

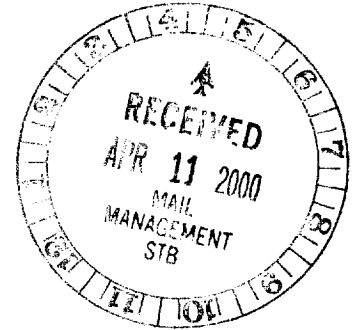
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Section 5a Application No. 61 (Sub No. 6)

National Classification Committee – Agreement



**Opening Proposals and Comments of
The National Industrial Transportation League**

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April 11, 2000

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**Section 5a Application No. 61 (Sub No. 6)
National Classification Committee – Agreement**

**Opening Proposals and Comments of
The National Industrial Transportation League**

The National Industrial Transportation League (“League”) hereby files its Opening Proposals and Comments with the Surface Transportation Board (“STB” or “Board”) in response to the Board’s request for suggested methodologies for increasing shipper participation in the classification process administered by the National Classification Committee (“NCC”). This proceeding was instituted by the Board as an outgrowth of its decision served on December 18, 1998, in Sec. 5a Application No. 61, *National Classification Committee – Agreement*, in which the Board determined that the NCC Agreement would be renewed for one year and, unless Congress directed the Board to do otherwise, the Agreement would only be approved by the Board thereafter if the Agreement was amended to provide for more effective shipper participation in the classification process. On Feb. 11, 2000, the Board denied the Petitions for Reconsideration filed by the NCC and the American Trucking Associations, Inc. (“ATA”) which sought to overturn this finding by the Board.

IDENTITY AND INTEREST OF THE LEAGUE

The National Industrial Transportation League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League is the oldest and largest nationwide organization representing shippers of all sizes and commodities. The members of the League utilize all modes of transportation to move their goods in interstate, intrastate, and international commerce. Substantial volumes of commodities are shipped by League members via motor carriage. The wide variety of commodities shipped by League members are within the scope of the classifications established by the NCC. Accordingly, the League's membership will be directly impacted by the resolution of the issues raised in this proceeding.

INTRODUCTION

In its filings submitted in the initial phase of this proceeding and in opposition to the Petitions for Reconsideration filed by the NCC and ATA, the League argued to the Board that the NCC Agreement should not be renewed because the motor carrier members of the NCC do not need antitrust immunity to establish and review motor carrier commodity classifications. The League argued that since the setting of classifications is akin to standard-setting, the NCC members would not violate the antitrust laws as long as classifications were established in accordance with the decisions of the Board's predecessor, the Interstate Commerce Commission, which limited the factors which may be considered by the NCC to density, stowability, handling, and liability. The League continues to believe that immunity from the antitrust laws is not required by the NCC to establish commodity classifications and, thus, that the public interest would be best served by removal of antitrust immunity for the NCC Agreement.

The League also asserted in its prior submissions that the classification process as currently administered by the NCC is perceived by shippers not to be fair and transparent and that there is an inherent bias in the process which results in a majority of decisions to increase classification ratings. Thus, the League argued to the Board that if the NCC Agreement were to be approved, such approval should be conditioned upon changes to the Agreement that would allow for greater shipper participation in the process. The League commends the Board for instituting this proceeding which is intended to correct existing deficiencies in the procedures followed by the NCC by seeking proposals that would allow for more meaningful shipper participation in the classification process.

**COMMENTS AND SUGGESTED PROPOSALS
FOR IMPROVING SHIPPER PARTICIPATION
IN THE CLASSIFICATION PROCESS**

The League believes that there are three primary areas related to the classification-setting process administered by the NCC for which changes are strongly needed. These areas include: (1) Notice to shippers of proposals to establish or amend commodity classifications and access to information relating to such proposals; (2) Decisions on classification proposals; and (3) Appeals of classification decisions. Each of these areas will be addressed in turn.

1. The NCC Agreement Should Be Amended To Ensure That Shippers Receive Adequate Notice Of Classification Proposals and Complete Access to Information Relating to such Proposals

(a) *Current Problems*

As was plainly established in the record in the earlier stages of this proceeding, a serious problem faced by shippers with respect to the classification process has been a lack of adequate notice of requests or proposals to initiate, investigate or modify a

commodity classification. Also problematic is the NCC's refusal to provide shippers with complete access to the data which forms the basis for a proposal or recommendation to adopt or change a classification rating, which has severely hampered the ability of shippers to effectively challenge classification rating increases.

In general, shippers have not been made aware of requests or proposals to establish or change a commodity classification until well after the requests are made to the NCC or the proposals were developed by NCC staff. Thus, shippers have typically not been a part of the early phases of the classification-setting process and usually participate only to oppose *post hoc* a classification rating increase. Moreover, until recently, only those shippers that were familiar with the NCC and paid for an annual docket subscription, received notice of pending classification proposals.¹ However, the simple fact is that there are many shippers, particularly small shippers, that are not familiar with the NCC or do not wish to subscribe to the NCC and pay for the receipt of proposals and information that, in many cases, are not likely to pertain to their shipments. Thus, the League believes that the problem whereby shippers do not receive adequate notice of requests or proposals to establish or change a classification must be addressed and it has proposed procedures below for doing so.

Shippers have also complained to the Board about the lack of access to studies, investigations and reports generated by NCC staff that form the basis for a classification proposal or recommendation to establish or change a classification rating. Shippers typically are most interested in obtaining the underlying data which relates to a proposal to increase a classification rating for a particular commodity, since that increase will

¹ The League now understands that the NCC is posting its proposals on its web site, which is a change that the League welcomes.

generally lead to a rate increase when such commodity is transported pursuant to motor carrier class rate or under discounts therefrom. However, shippers have generally been denied full access to such information by the NCC. The NCC usually will only furnish shippers that request information underlying a classification proposal with a summary of the data which has been relied upon in developing the proposal. The lack of full access to the underlying data inhibits the shipper's ability to analyze, question or challenge the basis for a proposal to increase a classification rating. To ensure that shippers are able to fully evaluate a proposal to establish or modify a classification rating, they must be able to receive complete and accurate information relating to the proposal. Accordingly, the League is proposing procedures below to address this problem.

Finally, the League also believes that the classification process could be improved by ensuring that notice of proposals and access to information supporting a particular proposal is furnished to shippers in a timely manner. Shippers must have sufficient time to review and analyze the data regarding a proposed classification change in order for the process to be truly fair and less one-sided. This concern is also addressed by the League's proposal set forth below.

(b) *The League's Proposal To Address Inadequate Notice of Classification Proposals and the Lack of Access to Data Relating to Such Proposals*

The League believes that the problems discussed above would be largely addressed, and that the classification process would be improved substantially, if the NCC was required to adopt the following procedures in their Agreement:

(i) The NCC shall provide prompt notice on its web site of all requests or proposals to investigate, establish, or change a commodity classification. This notice

should be posted before the NCC staff undertakes any formal studies or investigations of the commodity at issue.

(ii) If the staff of the NCC does perform any studies or investigations or issues a report or recommendation regarding a proposal to establish or change a classification rating, then complete copies of all such information shall be published on the NCC's web site and made available to shippers that access the NCC's web site.

(iii) Any shipper that is interested in receiving direct notice of a proposal to establish or modify a classification rating shall notify the NCC by e-mail or fax of the commodities for which they desire to receive such direct notice.

(iv) The NCC shall develop a database of shippers that it would use to provide direct notice of NCC proposals. The database would be comprised of shippers that have contacted the NCC by e-mail or fax as indicated in (iii) above; shippers that have participated in NCC proceedings in the past; and any other shippers of which the NCC is aware and believes would be impacted by a particular classification proposal. The database would be supplemented and updated on a continuing basis.

(v) The NCC shall directly notify, by e-mail or fax, any shipper that has indicated that it is interested in a particular commodity classification, or any other shipper included in the database that the NCC believes would be impacted by a particular

classification proposal. The notice must inform such shippers that information and data regarding the proposal is set forth on the NCC web site.

(vi) No formal action may be taken by the NCC on any request or proposal to establish or change a commodity classification sooner than 90 days from the date that shippers receive notice of the request or proposal and access to the data which relates to the proposal.

Adoption of the above procedures would improve the classification process in a number of important respects. First, notice of potential classification changes would be provided to a much broader number of shippers promptly after a request or proposal to establish or amend a classification rating is made. Any shipper that accesses the NCC's web site would be able to discover what classification proposals are currently being considered by the NCC. Thus, shippers that access the NCC web site on a regular basis would be able to decide early in the classification process whether to participate with respect to a given proposal. Although the NCC has recently apparently begun to publish its proposals on its web site, the League believes that the Board should require the NCC to amend its Agreement to provide for this procedure.

Second, notice of proposals to establish or change a classification rating would be further improved by requiring the NCC to provide specific notice of such proposals to those shippers that have informed the NCC that they are interested in proposals affecting a particular commodity, and to other shippers that the NCC has reason to believe would be interested in a given proposal. As indicated above, the League believes that shippers should have the option of notifying the NCC by e-mail or fax of the commodities for

which they desire to receive direct notice of classification proposals that concern such commodities. Once a shipper has notified the NCC, the NCC would be responsible for providing specific notice of a proposal that relates to the commodities identified by the shippers to such shippers. Moreover, to ensure that as many shippers as possible receive notice about classification proposals, the NCC should be required to review its existing files to identify other shippers that have participated in prior NCC proceedings relating to the commodity at issue (to the extent that prior proposals relating to such commodity exist) and to provide such shippers with direct notice of the proposal by fax or e-mail. If necessary, the NCC should be permitted to charge a nominal fee for providing the direct notice of classification proposals to shippers.

Adopting these procedures regarding specific notice of classification proposals would enable shippers to receive notice of classification proposals in a more targeted fashion and would allow shippers to avoid paying for proposals for which they have no interest. Moreover, by requiring the NCC to provide complete access to all data, studies, reports, and information relating to a classification proposal through publication of such information on its web site, shippers will be able to participate in the classification process in a more meaningful way by allowing them to analyze more fully the basis for a given proposal. Furthermore, by ensuring that access to such information is provided in a timely manner, and that the NCC will not act upon a particular proposal sooner than 90 days from the time that specific notice is provided to shippers, shippers will have an adequate opportunity to develop their own data or respond more effectively to the data prepared by the NCC staff should they choose to challenge a proposal.

Accordingly, the above procedures would enable shippers to become involved in the classification process earlier than is currently the case by providing them with advance notice of classification proposals. Also, adoption of the procedures proposed by the League regarding notice of proposals and access to data relating to such proposals, would lead to a more a fair and open classification process and would allow for greater shipper input in the classification process.

2. The NCC Agreement Should Be Amended To Ensure That Decisions on Classification Proposals Are Made In a Fair Manner and Without a Bias To Adopt Classification Increases

Another problem with the current classification system is the perceived bias and conflict of interest that exists in the decision-making on classification matters. Most shippers believe, and NCC practice seems to support their belief, that proposals to increase classification ratings will be approved by the motor carrier panel members of the NCC which vote on such measures, since classification rating increases generally result in increases in the rates actually charged by motor carriers that use the classification system. The League believes that this problem could be addressed by either (1) requiring that there be direct shipper participation at NCC meetings of some minority interest, which participation shall include voting rights, and by requiring that the decisions resulting from such meetings be subject to arbitration; or (2) requiring that all decisions as to whether to adopt a new classification rating or to amend an existing rating be “out-sourced” to a neutral body.

Under the first option, a select group of shipper representatives would serve directly on the NCC and participate fully in the NCC meetings. The League is proposing that 1/3 of the panel members sitting at the NCC meeting be comprised of representatives

of shipper interests. The shippers to be selected could include actual shippers, retired shippers, shipper consultants, or a mix of these categories, with shipper representatives rotated over a reasonable period of time. The League would also propose that 1-2 shipper alternates be selected to ensure that no shipper participating at an NCC meeting had a direct interest in any given proposal to be considered. For instance, it would not appear to be appropriate to have a proprietary shipper voting on a proposal that would impact its own shipments or the shipments of a competitor. The League also believes that the NCC should be required to reimburse shippers for their expenses related to their participation at the NCC meetings, for items such as travel, hotel, food and any other expenses directly related to their participation at the meetings.

The League believes that allowing a minority interest of shippers to serve directly on the NCC would help to diminish the problem of the perceived bias in the decision-making on NCC matters. The shippers participating at the NCC panel meeting would gain a better understanding of the classification process. They would also be able to discuss proposals directly with the carrier members of the NCC prior to voting on such matters, and would presumably bring new ideas and perspectives to the voting table. By including shippers directly in the classification-setting process, shipper input into the process would be substantially improved and the League believes that shippers will be less likely to believe that all decisions arising from the NCC are tainted with an underlying motive to achieve rate increases.

Because equal voting rights would not be provided to shippers, shippers could not block the adoption of a particular proposal. However, their minority voting rights could influence decisions where the carrier members may be divided over a particular proposal.

While allowing for 1/3 shipper representation at NCC panel meetings would not completely resolve the problem of the perceived bias in classification decision-making, the League believes that allowing for appeals of all NCC decisions to be made via the arbitration process proposed below, would help to address any remaining concerns of shippers.

If the Board were to decide not to adopt this proposal, the League believes that another option for removing the perceived bias in classification decision-making would be for the Board to require that all proposals to establish or amend a classification rating be out-sourced to a neutral body which would decide all classification matters. The neutral body could include a select group of university professors that have some background in or knowledge of the trucking industry, or a standard-setting organization, such as the American National Standards Institute (“ANSI”). By “farming-out” the decision-making process, the concern over the bias in classification decisions would be resolved by ensuring that the individuals voting on classification proposals do not have an interest in voting to increase classification ratings. In other words, existing conflicts-of-interest would be eliminated.²

3. The NCC Agreement Should Be Amended To Require That Decisions on Classification Proposals Shall Be Subject To Arbitration With Limited Review By the STB

Under existing NCC procedures, a shipper may appeal an unfavorable decision made by an NCC panel to an even larger group of motor carriers that serve on the NCC. This process, which rarely leads to reversals of NCC panel decisions, is generally

² If the Board were to accept this proposal, an outstanding issue that would need to be addressed is the manner in which the individuals that vote on the classification proposals would be compensated.

perceived to be fair and neutral by shippers. Accordingly, many shippers simply do not bother to exercise their appellate rights before the NCC, even if they strongly disagree with an NCC decision to increase a classification rating. Although NCC decisions may also be protested before the STB, this procedure is seldom followed by shippers, except for very controversial classification decisions, since it can be expensive and offers uncertain results.

Unless the Board requires that decisions on classification proposals are to be made by a neutral body, the League submits that all appeals of NCC decisions should be made to a 3-member panel of arbitrators, with limited review of the arbitrators' decision by the STB. Of all its proposals set forth herein, the League believes that subjecting NCC decisions to a neutral appellate process offers the most effective means for improving the existing classification-setting process and, thus, should be given the greatest amount of consideration by the Board.

The League believes that modifying the procedures regarding review of NCC decisions, by subjecting such decisions to arbitration that is expedient and more cost-effective, would dramatically improve the classification process by creating a more fair and neutral appellate process. Allowing a shipper dissatisfied with an NCC decision to appeal such decision directly to a panel of arbitrators, rather than to the NCC, would likely improve shipper participation in the process, since any decision which was perceived to have resulted from carrier bias to increase a classification rating would not be reviewed solely by parties that had an interest in upholding the decision.

The League proposes that the arbitration procedures to be followed when an NCC decision is reviewed should allow for the selection of a three member panel of arbitrators,

in which the participating shipper parties would select and pay for one arbitrator, the NCC would select and pay for one arbitrator, and a third neutral arbitrator would be selected from the roster of arbitrators retained by the STB under its Ex Parte 560 procedures. Unless otherwise agreed between the parties, the parties would share the expense of the neutral arbitrator. However, in a case where only a single shipper or a group of small shippers are concerned with a classification decision, the procedures to be adopted should allow for an appeal of the NCC decision to only a single neutral arbitrator to be selected from the STB's roster, and in which the shipper parties would split the costs for that arbitrator's time with the NCC.

The League believes that other outstanding issues relating to the arbitration procedures to be followed, such as time periods for selecting arbitrators, ground rules for the arbitration proceeding, the time period within which the arbitrators must render a decision, among others, could be negotiated between the NCC and shipper representatives. Only if the parties fail to reach agreement upon such procedures should the Board get involved to oversee the establishment of the arbitration procedures, perhaps in a sub-proceeding.

Finally, the League proposes that the decisions of the arbitrators should be able to be reviewed and amended or vacated by the STB only in limited circumstances. These circumstances should be similar to those that exist under the Board's existing arbitration procedures set forth in 49 C.F.R. Part 1108. These circumstances include review by the Board with authority to alter the decision where (1) the arbitrators' decision exceeds the statutory jurisdiction of the Board; or (2) where the decision "does not take its essence from the Interstate Commerce Act." 49 C.F.R. 1108.11. Allowing the STB to review the

arbitrators' decision in these narrow circumstances would ensure that the STB's jurisdiction over the reasonableness of classifications is preserved and that existing legal requirements regarding the classification-setting process are upheld.

The League further notes that by instituting an arbitration procedure for appeals of NCC decisions with only limited review rights by the Board would help preserve the scarce resources of the Board.

**THE LEAGUE SUPPORTS THE BOARD'S DECISION TO
CAREFULLY MONITOR COLLECTIVE ACTION REGARDING
THE UNIFORM BILL OF LADING**

In its decision served on February 11, 2000 in this proceeding, the Board reversed its finding made in its December 18, 1998 decision that the Uniform Bill of Lading should be excluded from the collective activities authorized by the NCC Agreement. The Board's decision to reverse itself was based upon the guidance and direction provided by the Congress in its consideration and adoption of the Motor Carrier Safety Act of 1999. Decision, pp. 6-7. Although the Board reversed its finding, it stated in its February 11 decision that:

We will be sensitive to any challenge that may be raised about any particular bill of lading that NCC may develop We have recognized in the past 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. We intend to allow continued collective action on bills of lading, but we will remain available to address complaints about the terms of any bill of lading that NCC may produce.

The League previously supported the Board's decision to exclude the Uniform Bill of Lading from the scope of activities authorized by the NCC Agreement, based

upon its belief that antitrust immunity is not required for collective action on the Uniform Bill of Lading and, thus, should not be granted. Although the League continues to believe that this is the case, and that the public interest is not served by the grant of antitrust immunity where it is not needed, it supports the position of the Board set forth in its February 11 decision.

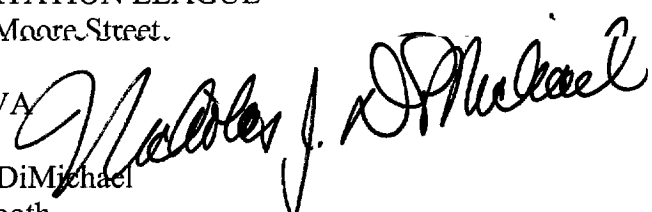
With respect to the Uniform Bill of Lading (“UBL”), shippers have been most concerned about the lack of adequate notice of liability limitations that apply to the transportation of their shipments based upon incorporation of such limitations in the UBL. While some changes have been made to the UBL in the recent past to improve upon the notice provided to shippers of the potential application of liability limitations, the League believes that there are still a number of common carrier shippers, particularly small shippers, that fail to fully comprehend the impact of the notice provision. The current notice provision directs shippers to the statutory requirements of the Interstate Commerce Act, which are technical requirements with which most shippers will not be familiar. Even if shippers are familiar with these requirements, they are arguably ambiguous with respect to the requirements that carriers must follow to affect a valid liability limit. Accordingly, the League believes that the Board’s decision to continue to carefully monitor collective action on the UBL and to remain sensitive to complaints relating to the UBL is appropriate.

CONCLUSION

The League respectfully requests that the Board adopt the proposals set forth herein which would serve to increase shipper participation in, and would otherwise improve, the classification-setting process administered by the NCC.

Respectfully submitted,,

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April 11, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of April, 2000, served a copy of the foregoing
OPENING PROPOSALS AND COMMENTS OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
upon the following persons by first class mail, postage prepaid:

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A handwritten signature in black ink, appearing to read 'Aimee DePew', written over a horizontal line.

Aimee DePew