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April 11, 2000

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VIA FEDERAL EXPRESS – 202-565-1600

Surface Transportation Board
Office of the Secretary
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001

Re: *Section 5a Application No. 61 (Sub-No.6) – 198066*
National Classification Committee – Agreement

Section 5a Application No. 118 (Amendment No. 1), et al.
EC-MAC Motor Carriers Service Association, Inc., et al.

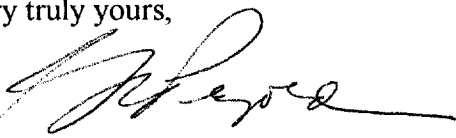
Dear Secretary:

This office represents The Transportation Consumer Protection Council, Inc. ("TCPC").

Enclosed herewith for filing in the above-referenced matters are the originals and ten copies of TCPC's Comments for each proceeding

Should you have any questions, please do not hesitate to contact this office.

Very truly yours,


George Carl Pezold

GCP/sb
Encs.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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



NATIONAL CLASSIFICATION COMMITTEE -- AGREEMENT

COMMENTS OF

THE TRANSPORTATION CONSUMER PROTECTION COUNCIL, INC.

REGARDING

SHIPPER PARTICIPATION IN THE CLASSIFICATION PROCESS

THE TRANSPORTATION CONSUMER
PROTECTION COUNCIL, INC.

by George Carl Pezold, General Counsel

William J. Augello, Executive Director

April 11, 2000

Of Counsel:

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The Transportation Consumer Protection Council, Inc. ("Council") respectfully submits its comments regarding shipper participation in the classification process of the National Classification Committee ("NCC"). While the Council agrees with the Surface Transportation Board ("STB") that shippers must have more effective participation in the classification process in order for the NCC to continue enjoying the privilege of antitrust immunity, the Council does not believe there is any practical or effective means to accomplish this. For this reason, and the other reasons outlined below, the Council asserts that there is no longer any reason, and the public benefit is not served, by continuing antitrust immunity for the NCC's classification.

SHIPPER PARTICIPATION

Assuming *arguendo* that there is any need for the NCC's classification process to continue, the Council does not believe there is any practical or workable means by which shippers can participate. The concept of shippers participating in a carrier rate-making function is just as illogical as having carriers participate in shippers' manufacturers' pricing decisions.

The classification committee consists of about 100 carrier representatives who meet periodically to discuss, review and revise classification ratings. While carriers transport many different commodities, they all do the same thing; they carry goods on trucks. On the other hand, shippers, the owners of the goods carried on the trucks, ship thousands of different products. Shippers are simply too diversified in what they do to effectively participate in a manner similar to the carrier members of the committee. For this reason, there is no realistic way that a "representative" group of shippers could be created to have a meaningful input into the classification process as it exists today. It would require 100 shippers on the Committee to

create a balance for the 100 carriers serving on the Committee, or carriers would continue to dominate and control the decision-making process.

This lack of a representative voice is exacerbated by the fact that not even all the shippers of the same product will be impacted a similar manner by any classification change. Shippers are often not aware of proposed classification changes of their products until after the revision becomes effective and it has had an impact on their freight rates. Because 'classification' is not a pricing function directly, different shippers of the same product will not be affected in a similar manner, or even notice any impact at the same time. Due to various market considerations, a change in classification may not have an impact on a shipper at all. Others may not be effected until some later date, such as when the shipper changes carriers or distribution patterns.

An additional reason for the disparity of impact a classification change has on shippers is that virtually all truckload traffic is moved without use of the classification rating system. Only LTL traffic is directly affected, but only when moved at class rates. Much of the LTL traffic today is moved under rate agreements and contracts, and many of those agreements are for Freight All Kinds (FAK). As a result, even shippers of the same product are likely to be too fragmented to speak effectively with a unified voice.

Also, unlike the NCC, there is no broad based shipper organization to fund shipper participation in the classification process. Therefore, the financial burden to participate in the classification process would essentially be on individual shippers. This would result in an economic disparity whereby the wealthy shippers (those who probably already benefit from their market clout in negotiations with carriers) are the only shippers having an input to the classification process.

While some sort of alternative dispute resolution system might be proposed to give shippers more say in the classification process, it would be very limited in its effectiveness because it is an after the fact remedy. As previously mentioned, not all shippers of the same product will be impacted by a classification change in the same manner, or even at the same time. To be meaningful, the shipper-appointed arbitrators would need to be sophisticated in the products under consideration. They would also need to be neutral and not engaged in the shipping or manufacture of the products under consideration.

The above assumes that there is an ongoing need for the classification process as it exists today. As outlined below, the NCC's Classification process has outlived its usefulness and there is no further need that justifies its continued antitrust immunity and no public benefit to be gained there from. Instead of modifying and extending antitrust immunity, the STB should deny the request for relief from the antitrust laws and permit the parties to negotiate class ratings and other terms of carriage in the same manner that rates are negotiated today

For those shippers that find utility in the present classification, a denial of further antitrust immunity would not preclude the current participants in NMFC 100-Z to continue incorporating that publication in their agreements and contracts by reference. Future products or modifications in products and packaging would then be classified by analogy with existing classification ratings, and by negotiation with the carriers serving the shipper. There simply is no current need for a 100-person committee to rule on every proposed change in existing ratings, rules and terms of carriage. There is an abundance of transportation consultants who have expertise in classifying freight that are available to assist small shippers in determining the appropriate classification for their products. Shippers desiring to use classification ratings

need only include the desired class in their bid packages and submit them to the carriers competing for their business.

CLASSIFICATION PROCESS

For the following reasons, the Council does not believe there is any need for the National Classification Committee (“NCC”) to continue to have antitrust protection for its activities in connection with the National Motor Freight Classification (“NMFC”).

1. At present, virtually all common carrier rates (and discounts) are individually determined, i.e., negotiated between shippers and carriers, and many shippers are using “FAK” rates applicable to all commodities shipped regardless of their classification rating. These negotiations are usually documented or “published” in tariff form, in carriers’ unfiled tariffs, pricing agreements and contracts. However, many of these tariffs incorporate the class ratings, rules, bills of lading, etc. published in the NMFC. This incorporation by reference is a vestigial remnant of the “filed rate doctrine” which Congress sought to stamp out by legislation starting with the Negotiated Rates Act of 1993 and continued in the enactment of the ICC Termination Act of 1995. The only action required to complete the deregulatory trend in U.S. freight transportation system is to deny renewal of antitrust immunity for the rate bureaus and the classification system.
2. Under the present system, shippers are misled into believing that their rates are established for a future period by the rate agreements negotiated with their carriers, only to discover later that the NCC can change the classification rating, packaging rule, bill of lading terms or other terms of carriage on the bill of lading without their knowledge or consent. This undesirable result has occurred to the detriment of small, unsophisticated shippers that are

not given actual notice of proposed changes to the classification ratings governing their products. These unilateral changes in the classification adversely affect shippers' total transportation costs, and therefore must be prevented for the future. The competitive marketplace is the best solution.

3. Carrier weighing and inspection bureaus frequently conduct checks on freight in transit (without shippers' knowledge), in search of freight having lighter densities than provided in the NMFC. The results of these investigations are submitted to the NCC for study. Proposals to change ratings are then published in a public docket, scheduled for hearings, and approved proposals are then published in the NMFC. All of these events take place without actual notice to shippers of the products involved. Although the NCC staff attempts to send a notice to the shippers known to ship the products under consideration, their list of shippers of the affected products is usually out of date and incomplete. Only those few shippers that subscribe to the NCC's Docket Notices are aware of these proposals, unless they happen to read them in Transport Topics or visit the NCC's website.
4. In many cases, a shipper's first notice of an increase in its product's classification rating, and thus, its rates, is a carrier's freight bill reflecting the increased rating. Even FAK rates can be affected when the negotiated FAK rate contained a cap on the ratings, such as "FAK 85, applicable on all products rated up to class 125." For example, when a shipper's product's rating is increased to class 150 or higher, the shipper thus loses its FAK rate on that product, without actual notice from its carriers, despite its negotiated rate agreement. Stated differently, classification ratings may be unilaterally changed, and without advance notice to, or the consent of the shipper.

5. The problem with this system of secret investigations and increases in ratings is that all products of the same type are affected by a classification change even though some products in that category have different, more favorable transportation characteristics.
6. Experience indicates that changes to class ratings are virtually always increases, and never decreases. This reflects a policy to increase carrier revenue, and not to objectively re-evaluate and update the class ratings.
7. Collective action retards progress, innovation and tariff simplification. Carriers should be encouraged, not discouraged, from publishing rates and classifications which are appropriate to their individual customers' commodities, product design, packaging and shipping practices.
8. There are many organizations (both national and international), which promulgate industry standards. Such standards govern everything from specifications for common materials and hardware to telecommunications interfaces and computer software. Certainly most of the rules, packaging standards, etc. in the NMFC would not require antitrust immunity. For example, see the AAR's "Intermodal Loading Guide," which contains rules for loading, blocking and bracing of freight, approved securement methods, etc.
9. To the extent that it may be argued that the class rating system is a component of pricing, the existing class ratings could be "frozen". The publication of exception ratings or class ratings for new items can be handled for individual carriers without antitrust immunity. For example, all major air carriers have continued to have their tariffs published by Airline Tariff Publishing Company ("ATAPCO") even after the abolition of the C.A.B., see Freight Claims in Plain English (3rd Ed. 1995) at Section 16.2.2.

Some commentators contend that no one has suggested a better system to replace the existing system if antitrust immunity is not renewed. On the contrary, the Council has repeatedly suggested that the present classification can be incorporated by reference by the participating carriers parties that opt to use it in the future. The only difference would be that the 100-carrier Classification Committee would no longer have the right to meet and unilaterally rule on changes in the classification or to classify new products. Shippers would negotiate class ratings individually with their carriers as they presently do with rates. Under this system, shippers need not be concerned with releasing confidential product information to 100 carriers during the classification process. They can better control their information through confidentiality clauses in their bid requests, pricing agreements and contracts.

To date, no one has offered a rebuttal to the Council's suggestion, or explained why classification ratings cannot be negotiated in the same manner as individually-negotiated rates and rules. If the Board does not address this suggestion and offer a sound reason why it will not work in the current deregulated environment, the courts will certainly demand an answer.

CONCLUSION

It is not realistic for shippers to have meaningful input into the classification process itself and it is not practical to provide for after-the-fact remedies. Therefore, there is no public benefit to continue the NCC's antitrust immunity for the classification process. The Council believes that all future classification ratings should be individually negotiated as part of the bargaining process. This will not create a problem for shippers or carriers desiring to use the NMFC, as the last issue of the NMFC can be utilized by participating carriers as a standard reference for classification ratings. Any newly developed products can be rated by the parties

when the rates are negotiated In a deregulated competitive environment there is no public benefit from the continued antitrust immunity for the NCC and the classification process.

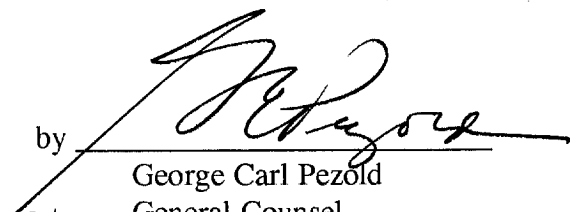
For all of the foregoing reasons, TCPC urges the Board to deny the application for renewal of antitrust immunity for the National Classification Committee.

April 11, 2000

Respectfully submitted:

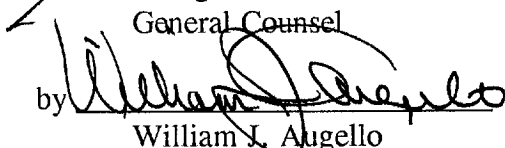
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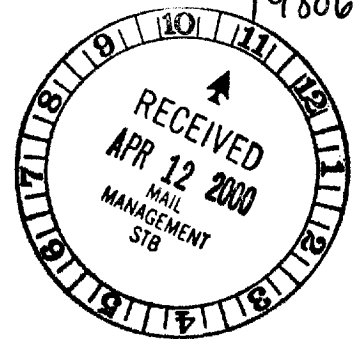
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Assuming arguendo that there is any need for the NCC's classification process to continue, the Council does not believe there is any practical or workable means by which shippers can participate. The concept of shippers participating in a carrier rate-making function is just as illogical as having carriers participate in shippers' manufacturers' pricing decisions.

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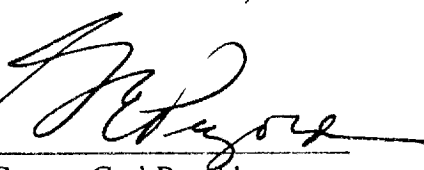
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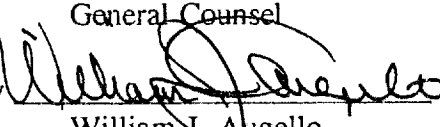
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