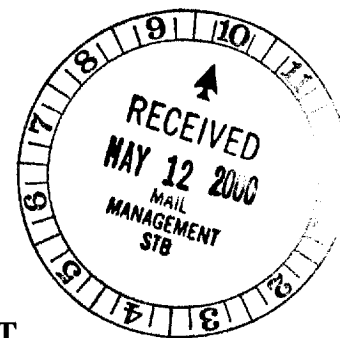


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

NATIONAL CLASSIFICATION COMMITTEE -- AGREEMENT



**REPLY COMMENTS OF
THE TRANSPORTATION CONSUMER PROTECTION COUNCIL, INC.
REGARDING
SHIPPER PARTICIPATION IN THE CLASSIFICATION PROCESS**

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**THE TRANSPORTATION CONSUMER
PROTECTION COUNCIL, INC.**

by George Carl Pezold, General Counsel
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May 11, 2000

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The Transportation Consumer Protection Council, Inc. ("Council") respectfully submits its reply comments regarding shipper participation in the classification process of the National Classification Committee ("NCC").

Like the Board's recent determination that it should not look at major rail mergers in isolation, see *Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company - Common Control*, STB Finance Docket No. 33842, Decision No. 1 (December 28, 1999), the Council believes that the issue of antitrust immunity for both the National Classification Committee and the Rate Bureaus cannot be addressed independent of each other. From a review of the comments filed, it is clear that there is a synergistic relationship between both processes, whereby the whole is greater than the sum of the parts. The carriers would preserve the status quo with only nominal shipper participation in the classification process, and then continue to allow any classification changes made be amplified by the changes made to the class rates by the Rate Bureaus. The result is a compounding effect that can drive the market rather than respond to changes in the market. This is not the goal or purpose of the grant of antitrust immunity to these entities.

Reply to NMFTA and Carrier Position

While the Council (and several other participating shipper groups) does not believe the public interest is served by continuing antitrust immunity for the NCC, it acknowledges the necessity to consider alternatives. Comments by supporters of the present classification process generally range from "its fine the way it is," to "we are working on improving it", with the American Trucking Associations, Inc. (ATA) taking the position that the Board does not have

the authority to make any determination regarding antitrust immunity for the classification process.

The ATA has taken the position that the action the Board seeks to take is beyond the authority it has been granted by law, and that the Board should renew the NCC Agreement for an additional five years, leaving shippers or the Board to petition Congress for legislation to change the law.

The argument that this action is beyond the Board's authority is premised upon what the ATA asserts is the Board's misconstruction of the law. This argument is a strained interpretation of part of section 13703 of the Interstate Commerce Act, and ignores language in the remainder of the statute. Specifically, section 13703(c) reads:

IN GENERAL- The Board may review an agreement approved under this section, on its own initiative or on request, and shall change the conditions of approval or terminate it when necessary to protect the public interest. 49 U.S.C. § 13703(c)

The plain reading of this section of the statute clearly gives the Board broad powers to "change conditions of approval or terminate it" as the Board determines the public interest is best served. That is exactly what this proceeding is about, to determine what conditions should be imposed to better serve the public interest in this deregulated environment. In other words, the Board's determination that the public interest is best served by conditioning continued antitrust immunity for the NCC upon greater shipper participation in the classification process is well within the authority granted by this statute.

The issue is not whether the existence of a uniform classification system itself is in the public interest, but whether the NCC's classification system as it exists today could better serve the public interest with greater participation of the impacted shippers. The ATA's argument

presupposes that once the NCC's Agreement was approved, it is inviolate no matter what, ignoring the changes that have been brought about in the transportation environment by deregulation.

Even assuming there is a presumption that maintenance of the classification process as it currently exists is in the public interest, shippers have made a credible showing to rebut that presumption (see, e.g., Comments by the National Industrial Transportation League (NITL), jointly by the National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc. (Shipper Conferences), Halogenated Solvents Industry Alliance, Inc., American Textile Manufacturers Institute). It is therefore incumbent upon the NCC and its supporters to now show why increasing shipper participation is not in the public interest.

It is worth noting that there appears to be a conflict between the ATA's interpretation of the law, and that of the NMFTA. The ATA asserts that the statute grants antitrust immunity to carriers alone (discussing "[t]he statutory grant of authority to motor carriers (not motor carriers and shippers))", ATA Comments at p. 5. while the NCC asserts that the NCC's antitrust immunity protects shippers as well as carriers. NCC Comments, Joint Statement of George M. Beck and Joel L. Ringer at fn. 14, p. 10. It is suggested that the NCC is correct and that shipper participation is not a problem. Conditions imposed in the public interest, such as greater shipper participation, would be in accord with the statute itself.

The National Motor Freight Traffic Association, Inc., in the comments it submitted on behalf of the NCC has expressed its willingness to increase shipper participation. "In any event, it should be perfectly clear that the NCC stands ready to adopt and implement

reasonable and practical changes in its procedures designed to further facilitate shipper participation – an objective which it has long sought to achieve for the benefit of all.” NCC Comments, Statement of Martin E. Foley at pp. 5-6. Suggestions are made that address some of the concerns raised by shippers, but are limited to the area of notice and dissemination of information.

While these suggestions and recent changes are welcome, they do not address shipper concerns regarding the imbalance in the underlying decision-making process, or concerns regarding appeal of decisions. There is also an apparent disparity between the NCC’s interpretation of the process, and that of the shippers. The NCC’s descriptions of notice, fairness, transparency, and shipper participation by the NCC contrast sharply with those of the shipper participants in this docket. However, in view of the expressed willingness of the NCC to improve the process, serious consideration should be given to the suggestions made by shippers as outlined below.

Comments on Shippers Positions

The Council previously expressed its opinion that the public interest would best be served by termination of antitrust immunity for the NCC (a view shared by the American Textile Manufacturers Institute and the Halogenated Solvents Industry Alliance, Inc.); it recognizes that this is not a likely result of these proceedings.¹ Therefore, the Council expresses its support for the recommendations made by the National Industrial Transportation League (NITL), jointly by the National Small Shipments Traffic Conference, Inc. and The

Health and Personal Care Distribution Conference, Inc. (Shipper Conferences), the American Textile Manufacturers Institute, the Halogenated Solvents Industry Alliance, Inc. and others.

Recent technological advances (e.g., the Internet and e-mail) have made practical both the broad and targeted dissemination of information heretofore not possible. Many of the suggestions made by NITL and the Shipper Conferences regarding advanced notice of possible changes, access to supporting evidence/documentation, and shipper ability to comment and provide input are all facilitated by the use of e-mail and the posting of relevant documents on the NCC's web-site.

The Council also supports the suggestions that any decision on proposed classification changes be supported by evidence of changed circumstances, made either by a neutral body or by a panel with direct shipper participation, and that some sort of effective appeal process to a neutral body be adopted.

Bill of Lading

The Council would like to express its support of the Board's position as set forth in its February 11th Decision in this docket that the Board should continue to carefully monitor collective action on the bill of lading. Particularly, the Council believes that it is imperative that the Board continue 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.

¹ The Council believes the suggestion by the American Textile Manufacturers Institute that the functions of the NCC be transferred to a neutral independent standards development body, such as is done in other industries, bears serious consideration.

Insofar as the Council has long advocated truth in trucking and that shippers should have actual notice of liability limitations before they are imposed, the Council agrees with the Shipper Conferences suggestion that the Board require the NMFC to modify its 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, along with their other suggestions.

CONCLUSION

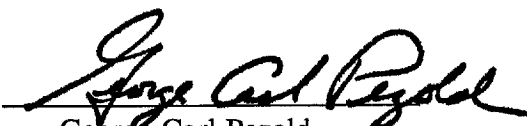
While the Council does not believe the public interest is served by continuing antitrust immunity for the NCC, as an alternative to make the process more open and fair the Council supports the suggestions that have been made by the Shipper Conferences, NITL and others.

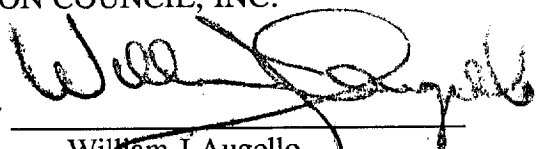
Notwithstanding the approach ultimately adopted by the Board, the Board's conclusions must take into consideration the synergistic relationship that exists between the classification process of the NCC and the rate making process of the Rate Bureaus.

May 11, 2000

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing **Reply Comments of the Transportation Consumer Protection Council, Inc.** on "**Section 5a Application No. 61 (Sub-No. 6), National Classification Committee -Agreement**" has been mailed to the parties on the attached service list, with adequate postage affixed thereon, this 11th day of May, 2000.



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