 (e). Except as otherwise provided, carriers shall not furnish:

(1) Bill of lading sets that consist of more than an 'Original,' a 'Shipping Order,' and a 'Memorandum' per shipment.

(2) More than one original freight bill on its own standard form and one duplicate thereof, exclusive of the consignee's memo copy, per shipment.

(3) More than one original and one copy of its statement of transportation charges on its own standard form.

Sec. 1 (f). Except on shipments moving on United States Government bills of lading, if payor of freight or other lawful charges requires or requests, as a prerequisite to payment, any of the following, such material or information will be provided subject to the provisions of applicable carrier tariffs:

(1) the return of any part of bill of lading sets or copies thereof, other than one shipper furnished copy (see Note 1); OR

(2) copies of freight bills or statements of transportation charges in excess of the number specified in **Sec. 1 (e)**; OR

(3) the preparation by the carrier of any forms requiring itemization, listing or description of single or multiple freight bills, for submittal with freight bills or statements of charges; OR

(4) any forms or copies of forms, other than those described in **Sec. 1 (f)(1)** or **Sec. 1 (f)(2)**, to be submitted with freight bills or statements of charges; OR

(5) that information not shown on the shipping order at time of shipment be shown on freight bills or statements of charges; OR

(6) that proof of delivery be furnished in any form.

Sec. 1 (g). Carriers are not obligated to furnish bills of lading containing information beyond that shown in the examples set forth in NMF 100-X and successive issues.

Sec. 1 (h). Consignors may elect to furnish their own bills of lading, in which case, all requirements of **Sec. 1 (a)** through **Sec. 1 (c)** and **Sec. 2** of this Item must be observed (see Note 2). These forms may also contain such information as: (1) identification or location of consignor or consignee; (2) commodity descriptions; (3) rates or classes; or (4) other information pertinent to the shipment.

Sec. 1 (i). On bills of lading furnished by carriers, freight bills and statements of charges issued by carriers, the Standard Carrier Alpha Code (SCAC) of the issuing carrier as shown in the Directory of Standard Carrier Alpha Codes, NMF 101 (or as amended), must be shown immediately adjacent to the carrier's name on the document heading. The SCAC designation must be printed in upper-case boldface type.

Sec. 1 (j). When bar coding is used to designate any information required by **Sec. 2** of Item 360 on bills of lading or freight bills, the symbology must be in both machine and human readable form. In addition, the standard data formats shall be in accordance with the Motor Carrier Industry Bar Code Implementation Guide, published by the Information Technology & Logistics Council of the American Trucking Associations (ATA).

Note 1—When as a prerequisite to payment, the shipper furnished copy of bill of lading is to be returned, it must be clearly and prominently marked by the shipper with specific instructions directing its return with freight bill.

Note 2—Consignor provided short form bills of lading need not be in any particular format so long as the information requirements of Sections 1 and 2 are observed and the bill of lading is complete when tendered by the shipper to the carrier for signature. When generated by a computer on other than preprinted forms, each such bill of lading must bear the title 'Shipper Provided Short Form Bill of Lading—Not Negotiable' and must incorporate the terms and conditions of the bill of lading with the statement 'All parties hereto and their assigns are familiar with, and agree that this bill of lading is subject to: (1) the terms and conditions of the Uniform Straight Bill of Lading as set forth in the National Motor Freight Classification; and (2) the individually determined rates or contracts agreed upon in writing between the carrier and shipper, if applicable, otherwise the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request, which are in effect on the date of the shipment.'

Shipment information should utilize the full width of the document. The order of appearance of the information listed after the title and statement incorporating the bill of lading terms and conditions should be as follows: Carrier's name and address, Carrier's Pro No., Shipper's Bill of Lading No., Consignee's Reference/PO No., consignee destination and address, shipper origin and address, statement of conditions or restrictions placed on shipment (where appropriate), including released valuation information, number of pieces and kinds of packages, commodity description, weight, and hazardous material designation as required, including the furnishing of placards to the carrier, COD (where appropriate), including the amount to be collected and the party to pay the COD, freight terms (collect or prepaid). The document must be concluded with a date and the notation 'Received in apparent good order—Exceptions Noted' which shall be deemed to be an acceptance of all such terms and conditions as provided in the Uniform Straight Bill of Lading.

Sec. 2. Information to be shown on a Bill of Lading.

Sec. 2 (a). The name and address of only one consignor and one consignee and only one destination shall appear on a bill of lading. When a shipment is consigned to a point of which there are two or more of the same name in the same state, the name of the county must be shown.

Sec. 2 (b). Not currently used.

Sec. 2 (c). To insure the assessment of correct freight charges and avoid infractions of federal and state laws, shippers should acquaint themselves with the descriptions of articles in the tariff under which they ship. Commodity word descriptions must be used in bills of lading and shipping orders and must conform to those in the applicable tariff. Appropriate abbreviated descriptions are permitted provided the NMFC item number and appropriate Sub number thereof are shown. The kind of package used must be shown. Bills of lading and shipping orders must specify number of articles, packages, or pieces. Except as provided in Item 640, **Sec. 3** (mixed packages), for each separate commodity description, the number and type of packages (bags, boxes, bundles, drums, etc.) and the gross weight must be shown.

Sec. 2 (d). Articles which are subject to the DOT's hazardous materials regulations must be described on bills of lading and shipping orders as shown in those regulations. Abbreviations must not be used. When the DOT hazardous materials regulations description differs from the tariff description in connection with which the applicable class or rate is published, the tariff description must also be shown on bills of lading and shipping orders.

(Continued on following page)

RULES**ITEM 360-Concluded**

Sec. 2 (e). Unless otherwise provided in carriers' tariffs, shipments requiring protective temperature control may be accepted subject to the availability of suitable equipment when the bills of lading and shipping orders are clearly and legibly marked in upper-case letters in accordance with the following:

(1) Where shipments are subject to damage from freezing, marking must clearly instruct carrier to protect from freezing.

(2) Where shipments require maintenance at or below a specific temperature, or movement within a range of temperatures, marking must indicate the temperature or temperature range required.

Commodities requiring special or additional care or attention in handling or stowing must be so marked and packaged as to ensure safe transportation with ordinary care. These articles include, but are not limited to: fragile articles; articles that must remain upright; top-heavy articles; articles that require more than normal protection from moisture; articles that must be protected from heat; articles that must be protected from freezing; articles that must be handled with a hand truck; articles that must not be handled with a hand truck; articles that must be handled with a forklift; articles that must not be handled with a forklift; articles that may be stacked to not exceed a certain height; articles that must not be stacked; articles that must be kept within a certain temperature range; articles that have a center of balance that is not the center of the commodity; and magnetically sensitive articles.

Sec. 2 (f). When shipments consist of packages subject to the same released value provisions and some packages are released as to value and other packages are not released as to value or are released to a different value, the packages and bills of lading must be marked or coded at time of shipment to identify which packages are released and the released value which applies to each package. In lieu of showing the specified information on the bill of lading, the carrier may be furnished a manifest at time of shipment which clearly identifies the packages which are released and the released value of each.

Sec. 3. **Inspection of Property.** When carrier's agent believes it is necessary that the contents of packages be inspected, he shall make or cause such inspection to be made, or require other sufficient evidence to determine the actual character of the property. When found to be incorrectly described, freight charges must be collected according to proper description.

Sec. 4. Not currently used.

Sec. 5. **Insurance Against Marine Risk.** The cost of insurance against marine risk will not be assumed by the carrier unless so provided specifically, in its tariffs.

ITEM 362**APPLICATION OF BILLS OF LADING**

Unless the shipper and carrier have an effective prior written agreement to use another bill of lading, all motor carriage performed by carriers participating in this tariff shall be subject to the bill of lading terms and conditions of the Uniform Straight Bill of Lading shown in NMF 100-X and successive issues.

ITEM 365**UNIFORM STRAIGHT BILL OF LADING—TERMS AND CONDITIONS**

The terms and conditions of the Uniform Straight Bill of Lading shown in NMF 100-X and successive issues are also applicable for all shipments moving on the:

(1) STRAIGHT BILL OF LADING—SHORT FORM.

(2) SHIPPER PROVIDED SHORT FORM BILL OF LADING, as allowed by Item 360, Note 2.

ITEM 381**CANCELLATION OF ITEMS**

As this Classification is supplemented, numbered items with letter suffixes cancel (except as otherwise specifically indicated) correspondingly numbered items in the original Classification or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A. Example: Item 4000-A cancels item 4000, and item 3600-B cancels item 3600-A in a prior supplement, which, in turn, cancelled item 3600.

ITEM 420**CLASSIFICATION OF ARTICLES—GENERAL**

Sec. 1. Numbers 50 to 500, specified in the 'CLASS' column on pages 267 through 600 of this Classification, and as amended, are the classes assigned to the articles described in connection therewith and refer to rates established by carriers for the same respective classes in tariffs governed by this Classification. Classes 77.5 and 92.5 refer also to rates for classes 77 and 92, respectively, in carriers' tariffs governed by this Classification.

The progression of classes in this Classification is from 50 (lowest) to 500 (highest).

Sec. 2. When 'Exempt' is shown in the 'CLASS' column, it means that the commodity or commodities are not subject to economic regulation, and the tariff user should consult with the individual carrier for the applicable provisions.

Sec. 3. When 'O' is shown in the 'CLASS' column, it means that such articles are subject to the rates and regulations of individual carriers.

Sec. 4. Where a carrier's rate tariff governed by this Classification does not provide a rate for a class shown in this Classification and no other provision is made in that carrier's tariff as to the application of such class, apply the rate for the next higher class for which rates are provided.