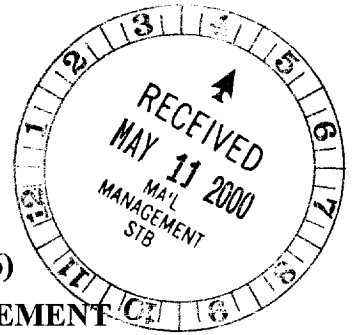


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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**SECTION 5A APPLICATION NO. 61 (SUB NO. 6)
NATIONAL CLASSIFICATION COMMITTEE - AGREEMENT**

**REPLY COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

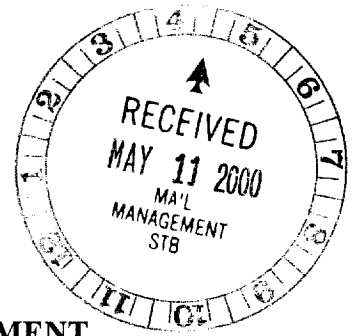
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Due and Dated: May 11, 2000

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**SECTION 5A APPLICATION NO. 61 (SUB NO. 6)
NATIONAL CLASSIFICATION COMMITTEE - AGREEMENT**

**REPLY COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League ("League") hereby files its Reply Comments with the Surface Transportation Board ("STB" or "Board") in the above referenced proceeding. On April 11, 2000, the League filed its Opening Proposals and Comments 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"). The League's proposals are designed to address various shipper concerns with the NCC's operation of the classification system. As explained below, other parties participating in this proceeding have expressed similar concerns to those raised by the League and, in some cases, have made similar proposals to address such concerns. The Board should adopt these proposals.

In this Reply, the League responds primarily to the comments submitted by the NCC and the American Trucking Associations ("ATA"), both of which fail to propose any substantive reforms, which would allow for meaningful shipper participation in the classification making process. As discussed below, although the NCC filed more than 200 pages of comments with the Board, the comments essentially argue for preservation of the status quo. The few proposals that

the NCC does offer to increase shipper participation appear to be nothing more than cosmetic enhancements to current procedures already followed by the NCC.

Moreover, notwithstanding the Board's denial of ATA's prior Petition for Reconsideration of the Board's Decision, served on December 18, 1998 ("December Decision"), which set forth the basis for the initiation of this related proceeding, ATA continues to challenge the Board's authority to condition its approval of the NCC Agreement by requiring increased shipper participation in the classification process. However, in doing so, ATA completely misconstrues the Board's exercise of its statutory authority set forth in Section 13703 of the Interstate Commerce Act. Accordingly, ATA's request for termination of this proceeding must be denied.

Finally, the League responds herein to a Petition filed in this proceeding by the NCC on April 11, 2000, which requests that the Board modify its Decision, served on February 11, 2000 ("February Decision"), by removing language that expresses the Board's intentions with respect to matters involving collective carrier action on bills of lading.¹ For the reasons set forth below, the NCC's Petition should be denied.

I. THE MAJORITY OF COMMENTS FILED BY NON-CARRIER USERS OF THE NCC CLASSIFICATION SYSTEM SUPPORT THE SAME OR SIMILAR REFORMS THAT WERE PROPOSED BY THE LEAGUE

In its Opening Comments, the League identified three key areas of concern with the classification system administered by the NCC and set forth proposals that would help to resolve these concerns. The League's proposals were specifically designed: (1) to ensure that shippers

¹ The NCC subsequently resubmitted its Petition to the Board under the Section 5a Application No. 61 Docket on or about April 28, 2000. However, given the confusion over which proceeding the Petition was intended to be filed in, and the late notice of the change in the docket number, the League is responding to the NCC Petition herein.

would receive adequate and timely notice of classification proposals and complete and timely access to information prepared by NCC staff relating to such proposals; (2) to reduce the perception that decisions on classification matters are subject to an inherent bias to increase classification ratings; and (3) to establish a fair and more neutral appellate process for handling classification disputes.

With respect to notice, the League believes that more shippers would be likely to take part in the development and review of classification ratings if they received timely notice of classification proposals that would impact the shipment of their commodities. In addition, in order to effectively respond to a classification proposal to which a shipper may disagree, the shipper needs to be able to obtain timely access to all data and information that forms the basis for the proposal. Accordingly, the League has recommended that the NCC be required to implement procedures that would expand the use of its website, in a manner that would require the NCC to promptly post therein, all classification matters and complete copies of all studies, investigations, data and information relating to such matters. Adoption for this proposal would provide shippers with quick and easy notice of all classification activities.

The League further proposed that notice of proposals be provided directly by the NCC, via fax or email, to any shipper that has notified the NCC of its desire to be specifically notified about proposals impacting certain commodities, and to any other shipper that the NCC has reason to believe would have an interest in the proposal (e.g. based upon NCC records of prior shipper participation). While posting all information relating to classification matters on the NCC website would substantially improve shippers' access to information, the League believes that procedures providing for more targeted notice of proposals should also be required.

Finally, the League proposed that no formal action on a classification matter should be able to be taken by the NCC sooner than 90 days from the date that shippers receive notice of the request or proposal and access to the data that relates to the proposal. This would ensure that shippers have sufficient time to analyze the classification proposal and supporting data should it desire to respond to the NCC.

A number of other parties that represent shipper interests also expressed their concern that shippers do not receive timely or adequate notice of NCC classification proposals, or timely and complete access to the data underlying such proposals. These parties proposed procedures similar to those made by the League for correcting such problems. *See* Opening Comments of National Small Shipments Traffic Conference, Inc. et al. ("NASSTRAC Comments") at 22-23; Comments of the American Textile Manufacturers Institute ("ATMI Comments") at 3-4; Comments of the Halogenated Solvents Industry Alliance Inc. ("HSIA Comments") at 3 and 6-7; Comments of the Rubber Manufacturers Association ("RMA Comments").

In addition, the concern expressed by the League that there is an inherent bias and conflict-of-interest that exists in the current classification system, because the motor carrier members of the NCC control the entire classification setting process and stand to benefit economically if class ratings are increased (since higher class ratings lead to the charging of higher rates), was also echoed by other users of the classification system. NASSTRAC Comments at 37-40; HSIA Comments at 7-8; ATMI Comments at 4-5.

To help rectify this problem, the League proposed that the decision-making procedures of the NCC be modified in one of two ways: That either 1/3 of the panel members of the NCC be required to be comprised of shipper representatives with full voting rights; or that all decisions to establish or amend a classification rating be "out sourced" to a neutral standard-setting

organization, such as the American National Standards Institute ("ANSI"), or to a select group of university professors that have some background in or knowledge of the trucking industry.

Even more important, was the League's proposal to ensure that all classification disputes are resolved fairly via an open and balanced appellate process. Under the current classification system, the trucking industry controls not only the classification proposals that are docketed, the information gathered in relation to such proposals, and the decisions on the proposals, but also the appeals of classification decisions. This system is largely perceived by shippers to be "rigged" rather than fair and neutral. To address this concern, the League proposed that all appeals of NCC decisions be subject to mandatory arbitration, with the ability of a party to obtain review by the Board in certain limited circumstances.

Based upon the comments filed with the Board, it is clear that other parties that have experience with the NCC classification system also believe that decisions on classification matters and the handling of classification disputes must be made in a more neutral and balanced way. These parties have made proposals that are substantially similar to the League's, or that aim to achieve the same objectives - i.e. removing the apparent bias from classification decision-making and establishing an independent appellate process. NASSTRAC Comments at 40 ("The Shipper Conferences suggest that a third of the seats on NCC Panels be reserved for shippers."); Comments of the North Carolina Traffic League ("The ultimate solution to this situation is to allow an equal number of shippers and carriers to sit on the NCC, with each committee member having one vote."); Comments of the Textile Transportation Managers Conference ("We . . . request that the STB allow shippers and shipper/manufacturers equal representation on the NCC"); ATMI Comments at 5 ("ATMI suggests dissolving the NCC and turning over all

responsibility for the administration of the NMFC to a major consensus standards developer such as ANSI.”); *Id.* (“The STB must establish an independent appeals board.”).

Thus, there is substantial support for having direct shipper representation on the NCC panels and/or for adopting other procedures that would ensure that classification decisions and the resolution of disputes are handled by a more balanced and independent body.

II. THE PROPOSALS OF THE NCC WOULD NOT LEAD TO EFFECTIVE SHIPPER PARTICIPATION IN THE CLASSIFICATION PROCESS

Notwithstanding the consistent views and calls for reform by the non-motor carrier users of the classification system, the NCC has apparently chosen not to take seriously the Board's request for proposals to increase shipper participation in the classification setting process. Although the NCC filed more than 200 pages of comments with the Board, comprised in two separate volumes, it failed to set forth any proposals that would lead to effective and meaningful shipper participation. The NCC devoted only a single page to its proposals for increasing shipper participation (*see* NCC Comments, Volume I, Statement of Martin E. Foley at 15), while the remainder of the voluminous filing essentially defended the current system. Based upon its filing, it is evident that the NCC is not willing to voluntarily propose and implement changes that would allow shippers to participate in the classification process in an effective and meaningful way, even though the Board has determined that such changes are required in order for the NCC Agreement to serve the public interest.

In its Comments, the NCC goes to great lengths to convince the Board that it has already implemented significant changes to the classification-making process in order to encourage greater shipper participation. However, after weeding through five verified statements submitted by the NCC to the Board, it is clear that the NCC is not interested in truly reforming the current

classification system to allow shippers to become more engaged in the process. Virtually all of these statements serve to explain *existing* NCC procedures and activities that the witnesses claim are fair to shippers, as opposed to setting forth new ideas that are intended to increase shipper participation and improve upon the current system.

The NCC specifically touts the activities that it has undertaken recently to educate the public, including shippers, on the workings of the existing classification setting process. These activities include the holding of workshops that provide instruction on how to use the National Motor Freight Classification tariff, making copies of the NCC's procedures and guidelines more readily available, and the posting of this information and NCC meeting information on its website. NCC Comments, Joint Statement of George Beck and Joel Ringer at 3-6.

While the NCC does deserve credit for undertaking activities which promote a better understanding of how classifications are *currently* established or reviewed by the NCC, these changes and activities do not come close to addressing the serious concerns surrounding the NCC's classification operations that have been raised by the Board, the League, and other parties. They serve only to promote the workings of the current classification system.

The League does not dispute that the NCC has taken some steps to improve upon the notice of proposals provided to shippers, but these efforts do not go far enough. Today, the primary means for shippers to learn about pending classification proposals is still through a subscription to the NCC's Docket Bulletin. But many shippers are either unaware of the existence of the Bulletin or choose not to pay for the Bulletin, which most often will include proposals that do not concern their commodities. Moreover, while in this proceeding the NCC has proposed to publish "all classification making activities, as well as a summary of the subjects to be considered on the next docket and the staff-respected classification reports and analyses"

on its website (NCC Comments, Foley Statement, Proposal No. 4 at 15), it is still not exactly clear whether all requests for research of commodities and all actual proposals to be docketed will actually appear on such site, or whether only summaries of such activities will be provided. Furthermore, specific notice of classification matters appears to be provided to shippers only on an ad hoc basis or is limited to shippers that actually participate in an NCC research project.²

But even more important, nowhere in its comments does the NCC address shippers' most serious concerns over the decision-making on classification matters and the appellate process for handling classification disputes. The proposals of the NCC for improving shipper participation in the classification process are set forth at page 15 in the Statement of Mr. Foley. Included therein are a series of cosmetic changes or minor enhancements to the current classification system but no proposals that would actually encourage greater shipper participation in the classification process. None of the proposals offered by the NCC would allow shippers to actually participate in the discussion, consideration or approval of a classification proposal. Indeed, some of the NCC's proposals would rarely, if ever, be utilized by shippers, since they potentially could lead shippers down the "primrose path" to further classification increases.

For example, the NCC has proposed to make NMFTA staff available to assist shippers in conducting research on their products, at a cost reimbursable to the staff members, which could lead to a review of the commodity *under the current classification system and to a referral of the commodity classification to an NCC Classification Panel for action.* Proposal No. 1, Foley St. at 15. This proposal essentially would require shippers to pay for NCC staff activities which

² In response to criticism by the League and other shipper representatives, and in light of this proceeding, the NCC has apparently begun to provide shippers, upon request, with access to the data and information which forms the basis for a classification proposal, commodity review, or appeal. This change was apparently implemented in February 2000. NCC Comments, Foley Statement at 8. While the League welcomes this change, it continues to believe that posting this information upon the NCC website would provide shippers with even better access to such information.

ultimately could result in classification increases -- hardly a proposal that would be routinely exercised by shippers. In addition, the NCC has proposed to expand its efforts to collect shipping data from shippers and carriers "which *might* support classification reductions." Proposal No. 8, Foley St. at 15. Again, this proposal does not substantively change the current classification setting process by improving the role that shippers would play in the process. Rather, it merely expands the current activities of the NCC in a manner that could be detrimental to shippers.

Moreover, although a few of the proposals would lead to minor improvements in the classification system,³ the majority of the proposals are simply cosmetic or hollow changes to current procedures followed by the NCC. None of the proposals would allow shippers to participate in the actual consideration, discussion, or approval of classification proposals (*see e.g.* Proposal No. 2 - after giving notice to the NCC, shippers could present a classification matter for discussion at a panel meeting; Proposal No. 3 - the NCC would accept classification proposals over the telephone or in other formats; Proposal No. 6 - the format of classification reports and analyses would be revised to reduce the number of pages in such documents). Foley St. at 15. These proposals of the NCC would not lead to meaningful shipper participation in the classification process nor would they address the concerns raised by the League or the Board in its December and February Decisions. They also would ensure that the NCC retains complete control over all decision-making and initial appeals of classification matters. Thus, they would not rectify the perceived bias and conflict-of-interest surrounding such processes which exist today. In sum, the proposals of the NCC would not satisfy the Board's determination that the

³ Proposals to expand the use of the NCC website and the information justifying a proposal set forth in the Docket Bulletin (Proposal Nos. 4 and 7) would improve the current practices of the NCC, but still would not lead to meaningful shipper participation.

NCC Agreement must be amended to allow for effective shipper participation in the classification-setting process.

III. THE COMMENTS OF ATA WHICH CHALLENGE THE BOARD'S AUTHORITY TO INITIATE THIS PROCEEDING LACK MERIT

Instead of complying with the Board's request for proposals for increasing shipper participation in the classification process, ATA's opening comments are essentially a second Petition for Reconsideration of the Board's December Decision. In its comments, ATA challenges the Board's legal authority to conduct this proceeding, and asks the Board to "terminate its search for 'methodologies for increasing shipper participation in the classification process' and instead approve for an additional five years the National Classification Committee (NCC) Agreement without changes to increase shipper participation." ATA Comments at 1. The Board has already rejected, in its February Decision, a prior challenge by ATA to the Board's determination to require increased shipper participation in the classification making process. Moreover, any new arguments set forth in ATA's comments to support termination of this proceeding are equally groundless. Accordingly, the Board should reject, again, ATA's attempt to avoid modification of the NCC Agreement to increase shipper participation in the classification process.

ATA specifically claims that the Board has misconstrued Section 13703 of the Interstate Commerce Act (which provision addresses collective motor carrier activities) in a manner which allows the Board to determine whether to grant or deny antitrust immunity to motor carrier agreement members engaged in collective carrier activities. ATA essentially argues that Section 13703 of the Act does not enable the Board to condition its approval of the NCC Agreement to ensure that the Agreement serves the public interest, and then to deny antitrust immunity to the

NCC by disapproving the Agreement, if the NCC fails to adhere to conditions imposed by the Board. However, it is ATA that has misconstrued Section 13703, not the Board.

ATA conveniently ignores that the proceeding instituted by the Board to address whether to renew the NCC Agreement was based upon amendments that were made to Section 13703 by Congress when it passed the ICC Termination Act of 1995 (“ICCTA”). At that time, Congress specifically directed that the NCC Agreement (and any other motor carrier bureau agreement) was to expire on December 31, 1998, unless renewed by the Board upon a finding that renewal of the Agreement was in the public interest. Prior 49 U.S.C. § 13703(d).⁴ Also, at the time that the Board instituted the proceeding regarding renewal of the NCC Agreement, Section 13703 expressly provided that when the Board reviews a motor carrier agreement “it shall change the conditions of approval or terminate it when necessary to protect the public interest.” Prior 49 U.S.C. § 13703(c).⁵ Thus, when the Board determined in its December Decision that the NCC Agreement would be approved only if it were amended to allow for effective shipper participation in the establishment of classifications, it acted completely within the boundaries of its statutory authority.

Moreover, Congress clearly left to the Board’s discretion the kind of conditions that may be imposed upon an agreement to ensure that the public interest will be served. Thus, there is no validity to ATA’s claim that increasing shipper participation in NCC classification making activities exceeds the Board’s authority, because Congress did not expressly “authorize the Board to mandate greater shipper participation in the NCC Classification Process.” ATA

⁴ Section 227 of the Motor Carrier Safety Improvement Act of 1999 (“MCSIA”) amended Section 13703 of the Interstate Commerce Act, and established a 5-year periodic review for motor carrier bureau agreements. *See* current 49 U.S.C. § 13703(c)(2).

⁵ Section 227 of the MCSIA retained the Board’s conditioning power over motor carrier bureau agreements. *See* current 49 U.S.C. § 13703(c)(1).

Comments at 9, n. 13. In granting the Board broad conditioning authority in Section 13703, Congress intentionally relied upon the Board's expertise to craft appropriate conditions that serve the public interest.

Finally, ATA's argument that the Board must terminate this proceeding because the Board has focused improperly on whether continuation of antitrust immunity for the NCC serves the public interest is unfounded. The simple fact is that approval by the Board of the NCC Agreement would continue antitrust immunity for the activities performed by the NCC, whereas disapproval of the Agreement would discontinue such immunity. Accordingly, consideration by the Board as to whether the continuation of antitrust immunity for NCC activities is appropriate, is relevant to the public interest determination that the Board must make in deciding whether to renew the NCC Agreement.

For all of these reasons, ATA's motion to terminate this proceeding must be denied.

IV. THE BOARD SHOULD DENY THE NCC'S PETITION WHICH ASKS THE BOARD TO MODIFY ITS FEBRUARY DECISION

In addition to its opening comments, the NCC also filed on April 11, in this docket, a pleading entitled "Petition," in which the NCC asks the Board to strike a paragraph included in the February Decision which addresses the NCC's activities relating to bills of lading. The NCC claims that the paragraph must be stricken for a variety of reasons, but primarily because the language is irrelevant and unrelated to the issues in this proceeding and because the Board previously took action similar to that requested here by the NCC, pursuant to a Petition filed by NASSTRAC in the context of a suspension proceeding. The NCC Petition must be denied.

In filing this Petition, the NCC apparently is not satisfied with the Board's decision to *grant* the NCC's Petition for Reconsideration with respect to whether the members of the NCC

may continue to collectively engage in activities regarding bills of lading. The NCC apparently believes it is entitled to more.

In its February Decision, the Board reversed its initial determination not to continue antitrust immunity for matters regarding bills of lading. The Board based its change in position primarily upon the fact that certain members of Congress stated, during the debate of an early version of the Motor Carrier Safety Act of 1999, that Congress did not intend to alter the NCC's consideration of such matters when it adopted the Trucking Industry Regulatory Reform Act of 1994 or ICCTA. Following this explanation the Board stated that:

However, we will be sensitive to any challenge that may be raised about any particular bill of lading that NCC may develop. HPCSC/NASSTRAC have identified several provisions in NCC's UBL that are of concern to their members. 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 NCC is now asking the Board to strike this paragraph from the February Decision.

The NCC claims that the paragraph is "extraneous" and addresses matters that are "unrelated to the NCC's collective process and have never been issues in this proceeding." NCC Petition at 2. This assertion is ludicrous, given that the Board specifically made a finding with respect to bill of lading matters conducted by the NCC in its December Decision and reversed that finding in its February Decision. Indeed, the NCC itself raised the degree to which collective activities on bills of lading were considered in this proceeding when it sought reconsideration of the Board's initial finding. The NCC cannot now assert that discussion by the Board of such matters has no place in this proceeding.

Recognition by the Board of concerns over *collective* action on bills of lading that are insulated from the antitrust laws, particularly the imposition of liability limitations through bill of

lading terms, is obviously appropriate and relevant to this proceeding. Moreover, to the extent that the Board believes that it is appropriate for it to entertain challenges to collectively established bill of lading terms, it certainly has the authority and discretion to do so, pursuant to 49 U.S.C. § 13703.

The NCC is apparently most disturbed by the Board's statement in the above paragraph which indicates that shippers should be provided with "actual notice of the arrangement being undertaken." This, the NCC claims, departs from prior Board precedent arising from the ISM-35002 suspension proceeding, including the Board's decision to ultimately remain neutral on such matters. However, since the Board issued its decisions in that proceeding, in December of 1997 and August of 1998, the Department of Transportation ("DOT") released its Cargo Liability Study, which included its recommendation that liability limitations should be freely negotiated between shippers and motor carriers, rather than incorporated in bills of lading via unfiled tariff terms. DOT Study at 57. Moreover, the Board has since had the opportunity to reconsider matters relating to the collective establishment of bill of lading terms, based upon the comments filed in this proceeding. To the extent that the Board may now believe that the continuation of antitrust immunity for collective activities on bills of lading necessitates that shippers receive actual notice of liability terms, it has the authority and discretion to impose such a condition pursuant to Section 13703 of the Act.

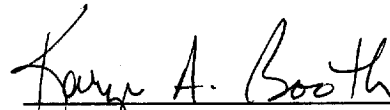
V. CONCLUSION

The League appreciates the opportunity to participate in this proceeding and respectfully requests the Board to (1) adopt the proposals set forth in its Opening Proposals and Comments

filed on April 11 in this proceeding; (2) deny the request of ATA to terminate this proceeding; and (3) deny the Petition of the NCC which seeks to modify the Board's February Decision.

Respectfully submitted,

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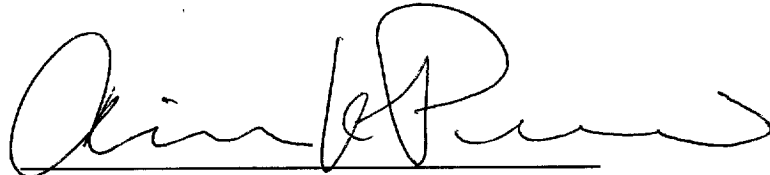
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May 11, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have on this 11th day of May, 2000, served a copy of the foregoing Reply Comments of The National Industrial Transportation League by first-class mail, postage prepaid upon all parties of record.

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

Aimee L. DePew