

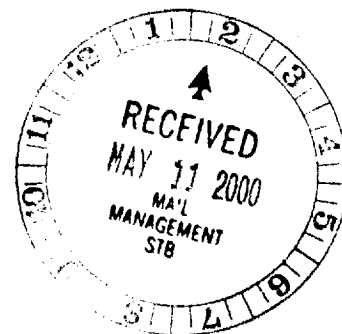
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Section 5a Application No. 61 (Sub-No. 6)  
National Classification Committee - Agreement



REPLY COMMENTS  
OF THE  
NATIONAL CLASSIFICATION COMMITTEE

William W. Pugh  
2200 Mill Road  
Alexandria, VA 22314-4654  
(703) 838-1825

John R. Bagileo  
Law Office of John R. Bagileo  
1101 30th Street, NW #300  
Washington, DC 20007  
(202) 944-3734

Counsel for the  
National Classification Committee

Due and Dated: May 11, 2000

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## **PREFATORY STATEMENT**

The Surface Transportation Board's Decision served in this proceeding on February 11, 2000 announced its intent "to approve renewal of the bureau agreement of the National Classification Committee only if the agreement is amended to provide for more effective shipper participation." The scope of that review unequivocally was intended to explore ways in which shippers could have an increased role in the classification process. In fact, the STB identified its purpose in initiating this proceeding as being the vehicle to provide "for more effective participation into the classification process." (Decision, p. 5.)

The National Classification Committee's April 11, 2000 Opening Comments concentrated on describing the manner in which classification matters are processed, including the notice provided to shippers and shipper associations and representatives at all stages of the classification process, actions which the NCC has taken on its own to encourage and facilitate shipper participation. The NCC also presented proposals as to additional actions which could be taken to even further assist and increase the role of shippers. Moreover, a factual presentation was made showing the actual relationship of classification changes involving increases to other classification matters, namely, classification reductions and proposals which involve both reductions and increases; and the demonstrated reasonableness in ICC and STB proceedings of those classification increases which have been protested or placed under suspension and investigation.

However, upon reviewing the Opening Comments submitted by certain shipper associations it is apparent that they view this proceeding as a forum to distort the identity of the classification as a ratemaking process, and to reargue every classification issue that they have contested or raised in the past and have lost in administrative proceedings before the

ICC or the STB and in the courts. This is not an open-ended investigation and the NCC will not needlessly labor this record with the recitation of those facts and arguments which prevailed in the past regarding those shipper-identified issues. Nevertheless, those matters not relevant or material to this proceeding, or which misstate the function of the classification, are identified herein.

A major portion of the Opening Comments of the National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc. (Conferences), is dedicated to equating classification and ratemaking in contending that there is "a direct link between Classes and class rates." (Conferences' Statement, p. 5.) The Conferences then go on to imply that there is collusion between the NCC and the rate bureaus as to the collective changes in freight classification and rate setting. They suggest that the present system 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 rate bureaus' tariffs." (Conferences' Statement, p. 9.) First, the "direct link" which the Conferences seek to improvise between the classification process and rate increases is a product of advocacy and not long-established fact and the law. Second, the market dictates actual carrier pricing, not the classification which is simply a tool to aid in the pricing process.

The distinction between classification and ratemaking which the Conferences seek to blur for their own purposes in this proceeding has been long recognized. In the Western Classification Case, 25 I.C.C. 442, 453 (1912), the ICC concluded that a classification proceeding raises issues entirely separate from those involved in rate matters. See, also, Class Rate Investigation, 262 I.C.C. 447 (1945); Classification of Jardinieres and Vases, 64

M.C.C. 58 (1955); and General Increase—Eastern Central Territory, 316 I.C.C. 467 (1962).

Moreover, the difference between the role of a motor carrier as a “classifier” and as a “ratemaker” is well established.

In Charge For Shipments Moving An Order—Notify Bills, 367 I.C.C. 330 (1983), the ICC pointed out that the primary purpose of freight classification is to assign an article, or group of articles, which has similar transportation characteristics to a related class. That assignment is based on “well known classification principles which are based upon distinctions relative to transportability.” It further explained that the class is found in a rate tariff published by regional rate bureaus and individual carriers; and “the class tariff provides the rate (usually stated in cents per hundredweight) for transporting an article or articles assigned to the same class between origins and destinations, that have been grouped for ease of use.” (367 I.C.C. at 335.) The ICC then proceeded to conclude that:

The classification tariff and the class tariff, although complementary, serve entirely different purposes. While the classification is designed to reflect the characteristics of the commodity transported, the class tariff reflects the characteristics of the haul. Specifically, the class tariff establishes the rate relationship between localities based upon weight and distance. Use of the classification in conjunction with the class tariff has made it possible for carriers to publish charges for transporting any article in commerce between any two points in the United States without the necessity of publishing millions of separate and distinct rates. (367 I.C.C. at 335-36.)

A very serious allegation is being made by the Conferences. Namely, if as their counsel argues, the carriers are using the classification for rate or revenue purposes, then they are abusing the classification process and acting in a manner in violation of their Section 5a Agreement. (See Conferences’ Statement, p. 10.) Not only is that self-serving contention

untrue and offensive, the NCC points out that there is not a single fact of record which substantiates that very serious allegation. To the contrary, those classification proposals which have been protested and/or suspended and investigated over the past 20 years, and are identified in the NCC's Opening Comments in the statement of Kelly Powers, NMFTA's Legal Assistant, evidence by the ICC's and STB's actions that those classification increases were based on the demonstrated transportation characteristics of the involved articles and, therefore, were found reasonable – as required by statute. The Conferences' contention regarding the classifications serving as "stealth" rate increases is utterly devoid of merit.

Matters which are plainly beyond the stated scope of this proceeding are the Conferences' contentions regarding the standards for classification, the decisionmaking process, the standard of changed circumstances as the basis for classification changes, the NMFC bill of lading, a need for a moratorium on reclassification; and, specifically, the poison materials proposal, the Density Guidelines, NMFC Item 640 (Mixed Shipments and Articles Classified by Weight or Quantity), and Item 172 (Limitation of Carrier Liability Where Value is Not Declared by Shipper). Those matters obviously form the basis of changes which comprise the Conferences' "wish list," but properly are not and properly should not be raised here. For that reason the NCC will not burden the proceeding with responses which already have been approved administratively and judicially with reference to those previously decided matters.

However, to the extent that the Conferences have challenged the NCC's decisionmaking processing which is based on classification standards they claim are "subjective," a response is necessary. Initially, it is pointed out that the discussion by the Conferences of the classification standards erroneously was drawn from the ICC's Interim

Decision in Investigation Into Motor Carrier Classification, 364 I.C.C. 906 (1981).

Significantly in the agency's subsequent decision in Instigation Into Motor Carrier Classification, 367 I.C.C. 243, the ICC, except for recognizing the relative importance of density with respect to the other factors, departed from the relative ranking of the importance of the classification factors cited by the Conferences, and reversed its prior finding that value per pound is not a relevant transportation characteristic. The ICC concluded, instead, that value per pound is a helpful measure of a carrier's potential liability and should be included under the liability factor—which correctly was not then recognized, as the Conferences wrongly assert, as the “least important of the four characteristics to be considered in classification.” (See 367 I.C.C. at 248-49.)

Apart from that misstatement of the transportation characteristics of freight, the Conferences then proceed to cast the NCC's evaluation of those recognized transportation characteristics as “subjective.” That assessment of the classification process is also incorrect. For some eight decades the purpose of the classification has been recognized and clearly defined. As the Supreme Court pointed out in Director General v. Viscose Company, 254 U.S. 498, 502 (1921):

Classification in carrier ratemaking practice is grouping – the associating in a designated list commodities which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like may justly and conveniently be given similar ratings.

Moreover, the method by which freight classification is achieved was aptly and succinctly described by the ICC in Classification of Canned Goods, 98 I.C.C. 166, 176 (1925) as follows:

Classification is largely a matter of comparison of all commodities that move as freight and the assignment of ratings such that each shall bear its fair share of the transportation burden.

There is nothing “subjective” in the way the classification process works. As has always been the case the NCC must establish classifications that are reasonable [49 U.S.C. §13701(a)(c)]. And, as has always been the case, the critical test applied by the ICC, and now by the STB, in assessing the reasonableness of a classification change is the relationship which the proposed ratings bear to those applicable on articles exhibiting the same or similar transportation characteristics. See, e.g., Batteries in D.C. and Pa. Over Tidewater Exp. Lines, 18 M.C.C. 118 (1939); and German Kali Works v. A.T. & S.F. Ry. Co., 28 I.C.C. 223 (1913). Review of any classification matter that has been the subject of an agency proceeding shows that the NCC’s burden has been to demonstrate that the proposed classification or reclassification assigns ratings on the involved articles which are the same as or related to those applied to articles in the classification having comparable transportation characteristics. See Motor Class Rating On Candy Or Confectionery, 353 I.C.C. 314 (1977); and Classification Ratings, Drinking Straws, 335 I.C.C. 1 (1969). The Conferences’ allegation that there is somehow a mystique in the classification process which is under the control of the NCC entirely misses the mark.

Further, the Conferences’ contention that the classification should be frozen has long been urged by those associations, as well as others opposing a classification change, but is recognized as having no merit. For some 50 years the ICC, in rejecting similar claims, recognized that there are ratings in the classification which were not reasonable at the time they initially became effective, or conditions changed so as to make them inappropriate, and

acknowledged the need for adjustments. See, e.g., Incandescent Electric Lamps or Bulbs, 44 M.C.C. 501, 509 (1945); and Cereal Food Preparations—Classification Ratings, 49 M.C.C. 33, 40 (1948). (See, also, The Glenn L. Martin Co. v. W.T. Cowan, Inc., 47 M.C.C. 303, 309 (1947) wherein the ICC concluded that motor carrier classifications based on rail classifications do not reflect the circumstances which are peculiar to transportation by motor vehicle. Such classifications continue to exist in the classification today). With the ever-changing technological advances in the materials used in products, e.g., plastics for metals, and in packaging, e.g., display blister packs, it cannot be doubted that freezing the classification would only render it unresponsive to the many product and packaging changes occurring in the market. Contrary to the essential purpose Congress recognized the classification performs, a frozen National Motor Freight Classification would soon lose its identity as the useful tool relied upon by the transportation community in creating an efficient and economical transportation system. [See, H.R. No. 96-1069, 96<sup>th</sup> Cong., 2d Sess. 28 (1980)].

REPLY STATEMENT  
OF  
MARTIN E. FOLEY

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**BEFORE THE  
U.S. SURFACE TRANSPORTATION BOARD**

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

**REPLY STATEMENT OF  
MARTIN E. FOLEY**

I am the Executive Director of the National Motor Freight Traffic Association, Inc. (NMFTA); its Secretary; and the Secretary of the National Classification Committee (NCC). I filed a Verified Statement in this proceeding on April 11, 2000. It is included in Volume I of the NCC's Comments and proposals.

Most of my reply comments will be directed to various comments, proposals, assertions and conclusions filed with the Surface Transportation Board (STB) by the: National Small Shipments Traffic Conference, Inc. (NASSTRAC); National Industrial Traffic League (NITL); Transportation Consumer Protection Council, Inc. (TCPC) and; Halogenated Solvents Industry Alliance, Inc. (HSIA). I will address the Rubber Manufacturers Association, Inc. (RMA) position separately.

**ANTITRUST IMMUNITY**

NASSTRAC, NITL, TCPC and HSIA's comments express very clearly that they really do not want reform in the classification system; they want it abolished one way or the other. Their preference is for the NCC's limited antitrust immunity to be repealed. Without their

conceding that the STB is not empowered to grant, withdraw or reduce immunity, those shipper associations go on at length to urge the STB to impose such totally unreasonable, impractical, disruptive and unfair restrictions on the NCC as to make it impossible for the NCC member carriers to classify motor freight collectively.

### **PUBLIC INTEREST**

By any objective observation it is clear that the shipper association proposals are not offered in the public interest. Their criticisms and their proposals are in their own narrow self interests – desires to thwart timely revisions to various aspects of the National Motor Freight Classification (NMFC) when the transportation characteristics of a product are found to have changed. The statute requires the establishment of reasonable classifications. The statute does not forbid increases, nor does it require only reductions; it simply demands classifications which are reasonable. The STB is the first interpreter as to whether a classification is reasonable and the courts have the last word on STB Decisions. The evidence submitted with the statements of NMFTA employees Welsh and Powers in the NCC's opening comments show clearly that those checks and balances work quite well. The system produces reasonable classifications. Yet the shipper associations would have the STB impose such restrictive conditions as to make it impossible for the NCC to function as intended by the statute.

### **SHIPPERS ON THE NCC**

NASSTRAC and NITL suggest adding shippers to the NCC. Not only does the statute not authorize it, the STB previously addressed the notion in its Decision served on December 10, 1998, where the Board noted that no shipper group has explained how the Board could reasonably require that shippers be given voting powers on the NCC equal to those of member carriers, and that the Board would not expect to adopt such a requirement. The proposal has

been debated before the Congress, the ICC and the STB in years past. Until such time as the Congress enacts such provisions, the suggestions waste the STB's time.

Moreover, it is a wholly unworkable scheme. It is interesting that the TCPC – a shipper group that would never be identified as an NCC/NMFTA supporter – commented to the STB that TCPC “... does not believe there is any practical or effective means to accomplish this” (shippers on the NCC). TCPC articulates how illogical and impractical is the concept of “shippers on the NCC” (Pages 2-4). I agree with TCPC on this issue. Leaving aside the lack of statutory authority, one insurmountable obstacle is the fact that NCC carriers have no proprietary, market based, or competitive interest in a commodity or a product being considered for classification. Shippers, on the other hand, would almost always have a potential conflict of interest; or be totally uninformed/inexperienced or disinterested as to the product, rule, or package.

NITL believes that the NCC should be required to reimburse shippers for their expenses related to their participation at the NCC Meetings. This is preposterous. The carriers certainly get no free ride on the NCC. They pay annual fees to operate the system. They pay their own lodging expenses at the meetings. Although the NCC member's company is reimbursed for the member's discounted coach class air fare to and from the meeting, that reimbursement comes from the annual fees which the members have already paid to NMFTA. To suggest that the carriers should underwrite the expenses of “shippers on the NCC” is excessively greedy. Shippers bear none of the expenses related to the classification system, other than to pay their own travel expenses if they elect to attend an NCC/Panel meeting. Shippers pay no fees to NMFTA/NCC for the assistance shippers frequently seek from our staff. Shippers get the cost free benefit of any research and analysis which our staff conducts for the NCC. For NMFTA to

be forced by the STB to reimburse shippers would be a wholly unfair and unreasonable requirement.

The expressed rationale for participating on a voting basis is to assure an “open process” and provide input prior to the “vote.” An alternative that may meet these objectives is an “Ad Hoc” group of shippers/carriers that could review concerns and staff procedures, including on site review. The Ad Hoc group of shippers and carriers would observe the actual daily operations and activities of our staff – not only at the public meetings, but in NMFTA’s offices. The shippers and carriers would be free to observe how the staff responds to direction from the NCC to do research; how the staff goes about trying to notify as many shippers as can be found which might have a possible interest in the research project; the extent of our effort and the projected problems we encounter; the care with which the analysis is developed; the breadth and depth of the assistance which the staff renders to shippers on a daily basis, particularly with regard to inquiries about research projects, proposals, or interpretations. Further, NMFTA would intensify and expand its existing procedures whenever possible to enable NMFTA to make a good faith effort at notifying associations/shippers about research projects/dockets that could be of concern to them as early in the process (when instituted) as possible. This could provide a longer notice period and greater participation as the project/docket develops, limited, however, by the current 120-Day Rule in the 5a Agreement.

The Ad Hoc shippers and carriers would not have actual access to the NCC’s files, but would be free to raise questions with senior staff or the Executive Director. The shippers and carriers would be encouraged to offer suggestions and to provide our staff with information about the transportation characteristics of a commodity being researched, or on a docket.

The idea here is simply to facilitate shipper participation in the form of a physical presence, as well as the continuing invitation for shippers to participate in the classification process in the traditional manner of supplying information about the transportation characteristics of their products when research or proposals are in play. NMFTA would welcome shippers, carriers or employees of their trade associations as members of the Ad Hoc group, but counsel or consultants to shippers, carriers or trade associations would not be appropriate.

Certain shipper groups are recommending arbitration as a means of “controlling” the carriers’ statutory duty to establish reasonable classifications, by taking disputed classification increases to so called “independent” arbitration. The STB should consider that arbitration is a concept that is not directly applicable to the classification process. The factors to be considered in arriving at a class for a commodity require an understanding of the factors, and how they merge in LTL transportation. Finding arbitrators with the necessary background would be very difficult.

### **CARRIERS PAY FOR SHIPPER’S REQUESTED STUDIES**

HSIA would have the Board require the NCC to pay the costs of what HSIA characterizes as “... non-duplicative studies or analyses requested by shippers...” HSIA’s conditions which would trigger this free ride for the shippers are totally subjective. HSIA does not identify: who will determine what is germane; who will resolve any dispute which might arise between shippers and carriers as to whether the subject matter requested by shippers to be studied/researched at the NCC expense has or has not been already addressed; or whether the evidence submitted by the NCC is subject to “good-faith” dispute or simply a difference in point of view. The dispute resolution aspect of this proposal is as unreasonable and unnecessary

a burden to impose on the STB as the cost paying burden on the NCC. Not only is the suggestion totally unworkable, it ignores the plain fact that if any research is undertaken by our staff it is at the direction of the NCC and it is to try to develop information on the transportation characteristics of a product(s) made by shippers. This is information which the NCC does not have (or needs to update), but is in the hands of the shippers. If shippers want to conduct their own studies they not only have the right to do so, they have the capabilities to do so. The NCC welcomes shipper participation, but shippers should cover the costs of any studies they want done beyond the NCC's proposed substantive standards.

NASSTRAC and HSLA both argue, even if not in precisely similar language, that classification changes should only be made when supported in the record by evidence that there have been changed transportation circumstances. HSLA carries the argument further than NASSTRAC; proposing that a class increase could only be made when a substantial percentage of motor carriers have experienced cost increases which can be demonstrated to be equal to the rate increase which they say will follow any class increase. The premise that rate increases always follow class rating increases is flawed theory. No evidence is ever produced to support the theory, but carriers testify that the theory is in error. (See letter from J-Line and Roadway Express for example). In any event, NMFTA/NCC have no capability to develop the cost vs. revenue increase data which HSLA's standard would require.

NASSTRAC noted that a prior ICC Decision which was based on the ICC's use of a "substantial change" standard to deny a class increase on poisons back in 1993, was reversed by the D.C. Circuit Court in 1995. But NASSTRAC's spin on it is that the STB can do it anyway.

HSLA's approach would introduce a multitude of factors into classification-making which were expressly prohibited by the ICC's investigation years ago: rates; price competition;

market competition; product competition; carrier costs; carrier profitability; and pricing strategies. The proposal is fatally flawed and unworkable.

If the STB were to consider HSIA's proposal for increased classes favorably, wouldn't the Board – in order to “level the playing field,” as shipper urge – have to require that a substantial percentage of shippers would have to show that they are losing money on the transportation of products at the current classification rating, in order to justify class reductions? HSIA's view seems one sided.

### **TIMELY NOTICE**

HSIA says the staff analysis was not made available until a “week or two” before the Panel meeting. Well, was it one, or two? In any event the proposed increase was in fact modified by the Panel to a lower class than was proposed. The system works. Shipper participation frequently works to the shipper's advantage. NCC has taken steps to increase the opportunity for shippers to participate and offers to do more as shown in our April 11, 2000, filing.

### **SHIPPER ACCESS TO NCC FILES**

NASSTRAC says shippers must have earlier and more complete access to NCC data and analyses. NITL proposes that no formal action may be taken by the NCC sooner than 90 days from the date that shippers receive notice and the data involving a request or proposal. HSIA wants everything placed in an open public docket at least 90 days prior to any proposed action.

The preference for as much information as possible, as soon as possible, is not a strange objective. What prevents NCC from being able to satisfy their request is in the stricture of the 5a Agreement itself. The Agreement requires that proposals must be placed on the first available docket. The panels and the NCC meet four times a year at about 90 day intervals, give

or take a few days. Final disposition for new or changed provisions IS required (by the Agreement) to be made by the 120<sup>th</sup> day after docketing, except that in unusual circumstances the 120 day period may be extended upon STB approval of an NCC request stating the reasons for the extension.

The “120 day Rule” in the Agreement prevents NCC from giving 90 day advance notice on docketed proposals. This is no longer a statutory requirement, but NCC must comply with the terms of its 5a Agreement. However, as to commodities to be researched – or are already being researched – notice is given as soon as possible after the staff has been directed by the NCC. Far more than 90 day notice is already given in most instances concerning research.

NMFTA/NCC has had a running battle with NASSTRAC counsel (prior and current) for years over the desire of the shipper group counsel to examine our files. The requests have usually been limited to access to documents received from any persons relating to a docketed proposal or a research matter. At issue, is proprietary, privileged information which is given to the NCC with the understanding that it will not be released outside the NCC without the express written consent of the person supplying the information. HSIA chimes in on NASSTRAC’s side here. The Board’s February 11, 2000, Decision echoed its earlier expression that any fears which the NCC and those who provide privileged information to it will be erased by the entry of a protective order. We object to the Board’s favorable consideration of this intrusion into NCC files by shipper representatives. As starters:

What right does a shipper group’s counsel have to inspect the privileged data that a shipper has furnished to the NCC voluntarily, or on request, when that shipper is a non-member of the group and potentially, if not actually, a competitor of one or more of the group’s members?;

What right does a shipper group's counsel have to see privileged data that a carrier submits to the NCC?

Will the STB order counsel for shipper groups to open their files to the NCC/NMFTA so that the carriers can be informed as to what a member of the shipper group has furnished to its counsel?;

The STB should order counsel for shipper groups not to advise group members against responding to NCC research requests, a practice which thwarts and frustrates NCC's efforts to develop as much information as possible before considering whether a classification action is supported or required by the transportation characteristics of the product in question.

Persons providing information to the NCC should be able to remain secure in the knowledge that the specifics of their particular product will be protected against disclosure to real or potential competitors - except as to the extent it is included and merged into summary data revealed to all interested persons in a given case: protected, not by an order of the STB, but protected by the privilege of privacy and non-disclosure to competing interests.

### **STAFF GATHERING, REVIEW AND PRESENTATION OF DATA**

The efforts made and procedures followed by NMFTA staff are detailed in the various statements presented in the NCC's Opening Comments, dated April 11, 2000, and in this Reply, and will not be repeated in detail, although I may touch on some aspects of them in one or more sections of this reply. Yet, I must comment on what I deem a scandalous and impertinent attack on the integrity of NMFTA staff in implying that they cannot be trusted to accurately and fairly gather and report that information to the NCC. That contention is predicated mainly on a purported "conflict of interest" that allegedly exists in the classification process based on the

allegation that the trucking industry controls freight classification. (See, e.g. NASSTRAC Comments, pp. 37-40.) Such a serious allegation demands evidence, but, apart from unsubstantiated allegations by counsel, nothing on the record underpins that very serious contention. This is highly unfair and inappropriate.

This is not the first time NASSTRAC has attacked the fairness and openness of the NCC's classification procedures and process. In 1992 NASSTRAC's former counsel made disparaging allegations regarding the NCC's procedures and the integrity of NMFTA's staff. In a letter dated September 4, 1992 from NASSTRAC's counsel to Bernard Gaillard, a former Director of the ICC's Office of Compliance and Consumer Assistance, serious allegations were made that the NCC staff, and not the carrier members, originates classification proposals. Those allegations, if true, were not only violations of the NCC's Section 5a procedures, but also illegal. The specific focus of that complaint were Docket 922, Subject 11, and Docket 924, Subject 10, both of which dealt with poison inhalation hazard commodities proposals which were opposed by NASSTRAC.

In response to the various contentions and allegations made by the NASSTRAC counsel, during the week of October 18 through 23, 1992, ICC investigators reviewed all documents involving the handling and the history associated with the two identified subjects, as well as 43 other subjects on those dockets. Personal interviews were conducted with carrier members and NCC staff associated with those proposals. Interviews were conducted as well as with the Conference's counsel, others suggested by him, and carrier members of the NCC he identified and criticized as purported "stand-ins" to place staff efforts into formal proposals before the NCC or its panels. (The ICC's Compliance Survey, and pertinent letters are appended to my

statement as Exhibit A). After an extensive review of the documents, interviews and allegations, the Report concludes:

We have examined, in detail, each of the 45 subject matters or proposals found and abstracted on Exhibit H. We have entered into extensive discussions and inquiry with the various members of the NCC staff in connection with certain of these proposals and in connection with their functions in general. We have as carefully as possible compared the actual handling and procedures of the staff of the NCC to the provisions and requirements of the NCC's currently applicable Section 5a Agreement with this Commission, the Motor Carrier Act of 1980, Ex Parte No. 297 (Sub-No. 5), and Ex Parte No. MC-98 (Sub-No. 1), and the NCC policies and directives as revised August 4, 1992. (Exhibit II.)

Our efforts included interviews with proposal proponents and/or those making motions to present a certain matter as a proposal at a future meeting of the NCC or one of its panels.

We have found no instances of any of the staff of the NCC acting outside their approved policies and directives, or contrary to the spirit or letter of the NCC's 5a Agreement, the Motor Carrier Act of 1980, Ex Parte No. 297 (Sub-No. 5), or Ex Parte No. MC-98 (Sub-No. 1). (Emphasis added.) (See Exhibit A, Compliance Survey, pp. 40-41.)

In the April 16, 1993 memorandum of Bernard Gaillard, OCCA's then Director, to the Commission, that office's legal staff had reviewed the information obtained through the compliance survey. Asserting privilege, a copy of that document was not provided to the NCC pursuant to its Freedom of Information Act request. Nevertheless, then Director Gaillard reported that:

Attorneys of this office conducted a legal analysis (see Attachment B) of the information developed in the survey, which was included in the Compliance Survey Report. The conclusion reached in this analysis is that the NMFTA's staff's activities were consistent with the statutory requirements and in conformity with the approved 5a Agreement. Based on this conclusion, a letter was sent to the complainant, copy to NMFTA, advising the parties that the allegations were not substantiated, but that this office will continue to monitor compliance of NCC and NMFTA, and other rate bureaus, with the terms and conditions of the

statutes and the 5A Agreements. (Emphasis added.) (See Exhibit A for copy of Memorandum.)

In the April 15, 1993 letter from Charles E. Wagner, then Deputy Director of the ICC's Section of Operations and Enforcement, NASSTRAC's counsel was advised:

The field report has been reviewed and based on the information developed during the compliance review, this office did not substantiate your allegations. (Emphasis added.) (Exhibit A).

Also, I would call to the STB's attention the fact that up until the summer of 1994, staff of the ICC regularly attended and monitored all NCC and Classification Panel meetings. The purpose of those visits was to ensure that the NCC was acting in compliance with its approved Section 5a procedures and to review the manner in which the proposals were handled. I am unaware of a single compliance report during the nine-year period in which those surveys were conducted, and I was NMFTA's Executive Director and Secretary to the NCC, which criticized the NCC's actions as not being in full compliance with its approved classification procedures, or indicating that the NCC's handling of proposals was unfair in any respect. If the classification process is as tainted as NASSTRAC suggests, or its staff misrepresents data or information, as a former long-time employee of the ICC well familiar with its procedures and competence, I am certain that the investigation and compliance surveys which were conducted by the agency would have identified and rectified any such problems. The self-serving and unsubstantiated allegations to the contrary presented here by certain shipper groups should be given no weight.

### SUMMARY

Boiled down, much of the shipper groups' filings are points of view, even legal argument, but lacking in evidence. An example is the length of argument regarding poisonous materials; a matter not even before the STB. It is far beyond the scope of the instant proceeding. Another

matter which should be stricken from this proceeding altogether is the Uniform Bill of Lading (UBOL).

Shipper groups have no evidence - ever - of NMFTA staff members withholding or manipulating record evidence. It has never been found in previous regulatory agency investigations and would not be found now. It doesn't happen. It is not done, period. Counsel for shipper groups' comments appear to try to spook the STB into imposing unfair and unnecessary restrictions to bar the "potential" for such abuses. "Witch hunting" is a more appropriate term, in my view.

Along that same line - argument, but no evidence - is the assertion that NASSTRAC members have unspecified concerns about the UBOL. The Uniform Bill of Lading published in the NMFC, as the STB has already been advised and has recognized, is a document jointly drafted by six members of NASSTRAC's Board of Directors (one of whom also headed the NITL's Highway Transportation Committee), along with 6 members of NMFTA. Counsel were not present in 4 of the 5 meetings. The jointly drafted new UBOL was first approved by NASSTRAC's Board and then by its membership, before it was ever docketed before the NCC. There, NASSTRAC members urged the NCC to approve the proposal and it was. It seems disingenuous for NASSTRAC counsel to "retry the case," as it were, and totally wasteful of the Board's time in doing so. The pity of it all is in the Board's expression on Page 7 of the February 11<sup>th</sup> decision, which we have petitioned the Board to excise.

The Rubber Manufacturers Association (RMA) brief statement essentially "me toos" the comments of other shipper groups and counsel for NASSTRAC and complains extensively on a classification matter in which RMA prevailed!

TCPC's self-serving arguments are not enlightening.

The shipper groups' suggestions and petitions for "freezing" the NMFC and for the imposition of a moratorium on classification actions until the Board's "anticipated reforms" are in place – are not in the public interest.

Respectfully submitted,

*Martin E. Jolley*

## VERIFICATION

I, Martin E. Foley, verify under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized this statement. Executed on May 9, 2000.

  
\_\_\_\_\_  
MARTIN E. FOLEY

**REPLY STATEMENT**  
**OF**  
**MARTIN E. FOLEY**

**BEFORE THE  
U.S. SURFACE TRANSPORTATION BOARD**

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

**REPLY STATEMENT OF  
MARTIN E. FOLEY**

I am the Executive Director of the National Motor Freight Traffic Association, Inc. (NMFTA); its Secretary; and the Secretary of the National Classification Committee (NCC). I filed a Verified Statement in this proceeding on April 11, 2000. It is included in Volume I of the NCC's Comments and proposals.

Most of my reply comments will be directed to various comments, proposals, assertions and conclusions filed with the Surface Transportation Board (STB) by the: National Small Shipments Traffic Conference, Inc. (NASSTRAC); National Industrial Traffic League (NITL); Transportation Consumer Protection Council, Inc. (TCPC) and; Halogenated Solvents Industry Alliance, Inc. (HSIA). I will address the Rubber Manufacturers Association, Inc. (RMA) position separately.

**ANTITRUST IMMUNITY**

NASSTRAC, NITL, TCPC and HSIA's comments express very clearly that they really do not want reform in the classification system; they want it abolished one way or the other. Their preference is for the NCC's limited antitrust immunity to be repealed. Without their

conceding that the STB is not empowered to grant, withdraw or reduce immunity, those shipper associations go on at length to urge the STB to impose such totally unreasonable, impractical, disruptive and unfair restrictions on the NCC as to make it impossible for the NCC member carriers to classify motor freight collectively.

### **PUBLIC INTEREST**

By any objective observation it is clear that the shipper association proposals are not offered in the public interest. Their criticisms and their proposals are in their own narrow self interests – desires to thwart timely revisions to various aspects of the National Motor Freight Classification (NMFC) when the transportation characteristics of a product are found to have changed. The statute requires the establishment of reasonable classifications. The statute does not forbid increases, nor does it require only reductions; it simply demands classifications which are reasonable. The STB is the first interpreter as to whether a classification is reasonable and the courts have the last word on STB Decisions. The evidence submitted with the statements of NMFTA employees Welsh and Powers in the NCC's opening comments show clearly that those checks and balances work quite well. The system produces reasonable classifications. Yet the shipper associations would have the STB impose such restrictive conditions as to make it impossible for the NCC to function as intended by the statute.

### **SHIPPERS ON THE NCC**

NASSTRAC and NITL suggest adding shippers to the NCC. Not only does the statute not authorize it, the STB previously addressed the notion in its Decision served on December 10, 1998, where the Board noted that no shipper group has explained how the Board could reasonably require that shippers be given voting powers on the NCC equal to those of member carriers, and that the Board would not expect to adopt such a requirement. The proposal has

been debated before the Congress, the ICC and the STB in years past. Until such time as the Congress enacts such provisions, the suggestions waste the STB's time.

Moreover, it is a wholly unworkable scheme. It is interesting that the TCPC – a shipper group that would never be identified as an NCC/NMFTA supporter – commented to the STB that TCPC “... does not believe there is any practical or effective means to accomplish this” (shippers on the NCC). TCPC articulates how illogical and impractical is the concept of “shippers on the NCC” (Pages 2-4). I agree with TCPC on this issue. Leaving aside the lack of statutory authority, one insurmountable obstacle is the fact that NCC carriers have no proprietary, market based, or competitive interest in a commodity or a product being considered for classification. Shippers, on the other hand, would almost always have a potential conflict of interest; or be totally uninformed/inexperienced or disinterested as to the product, rule, or package.

NTTL believes that the NCC should be required to reimburse shippers for their expenses related to their participation at the NCC Meetings. This is preposterous. The carriers certainly get no free ride on the NCC. They pay annual fees to operate the system. They pay their own lodging expenses at the meetings. Although the NCC member's company is reimbursed for the member's discounted coach class air fare to and from the meeting, that reimbursement comes from the annual fees which the members have already paid to NMFTA. To suggest that the carriers should underwrite the expenses of “shippers on the NCC” is excessively greedy. Shippers bear none of the expenses related to the classification system, other than to pay their own travel expenses if they elect to attend an NCC/Panel meeting. Shippers pay no fees to NMFTA/NCC for the assistance shippers frequently seek from our staff. Shippers get the cost free benefit of any research and analysis which our staff conducts for the NCC. For NMFTA to

be forced by the STB to reimburse shippers would be a wholly unfair and unreasonable requirement.

The expressed rationale for participating on a voting basis is to assure an “open process” and provide input prior to the “vote.” An alternative that may meet these objectives is an “Ad Hoc” group of shippers/carriers that could review concerns and staff procedures, including on site review. The Ad Hoc group of shippers and carriers would observe the actual daily operations and activities of our staff – not only at the public meetings, but in NMFTA’s offices. The shippers and carriers would be free to observe how the staff responds to direction from the NCC to do research; how the staff goes about trying to notify as many shippers as can be found which might have a possible interest in the research project; the extent of our effort and the projected problems we encounter; the care with which the analysis is developed; the breadth and depth of the assistance which the staff renders to shippers on a daily basis, particularly with regard to inquiries about research projects, proposals, or interpretations. Further, NMFTA would intensify and expand its existing procedures whenever possible to enable NMFTA to make a good faith effort at notifying associations/shippers about research projects/dockets that could be of concern to them as early in the process (when instituted) as possible. This could provide a longer notice period and greater participation as the project/docket develops, limited, however, by the current 120-Day Rule in the 5a Agreement.

The Ad Hoc shippers and carriers would not have actual access to the NCC’s files, but would be free to raise questions with senior staff or the Executive Director. The shippers and carriers would be encouraged to offer suggestions and to provide our staff with information about the transportation characteristics of a commodity being researched, or on a docket.

Exhibit E contains two examples of traffic agreements signed by two members of the NMFTA.

Exhibit F is an example of NMFTA member fee invoice for participation in the NMFC for the period July 1, 1992, through June 30, 1993. On the back side of the invoice, there is printed the fee schedule as follows: Up to gross operating revenue of \$500,000.00, the fee is \$50.00; \$500,001.00 to \$5,000,000.00, the fee is \$250.00, plus .00016 of total gross revenue; \$5,000,001.00 to \$100,000,000.00, the fee is \$900.00, plus .000038 of total gross revenue; \$100,000,001.00 to \$960,000,000.00, the fee is \$4,200.00, plus .00005 of total gross revenue; and more than \$960,000,000.00, the fee is \$11,000.00.

250.00

Exhibit G contains financial statements of the NMFTA for years ended June 30, 1991, and June 30, 1992. The auditing firm is DeLeon and Stang, Certified Public Accountants, Gaithersburg, Maryland. Review of the balance sheets will show assets of about \$4 million in both years. Cash flow shows \$39,314.00 in 1991, with an improvement to \$65,245.00 in 1992. In addition, Executive Director Foley reports to each meeting of the Board of Directors of NMFTA as to the financial condition of the organization as of time of each meeting.

Exhibit H contains four sheets of 17-column paper. We have abstracted on these sheets all subject matters placed in Docket 921 and Docket 922. We selected these two dockets to develop certain statistical information as will be reported below and to determine if the docket handling procedures are in compliance with the

In addition to the NCC, the NMFTA also has the following Standing Committees: Bill of Lading Committee; Committee on Form and Construction of Tariffs; Commerce Committee, Hazardous Materials Committee; and Weighing and Research Committee. These committees and the members are listed on pages 4, 5, 6 and 7 of the Organizational Directory (Exhibit B). These pages also list a variety of special committees which vary from time to time.

The NMFTA's Certificate of Incorporation in 1956, along with its Bylaws as amended May 6, 1987, are found on pages 17, 18, 19, 20, 21 and 22.

The Bylaws of the NCC are printed in working form on pages 27 through 34 of the directory (Exhibit B).

Foley said a new Organizational Directory will be published as soon as possible after their November meeting when new directors, chairmen and committee members are established.

Exhibit C contains minutes of twelve (12) NMFTA Board of Directors meetings dating from November 7, 1989, to August 4, 1992. the minutes are self-explanatory. Each contains a brief record of what transpired at the meeting and the action taken on each subject discussed.

Exhibit D is a computerized list of "signers of NCC/NMFTA Agreement". This list was produced at our request and is dated October 21, 1992. The list consists of 17 pages with 819 carriers listed thereon. In addition to the "signer's" name, the full address is shown along with an ID number given to each entity by the NMFTA.

developed as the result of commodity reports or research project reports by the staff, and one had been deferred from a previous docket. Again, the proposals developed as the result of staff reports were items of tariff "house cleaning".

We selected two proposals from the abstracted Docket 921, and two proposals from the abstracted Docket 922, for further examination. These proposals are identified as Docket 921, Subject 1; 921, Subject 3; Docket 922, Subject 6, and 922, Subject 16. These four proposal files were selected at random for no specific reason. In addition, we selected proposals in Docket 922, Subject 11, and Docket 924, Subject 10, for complete review because of comments made by Attorney at Law Daniel A. Sweeney in his letter of September 4, 1992, to Director Gaillard concerning the role of the staff of the National Classification Committee in initiating proposals to change classifications. We made copies of all documents contained in each of these proposal files. Each file will be discussed below and submitted as exhibits with this report.

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DOCKET 922, SUBJECT 11, AND DOCKET 924, SUBJECT 10:

File folder marked Exhibit I contains copies of all documents found in the file of the NCC pertaining to Docket 922, Subject 11. The documents discussed will be tabbed within the file folder for easy location.

Contained in the file folder is copy of letter dated October 18, 1991, from Frank V. Klein, Vice-President-Pricing, Preston Trucking Company, Inc., addressed to Frank T. Grice, Director,

requirements of the NCC's currently applicable agreement with this Commission, the Motor Carrier Act of 1980, Ex Parte No. 297 (Sub No. 5), and Ex Parte No. MC-98 (Sub No. 1).

The abstract sheets contain nine general columns listing the docket and subject number; the proponent of the subject; category or commodity; the date docket proposal made by panel or date received from an interested party; the date the docketed proposal served to public parties; the disposition of the docket by the panel members; the date of disposition and (date of disposition notice made public); (tariff issued date) and tariff effective date; and a remarks section.

Docket 921 contained 21 subject matters, of which 13 were approved as docketed. Four subjects were approved as modified, one deferred for further research, and one withdrawn by its shipper proponent. Of these 21 docketed proposals, three were proposed or had their inception by carriers; 11 were proposals by shipper interest; six were developed by staff research; and one had been deferred from a previous docket for further study. The proposals that were the result of the staff's commodity report or research project report were items of tariff "house cleaning", such as, simplification, clarification and uniformity.

Docket 922 contained 24 subject matters, of which 15 were approved as docketed, two were approved as modified, four were disapproved, and two were withdrawn by their shipper proponents. Of these 24 subjects, seven were proposed or had their inception by carriers; 11 were proposals by shipper interest, five were

as a review matter for whatever the staff and/or classification panel may recommend in the circumstances."

There is also contained in the same file copies of pages 47158 through 47163, inclusive, of the *Federal Register*, Volume 56, Number 181, September 18, 1991. These regulations are summarized by McIntyre in Commodity Report, Docket 921, Review Matter B, included in the same file. Quoted below is portion from the Commodity Report:

"Recently, the staff received an inquiry from a member carrier concerning the classification of various hazardous commodities. The specific question raised was how the DOT's new regulations under HM-181 affected the NMFC descriptions, which reflect the DOT's old hazard classifications. Under the old system, poisonous materials were grouped together (Subpart H) with three subgroups - Poison A's, Poison B's and Irritating Materials. The Poison A's consisted of gases or liquids which gave off highly toxic fumes and reflected the dangers associated with these inhalation hazards. Poison B's consisted of gases, liquids or solids which were less toxic than Poison A's. Under the new system, these poisons are separated into two different divisions, one for poison gases (Division 2.3) and one for other liquid or solid poisons (Division 6.1). While separately classed, the materials which present an inhalation hazard (formerly Class A poisons and Class B poison gases) are being reflected under the new regulations by the special designation "Poisonous by Inhalation". The new regulations group inhalation hazards into four zones (Hazard Zones A, B, C and D) depending on the level of the inhalation toxicity and also set forth the methodology for determining whether a material is considered to be poisonous by inhalation and, if so, which hazard zone it falls in. These requirements are set forth in Section 171.8, which defines material poisonous by inhalation and in Sections 173.116(a) and 172.133(a) which indicate the criteria for determining the toxicity level. Thus, while the new divisions represent a separation of the materials formerly classed as poisons, the poisonous by inhalation designation for materials in Hazard Zones A and B appears to be comparable to the Class A designation. Those gases formerly classed as Poison B's would appear to be comparable to Division 2.3 gases in Hazard Zones C and D. It should be noted, however, that, in the process of

National Classification Development, NCC, Alexandria, Virginia. Klein enclosed four pages of commodity descriptions furnished by Solkatronic Chemicals, Inc., Morrisville, Pennsylvania. Klein stated: "With the new descriptions coming under HM-181, the customer is anxious to provide correct classification descriptions to motor carriers." Klein then furnished the full name and address of his customer and requested that Grice respond directly with copy to him (Klein).

The response to Klein's letter is letter dated January 7, 1992, addressed to Mr. Michael M. Hollander, Plant Manager, Solkatronic Chemicals, Inc., Morrisville, Pennsylvania. The response is from Jane E. McIntyre, Assistant to the Director of Classification Development, MFTA, with copy to Klein at Preston Trucking Company, Inc. McIntyre provides the information requested in connection with commodities specifically provided for in the NMFC, then relates the complications in connection with the changes to be brought about in the NMFC to come in line with the new regulations found in HM-181.

There is in this same proposal file a letter dated January 16, 1992, from Frank Klein, Preston Trucking Company, Inc., addressed to McIntyre thanking her for replying to their customer's request as to proper classification descriptions as requested. Klein then states: "In view of the upcoming HazMat Rules later this year, it would seem incumbent upon us to adequately prepare the classification for this occurrence.

"I, therefore, suggest that the matter be placed on the agenda

was "approved a motion directing the listing of a proposal on Docket 922". The proposal is identified as Subject 11 listed on pages 12, 13 and 14 of Section 1 of Docket 922. On page 14, at the bottom of the page, the justification is shown as "It is proposed to amend the involved classification items to reflect changes in the DOT's hazardous materials regulations as a result of HM-181."

Exhibit M contains minutes of the NCC Panel 4 March 9, 1992, meeting in Irving, Texas. The minutes reveal that Subject 11 was approved as modified with a vote of 12 to 0. The modification was a result of a motion by Robert L. Wittenberg, Hyman Freightways, Inc., Moundsview, Minnesota, seconded by Robert S. Maloney, Spartan Express, Inc., Greer, South Carolina, to amend Item 85900 by removing the word "metal" in the term "metal containers" from the packaging description. The motion for the amendment carried with a vote of 12 to 0.

Exhibit N is NCC Docket 923 issued April 21, 1992. It contains proposals to be considered by a classification panel on May 4, 1992, in Arlington, Virginia, and classification matters to be considered by the NCC on May 5, 1992, in Arlington, Virginia. On page 26 of Docket 923, Section 4, Disposition of Proposals Listed on Docket 922 - Bulletin 1177, Subject 11 is shown with the following comment: "Please refer to page 22 of this docket for further information with regard to the status of this proposal."

Page 22, Section 3, Docket 923, under paragraph A(2) lists "Appeal 1003 - Subject 11 of Docket 922." This paragraph contains explanation of the history of the proposal (Subject 11 of Docket

redefining the classifications, the DOT has included in the poisonous by inhalation category a number of products both, gases and liquids, which were not formerly so classed.

"The question is complicated further by the fact that parts of the new system are optional until October 1, 1992....."

This subject was first found in Docket 921, Section 2 (page 25) as Classification Review Matter B - Poisons or Poison Gases. Docket 921 was issued January 16, 1992, and reflects that Classification Review Matter B would be discussed and considered by a classification panel on February 3, 1992, at its meeting in Fort Lauderdale, Florida. Docket 921 is included as Exhibit J.

Exhibit K contains minutes of the February 3, 1992, meeting of Classification Panel No. 4 in Fort Lauderdale, Florida. The minutes reveal on page 6 that Review Matter B, a commodity report on poison inhalation hazards, was considered with the result a motion was made by R. L. Wittenberg, Hyman Freightways, Inc., Moundsvew, Minnesota, seconded by William J. Condon, H & W Motor Express Company, Dubuque, Iowa, directing the docketing of a proposal dealing with the matter. The motion was carried with a vote of 17 to 1.

Exhibit L is copy of Docket 922 issued February 20, 1992, containing proposals to be considered by a classification panel on March 9, 1992, in Irving, Texas. On page 28 of Docket 922, Section 4, there is a report of action taken by the classification panel on classification review matters at the open meeting of the classification panel in Fort Lauderdale, Florida, on February 3, 1992. It reports the results of Review Matter B, "Poisons or Poison Gases"

paragraph 4, "Report on the staff review of poison inhalation hazards". The first five paragraphs review the reasons and history of this subject with special emphasis on Subject 11 of Docket 922. The sixth, seventh and eighth paragraphs of these minutes read as follows:

"The amendments approved in connection with Subject 11 of Docket 922, would have established full value provisions without a release for some commodities presently subject to released value. Therefore, the NCC is now precluded from discussing or voting on Subject 11. Consequently, the secretary of the NCC, pursuant to Rule 6 of the NCC's 5(a) agreement removed the appeal of this proposal from the MCC's agenda.

"Nullifying Subject 11, however, leaves this very significant classification problem unaddressed, and if nothing is done, numerous interpretation problems will arise. The staff has reviewed the previous proposal to determine if the released value problem could be eliminated. The review indicates that it would be possible to amend the involved MNFC provisions to conform to the DOT's new regulations without violating the released rates prohibition.

"Following a discussion on the subject, a motion was made by Mr. D. R. Free (U W Freight Line, Inc., Salt Lake City, Utah) and seconded by Mr. D. E. Clark (Rudolf Express Company, Bourbonnais, Illinois) to docket a proposal to be heard at a future panel meeting, to amend the involved NMFC provisions to conform to the new DOT regulations without violating the released rates prohibition. The motion carried with a unanimous vote."

Exhibit P contains NCC Docket 924 issued May 21, 1992. On page 25, Section 3, of Docket 924, under paragraph C(2), Discussion Matter Agenda, it is reported, "The staff delivered a report on the classification of poison inhalation hazards. The Committee voted to docket a proposal to amend various items in the classification to conform with the new DOT regulations which resulted from HM-181."

922) and reports that subsequent to the panel's disposition of this proposal, the Interstate Commerce Commission served a decision in Investigation and Suspension Case No. M-30424, concerning classification of acids, which has an impact on the handling of Subject 11 of Docket 922. It further reports that "In that proceeding, the ICC expressed the opinion that Section 10706(b)(3)(c) prohibits the National Classification Committee from voting on proposals which would remove a commodity from a released value provision. As in HM-181, the DOT also designated certain commodities to be poison inhalation hazards which were not previously designated as such, the proposed changes contemplated in Subject 11 of Docket 922 could possibly be viewed as removing commodities from released value provisions." They further state that, accordingly, the secretary of the NCC has removed appeal 1003 from the NCC's agenda and that the subject would not be discussed or voted on at the NCC's May 5, 1992, meeting. Further, they said, there will be no publication of the amendments approved as a result of Section 11 of Docket 922 and listed in Disposition Bulletin 1177.

Then, the last paragraph under this subject states: "Those parties which had an interest in Subject 11 of Docket 922 may wish to be present for the sunshine discussion of poison inhalation hazards which will be conducted at the NCC meeting on May 5, 1992.

Exhibit O contains minutes of the National Classification Committee meeting held May 5, 1992, in Arlington, Virginia. There will be found on the first and second pages of the minutes, in

Docket 924, Bulletin 1180, was approved as modified. Then, on pages 16 through 22, Section 3, Docket 925, is listed Appeal 1007 - Subject 10 - Docket 924. The justification is, as previously stated, i.e., to comply with DOT's hazardous materials regulations as the result of HM-181.

Exhibit S is NCC Docket 926 issued August 27, 1992, listing proposals to be considered by a classification panel on September 14, 1992, in Rosemont, Illinois, and reviewing in Section 3 classification matters which were considered by the NCC on August 4, 1992, in Monterey, California. On page 40, Section 3, of Docket 926, paragraph A(3) reports that Appeal 1007 - Subject 10 of Docket 924, that the NCC voted to uphold the decision of the classification panel that met on June 8, 1992, in Denver, Colorado, approving the proposal as modified.

Exhibit T contains the minutes of the National Classification Committee that met in Monterey, California, August 4, 1992. It is reported on page 2, paragraph 5(C) dealing with the Appeal 1007 - Docket 924, Subject 10 (Poison Inhalation Hazards), the committee voted to approve the action of the panel by a vote of 46 to 4, with two abstentions.

Exhibit U is NCC Docket 927, issued October 16, 1992, containing proposals to be considered by classification panel at its meeting November 2, 1992, in Arlington, Virginia, and matters which will be considered by the NCC at its meeting on November 3, 1992, in Arlington, Virginia. No reference is found in any part of Docket 927 relating to the subject of poison inhalation hazards.

~~SECRET~~

Subject 10 of Docket 924, Section 1, on pages 15 through 21, inclusive, outlines this new proposal. The justification found on page 21 for the proposal reads as follows: "It is proposed to amend the involved classification items to reflect changes in the DOT's hazardous materials regulations as a result of HM-181. The designations of Class A and B poisons have been eliminated by the DOT and have been redefined as hazardous materials which are poisonous by inhalation. The proposed amendments to the existing classification provisions are designed to indicate commodities which are poisonous by inhalation and to identify them as to whether or not they are classified under Hazard Zone A or B."

Exhibit Q contains minutes of the NCC Panel 1 meeting June 8, 1992, held in Denver, Colorado. It is reported there was a motion in regard to Subject 10 by Zane R. Johnsonbaugh (Raible's Commercial Warehouse, Altoona, Pennsylvania) to amend the proposal by removing the term "hermetically sealed" from the involved descriptions, and by amending Item 85900 by adding the term "NOI" after the provisions for chloropicrin and hydrocyanic acid. The motion carried unanimously. The proposal was approved as modified with a vote of 10 to 1, with one abstention."

Exhibit R is NCC Docket 925 issued July 16, 1992. This docket contains proposals to be considered by a classification panel on August 3, 1992, in Monterey, California. It also lists in Section 3, Classification Matters to be considered by the NCC on August 4, 1992, in Monterey, California.

Page 23, Section 4, Docket 925 reports that Subject 10 of

hazards to conform to the new DOT regulations without violating the released rates prohibition is in the file.

The file (Exhibit W) contains the following correspondence:

Letter dated July 2, 1992, from Daniel J. Sweeney, Attorney, McCarthy, Sweeney and Harkaway, Washington, D.C., addressed to NCC Secretary Foley. This letter, according to markings at the top and a transmittal sheet, was faxed to Secretary Foley on July 16, 1992. Two additional copies of the letter are in the file.

Letter dated July 24, 1992, from Foley to Sweeney.

Letter dated July 27, 1992, from Sweeney to the NCC, with copy to Foley.

Letter dated August 13, 1992, from Sweeney to Foley.

Letter dated August 19, 1992, from Foley to Sweeney.

Letter dated August 19, 1992, from Foley to "NCC Members".

This series of exchange of correspondence deals with procedures and handling given the subject of poison inhalation hazards proposal Docket 924, Subject 10. We have made additional copies of this correspondence and identified these copies as Exhibit X and will offer additional comments later in this report.

Exhibit W also contains the following listed letters from shippers to the NCC registering their concern about proposal Docket 924, Subject 10:

Letter dated May 28, 1992, from Mallinckrodt Specialty Chemicals Company, Chesterfield, Missouri, registering their objection to the proposal.

Letter dated June 5, 1992, from Arkansas Industrial Traffic Association, Fort Smith, Arkansas, registering their objection to the proposal.

Letter dated June 8, 1992, from Matheson Gas Products, Secaucus, New Jersey, asking to become a party to the record in connection with the proposal.

Exhibit V contains copies of Supplement No. 4 and Supplement No. 6 to NMF 100-S, ICC NMF 100-S. Supplement 4, issued September 1, 1992, scheduled to become effective October 1, 1992, contains the classification changes in accordance with proposal Docket 924, Subject 10. Supplement 6, issued October 6, 1992, is a suspension notice - Investigation and Suspension No. M-30430, dated September 28, 1992, that suspends to and including April 30, 1993, all items listed in Supplement 4, Item 2080-A through Item 102101-A, inclusive, appearing on pages 2 through 4.

Exhibit I (Docket 922, Subject 11 file) contains voting record in connection with Review Matter B, Docket 921, by the NCC panel meeting in Fort Lauderdale, Florida, February 3, 1992. It also contains the voting record on Docket 922, Subject 11, of the proposal, and voting record of Motion No. 1 to amend Subject 11 of Docket 922, both March 9, 1992, in Irving, Texas.

Exhibit W contains copies of all documents found in the NCC's Docket 924, Subject 10 file. Included is voting record of the NCC pertaining to Docket 924, Subject 10 - Appeal 1007 - Poison Inhalation Hazards, on August 4, 1992, at Monterey, California. Also included in this folder are voting record of Classification Panel meeting in Denver, Colorado, June 8, 1992, on the proposal contained in Subject 10, Docket 924, and on the amendment to the proposal, same subject, same meeting.

The voting record of the NCC at their May 5, 1992, meeting in Arlington, Virginia, in connection with docketing a proposal to amend the provisions of the NMFC relating to poison inhalation

Preston's headquarters and inquired at to how HM-181 would change the hazardous materials classification in connection with shipments from one of their customers, Solkatronic Chemicals, Inc., Morrisville, Pennsylvania. He said the telephone conversation was followed up by a fax message October 9, 1991, listing the various hazardous materials shipped by Solkatronic. The faxed message is included as Exhibit No. 1 to the oral interview report (Exhibit Y). Klein said the notes on the faxed memorandum indicate the initial inquiry came from Mike Hollander, Plant Manager, Solkatronic Chemicals, Inc., Morrisville, Pennsylvania. Included with the oral interview report is letter dated October 18, 1991 (marked Exhibit No. 3), that Klein wrote to Frank Grice, NCC, requesting assistance in properly describing the commodities in question and asking that proper classification descriptions be given directly to Michael M. Hollander, Plant Manager of Solkatronic Chemicals, Inc. Klein also produced copy of response to Michael Hollander dated January 7, 1992 (letter marked Exhibit No. 4), to Hollander from Jane McIntyre, NMFTA. Klein then produced copy of letter dated January 16, 1992 (marked Exhibit No. 5), from Klein to McIntyre suggesting that the matter be placed on the agenda as a review matter for whatever the staff and/or the classification panel may recommend. Klein said the information from the staff study was presented to the classification panel at its February 3, 1992, meeting in Fort Lauderdale, Florida. He said the carrier members proposed certain classification item changes with specific amendments listed in Docket 922, Subject 11.

Letter dated June 3, 1992, from Union Carbide Chemicals and Plastics Company, Inc., Danbury, Connecticut, asking that they become a party to the record in connection with the proposal.

Copy of written statement dated August 4, 1992, in connection with the proposal by Norbert Hinze, Transportation Purchasing Manager for Praxair, Inc. (formerly Union Carbide Industrial Gases, Inc.).

As stated above, Exhibit X contains exchanges of correspondence between Attorney Sweeney and Secretary Foley. These letters are extracted from file, Exhibit W. In his letter dated July 2, 1992, Sweeney states:

"This proposal did not originate with any carrier but was rather handed out by the staff at the Crystal City meeting and then rubber stamped by the group. There is a statutory prohibition against this kind of staff proposal and, since I was in the room at the time, this would be a good case to test whether the statute can be so easily avoided by having a member come forward to "sponsor" a proposal."

In the fourth paragraph of his letter of July 2, 1992, Sweeney further states: "It is improperly originated ...."

In view of Attorney Sweeney's statements and allegations, we traced to the extent possible all handling and history involved with proposal Docket 924, Subject 10. This effort included a visit to Preston Trucking Company, Inc., Preston, Maryland, and interview with Frank V. Klein, Vice-President-Pricing, by Special Agents Paul E. Graham and Franklin Bail, on October 28, 1992. Copy of the interview report and its attachments are included as Exhibit Y.

The interview report (Exhibit Y) states that Klein is a member of the National Classification Committee and a member of one of the active NCC panels. Klein said that on October 8, 1991, a sales representative from their Trenton, New Jersey, terminal called

"In view of the upcoming HazMat rules later this year, it would seem incumbent upon us to adequately prepare the classification for this occurrence.

"I therefore suggest that the matter be placed on the agenda as a review matter for whatever the staff and/or classification panel may recommend in the circumstances."

McIntyre said the letter from Klein is what originated and caused a staff review of the subject matter of HM-181. She said the staff report is what resulted in proposal Docket 922, Subject 11.

In answer to our question, McIntyre said that even though in this instance the review matter that resulted in the proposal was originated by a carrier, it would not be unusual if the staff had noted HM-181 and its consequences and presented it as a review matter to a NCC panel as information and consideration for whatever action the panel may want to take.

Therefore, based upon our thorough as possible review of procedures and history of proposal Docket 922, Subject 11, it would appear the genesis of the proposal was an inquiry from a shipper (Solkatronic Chemicals, Inc.) regarding the status of their commodities shipped by motor common carrier as a result of HM-181, with the resulting request by the carrier to a staff member of the NMFTA for help with their expertise in furnishing their customer the desired and accurate information. The resultant proposal Docket 922, Subject 11 (and appeal 1003) was removed from the NCC's agenda for discussion at its May 5, 1992, meeting to "avoid any possible conflict with the Commission's decision finding that our acids proposal contravened with statutory prohibition against

Included in file (Exhibit I), Docket 922, Subject 11, is voting record in connection with this matter identified as Review Matter B - (Poison Inhalation Hazards). It shows a motion by R. L. Wittenberg, Hyman Freightways, Inc., Moundsvew, Minnesota, seconded by W. J. Condon, H & W Motor Express Company, Dubuque, Iowa, to docket a proposal relating to this matter. The motion to docket the proposal was carried with 17 members voting for the motion and one voting to abstain.

Our research in connection with the origin and history of proposal Docket 922, Subject 11, included an interview with Jane McIntyre of the NMFTA in her office in Arlington, Virginia, on October 22, 1992. Exhibit Z contains copy of our oral interview report with McIntyre.

McIntyre reviewed her files and said the review matter was started as the result of a letter dated October 18, 1991, to former Director-Classification Development Frank Grice, NCC, from Frank V. Klein, Vice-President-Pricing, Preston Trucking Company, Inc., Preston, Maryland. Klein requested Grice to review a list of commodities furnished by Preston's customer Solkatronic Chemicals, Inc., Morrisville, Pennsylvania. McIntyre said she responded to Klein's request by letter dated January 7, 1992, addressed to Solkatronic with a blind note to Klein to the effect that a review matter would be prepared by the staff for presentation to a panel meeting in February.

McIntyre stated that Klein then addressed a letter to her thanking her for her response to his customers and further stated:

in the origin, history and handling of proposal Docket 922, Subject 11, i.e., a shipper requesting a carrier for classification help and information.

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DOCKET 921, SUBJECT 1:

File folder marked AA contains copies of all documents found in the file of the NCC pertaining to Docket 921, Subject 1. The documents discussed will be tabbed within the file folder for easy location.

Our investigation as to the origin, history and handling of proposal Docket No. 921, Subject 1, included interview with the carrier who requested the staff of the NMFTA to research the matter of classification of flares. On October 29, 1992, Special Agent Paul Graham and Special Agent Franklin Bail interviewed Mr. Stanley J. Gutkowski at the general offices of Friedman's Express, Inc., Wilkes-Barre (Dorrance), Pennsylvania. Gutkowski is Senior Vice-President of Friedman's, a member of the NCC, and a member of a current NCC panel.

Gutkowski told Special Agents Graham and Bail that he contacted the NCC (NMFTA) for help in properly classifying flares because flares were not listed in the index of the NMFC. Gutkowski said he requested the staff to research and prepare a report on flares to a classification panel for consideration.

Gutkowski said his contacting the NMFTA for their expert assistance was the result of one of his terminal personnel contacting him (Gutkowski) for help for a particular shipper of

collective action on released rates provisions," and "in response to your (Sweeney) objections". See letter dated July 24, 1992, from Foley to Sweeney contained in Exhibit X. In this same letter, second paragraph, Foley points out to Sweeney that "The NCC heard a report on poison inhalation hazards and ultimately voted to docket a new proposal to amend the involved classification items as necessary to comport with the DOT's HM-181 new hazard classifications; without violating the statutory prohibition against collective action on release rates."

Exhibit O containing copies of minutes of the May 5, 1992, NCC meeting reflects this matter was discussed and a motion made by David R. Free, U W Freight Lines, Inc., Salt Lake City, Utah, seconded by D. E. Clark, Rudolf Express Company, Bourbonnais, Illinois, to docket a proposal to be heard at a future panel meeting, to amend the involved NMFC provisions to conform to the new DOT regulations without violating the released rates prohibition. The motion carried with a unanimous vote.

Therefore, according to as thorough as possible research of the procedures and history of proposal Docket 924, Subject 10, we find the genesis to be that as just stated, i.e., motion made, seconded and passed at the May 5, 1992, meeting of the NCC. The motion to docket this proposal was the result of a report by the staff on poison inhalation hazards. This staff report included the history, handling and removal of proposal Docket 922, Subject 11, from any discussion by the NCC for reasons just stated. Therefore, part of the genesis of proposal Docket 924, Subject 10, is rooted

prepared by staff members Frank T. Grice and Joanna G. Knoll. This commodity report is included in the file because, as stated under "Substance of Report", the panel directed the staff to conduct further research on Item 64300, including the differentiation between Class A and B explosives, and to report back with provisions that are within the NCC's guidelines.

Exhibit CC is NCC Docket 917, listing subjects to be discussed by a classification panel on November 4, 1991, and review matters to be discussed by the panel at its meeting on November 4, 1991, in Washington, DC. On page 20, Section 2, "Classification Review Matters", is listed Subject K, Flares.

The next document in file (Exhibit AA) proposal Docket No. 921, Subject L, is voting record of the panel members at their November 4, 1991, Washington, DC meeting. J. V. Luckadoo, Fredrickson Motor Express Corporation, Charlotte, North Carolina, made a motion, seconded by D. A. Norman, Overnite Transportation Company, Richmond, Virginia, in connection with Review Matter K, Docket 917, to conduct further research on all items involving flares and present a report on Docket 918, with the research to include the appropriateness of the present sub-provisions of Item 64300. The motion passed 13 to 1.

Exhibit DD is NCC Docket 918 listing proposals and review subjects to be discussed and considered by a NCC panel at its meeting on December 10, 1991, in Atlanta, Georgia. On page 17, Section 2, Docket 918, under "Classification Review Matters", is listed Subject C, Flares, and Subject D, Class A or B Explosives.

flares. Gutkowski said he could not recall the name of his personnel or the name of the shipper involved. Gutkowski said he assumed that if Friedman's was experiencing a problem in the proper classification of flares, other carriers would also be having the same problem. Therefore, he said he requested the staff to prepare a report on the matter for presentation to a classification panel.

Copy of Special Agent Graham and Bail's report of oral interview with Gutkowski is included, marked Exhibit BB.

Near the back of the file folder (Exhibit AA) containing proposal Docket 921, Subject 1, is a note to file which reads:

"In March of 1991, Stan Gutkowski of Friedman's Express, Inc., an NCC member, called to request that the staff research the matter of flares as they are not listed in the index of the classification and to deliver a report to a classification panel for their consideration. Frank Grice forwarded the request to Elaine Hatfield, Manager of Research Section, who assigned it originally to Steven Meyer, Research Analyst. Mr. Meyer resigned his position and the subject was reassigned to Joanna Knoll, Senior Research Analyst, who prepared a report in accordance with Mr. Gutkowski's original request. The matter was listed on Docket 917 as Review Matter K."

The next document in the file folder (Exhibit AA) is a memorandum from Hatfield to Meyer about this matter directing that Meyer's research include a complete history of Item 64300, Fireworks. This history is included in the file.

The next document in the file is the commodity report identified as Docket 917, Review Matter K, prepared by staff members Joanna G. Knoll and Breck T. Marshall, on flares.

The next document in the file is a commodity report on Class A and B explosives, identified as Docket 918, Review Matter D,

Therefore, based upon as thorough as possible review of procedures, handling and history of proposal Docket 921, Subject 1, we find the genesis to be that of an inquiry from a shipper to a carrier for classification assistance. The carrier (Friedman's), see Exhibit BB, turned to the staff of the NMFTA for their expertise and assistance and requested the staff to prepare a report on the matter for presentation to a NCC panel.

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DOCKET 922, SUBJECT 6:

File folder marked Exhibit EE contains copies of all documents found in the file of the NCC pertaining to Docket 922, Subject 6. The documents discussed below are tabbed for easy location.

Our investigation of this particular proposal includes an interview by Special Agent Lamm with R. L. Trocke, Manager, Traffic, Hyman Freightways, Inc., Saint Paul (Roseville), Minnesota. Exhibit FF is the report of oral interview with Trocke. Trocke said he discovered he was hauling a product described at "denatured alcohol" and could not decide if the product was properly described under Item 42690 or Item 42670 of the NMFC. Trocke said he wrote a letter dated October 23, 1991, to Frank Grice of the NMFC (NMFTA) asking for his help in determining the proper item in the NMFC applicable to denatured alcohol. Copy of Trocke's letter of October 23, 1991, is included in the file of the proposal, Exhibit EE. In Trocke's letter, he asks, "Could you go over this and advise if the above is correct and perhaps provide some guidance as to what can be changed in the classification to

The next documents in Exhibit AA, Docket 921, Subject 1, is voting record in connection with Review Matter D, Class A and B Explosives, Docket 918. Motion by Glenn M. Brown, Yellow Freight System, Inc., Shawnee Mission, Kansas, seconded by D. G. Free, U W Freight Lines, Inc., Salt Lake City, Utah, is to restructure the subprovisions and attendant notes of Item 64300, Explosives, to Group Class A and Class B Explosives together. This motion carried with a vote of 9 to 0.

The next document in File, Exhibit AA, Docket 921, Subject 1, was in connection with Review Matter C, Flares, Fusees and Highway Emergency Kits, Docket 918. Motion by D. G. Free, U W Freight Lines, Inc., Salt Lake City, Utah, seconded by T. E. Jensen, Clearwater Trucking, Inc., Salt Lake City, Utah, to (1) cancel as obsolete Item 109950, Truck Flares; (2) amend Note Item 108132 to clarify the application of Item 108130, Highway Emergency Kits; and (3) amend Item 64300, Explosives, to specifically name flares or fusees, and to reference a new note. The motion carried 9 to 0.

Exhibit J, NCC Docket 921, lists proposals to be considered by a classification panel on February 3, 1992, in Fort Lauderdale, Florida. Subject 1 is listed on pages 4 and 5, Section 1, of Docket 921.

The next document in the File Folder, Exhibit AA, Docket 921, Subject 1, is Voting Record on the Disposition of Docket 921, Subject 1 - (Explosives and Flares). This proposal passed as docketed with 17 members voting to approve and one member abstaining.

The motion carried by a vote of 18 to 0.

The proposal is found on page 9, Section 1, NCC Docket 922 (see Exhibit L).

The proposal file, Exhibit EE, contains voting record in connection with the proposal, Docket 922, Subject 6 - (Anhydrous Non-denatured Alcohol). The proposal was approved as docketed by the NCC panel meeting in Dallas, Texas, March 9, 1992, with a vote of 12 to 0.

Therefore, based upon our thorough as possible review of the procedures and history of proposal Docket 922, Subject 6, we find the genesis to be that of an inquiry from a carrier (Hyman) for assistance from the staff of the NMFTA in properly describing a product not specifically provided for in the NMFC.

As reported on page 2 of the oral interview report with Trocke (Exhibit FF), "Trocke stated that without such assistance by the expertise of the staff of the NCC, there would be many instances where he would have difficulty in determining the classification item applicable to certain products. Also, he added that the guidelines established for the commodity reports and reviews are what keep the contents of the National Motor Freight Classification current and more usable."

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DOCKET 921, SUBJECT 3:

File folder marked Exhibit GG contains copies of all documents found in the file of the NCC pertaining to Docket 921, Subject 3. The documents discussed will be tabbed within the file folder for

make this more clear?"

The response to Trocke's letter is a letter from Daniel Horning, Chief, Interpretation Section, NCC, dated November 7, 1991. This letter is also included in the proposal file, Exhibit EE. Horning expressed his opinion that the product in question, based upon the information available to him, would be properly classed under Item 42670, but that he would prefer to see additional information from the shipper to more clearly depict the exact character and nature of the product. Horning states in his letter, "A commodity review report outlining the present controversy will be prepared for presentation to a classification panel for their consideration. The solution may lie in specifically naming anhydrous under the provisions of Item 42670."

There is found in Exhibit EE a commodity report identified as Docket 921, Review Matter E, prepared by staff member Horning. This review matter is listed in Section 2, page 25, of the NCC Docket 921 containing matters to be discussed and considered by a classification panel at its meeting February 3, 1992, in Fort Lauderdale, Florida. See Exhibit J, Docket 921.

There is contained in the proposal file Exhibit EE voting record of the members present in connection with Docket 921, Review Matter E - (Anhydrous Non-denatured Alcohol) at the NCC panel meeting in Fort Lauderdale February 3. Motion was made by R. S. Maloney, Spartan Express, Inc., Greer, South Carolina, seconded by R. L. Wittenberg, Hyman Freightways, Inc., Moundsview, Minnesota, to amend Item 42670 to include the listing of "anhydrous alcohol".

commodity report.

There is found on page 17, Section 2, of NCC Docket 918 (Exhibit DD) a listing of these item numbers identified as Classification Review Matter H. These review matters were to be considered by a classification panel at the December 10, 1991, meeting in Atlanta, Georgia.

The docket file, Exhibit GG, contains voting record on proposal made by G. M. Brown, Yellow Freight, seconded by D. G. Free, U W Freight Lines, Inc., Salt Lake City, Utah, to cancel and amend certain items, as stated, for clarification purposes. The motion carried with a vote of 9 to 0.

The proposal is found on pages 6, 7, 8 and 9 of Section 1, Docket 921, identified as Subject 3, scheduled for consideration by a NCC panel meeting in Fort Lauderdale on February 3, 1992 (see Docket 921, Exhibit J).

The proposal file, Exhibit GG, contains voting record on the proposal, Docket 921, Subject 3 - (Clarification Matters), with 17 members voting to approve the proposal as docketed, with one abstention.

Therefore, based upon our thorough as possible review of procedures and history of proposal Docket 921, Subject 3, we find the genesis to be research by staff members in identifying items not presently listed under proper generic headings, generic heading which does not properly describe provisions subject to the grouping, and items in the NMFC that may no longer be moving in commerce.

easy location.

Our investigation into this proposal included interview with Mr. G. M. Brown, former Vice-President-Traffic of Yellow Freight System, Inc., Overland Park, Kansas. See oral interview report by Special Agent Lamm with Mr. Brown, Exhibit HH. Brown said he is now retired from Yellow Freight System, Inc. He said he began the retiring process in January 1992 and officially retired on May 1, 1992. Brown said that Subject 3 of Docket 921 was the result of a commodity report by the NCC staff in connection with policy and guidelines they operate under. Brown said the NCC has instructed the staff to identify items that are presently not listed under proper generic headings and to update the classification (NMFC) as to provisions that may be obsolete. He said several items were presented to the NCC panel meeting in Atlanta, Georgia, December 10, 1991, under Docket 918, Review Matter H. Brown said he made the motion to docket a proposal to make the several changes and deletions suggested in the staff's commodity report and that the motion was unanimously passed. He said 17 members of the panel voted to approve the proposal as docketed, with one member abstaining, at a NCC panel meeting in February 1992.

Included in the proposal file, Exhibit GG, is commodity report prepared by staff members Elaine M. Hatfield and Fredrick Breidenstein, identified as Docket 918, Review Matter H, concerning Classification Items 22720, 27700, 33340, 47860, 47880, 47890, 47895, 47910, 47940, 47950, 58300, 64550, 64590, 101600, 188220 and 196740. These items are specifically listed in attachment to the

concern "that proposals may not be originating with individual carriers and that the staff may be developing proposals which are then sponsored by a carrier for the staff, typically a carrier member of a panel or the committee." This letter is included as Exhibit JJ. Sweeney questions, "Who generates and places before the panel something in the equivalent form of a proposal so that the panel can simply adopt it and formally make it a proposal?" He also expressed his concern about "reports" or "research projects" conducted by the staff and states, "The reports can ripen into proposals at the next meeting." He further expresses his concern as to "whether the initiative for a proposal comes from the staff and is handed off as a carrier proposal at a later date" or "whether some carrier actually comes up with an initial proposal which is turned over to the staff for research".

Our investigation of this matter included an interview by Special Agents Paul Graham and Franklin Bail of Attorney Sweeney at his office located at 1750 Pennsylvania Avenue, N. W., Washington, DC. Report of the oral interview is included as Exhibit KK. This interview was to seek further information from Attorney Sweeney relating to his letter of September 4, 1992, (Exhibit JJ) to Director Gaillard concerning the roll of the staff of the NCC in initiating proposals. He was asked if he could provide additional information or insight on the matter of his letter to Director Gaillard.

Some of the points, as contained in the report of oral interview, made by Attorney Sweeney are:

As reported on page 2, last paragraph, oral interview report with Mr. Brown (Exhibit HH), he added, "This is the manner in which the National Motor Freight Classification has been improved over the years by correcting, adding to and deleting from the publication." Brown also said, "The staff is acting within the guidelines established by the National Classification Committee and that if he had not made the motion to establish the proposal, no doubt another member of the panel would have done so."

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Exhibit II is copy of NCC "Policies and Directives Pertaining to the National Motor Freight Classification", revised August 4, 1992. NCC Secretary Foley said these policies and directives are reviewed at least once a year. He said where the policies and directives, including density and value guidelines and hazardous materials guidelines, are found to be not reflective of NCC or ICC precedent, or otherwise may require revision or updating, the staff will bring such matters to the attention of the NCC and will indicate possible revisions in the policies and directives. Foley said these policies and directives, as well as their agreement as amended November 5, 1985, and August 20, 1987 (as contained in Exhibits A and B), were considered and approved by the Interstate Commerce Commission, along with their application for amendment to their 5A agreement.

On September 4, 1992, Attorney Daniel J. Sweeney addressed a letter to Director Bernard Gaillard, Office of Compliance and Consumer Assistance, Interstate Commerce Commission, regarding his

He points out that on page 14 there are listed 15 "Classification Review" matters that appear to be items which the staff will come forward with and in all likelihood will be sponsored as a proposal by some manner of the panel. He points to page 17 as listing actions taken by the panel at its September 14, 1992, meeting and states, "Read broadly, each action appears as though it might be an adoption of a staff report into a proposal or as accepting a staff report to become a proposal."

Also, at the suggestion of Attorney Sweeney, Special Agent Paul Graham on January 8, 1993, interviewed Mr. Martin W. Bercovici, Attorney, Keller and Heckman, 1001 G Street, N. W., Washington, DC 20001. Mr. Sweeney said that Mr. Bercovici represents shipping interests, i.e., The Society of the Plastics Industry, Inc., in classification matters before the National Classification Committee. Report of Interview with Mr. Bercovici is included as Exhibit LL.

Mr. Bercovici said that the NCC should be allowed to consider economic factors in its analysis in addition to density, stowability, ease or difficulty in handling and liability. He also said that at times he felt the staff of the NCC in its investigations of shipping characteristics was biased. Standards used by the staff were not public information, such as the density standard, and shipper access to NCC data was limited. He further believes the density scale used by the NCC as a guideline in classification determination needs to be updated to compensate for new technology used in packaging and the increased cubic capacity

Prior to 1980, the NCC had a National Employee Board that developed a significant number of classification items.

The Motor Carrier Act of 1980 prohibited the use of employee boards in rate bureaus to make proposals on rates and rules.

He believes a significant number of proposals that come before the NCC have their inception by the staff of the NCC.

He observed there is the potential for a bias among the NCC staff to increase the classification ratings, which increases carrier revenues, justifying the cost of the operation of the NCC.

He believes David R. Free and David G. Free, father and son, representing the State of Utah and the District of Columbia, are stand-ins to place staff efforts into formal proposals before the NCC or its panels.

He believes the density scale used by the NCC as a guideline in classification determination needs to be updated to compensate for new technology used in packaging and the increased cubic capacity of highway trailers.

He noted that most shippers, after appearing before the NCC or its panels, come away from the meetings with a bad taste for the proceedings.

He elaborated on the prohibition of shippers attending the social functions (dinners, cocktail hours) that accompany NCC and panel meetings.

Attorney Sweeney observed there is a need within the transportation industry for work that the NCC performs. He believes that the origin of the proposals should be from shippers or carriers. Sweeney said he feels that social functions would provide proper opportunities for carriers and shippers to meet to discuss common concerns.

After the interview by Special Agents Graham and Bail, Sweeney addressed a letter to Special Agent Graham and enclosed copies of cover and pages 14 and 17 of the NCC Docket 927 for November 1992.

vice president of U W Freight Line, Inc. (UWFL). He also confirmed that he is a director of the National Motor Freight Traffic Association, Inc. (NMFTA); the second vice chairman of the National Classification Committee (NCC); a member of NCC's Classification Panel No. 2; and chairman of Classification Panel No. 2's Packaging Subcommittee. He stated that David R. Free is his father and the president of UWFL.

Mr. Free said he has been a member of the NCC for four years, 1989-1993, and has served as a panel member for two years, 1991-1993. Mr. Free said in all probability he was elected to serve on the NCC because he enjoys getting involved with rate classifications as well as all facets of the transportation industry. He said he is active in state organizations and is now vice president of the Utah Motor Transport Association (UMTA), and within the next four years, will probably be the president. He said his father is past president of the UMTA. He said as a panel member, it is his responsibility to review matters and facts brought before the panel, both by panel members and staff who report on them. Mr. Free stated that based on the facts, they try to make the best decision for all concerned, approve, deny, or compromise if possible, to promote a win-win situation. He added that normally, new members on the committee are not placed on panels until they get some experience. He said the committee mainly handles appeals from the panels. Mr. Free observed that appeals come from some action of a panel which is then appealed by a proponent, and sometimes there is very little controversy.

of highway trailers.

Mr. Bercovici further stated that the investigations and proposals developed by the staff were a subterfuge for rate increase. Mr. Bercovici noted the Motor Carrier Act of 1980 prohibited the use of employee boards in rate bureaus to make proposals on rates and rules. Mr. Bercovici believes a significant number of proposals that come before the NCC have their inception by the staff of the NCC.

Mr. Bercovici observed that the NCC committee structure calls for two representatives per state, Canada, and the District of Columbia. He questioned how an official (Mr. David R. Free) of a small carrier in Utah could stand as a representative of the District of Columbia. He noted that a large number of the reports of the NCC staff become a proposal on the motion or the second to a motion by two NCC members, David R. Free and David G. Free, a father and son, representing the District of Columbia and the State of Utah, respectively. Mr. Bercovici believes the Frees are stand-ins to place staff efforts into formal proposals before the NCC or its Panels. Mr. Bercovici believes that the origin of the proposals should be from shippers or carriers.

Exhibit MM contains report of oral interview with Mr. David G. Free, Vice President, U W Freight Line, Inc, Salt Lake City, Utah 84119, by Senior Special Agent Raymond Weddel and Special Agent Patricia Allgier, on January 20, 1993.

Mr. Free said his father, David R. Free, was in Washington, DC, attending the inauguration of President Clinton. He said he is

"Yes. They must do the same as anyone else does; they must send in a letter requesting a review matter (be instituted). We might check with members on a survey asking for data such as number of shipments involved, problems, etc. A shipper or carrier can submit a proposal directly, but carriers usually go via the review matter route first. At the end of the proposal by the proponent, there is a time for discussion, requests for more facts, etc."

Mr. Free said the reason the staff usually does the research of a review matter, as opposed to a carrier member, is because the member carriers usually do not have the data base.

He said he does not know why his father, David R. Free, is interested in his service on the NCC and the NMFTA. When asked how his father became a member of the NCC representing the District of Columbia, he said:

"Because nobody was nominated or ran from the District of Columbia. He has been on the committee for close to thirty years. He was first elected from the State of Utah, then went through the chairs. There are many gentlemen who have been on the committee for many years and really understand it very well. I know they are appointed or nominated to represent states that are not represented, but I am not sure how or by whom. Dad spends a lot of time in Washington (DC). He is vice chairman of the ATA. In October, he will go in as chairman (of the ATA). He will be the first chairman from west of the Mississippi."

It was pointed out to Mr. Free that in the past seven panel meetings that he and his father have participated, the two of them have made 19 motions and seconded 17 motions to present the findings of the staff on Review Matters as proposals at a subsequent meeting (out of a total of 98 matters for review).

He was asked why they decided to make and second these

The idea here is simply to facilitate shipper participation in the form of a physical presence, as well as the continuing invitation for shippers to participate in the classification process in the traditional manner of supplying information about the transportation characteristics of their products when research or proposals are in play. NMFTA would welcome shippers, carriers or employees of their trade associations as members of the Ad Hoc group, but counsel or consultants to shippers, carriers or trade associations would not be appropriate.

Certain shipper groups are recommending arbitration as a means of “controlling” the carriers’ statutory duty to establish reasonable classifications, by taking disputed classification increases to so called “independent” arbitration. The STB should consider that arbitration is a concept that is not directly applicable to the classification process. The factors to be considered in arriving at a class for a commodity require an understanding of the factors, and how they merge in LTL transportation. Finding arbitrators with the necessary background would be very difficult.

### **CARRIERS PAY FOR SHIPPER’S REQUESTED STUDIES**

HSIA would have the Board require the NCC to pay the costs of what HSIA characterizes as “... non-duplicative studies or analyses requested by shippers...” HSIA’s conditions which would trigger this free ride for the shippers are totally subjective. HSIA does not identify: who will determine what is germane; who will resolve any dispute which might arise between shippers and carriers as to whether the subject matter requested by shippers to be studied/researched at the NCC expense has or has not been already addressed; or whether the evidence submitted by the NCC is subject to “good-faith” dispute or simply a difference in point of view. The dispute resolution aspect of this proposal is as unreasonable and unnecessary

a burden to impose on the STB as the cost paying burden on the NCC. Not only is the suggestion totally unworkable, it ignores the plain fact that if any research is undertaken by our staff it is at the direction of the NCC and it is to try to develop information on the transportation characteristics of a product(s) made by shippers. This is information which the NCC does not have (or needs to update), but is in the hands of the shippers. If shippers want to conduct their own studies they not only have the right to do so, they have the capabilities to do so. The NCC welcomes shipper participation, but shippers should cover the costs of any studies they want done beyond the NCC's proposed substantive standards.

NASSTRAC and HSIA both argue, even if not in precisely similar language, that classification changes should only be made when supported in the record by evidence that there have been changed transportation circumstances. HSIA carries the argument further than NASSTRAC; proposing that a class increase could only be made when a substantial percentage of motor carriers have experienced cost increases which can be demonstrated to be equal to the rate increase which they say will follow any class increase. The premise that rate increases always follow class rating increases is flawed theory. No evidence is ever produced to support the theory, but carriers testify that the theory is in error. (See letter from J-Line and Roadway Express for example). In any event, NMFTA/NCC have no capability to develop the cost vs. revenue increase data which HSIA's standard would require.

NASSTRAC noted that a prior ICC Decision which was based on the ICC's use of a "substantial change" standard to deny a class increase on poisons back in 1993, was reversed by the D.C. Circuit Court in 1995. But NASSTRAC's spin on it is that the STB can do it anyway.

HSIA's approach would introduce a multitude of factors into classification-making which were expressly prohibited by the ICC's investigation years ago: rates; price competition;

market competition; product competition; carrier costs; carrier profitability; and pricing strategies. The proposal is fatally flawed and unworkable.

If the STB were to consider HSIA's proposal for increased classes favorably, wouldn't the Board – in order to “level the playing field,” as shipper urge – have to require that a substantial percentage of shippers would have to show that they are losing money on the transportation of products at the current classification rating, in order to justify class reductions? HSIA's view seems one sided.

### **TIMELY NOTICE**

HSIA says the staff analysis was not made available until a “week or two” before the Panel meeting. Well, was it one, or two? In any event the proposed increase was in fact modified by the Panel to a lower class than was proposed. The system works. Shipper participation frequently works to the shipper's advantage. NCC has taken steps to increase the opportunity for shippers to participate and offers to do more as shown in our April 11, 2000, filing.

### **SHIPPER ACCESS TO NCC FILES**

NASSTRAC says shippers must have earlier and more complete access to NCC data and analyses. NITL proposes that no formal action may be taken by the NCC sooner than 90 days from the date that shippers receive notice and the data involving a request or proposal. HSIA wants everything placed in an open public docket at least 90 days prior to any proposed action.

The preference for as much information as possible, as soon as possible, is not a strange objective. What prevents NCC from being able to satisfy their request is in the stricture of the 5a Agreement itself. The Agreement requires that proposals must be placed on the first available docket. The panels and the NCC meet four times a year at about 90 day intervals, give

or take a few days. Final disposition for new or changed provisions IS required (by the Agreement) to be made by the 120<sup>th</sup> day after docketing, except that in unusual circumstances the 120 day period may be extended upon STB approval of an NCC request stating the reasons for the extension.

The “120 day Rule” in the Agreement prevents NCC from giving 90 day advance notice on docketed proposals. This is no longer a statutory requirement, but NCC must comply with the terms of its 5a Agreement. However, as to commodities to be researched – or are already being researched – notice is given as soon as possible after the staff has been directed by the NCC. Far more than 90 day notice is already given in most instances concerning research.

NMFTA/NCC has had a running battle with NASSTRAC counsel (prior and current) for years over the desire of the shipper group counsel to examine our files. The requests have usually been limited to access to documents received from any persons relating to a docketed proposal or a research matter. At issue, is proprietary, privileged information which is given to the NCC with the understanding that it will not be released outside the NCC without the express written consent of the person supplying the information. HSLA chimes in on NASSTRAC’s side here. The Board’s February 11, 2000, Decision echoed its earlier expression that any fears which the NCC and those who provide privileged information to it will be erased by the entry of a protective order. We object to the Board’s favorable consideration of this intrusion into NCC files by shipper representatives. As starters:

What right does a shipper group’s counsel have to inspect the privileged data that a shipper has furnished to the NCC voluntarily, or on request, when that shipper is a non-member of the group and potentially, if not actually, a competitor of one or more of the group’s members?;

What right does a shipper group's counsel have to see privileged data that a carrier submits to the NCC?

Will the STB order counsel for shipper groups to open their files to the NCC/NMFTA so that the carriers can be informed as to what a member of the shipper group has furnished to its counsel?;

The STB should order counsel for shipper groups not to advise group members against responding to NCC research requests, a practice which thwarts and frustrates NCC's efforts to develop as much information as possible before considering whether a classification action is supported or required by the transportation characteristics of the product in question.

Persons providing information to the NCC should be able to remain secure in the knowledge that the specifics of their particular product will be protected against disclosure to real or potential competitors - except as to the extent it is included and merged into summary data revealed to all interested persons in a given case: protected, not by an order of the STB, but protected by the privilege of privacy and non-disclosure to competing interests.

### **STAFF GATHERING, REVIEW AND PRESENTATION OF DATA**

The efforts made and procedures followed by NMFTA staff are detailed in the various statements presented in the NCC's Opening Comments, dated April 11, 2000, and in this Reply, and will not be repeated in detail, although I may touch on some aspects of them in one or more sections of this reply. Yet, I must comment on what I deem a scandalous and impertinent attack on the integrity of NMFTA staff in implying that they cannot be trusted to accurately and fairly gather and report that information to the NCC. That contention is predicated mainly on a purported "conflict of interest" that allegedly exists in the classification process based on the

allegation that the trucking industry controls freight classification. (See, e.g. NASSTRAC Comments, pp. 37-40.) Such a serious allegation demands evidence, but, apart from unsubstantiated allegations by counsel, nothing on the record underpins that very serious contention. This is highly unfair and inappropriate.

This is not the first time NASSTRAC has attacked the fairness and openness of the NCC's classification procedures and process. In 1992 NASSTRAC's former counsel made disparaging allegations regarding the NCC's procedures and the integrity of NMFTA's staff. In a letter dated September 4, 1992 from NASSTRAC's counsel to Bernard Gaillard, a former Director of the ICC's Office of Compliance and Consumer Assistance, serious allegations were made that the NCC staff, and not the carrier members, originates classification proposals. Those allegations, if true, were not only violations of the NCC's Section 5a procedures, but also illegal. The specific focus of that complaint were Docket 922, Subject 11, and Docket 924, Subject 10, both of which dealt with poison inhalation hazard commodities proposals which were opposed by NASSTRAC.

In response to the various contentions and allegations made by the NASSTRAC counsel, during the week of October 18 through 23, 1992, ICC investigators reviewed all documents involving the handling and the history associated with the two identified subjects, as well as 43 other subjects on those dockets. Personal interviews were conducted with carrier members and NCC staff associated with those proposals. Interviews were conducted as well as with the Conference's counsel, others suggested by him, and carrier members of the NCC he identified and criticized as purported "stand-ins" to place staff efforts into formal proposals before the NCC or its panels. (The ICC's Compliance Survey, and pertinent letters are appended to my

statement as Exhibit A). After an extensive review of the documents, interviews and allegations, the Report concludes:

We have examined, in detail, each of the 45 subject matters or proposals found and abstracted on Exhibit H. We have entered into extensive discussions and inquiry with the various members of the NCC staff in connection with certain of these proposals and in connection with their functions in general. We have as carefully as possible compared the actual handling and procedures of the staff of the NCC to the provisions and requirements of the NCC's currently applicable Section 5a Agreement with this Commission, the Motor Carrier Act of 1980, Ex Parte No. 297 (Sub-No. 5), and Ex Parte No. MC-98 (Sub-No. 1), and the NCC policies and directives as revised August 4, 1992. (Exhibit II.)

Our efforts included interviews with proposal proponents and/or those making motions to present a certain matter as a proposal at a future meeting of the NCC or one of its panels.

We have found no instances of any of the staff of the NCC acting outside their approved policies and directives, or contrary to the spirit or letter of the NCC's 5a Agreement, the Motor Carrier Act of 1980, Ex Parte No. 297 (Sub-No. 5), or Ex Parte No. MC-98 (Sub-No. 1). (Emphasis added.) (See Exhibit A, Compliance Survey, pp. 40-41.)

In the April 16, 1993 memorandum of Bernard Gaillard, OCCA's then Director, to the Commission, that office's legal staff had reviewed the information obtained through the compliance survey. Asserting privilege, a copy of that document was not provided to the NCC pursuant to its Freedom of Information Act request. Nevertheless, then Director Gaillard reported that:

Attorneys of this office conducted a legal analysis (see Attachment B) of the information developed in the survey, which was included in the Compliance Survey Report. The conclusion reached in this analysis is that the NMFTA's staff's activities were consistent with the statutory requirements and in conformity with the approved 5a Agreement. Based on this conclusion, a letter was sent to the complainant, copy to NMFTA, advising the parties that the allegations were not substantiated, but that this office will continue to monitor compliance of NCC and NMFTA, and other rate bureaus, with the terms and conditions of the

statutes and the 5A Agreements. (Emphasis added.) (See Exhibit A for copy of Memorandum.)

In the April 15, 1993 letter from Charles E. Wagner, then Deputy Director of the ICC's Section of Operations and Enforcement, NASSTRAC's counsel was advised:

The field report has been reviewed and based on the information developed during the compliance review, this office did not substantiate your allegations. (Emphasis added.) (Exhibit A).

Also, I would call to the STB's attention the fact that up until the summer of 1994, staff of the ICC regularly attended and monitored all NCC and Classification Panel meetings. The purpose of those visits was to ensure that the NCC was acting in compliance with its approved Section 5a procedures and to review the manner in which the proposals were handled. I am unaware of a single compliance report during the nine-year period in which those surveys were conducted, and I was NMFTA's Executive Director and Secretary to the NCC, which criticized the NCC's actions as not being in full compliance with its approved classification procedures, or indicating that the NCC's handling of proposals was unfair in any respect. If the classification process is as tainted as NASSTRAC suggests, or its staff misrepresents data or information, as a former long-time employee of the ICC well familiar with its procedures and competence, I am certain that the investigation and compliance surveys which were conducted by the agency would have identified and rectified any such problems. The self-serving and unsubstantiated allegations to the contrary presented here by certain shipper groups should be given no weight.

### SUMMARY

Boiled down, much of the shipper groups' filings are points of view, even legal argument, but lacking in evidence. An example is the length of argument regarding poisonous materials; a matter not even before the STB. It is far beyond the scope of the instant proceeding. Another

matter which should be stricken from this proceeding altogether is the Uniform Bill of Lading (UBOL).

Shipper groups have no evidence - ever - of NMFTA staff members withholding or manipulating record evidence. It has never been found in previous regulatory agency investigations and would not be found now. It doesn't happen. It is not done, period. Counsel for shipper groups' comments appear to try to spook the STB into imposing unfair and unnecessary restrictions to bar the "potential" for such abuses. "Witch hunting" is a more appropriate term, in my view.

Along that same line - argument, but no evidence - is the assertion that NASSTRAC members have unspecified concerns about the UBOL. The Uniform Bill of Lading published in the NMFC, as the STB has already been advised and has recognized, is a document jointly drafted by six members of NASSTRAC's Board of Directors (one of whom also headed the NTTL's Highway Transportation Committee), along with 6 members of NMFTA. Counsel were not present in 4 of the 5 meetings. The jointly drafted new UBOL was first approved by NASSTRAC's Board and then by its membership, before it was ever docketed before the NCC. There, NASSTRAC members urged the NCC to approve the proposal and it was. It seems disingenuous for NASSTRAC counsel to "retry the case," as it were, and totally wasteful of the Board's time in doing so. The pity of it all is in the Board's expression on Page 7 of the February 11<sup>th</sup> decision, which we have petitioned the Board to excise.

The Rubber Manufacturers Association (RMA) brief statement essentially "me toos" the comments of other shipper groups and counsel for NASSTRAC and complains extensively on a classification matter in which RMA prevailed!

TCPC's self-serving arguments are not enlightening.

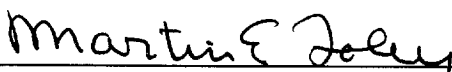
The shipper groups' suggestions and petitions for "freezing" the NMFC and for the imposition of a moratorium on classification actions until the Board's "anticipated reforms" are in place – are not in the public interest.

Respectfully submitted,

*Martin E. Jolley*

## VERIFICATION

I, Martin E. Foley, verify under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized this statement. Executed on May 9, 2000.

  
\_\_\_\_\_  
MARTIN E. FOLEY

**ATTACHMENT**

**MARTIN E. FOLEY**

**STATEMENT**

# Memorandum

TO : The Commission

DATE: 4-16-93

FROM : Bernard Gaillard, Director *BA*  
Office of Compliance and Consumer Assistance

SUBJECT : COMPLIANCE SURVEY - NATIONAL CLASSIFICATION COMMITTEE  
AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION

The purpose of this memorandum is to inform the Commission of the results of a recent compliance review conducted by this office into the practices of the National Classification Committee (NCC) and its agent, the National Motor Freight Traffic Association, Inc. (NMFTA).<sup>1</sup> The compliance review was also designed to consider issues raised in a request letter for an inquiry filed with this office.<sup>2</sup> The attachments include:

Attachment A: A copy of OCCA's field investigators' Compliance Survey Report;

Attachment B: A copy of OCCA's legal analysis of the Compliance Survey Report;

Attachment C: A copy of a letter request, dated September 4, 1992 from Mr. Daniel J. Sweeney, Attorney, McCarthy, Sweeney & Harkaway, P.C., Washington, D.C., and a copy of OCCA's Deputy Director Charles Wagner's April 15, 1993 letter advising Mr. Sweeney that OCCA conducted a compliance review of NCC and NMFTA and that based on the facts developed, the allegations he raised were not substantiated.

Mr. Sweeney alleged that proposals possibly were not originating with individuals carriers but that NMFTA's staff independently developed proposals and sought a willing member-

---

<sup>1</sup> The NCC is composed of 100 carrier members. There are four panels made up of carrier members that periodically meet to consider classification changes (proposals) to articles for transportation purposes. The NMFTA provides staff support to the NCC and also publishes the National Motor Freight Classification tariff.

<sup>2</sup> These issues are also embraced in the proceeding currently before the Commission in Docket No. 922, Subject 11, Poison Inhalating Hazards; Docket No. 924, Subject 10, Acids.

COMPLIANCE SURVEY  
OF  
PROCEDURES AND PRACTICES  
OF THE  
NATIONAL CLASSIFICATION COMMITTEE

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.

2200 Mill Road  
Alexandria, Virginia 22314  
(703) 838-1810

Conducted October 18-23, 1992, by:  
Jack C. Lamm, Senior Special Agent  
and  
Paul E. Graham, Special Agent

LIST OF EXHIBITS TO COMPLIANCE SURVEY REPORT  
OF THE  
NATIONAL CLASSIFICATION COMMITTEE

EXHIBIT

- A - ICC Decision Section 5A Application 61  
Decided May 7, 1987, Service Date May 18, 1987.  
  
ICC Decision Section 5A Application 61  
Decided May 2, 1978, Service Date May 9, 1988.
- B - 1991-1992 Organizational Directory of the NMFTA  
and the NCC.
- C - Minutes of 12 NMFTA Board of Directors meetings from  
November 7, 1989, to August 4, 1992.
- D - Computer printout of "signers of NCC/NMFTA agreement"  
dated October 21, 1992.
- E - Two examples of traffic agreement signed by two members  
of the NMFTA.
- F - Examples of NMFTA member fee invoice for participation in  
the NMFC for period July 1, 1992, through June 30, 1993.
- G - Financial statements for years ended June 30, 1991, and  
June 30, 1992.
- H - Abstract of all subject matters placed in Dockets 921 and  
922.
- I - NCC file Docket 922, Subject 11.
- J - NCC Docket 921.
- K - Minutes NCC panel meeting February 3, 1992.
- L - NCC Docket 922.
- M - Minutes NCC panel meeting March 9, 1992.
- N - NCC Docket 923.
- O - Minutes NCC meeting May 5, 1992.
- P - NCC Docket 924.
- Q - Minutes NCC panel meeting June 8, 1992.

During the week of October 19-23, 1992, a compliance survey of the procedures and practices of the National Classification Committee, and its panels, was conducted at the offices of the National Motor Freight Traffic Association, Inc., 2200 Mill Road, Alexandria, Virginia 22314. Senior Special Agent Jack C. Lamm and Special Agent Paul Graham participated in this compliance survey. We dealt primarily with Mr. Martin E. Foley, Executive Director and Tariff Issuing Officer, National Motor Freight Traffic Association, Inc. (NMFTA) and Secretary of the National Classification Committee; Charles E. Jackson, Assistant Executive Director, NMFTA; Mr. William W. Pugh, General Counsel, NMFTA; and Matthew Welsh, Classification Docket Coordinator. Mr. Foley came to the NMFTA as Executive Director seven years ago upon retirement from the Interstate Commerce Commission.

The relationship between the National Classification Committee (NCC) and the NMFTA is that of principal and agent. The NCC, the principal, determines what provisions the National Motor Freight Classification will contain. The NMFTA, the agent, compiles, publishes and distributes the National Motor Freight Classification (NMFC). The NMFC is a non-rate classification tariff containing approximately 10,000 descriptions of commodities hauled by motor common carriers providing interstate or intrastate service. The publication sets forth, also, rules pertaining to claim filing procedures, packaging provision requirements, etc.

The NCC filed Section 5A (49 U.S.C. 10706(b)(2)) application No. 61, for approval of the National Motor Freight Classification

density, stowability, ease or difficulty in handling, and liability. This is in keeping with decision by the Commission in Ex Parte No. MC-98 (Sub No. 1), Investigation into Motor Carrier Classification, 367 ICC 243 (1983).

Exhibit B contains the 1991-1992 organizational directory of the NMFTA and the NCC. Current members of the NCC are found on pages 9 through 14, with the members of the four classification panels being listed on page 15. Current officers of the NCC are: Robert L. Wittenberg, Hyman Freightways, Chairman; Robert G. Bowman, TNT Holland Motor Express, First Vice-Chairman; John C. Rader, Southeastern Freight Lines, Inc., Second Vice-Chairman; and Martin E. Foley, Secretary. It will be noted on the bottom of page 15 the following statement: "The information on this page is confidential and not to be released." We asked Foley why the names of each of the panel members are considered confidential and not to be released. He said they do not divulge the names of the individual members of classification panels prior to meetings in order to preclude any possibility of pressure being applied to certain panel members by proponent or interested parties to a proposal. Foley added that he believes this is in keeping with the intent of their 5A Agreement.

Exhibit B, page 3, lists the Board of Directors and the Officers of NMFTA. The officers are: Robert A. Davidson, ABF Freight System, Chairman; Zane R. Johnsonbaugh, Raible's Commercial Warehouse, First Vice-Chairman; William J. Condon, H & W Motor Express Company, Treasurer; and Martin E. Foley, Secretary.

Agreement which was approved in 1956 (299 ICC 519, at 522). The approval by the Commission confers antitrust immunity on collective activities of the NCC as authorized in the agreement. The Motor Carrier Act of 1980 and Ex Parte No. 297 (Sub No. 5) call for the Commission to review the NCC's proposed amended Collective Agreement with the result that the NCC is presently working under approved amended agreement with the NCC by decision decided May 2, 1988, service date May 9, 1988. Exhibit A contains ICC decision, Section 5A Application 61 decided May 7, 1987, service date May 18, 1987, and ICC decision Section 5A Application 61, decided May 2, 1988, service date May 9, 1988.

The NCC is made up of not more than 100 members elected by the parties to the NMFC Agreement from each of the 48 contiguous United States, Alaska, the District of Columbia and Canada, with at least one member representing each.

Within the NCC, there are four classification panels designated No. 1, No. 2, No. 3 and No. 4, with each panel having its own chairman and vice-chairman appointed annually by the NCC chairman. Each panel meets twice annually to consider proposals to change article descriptions, commodity classes, packaging requirements and rules and regulations of the NMFC. The proponent of any proposal or any party of record to the proposal can appeal a panel's disposition of a proposal to the full NCC for review and a final decision at its next meeting. The NCC panels and the NCC must consider and evaluate proposals for classification purposes according to four composite transportation characteristics, i.e.,

Mr. Free said you cannot choose which of the four panels you go on. He said he serves on Panel 2 and his father, David R. Free, serves on Panel 1. He said each area has "so many" members elected to the NMFTA and that the State of Utah has only one representative. He said that someone with extensive experience might then be appointed to some other area where nobody is interested in serving.

When asked how he views the overall functions of the NCC staff, Mr. Free said:

"They work under the direction of the committee, do what they are asked to do, 'the investigative work.' When there have been shippers who wanted to make a proposal, I have taken them to the staff who have been very helpful, but only within the limits of their authority. To my knowledge, the staff has never done work on their own--only at the direction of the committee or proponents. If you check the minutes of the meetings, you will see that they show that the committee members really press the staff to find out if they have fully investigated the issue."

Mr. Free was asked if all the reports on review matters presented at the meeting by the staff were always originated by the staff. He responded as follows:

"No. Only when the staff is under direction from the committee to review obsolete items. Otherwise, all are from other than staff. Recently, we removed (what we thought was) an obsolete item. It had to do with air conditioner parts. The item was taken out, and the notice went out, but we found we really did have one producer/shipper left (so did not delete the item)."

He was also asked if a carrier member can originate a review matter. He said:

to vote according to the facts and what our job is on the committee."

Mr. Free was asked if when the staff presents a report on a Review Matter to the Panel, along with a suggested form for a proposal, does he perceive this work and action by the staff as a staff originated proposal? He said:

"No. It really is not, because the review matter was given to them by someone else who really started the thing. If we do not know exactly how to word an item, we request that they act on it. Obsolete items are the only exception."

Mr. Free said he knows of no other way to keep the NMFC topical and current with less initiative on the part of the staff. He added that the staff researches only as directed by the committee or panel.

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We have examined, in detail, each of the 45 subject matters or proposals found and abstracted on Exhibit H. We have entered into extensive discussions and inquiry with the various members of the NCC staff in connection with certain of these proposals and in connection with their functions in general. We have as carefully as possible compared the actual handling and procedures of the staff of the NCC to the provisions and requirements of the NCC's currently applicable 5A agreement with this Commission, the Motor Carrier Act of 1980, Ex Parte No. 297 (Sub No. 5), and Ex Parte No. MC-98 (Sub No. 1), and the NCC policies and directives as revised August 4, 1992 (Exhibit II).

Our efforts included interviews with proposal proponents

motions. He replied:

"We are not afraid to speak our minds. Sometimes each of us votes differently on the same issue if we don't view the situation the same. Because the material is there. We have all the facts from both the proponent and the staff. I like to keep things moving. You could go on discussing it all day, but I think that when you get the facts, it is time to make a decision. It is the same in business; you must get the facts, make a decision, and move on to the next order of business."

Mr. Free said there have not been any discussions with him before the meetings or during the meetings by any member of the staff or anyone else as to his thinking or feelings about a certain Review Matter or of the Review Matters in general. He said the staff is very careful about answering questions where they do not have the authority. He added:

"I have asked questions and had the staff refuse to answer, saying we can't do that. Even in the meetings, they provide the information, but you must interpret the facts yourself. Sometimes I feel frustrated knowing of their expertise but not being able to get their opinions; but I know they must stay within the guidelines."

Mr. Free was asked if any of his motions have ever been solicited in connection with any subject or matter by anyone including any NCC staff member? He responded:

"Never by any NCC staff member. Our names are public knowledge, so we do receive solicitation from other parties. Recently, in connection with a footwear item, I received at least 200 letters from members of the footwear industry. One of the biggest shippers here in the Salt Lake City area put great pressure on both Dad and me to approve an item, but we both had to vote against it because the facts just were not there. I am sure our decision cost us some business, but we both knew we had

LIST OF EXHIBITS TO COMPLIANCE SURVEY REPORT  
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EXHIBIT

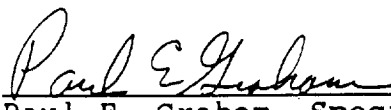
- A - ICC Decision Section 5A Application 61  
~~Decided May 7, 1987, Service Date May 18, 1987.~~  
ICC Decision Section 5A Application 61  
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- N - NCC Docket 923.
- O - Minutes NCC meeting May 5, 1992.
- P - NCC Docket 924.
- Q - Minutes NCC panel meeting June 8, 1992.

and/or those making motions to present a certain matter as a proposal at a future meeting of the NCC or one of its panels.

We have found no instances of any of the staff of the NCC acting outside their approved policies and directives, or contrary to the spirit or letter of the NCC's 5A agreement, the Motor Carrier Act of 1980, Ex Parte No. 297 (Sub No. 5), or Ex Parte No. MC-98 (Sub No. 1).

During our review of this matter, all documents, files and information requested were promptly furnished to us by the NCC staff.

  
\_\_\_\_\_  
Jack C. Lamm, Senior Special Agent

  
\_\_\_\_\_  
Paul E. Graham, Special Agent

ATTACHMENT B was not furnished to the  
National Motor Freight Traffic Association, Inc.  
By the Interstate Commerce Commission.

LAW OFFICES  
McCARTHY, SWEENEY & HARKAWAY, P. C.  
1750 PENNSYLVANIA AVE., N. W.  
WASHINGTON, D. C. 20006  
TELEPHONE (202) 393-5710  
TELECOPIER (202) 393-5721

ATTACHMENT C

DOUGLAS M. CANTER  
JOHN M. CUTLER, JR.  
WILLIAM I. HARKAWAY  
STEVEN J. KALISH  
HARVEY L. REITER  
DANIEL J. SWEENEY  
KATHLEEN L. MAZURE

ANDREW P. GOLDSTEIN  
*Counsel*

CHARLES J. MCCARTHY  
*Counsel*

September 4, 1992

Bernard Gaillard, Director  
Office of Compliance and Consumer Assistance  
Room 4412  
Interstate Commerce Commission

Dear Director Gaillard,

We understand that your office is undertaking an inquiry to determine the role that NCC Staff has been playing in initiating proposals to change classifications. Our concern is that proposals may not be originating with individual carriers and that the Staff may be developing proposals which are then sponsored by a carrier for the staff, typically a carrier-member of a Panel or the Committee. This concern proceeds from the statutory prohibition against staff proposals.

As a good starting point for an inquiry, enclosed is an NCC Bulletin summarizing the "actions taken by the Classification Panel" at the recent meeting on August 3rd. You will note that fourteen of the eighteen "actions" taken by the Panel consisted of "Approved a motion directing the listing of a proposal on Docket 926". The question is, who generated and placed before the Panel something in the equivalent form of a proposal, so that the Panel could simply adopt it and formally make it a proposal. We would tend to doubt that all of these proposals in any form were created by the Panel, yet members of the Panel are being duly recorded as the proponents of record.

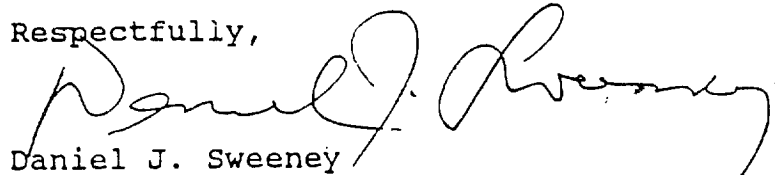
As indicated by the other "action" items, the balance of the agenda was concerned with "reports" or "research projects" being carried on by the Staff. The reports can ripen into proposals at the next meeting.

It is appropriate that your office look into this because shippers do not have access to NCC files to trace a proposal from its very inception to the point where some carrier steps forward and sponsors it as a proposal. Indeed, shippers are denied copies of the reports and other topical papers routinely handed out by the Staff to the carriers at the public meetings.

We would suggest that the focus of the inquiry be upon whether some carrier actually comes up with an initial proposal which is turned over to the Staff for research, or whether the initiative for a proposal comes from the Staff and is handed off as a carrier proposal at a later date.

All of the above are put forward as areas of legitimate inquiry, as we do not purport to have the answers to these questions. It would take an inside look at the files to establish what is really happening. Since shippers are not given access to the basic records, the next logical step is for your office to examine the files at NCC.

Respectfully,

A handwritten signature in dark ink, appearing to read "Daniel J. Sweeney". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Daniel J. Sweeney  
Attorney for:  
NASSTRAC  
Health and Personal Care Distribution  
Conference

ACTIONS TAKEN BY THE CLASSIFICATION PANEL ON CLASSIFICATION REVIEW MATTERS AT THE OPEN MEETING ON AUGUST 3, 1992 IN MONTEREY, CALIFORNIA.

- A. **Knit Fabrics** - The Panel directed that additional research be done on the transportation characteristics of knit and woven fabrics and that a report be presented at the September 14, 1992 Panel meeting.
- B. **Filters (new generic grouping)** - Approved a motion directing the listing of a proposal on Docket 926.
- C. **Plastic or Rubber Machine Parts** - Approved a motion directing the listing of a proposal on Docket 926.
- D. **Stands, NOI, other than Furniture, Item 178690** - Approved a motion directing the listing of a proposal on Docket 926.
- E. **Medical Stores, item 135000** - Approved a motion directing the listing of a proposal on Docket 926.
- F. **Ladders** - Approved a motion directing the listing of a proposal on Docket 926.
- G. **Sailboards, Surfboards, Paddleboards or Water Sport Floats, Rafts or Toys** - Approved a motion directing the listing of a proposal on Docket 926.
- H. **Turnstiles** - Approved a motion directing the listing of a proposal on Docket 926.
- I. **Can Crushing Machinery** - Approved a motion directing the listing of a proposal on Docket 926.
- J. **Animal Feces Scoops** - The Panel accepted the report of the staff.
- K. **Golf Practice Mats, Platforms or Tees** - Approved a motion directing the institution of a research project on these commodities.
- L. **Asbestos (obsolete provisions)** - Approved a motion directing the listing of a proposal on Docket 926.
- M. **Hotel Type Stoves or Ranges** - Approved a motion directing the listing of a proposal on Docket 926.
- N. **Hotel or Restaurant Kitchen Equipment (mixed TL provisions) - item 169440** - Approved a motion directing the listing of a proposal on Docket 926.
- O. **Boxes or Cabinets, designed to heat or insulate pumps, meters, control valves and back-flow assemblies (Hot Boxes (T))** - Approved a motion directing the institution of a research project on these commodities.
- P. **Wooden Games or Toys** - Approved a motion directing the listing of a proposal on Docket 926.
- Q. **Mixed TL Provisions, items 26300, 26302, 26304, 26306, 27500, 27502, 27560, 27562, 119770, 120520, 122440 and 122442** - Approved a motion directing the listing of a proposal on Docket 926.
- R. **Clarification Matters, items 680, 13600, 17200, 17201, 21100, 21105, 25940, 25960, 41480, 41482, 84730, 134120, 135100, 137480, 159350 and 175000** - Approved a motion directing the listing of a proposal on Docket 926.

**VERIFIED STATEMENT**  
**OF**  
**VERNON SCHROF**

My name is Vernon Schrof. I am Chairman of the National Classification Committee and I have been a member of the National Classification Committee (NCC) for 10 years. I am also President and CEO of Nu-Way Transportation Services, Inc., a motor carrier of general commodities doing business throughout the United States and Canada. I am making this statement on behalf of the NCC, including Nu-Way Transportation Services, Inc.

The purpose of this statement is to respond to comments that have been filed in this proceeding by a variety of shipper groups who urge the Surface Transportation Board to impose restrictions on the classification process that are so burdensome as to make it very difficult for the NCC to fulfill its statutory obligation of maintaining a reasonable classification. The allegations that are offered to justify these severe restrictions range from simply erroneous to outrageous and even bazaar. For example, the NCC is accused of taking advantage of its antitrust immunity and engaging in a variety of unlawful activities to generate revenue for the carriers to the point of being blamed for the undercharge crisis of a decade ago. I would emphasize, however, these false allegations are supported primarily by mere speculation that it would be in the carriers economic interests to violate the law and ICC/STB requirements. Such allegations are completely unfounded and will not withstand scrutiny.

As a long time member of the NCC, I have personally witnessed the caution exercised by this organization to ensure that its operations are conducted within the requirements of the law and its section 5 a agreement. Members are very well aware that, pursuant to ICC/STB requirements,

classes must be assigned based on an evaluation of the four transportation characteristics of the involved product (density, stowability, handling and liability) and that economic considerations such as rates, charges and discounts have no place in their classification-making determinations. NCC Counsel is present at every classification meeting to answer questions as to whether or not a proposed action would be lawful and to make sure that all actions of the NCC and its panels are consistent with the requirements of law and the NCC's section 5a Agreement. Nevertheless, in recent years, we have endured a constant drumbeat of false accusations from these same shipper groups in an apparent attempt to discredit the NCC.

In this proceeding, the National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc. (NASSTRAC) have contributed to this criticism, attributing a spectrum of inappropriate and unlawful activity to the NCC. Most significantly, however, they have been unable to produce evidence to support any of these charges. One such outrageous and completely unfounded allegation is NASSTRAC's contention (NASSTRAC's Opening Comments at page 14) that the "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." It is all too easy to hurl such baseless allegations this proceeding.<sup>1</sup> NASSTRAC goes on to contend, again with no supporting evidence, that the NCC has used its antitrust immunity to "game" the system (NASSTRAC's comments at p. 13). These sorts of groundless attacks are found throughout the comments of various shipper groups. They go so far as to resurrect the now thoroughly discredited

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<sup>1</sup> The use of the phrase "too often" makes it sound like there are many such instances. To NASSTRAC we would say: "Please name one instance where an unjustified classification increase has been used as a vehicle for rate increases." We would note, however the instance has to be

contention that the NCC pursues exclusively classification increases, (see NASSTRAC p. 12, TCPC page 7). These allegations are discredited by our opening comments in this proceeding, which demonstrated that, rather than being the sole preoccupation of the NCC, such class increases represent only one out of five proposals that it considers. The shipper groups are wrong when they argue that there is a uniform link between class rates and classification ratings so that the NCC's upward reclassifications will almost always result in a rate increase (NASSTRAC page 5, 12; TCPC page 5). NASSTRAC and other shipper groups also suggest that NCC must be unlawfully using the classification to increase revenue because its members have an economic incentive to do so. This is the sort of logic that permeates their comments in this proceeding. If the NCC evaluates the transportation characteristics of a particular product and decides that these characteristics are comparable to those of commodities comprising a group other than its present class it has the legal responsibility to amend the classification for that reason. The relationship between the class assigned to a given commodity in the NMFC and the rate that is associated with that class is a matter to be determined by the ratemaker and not the classifier. Regardless of the number of times certain shipper groups argue that class increases are rate increases, it is still not true.

I would point out that (as explained in more detail by the NCC's previous comments in this proceeding) during the decade of the 1980's, the ICC instituted a number of major proceedings focusing on the Classification, focusing on "sunshining" classification making activities and enforcing the distinction between classification and ratemaking. The NCC's section 5a agreement was completely redrafted to incorporate all of the procedural requirements and safeguards as required by the ICC's decision in Ex Parte No MC 297 (Sub No. 5) implementing the Motor Carrier

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supported by a real, established classification principle and not just hollow rhetoric. And give us a chance to show why your justification is wrong.

Act of 1980. In its Classification Investigation, Ex Parte No. MC 98 (Sub No. 1), the ICC examined the technical aspects of classification making. That decision removed the (ratemaking) factors “Trade Conditions”, “ Value of Service”, and “Competition With Other Commodities” as elements to be considered and generally prohibited the use of truckload ratings and minimum weights. In the decade long proceeding, I&S M-29788, Charges for Shipments Moving on or Notify Bills of Lading, the ICC exhaustively reviewed the entire content of the classification, item by item, and ordered it purged of any of economic (ratemaking) elements. Thus, the principal classification proceedings of the 1980’s were conducted and substantial changes made in classification content, criteria and procedures in large part to ensure that classification and ratemaking would be entirely separate components of the pricing process.

As indicated, the comments submitted by the shipper groups are replete with unsupported and erroneous allegations of conduct by the NCC that would constitute severe violations of its section 5a agreement as well as the strictures identified by the ICC in the Classification Investigation and Order Notify proceedings. To ensure that the NCC operated in strict compliance with all of the provisions of its Section 5a Agreement as well as the Interstate Commerce Act, and the applicable agency decisions, the ICC sent monitors to observe each NCC panel meeting and each NCC appeal hearing until the termination of the ICC at the end of 1995. And on a number of occasions exhaustive compliance surveys were conducted at NCC headquarters which included detailed and meticulous examinations of large portions of the NCC’s docket files. There were no findings of misuse of the NCC’s classification process as has been alleged by the shipper groups in this proceeding. Further, testimony submitted in the earlier phase of his proceeding by former ICC Chairman Reese Taylor, former ICC Vice Chairman J. J. Simmons, and a number of respected transportation consultants including: Ray Bohmann, Bruce Hokum, and others confirmed, from

personal knowledge and observation, that the NCC's process was in compliance with all of the legal requirements – including the requirements that mandated that the classification and classification making process should be entirely devoid of economic considerations.

The comments alleging the NCC's poor treatment of shippers are based largely on the shippers' failure to obtain a classification result that they wanted but could not be justified.<sup>2</sup> These complaints often reflect a complete misconception of the purpose of freight classification. The NCC has a legal obligation to maintain a reasonable classification. That is a classification in which commodities are grouped with other commodities that have comparable transportation characteristics. In order to fulfill its statutory mandate, the NCC must continue to be vigilant, not only in identifying and properly classifying new commodities that enter into the stream of commerce, but in adjusting the classifications of existing commodities when information brought to the NCC's attention reveals that their transportation characteristics are not comparable to those of the other commodities with which they are grouped.

In order to make sure that every shipper is treated fairly, the NCC measures all classification proposals by the same set of standards that reflect well established ICC/STB precedent, i.e., the NCC's guidelines. However, even beyond that, it has been my experience that NCC members bend over backwards in an effort to provide the results that the shippers are seeking, as long as accommodating the shippers does not require classification principles to be compromised.

Various shipper commenters suggest (again without any evidentiary support) that the NCC's use of the transportation characteristics "stowability", "handling" and "liability" is not objective and

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<sup>2</sup> This is born out by the statement submitted in this proceeding by recognized transportation consultant Ray Bohman. (see NCC's Opening Comments Vol II)

that these subjective characteristics allow the NCC to "justify" whatever results it desires (NASSTRAC at page 25), namely to approve classification increases (see NASSTRAC pp. 24,25, Smart page 4). Once again, this is an allegation of unlawful activity with no evidentiary support. In fact, in connection with their meetings conducted over the last 15 years, the NCC and the panels routinely have been advised by their counsel that their actions must be guided solely by classification principles. Therefore, the NCC members are well aware that a lawful classification rating must be determined according to the density, stowability, handling, and liability characteristics of the involved commodity, and so analyze the commodities under consideration. As a longstanding member of the NCC and classification panels, I can state from personal knowledge that my decisions have always been governed by those principles, and to my knowledge, so have the decisions of all of the NCC members. I have considerable personal experience with the classification system and I am aware of no such misuse of these classification factors that ever took place in the meetings I've attended. Moreover, if the classification factors stowability, handling and liability had been used as the shipper groups suggest, such misuse would certainly have been detected by ICC personnel monitoring classification meetings or by the investigators conducting compliance surveys of the NCC's files or in the NCC's litigation before the ICC/STB. There is simply no evidence whatsoever to support this reckless allegation.

It is ironic that after campaigning vigorously and successfully 20 years ago for the removal of economic considerations from classification making, various shipper groups now want to reinsert these factors into the process. The shippers appear to have lost sight of the purpose of classification, which is to group commodities according to their "transportability," i.e., the burden their transportation imposes on motor carriers, and without consideration of economic factors such as rates, costs, discounts and the like. Halogenated Solvents Industry Alliance, Inc. (Statement at p.

4) wants the NCC to measure the impact of alleged rate increases due to a classification change and determine whether the proposed changes are commensurate with increases in carrier costs. These suggestions are completely misguided. They are apparently based in part on the unfounded theory that there is a constant relationship between classes and rates. Also, I would reiterate that this relationship is not determined by the NCC. Therefore, the impact of a classification change on the rates that are ultimately charged by all of the carriers making reference to that class would be virtually impossible to assess. Smart (at pp. 4,5) wants reclassifications to be justified, based on identifiable, quantified problems regarding a minimum of 10 percent of all shipments; further it wants the NCC to investigate alternatives to any classification action that could require higher shipping rates; and it wants appellate panels to base their decisions on the economic impact of a proposal. (Smart, Page 6). This proposed injection of such economic considerations into the NCC's decision-making process would constitute the antithesis of classification making which, under well-established ICC/STC precedent, must be determined exclusively in accordance with the four recognized transportation characteristics of the involved commodity.

NASSTRAC, (p. 41, 42) and Halogenated Solvents (page 4) urge the STB to make classification amendments dependent on a product's changed circumstances. They would have the STB resurrect an improper standard that has already been emphatically rejected by United States Court of Appeals shortly after being identified by the ICC. If this argument prevailed, the classification of a product that is presently misclassified (for any one of a number of reasons) could not be corrected as necessary so that the commodity could bear its fair share of the transportation burden.

The various shipper groups have made a number of requests dealing with information. For example, they assert that it is the NCC's duty somehow to obtain pertinent information that is in the possession of the shippers and the shippers do not wish to relinquish. Also, the shippers demand access to the confidential and commercially sensitive information that underlies the NCC's staff reports and analyses. Without justification, NASSTRAC complains (at pages 15, 21 and 22) that shippers do not know the basis for NCC proposals, that they have been kept in the dark as to the details of the NCC's rationale and that the NCC conceals the factual basis for its decisions. Contrary to these absurd arguments, the NCC decides classification issues in open public meetings where the merits of proposals are openly discussed, and it readily provides the staff memoranda fully analyzing the facts of record to any person upon request. Further, the NCC's Opening Statement in this proceeding explained the NCC's extensive efforts to notify any trade group that may be interested in the research on a given classification.

The shipper groups demand for access to the background information underlying the analyses that are prepared by staff for the NCC classification makers is unfounded (NASSTRAC Page 22, Halogenated Solvents page 3, Smart page 4, RMA, ATMI, NIT League page 5). The justification they offer in support of this demand includes the puzzling suggestion that "lack of full access to carrier data inhibits the shipper's ability to analyze, question or challenge the basis for a proposal" (NIT League page 6). This simply doesn't make sense in view of the fact that the shipper groups now have access to the same staff prepared analyses that are used by the NCC and its panel members. However, some of the pleadings filed in the proceeding indicate a darker rationale, i.e., shipper groups claim to need this information because they can't trust the staff to provide the NCC members with an honest and unbiased analysis of the facts of record. Moreover, they imply, and

have publicly stated, that the staff may be inclined to "doctor" the data so that it will support an increase that they know the NCC will want to approve. Nothing could be further from the truth. I can speak for other members of the NCC when I state that I insist on having an unbiased accurate analysis of the facts of record. Anything else would be completely unacceptable. And the staff is well aware that we would not tolerate dishonest analyses. The background information that is sought by the shipper groups includes confidential and commercially sensitive data that would not have been made available to the NCC if its confidentiality could not be protected. Further, the alleged doctoring of the data that is presented in the staff's analyses would have been detected by ICC compliance surveys and clearly the NCC would not have prevailed in approximately 90 percent of the classification proceedings based on such altered information.

Rather than demanding the NCC's confidential and commercially sensitive background data so they can punish carriers that take part in certain classification efforts and shut off the NCC's source of information, shippers who claim that they wish to more fully participate in classification making should recognize that participation is a two-way street. An experience I had as a panel member during the recent NCC's May 2nd meeting would be illustrative of the problems we sometimes encounter in connection with the research and responds to many of the arguments raised by the shipper groups. In connection with their consideration of Review Matter C of NCC Docket 2002 "belts or belting," an NCC panel heard from counsel for the Rubber Manufacturers Association (RMA) who began by criticizing the carriers and their staff for being "shipper unfriendly." The justification for this charge was that the panel was considering a report that did not include density data in a particular range (12 through 20 pcf.) that was associated with the products of their members. However, further discussion revealed that not only RMA but other shippers as well (Goodyear Tire & Rubber Co.) had received the staff's request for such information but

declined to provide it until the NCC published a report including possible classification provisions. It became apparent that the NCC was in a catch 22 situation. The panel was being criticized by RMA for even considering a staff research report that did not include density data in the 12 through 20 PCS range -but this was the very same data that the shippers had withheld from the staff. Review matter C stands in sharp contrast to other classification matters that were considered by the panel that day with much more positive results. For example in considering subject 14 of Docket 2002 "grills or grill sets" classified under item 26350, the NCC was pleased to approve a proposal by Kay Home Products, Inc., so as to reduce the classes applicable on their grills or grill kits shipped moving with charcoal from the existing class 200 to class 92.5 for kits having a density of 10.5 but less than 15 pcf. and to class 70 for kits having a density of 15 pcf. or greater. Shippers demand the opportunity to participate more fully in the classification process. As a minimum, however, they should be willing to at least assist the NCC's research by supplying pertinent data on their own freight -- information that otherwise may be difficult for the carriers to obtain.

On a positive note there were some very sensible and welcome suggestions in regard to disseminating notice of classification actions. For example, NIT League indicates its willingness to provide the NCC with lists of shippers that would be interested in a particular classification proposal. We enthusiastically support this suggestion and certainly would cooperate by providing notice to the identified shippers. Also, we agree with NIT League that notice of classification actions should be published on the NCC's website. In fact, we have reached the same conclusion independently and therefore intend to promptly take that action, and will look forward to NIT League's cooperation.

A number of shipper groups request 90 days notice of classification actions. The immediate problem, of course, is that in accordance with our section 5a Agreement and the STB's regulations, a classification proposal must be processed to completion within 120 days after docketing, and each proposal received must be published in the first available docket. Ninety days notice prior to each action by the NCC would be inconsistent with that 120-day requirement.

Many of the shipper groups argue that their members should have the right to be full voting members of the NCC. This suggestion fails to comprehend the fundamental nature of freight classification. During the course of a regular meeting, the NCC or one of its classification panels considers proposals for changes in the class assigned to a variety of general commodities. The class assignment must promote the equitable distribution of the transportation burden among all commodities. By adhering to this principle, all shippers are treated fairly. The NCC's selection of the appropriate class is based on its determination as to how the transportation characteristics of each of these commodities will impact on motor carrier operations. Therefore the classifier must have a detailed knowledge of motor carrier operations, the transportation characteristics of general commodities, and how those characteristics will impact on motor carrier operations. Further, the classifier must not have an economic interest that would bias his or her vote in regard to any product under consideration. I can well remember that, pursuant to the Motor Carrier Act of 1980, all members of the NCC were by law (49 USC § 10706 (b) required to file with the Commission, a verified statement that specified information regarding their shipper affiliates. This verified statement was intended to provide information the Commission needed in order to determine whether or not the carrier would have a conflict of interest when acting as an NCC member. Paradoxically, whereas shipper employees sitting on the NCC might conceivably have the required knowledge of the transportation characteristics and transportation burden imposed on motor

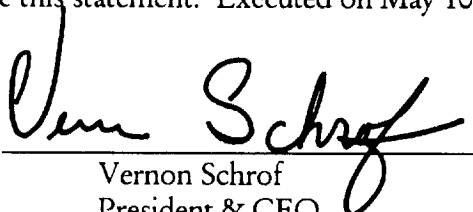
carriers by their own products, these are precisely the products that they would be barred from considering in order to avoid a conflict of interest. Obviously, the shipper would be inclined to vote lower classes for his own products and higher classes for the products of a competitor. This would be inconsistent with service on the NCC.

Finally, I would note that a number of shippers have called upon the STB to withdraw the NCC's antitrust immunity. It is my understanding that under the applicable statute, the NCC will have antitrust immunity until the STB finds that it is necessary for its immunity must be taken away in order to protect the public interest. Clearly, this standard has not been met, keeping in mind that we have a free market, that participation in the NMFC is completely voluntary and that a shipper who objects to a carrier's use of the NMFC can always select another carrier.

Respectfully submitted  
Vernon Schrof

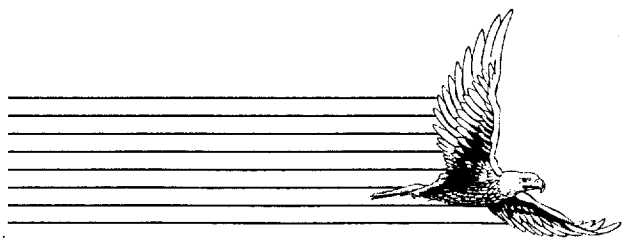
#### VERIFICATION

I, Vernon Schrof, verify, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on May 10, 2000.

A handwritten signature in black ink, appearing to read "Vern Schrof", is written over a horizontal line.

Vernon Schrof  
President & CEO  
Nu-Way Transportation Services, Inc.

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## Verified Statement of John L. Nason

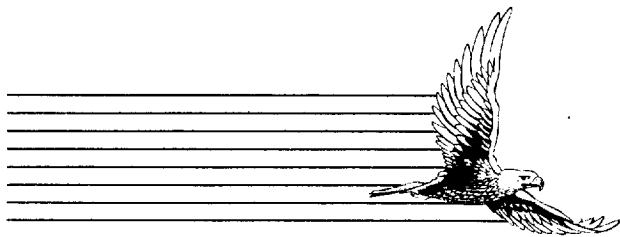
My name is John L. Nason and I am Vice President of Nason's Delivery, Inc., a motor carrier of general commodities located in Springville, New York and do business in the states of New York and Pennsylvania. We are a small family run business that transports thousands of diverse general commodities moving within and between these states on a daily basis. Nason's Delivery participates in the National Motor Freight Classification (NMFC), and I have represented my state as a member of the National Classification Committee (NCC) since 1985. I am also a former chairman of the National Motor Freight Traffic Association. I have been authorized by Nason's to submit this statement in support of the NMFC.

While a number of shipper representatives have argued that shippers must be included as voting members of the NCC, I strongly believe that this is not a feasible suggestion<sup>1</sup> for a number of reasons. For example, as a voting member of the NCC, a shipper of games or toys would be required to decide issues that are not within his or her experience. For example, he might be required to determine whether the magnitude of the burden imposed on motor carrier operations, not by his own products, but by the transportation of marshmallow candy, would be comparable to the burdens imposed by the transportation of household heating furnaces so as to justify the grouping of both commodities in the same class (class 85). Most shippers will not have the requisite fundamental knowledge of general freight and its transportation characteristics, as well as the understanding of how these characteristics will impact on the operations of a motor carrier. I have the opportunity to witness the handling of the great variety of products that move by motor carrier, and I am familiar with the transportation characteristics of these commodities and well aware of how these transportation characteristics affect my company's operations.

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<sup>1</sup> Apparently commentor Transportation Consumer Protection Council has reached precisely the same conclusion although from a completely different perspective. (See TCPC comments page 2).

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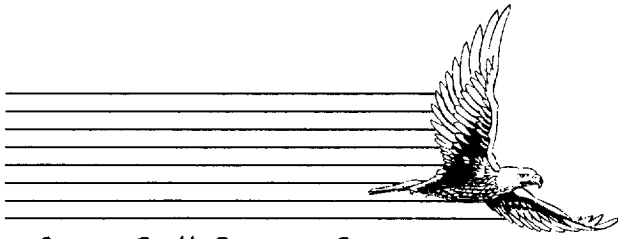
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I believe that the NCC's classification process normally works to benefit shippers, as well as carriers, provided that all parties cooperate to develop reasonable classification provisions based on reliable information. In these circumstances, the results are apt to be the best classification provisions because, even if the involved shippers don't agree with the assigned classes, they will at least understand the reasons why these classes were assigned. During my 15 years of experience with the NCC, I have participated in the consideration of many proposals where cooperation between carriers, shippers and our staff resulted in provisions that were mutually agreeable. However, I have also witnessed many instances in which the shippers principal effort was to oppose and thwart the classification system, often through withholding pertinent information of the transportation characteristics of their products. Information relating the transportation characteristics of a commodity under consideration is the lifeblood of the classification process and withholding this information impedes the NCC's fulfillment of its statutory obligation to maintain a reasonable classification.

The benefits of timely participation by the involved shippers was illustrated during the classification panel meeting of last Tuesday, May 2nd, 2000 which was convened to review the subject matter included in NCC Docket 2000-2. That open classification panel meeting was typical of a great many classification panel meetings that I have attended in the past fifteen years since the NCC's section 5a procedures were changed to institute classification panels. The panel heard proposals that were submitted by shippers as well as carriers. In fact, the panel approved three of the five shipper proposals. However, some of the shippers were much more cooperative than others. The first appearance was that of Mr. Mulloy of behalf of Kay Home Products. Mr. Mulloy's company had filed a proposal (subject 14 of NCC Docket 2000-2) seeking reclassification of his company's charcoal burning grills or grill kits that were subject to item 26350 at class 200. Under the proposed provisions, these kits shipped with charcoal would be subject to lower classes, based on density. Further, item 26350 would be amended to allow the named product to be shipped with cooking utensils. The facts of record indicated that the proposal (providing class 92.5 for products with densities of 10.5 pcf but less than 15 pcf, and class 70 for products having densities of 15 pcf. or greater) were consistent with the NCC's guidelines. Consequently the panel voted to approve the proposal as docketed.

Mr. Mulloy next appeared on subject 15 which proposed to reduce the class assigned to his company's screen houses or screen enclosures as named in the NMFC

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item 172527<sup>2</sup> (from class 110 to class 85). The facts provided by Kay Home Products indicated that the involved screen houses or screen enclosures had a average density of 7.94 pounds cubic foot (although information subsequently received indicated a slightly higher average density of 8.58 pcf.). This average density was too low to meet the NCC's guidelines for the proposed class 85 (a minimum average density of 12 pcf.) and, in fact, it was well within the range normally associated with the presently existing class for these products (class 110 associated with a minimum average density of 8.0 pcf.). Nevertheless, the panel engaged in a detailed discussion of the transportation characteristics of the involved products in an effort to determine whether there was any way that these characteristics could meet the requirements for the proposed class 85. Ultimately, the panel was obliged to disapprove the proposal in order to avoid providing an unfairly preferential classification for these products. Nevertheless, the panel instructed the staff to work with Kay Home Products in a effort to develop a proposal that would provide a reduction and still come within the NCC's guidelines.

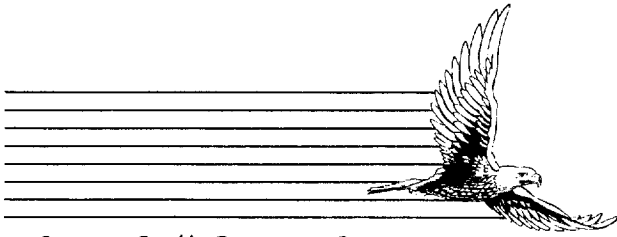
The panel also considered Review Matter C, which reported the results of the staff's research of products identified as "belts or belting" classified under items 23320 and 23340 for the NMFC. This research project had been initiated on behalf of a member carrier who had apparently concluded that the existing classification of the involved belts or belting may not properly reflect the transportation characteristics of these products and therefore may require adjustment. Pursuant to a directive of a classification panel, the staff's report showed some provisions that would be in keeping with the NCC's guidelines for the information that had been obtained thus far.

Appearances were made on behalf of the Rubber Manufacturers Association (RMA), Goodyear Tire and Rubber Company. The attorney for the Rubber Manufacturers Association began his appearance by criticizing the NCC's classification process for considering a report that failed to include data - particularly density data - that his members were aware of. His position was that it was not "shipper friendly" for a panel to consider a staff report that was so deficient in the information provided. Other shipper trade association spokespersons complained that their members had been obliged to incur the loss of time and expense of traveling to Alexandria, Virginia in order to advise the panel members regarding the deficiencies of the data presented in this research report. In view of these "deficiencies," the RMA requested the research be terminated and that the project go no further.

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<sup>2</sup> This item is also published in the NMFC Supplement 4 to 100-Z.

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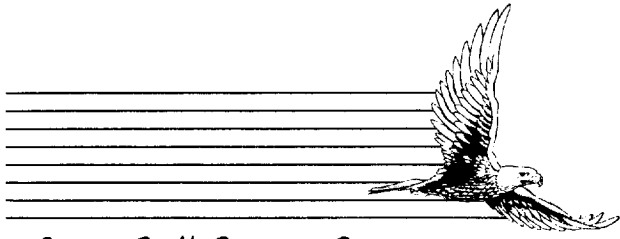
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The Panel discussion turned to the alleged deficiencies in data of the staff's efforts to obtain pertinent data in fulfillment of their directive to conduct research on the involved belts or belting. The staff reported that notice of the involved research project and requests for pertinent information on belts or belting had been sent to 126 companies that were regarded as potential shippers of the involved products. However, the staff received only 2 responses to their inquiry. In fact, the record revealed that inquiries had been sent to some of the same industry representative who, citing the lack of data, urged the panel to make no change in the classification of the belts or belting and terminate the research. Moreover, the Goodyear representative admitted the despite his personal receipt of the staff's request for information, he had not responded due to the press of business. He indicated a willingness to supply information, but not until the NCC had docketed a proposal or at least published a notice identifying some classification provisions that would be presented to a panel. Other representatives of the industry agreed that they too would not provide data to the NCC until classification provisions had been developed. Thus, RMA and the other shipper representative criticized the NCC for failing to produce the very data that the shippers had deliberately withheld.

Curiously, after admitting that is had obstructed the NCC's research project by withholding critical data, certain shipper representatives were heard to complain about the need to attend the NCC's meetings and incur unnecessary expense and waste of time to advise the panel regarding the information that they had previously withheld. The panel concluded that simply discontinuing the research on the involved belts or belting, as the shipper groups had requested would not be consistent with its statutory responsibility. Consequently, the panel instructed the staff to solicit information from the interested parties and report back to a panel at a later date. In contrast, I would point out that as the owner of a small trucking company, I often have to make sacrifices and experience difficulty in order to attend classification meetings. Yet, I have done this generally four time a year as part of my responsibilities to the NCC and my industry. I appreciate the efforts of the many shippers who participate in the classification process in a spirit of corporation to obtain mutually satisfactory results. Unfortunately, however, others appear to be bent on thwarting and ultimately destroying the classification for their own perceived benefit.

The NMFC groups each of the hundreds of thousands of general commodities moving commerce into classes with other commodities having comparable transportation characteristics. It is the NCC's statutory responsibility to maintain a "reasonable" classification by maintaining these groupings based on the best and most complete available data. When shippers refuse the NCC's requests for information that reflects the

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characteristics of their products they obstruct the NCC's effort to discharge their legal responsibility.

A number of shipper representatives argue that they are unable to participate effectively in the NCC's classification proceedings without having access to all of the background information (raw data) that the NCC has collected. I would emphasize that the shippers groups have access to the same staff analyses and reports that provide the factual basis for the NCC's decisions. Nevertheless, these shipper groups are not satisfied without this confidential and commercially sensitive underlying data, including information that is furnished to the NCC only upon the assurance that its confidentiality will be protected - data that is not required even by NCC or its panel members. If the classification makers don't need this data in order to reach their determinations, it would seem that the shipper groups should be able to participate effectively without it.

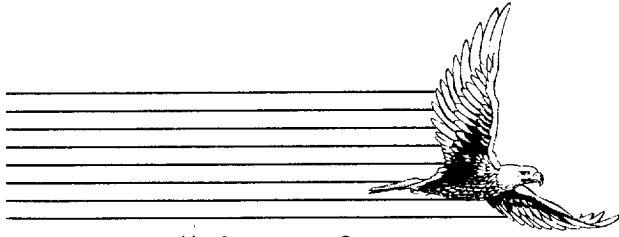
The representatives of various shipper trade groups contend that this confidential underlying data is needed so that they can check the accuracy and reliability of the analyses that are prepared for the classification makers,<sup>3</sup> i.e., the NCC by their staff. Indeed, the shipper groups appear to question whether the NCC's staff can be trusted not to unlawfully alter this data to favor increases that they presume the trucking industry would favor. Responsive to such allegations, I can state unequivocally that I insist on receiving data that truly and accurately represents the information of record. Moreover, our staff is very well aware that the reports and analyses that they prepare and present to the NCC and its panels must contain a true and accurate representation of the available information and that distortions, manipulation or slanting of the data is completely unacceptable. In over 20 years, as a member of the NCC I have not been aware of any evidence or instance of any such deception by the staff as has been alleged or implied by certain shipper groups that have participated in this proceeding.

I would point out that these representations by certain shipper groups have unfairly sought to cast doubt on the honesty of the NCC and the staff members who have served the industry well and honorably for many years. Further, they insinuate that the NCC either condones this intentional deception or it is somehow unable to control its own staff. I would note that in the recent past, based on similarly scandalous but completely groundless allegations of the previous counsel to NASSTRAC, the ICC conducted extensive compliance surveys of the NCC only to reach the conclusion that

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<sup>3</sup> See Comments of: NASSTRAC p. 15, 22; ATMI; NIT League p. 5,6; SMART p.4.

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these allegations were completely unfounded. (See comments of the NCC in section 5 application No. 61, p. 41).

Finally, to conclude my remarks on a high note, I would point out that the carrier members of the NCC, as well as the organization itself, do not lose sight of the fact that they must serve the needs of their customers in order to stay in business. Collectively maintaining the NCC procedures collateral benefits for shippers as well as carriers. For example, one of Nason's customers is a shipper of commercial debris blowers. Although these products are not particularly fragile, shipments of them were recently experiencing excessive damage in transportation. Through our association with the NCC I have access to Mr. Jerry Stone, the Committee's well-recognized packaging engineer who has extensive expertise in packaging development. Mr. Stone analyzed the damage problem and helped my customer develop a solution. Pursuant to his advice, they implemented a packaging change that resulted in a dramatic reduction in the damage their products suffered in transportation. There was no charge to my customer for Mr. Stone's expertise. This is just one of the many collateral benefits that flows from the collectively maintained NMFC.

I appreciated the opportunity to comment on this matter of considerable importance.

Respectfully Submitted

John L. Nason

## VERIFICATION

I, John L. Nason, verify, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on May 9, 2000.

John L. Nason  
Vice President  
Nason's Delivery, Inc.

REPLY STATEMENT  
OF  
JOEL L. RINGER  
AND  
GEORGE M. BECK

## **Reply Statement of George M. Beck and Joel L. Ringer**

This Statement is submitted jointly by George M. Beck and Joel L. Ringer, Senior Classification Specialists for the National Motor Freight Traffic Association, Inc., 2200 Mill Road, Alexandria, Virginia 22314, in reply to comments, unsubstantiated and unfounded, by opponents of the National Classification Committee's Section 5a Agreement.

### **The NCC Does Not Rely Primarily On Carrier-Supplied Data**

In their Opening Comments, dated April 11, 2000, the National Small Shipments Traffic Conference and the Health and Personal Care Distribution Conference (Conferences or NASSTRAC) state that the information collected by the NMFTA's staff on behalf of the NCC "comes primarily from the trucking industry."<sup>1</sup> And in pleading their case for access to the raw data on which reclassifications are based, they suggest that the NCC relies upon data submitted "by only one side (the trucking industry)."<sup>2</sup> Of course, the Conferences do not bother to back up these statements with any facts. They can't, because the statements are not true.

The NCC recognizes that the best classification decisions are based on the most complete information. For this reason, it is advantageous to obtain data from both shippers and carriers. It is true that the NMFTA's staff regularly receives product information from carrier members of the NCC. But to balance that out, the staff also surveys shippers of the products it researches on behalf of the NCC.

Our previous Statement demonstrated the lengths to which the NMFTA's staff goes to obtain shipper information. We take great pains to identify and contact as many shippers as

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<sup>1</sup> Conferences' Opening Comments, at page 15.

<sup>2</sup> Conferences' Opening Comments, at page 21.

possible, as early as possible in the classification-review process, to obtain relevant information from them. We consult a variety of sources in this regard, including the *Thomas Register of American Manufacturers* and the NCC's historical files as well as trade associations that may represent shippers of the product(s) involved. And at every stage of the classification process—research projects, proposals, appeals—shippers and shipper groups are invited, indeed encouraged, to submit relevant information pertaining to the transportation characteristics of the product(s) under review. Over the years, thousands of individual shippers have participated in the classification process, as have dozens of trade associations representing shippers.<sup>3</sup>

Examination of the NCC's files reveals that, where there is shipper participation, the shipper data factors significantly in the classification decision. Indeed, when shippers participate in the classification process it is not uncommon for the classification action taken to be based *primarily* on shipper-supplied information.

### **NASSTRAC Fails To Provide Specific Data In Connection With Proposed Classification Changes**

As we noted in our previous Statement, cooperation between shipper and carrier interests facilitates the collection of industry-representative information, enabling the NCC to fulfill its statutory obligation to establish and maintain reasonable classifications reflective of the transportation characteristics of the commodities involved. Moreover, by participating in the process, shippers can influence decisions that impact the classification of their products.

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<sup>3</sup> A list of the more than 65 shipper groups that have been involved in classification actions since 1989 is provided in the Statement of George M. Beck and Joel L. Ringer, April 11, 2000, at page 17.

The Conferences profess to be most concerned about the information used by the NCC to justify classification changes, and they assert that they must have access to the NCC's database so they can adequately judge the validity of that information. But the truth is that, while the Conferences cast doubt as to the validity of the information on which classification changes are made, they often fail to take advantage of the opportunities afforded them under the NCC's Section 5a procedures to submit specific data of their own.<sup>4</sup>

In their Opening Comments, the Conferences refer to the NCC's proposal to reclassify poisonous materials.<sup>5</sup> They note that several hundred poisonous materials are involved and that some of the proposed class increases are substantial. They note also that shippers are opposed to the reclassification, that approval of the reclassification by a Classification Panel has been appealed and that shippers have sought the data that was the basis for this reclassification.<sup>6</sup> They neglect to mention, however, that the NMFTA's staff first gave NASSTRAC the NCC's data months before a Classification Panel considered the proposal. Moreover, despite having knowledge of this matter for at least six months and ample opportunity to do so, as of this writing **NASSTRAC has submitted no specific data on the transportation characteristics of the materials involved.**

NMFTA staff met with Counsel for NASSTRAC on October 28, 1999, at NASSTRAC's request, to discuss the classification of poisonous materials. The staff answered NASSTRAC's questions and provided NASSTRAC with a report detailing the NCC's data on the transportation characteristics of poisonous materials. The staff, in turn,

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<sup>4</sup> Similarly, the National Industrial Transportation League, which is also calling for access to the NCC's underlying data, rarely furnishes specific information on the transportation characteristics of the product(s) being considered.

<sup>5</sup> Subject 10 of NCC Docket 2000-1 (February 2000).

<sup>6</sup> Conferences' Opening Comments, at page 20.

asked NASSTRAC to provide additional data relating the transportation characteristics of these materials. None was provided at the time.

Counsel for NASSTRAC attended the Classification Panel meeting on November 9, 1999, where the proposal for reclassification of poisonous materials was docketed, and he was given an advance copy of the proposal. Here, too, NASSTRAC presented no specific information relating to the relevant transportation characteristics.

Counsel for NASSTRAC was in attendance also at the Classification Panel meeting on February 7, 2000, where the proposal was considered, as was NASSTRAC's executive director. Prior to this meeting, the NMFTA's staff gave NASSTRAC a copy of the analysis it prepared for the Panel, detailing the NCC's data on the transportation characteristics of poisonous materials. The analysis was made available to NASSTRAC (as well as other interested parties) immediately upon its completion. But once again, the Conference provided no specific information of its own. Representatives from Fisher Scientific Company, Mallinckrodt, Inc., and the Halogenated Solvents Industry Alliance attended the Panel meeting, too. And a written Statement was submitted on behalf of the National Industrial Transportation League (NIT League). **None of these parties provided any specific data, either.**

NASSTRAC says that the "shippers' arguments were brushed aside."<sup>7</sup> But the truth is that NASSTRAC and the others had presented no data for the Classification Panel to consider.

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<sup>7</sup> Conferences' Opening Comments, at page 20.

By way of update, the NCC heard the shippers' appeal of the approved reclassification of poisons at its open, public meeting on May 1, 2000.<sup>8</sup> Representatives from Fisher Scientific, Mallinckrodt and NASSTRAC attended the meeting and made oral presentations. Following their presentations and the ensuing discussion, the NCC voted to disapprove the Panel's disposition and disapprove the proposal. The NCC took this action in response to a commitment from the shippers that they would (finally) cooperate with the NCC and the NMFTA's staff in an effort to develop comprehensive information on the transportation characteristics of poisonous materials. We'll see.

(For additional comments regarding the proposed reclassification of poisons, see accompanying Statement of Lisa K. Winter, Classification Specialist.)

### **NASSTRAC Discourages Shippers from Submitting Specific Data on Their Products**

In addition to not submitting specific data of its own, NASSTRAC advises its shipper members not to furnish the NCC information relating to the transportation characteristics of their products.<sup>9</sup> At the same time it suggests that the NCC's classification determinations are flawed due to limited shipper input. NASSTRAC discourages shippers from submitting the relevant information on their products; thus limiting shipper involvement in the classification-making process.

When a group such as NASSTRAC, which speaks on behalf of shippers, advises its members not to furnish information on their products, it does the shipping community a great

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<sup>8</sup> NCC Appeal 1071.

<sup>9</sup> Former Counsel for the Conferences informed NMFTA staff that he advises members not to participate in the NCC's research efforts. That advice was also published in a NASSTRAC newsletter.

disservice. It not only hinders the NCC's ability to obtain the pertinent facts but also the shippers' ability to influence decisions impacting the classification of their products; a result contrary to the Conferences' professed goal.

As we have already demonstrated many times over, the NCC understands the need for shipper participation in the classification process and, accordingly, goes to great lengths to notify the shipping public of its classification-making activities and to encourage shipper participation in those activities.

### **NCC Analyses Yield Reasonable Classifications**

Despite the opposition and lack of cooperation of groups such as NASSTRAC, the NCC, through its considerable efforts, is able to obtain reliable, relevant information from shippers as well as carriers to effect reasonable classifications. This is evidenced by the level of success the NCC has had in defending proposed classification changes that have been protested to the STB and its predecessor, the Interstate Commerce Commission.

We would call the STB's attention to the NCC's Comments in this proceeding filed April 11, 2000, specifically the Statement of Kelly Powers, NMFTA Legal Assistant. Ms. Powers' review of protested classification changes involving class increases revealed that, since 1980, the overwhelming majority of those protested changes—42 out of 52—were not suspended nor investigated. And of the 10 changes that were suspended and investigated, most were ultimately found to be reasonable.

Ms. Powers' findings clearly and unequivocally disprove NASSTRAC's outrageous and completely unsupported claim that "There can be little doubt that many...meritless classification increase proposals are approved" (emphasis theirs).<sup>10</sup>

**The NCC's Handling of the Recent Proposal on Rubber Hose  
Demonstrates that the Present Classification System Works As Intended**

The Conferences point to a 1999 proposal to reclassify rubber hose as evidence that the classification system is in need of reform.<sup>11</sup> What the proposal actually illustrates, however, is that shippers are well served by the NCC's current Section 5a procedures.

The classification provisions involved are listed as item 100120 of the *NMFC*, "Hose, plastic or rubber, reinforced with fabric or wire, with or without attached fittings, with or without metal armor or sheathing, other than garden hose, in packages having a density in pounds per cubic foot of 6 or greater," at class 70. As the Conferences state, these provisions were examined in 1990. Research Project 440 had been initiated to obtain information relating to the transportation characteristics of the hose named in item 100120 as well as plastic garden hose, which was named at the time in item 100100 and also assigned class 70. Consistent with NCC policy, 292 shippers plus the National Association of Hose and Accessories Distributors were contacted and asked to participate in the research survey.

Based on the information obtained through the research, Subject 7 of Docket 904 (June 1990) proposed to cancel both items 100100 and 100120 with reference to the catchall provisions of item 100130 for "Hose, NOI, or Tubing, flexible," which assigns full-scale, density-based classes. The proposal generated considerable shipper interest, including that

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<sup>10</sup> Conferences' Opening Comments, at page 19.

<sup>11</sup> Conferences' Opening Comments, at pages 16 through 19.

of the Rubber Manufacturers Association, and several shipper representatives appeared before the Classification Panel that considered the proposal. Following the shipper presentations, and in the spirit of compromise, the Panel approved the proposal with modifications. Item 100100 was canceled as initially proposed, but item 100120 was retained (with a clarifying amendment).<sup>12</sup> A related shipper proposal—Subject 16 of Docket 905 (August 1990)—further amended item 100120 to apply on hose made of plastic as well rubber, the way the item currently reads. Facts submitted indicated that the transportation characteristics of the plastic hose were comparable to those of the rubber hose.

Under NCC guidelines, products having a minimum average density of 6 pounds per cubic foot (pcf) are associated with a class 150. And under the general provisions for hose in item 100130, a 6-pcf density is assigned class 125. But under the provisions of item 100120, hose having a density of 6 pcf is assigned class 70. Shippers argued successfully that, while the hose classified in item 100120 exhibits a wide range of densities, on balance shipments will exhibit densities exceeding 15 pcf, consistent with NCC guidelines for class 70.

The NMFTA's staff continued to receive reports on the hose classified in item 100120, though, showing densities of 6.28 to 13.21 pcf, with an average of 8.62 pcf; lower than what had been indicated by the shippers and lower than what is called for under NCC guidelines for the assigned class 70. (Under NCC guidelines, an average density of 8.62 pcf is associated with a class 110.) This led to Subject 3 of Docket 961 (February 1996), which again proposed to cancel item 100120 with reference to item 100130 and again generated much shipper interest. Several shipper representatives, including a representative from the Rubber Manufacturers Association, again appeared before the Classification Panel that

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<sup>12</sup> The Panel's action was upheld on NCC Appeal 976.

considered the proposal. Following their presentations, and in light of the shipper/carrier compromise in 1990, the proposal was disapproved, and item 100120 was again retained.

But reports showing densities inconsistent with NCC guidelines for the assigned class 70 persisted. Densities of 5.82 to 9.7 pcf were reported, averaging 7.39 pcf (which under NCC guidelines is associated with a class 125).<sup>13</sup> In addition, there were now interpretation questions being asked regarding the application of item 100120 vis-à-vis the general provisions for hose in item 100130. These density and interpretation issues led to the docketing of yet another proposal to cancel item 100120 with reference to item 100130: Subject 7 of Docket 994 (November 1999).

It came as no surprise to anyone that there was considerable shipper interest in this proposal. A number of shipper representatives attended the Classification Panel meeting where the proposal was considered, including Counsel for the Conferences who on this occasion was representing the Rubber Manufacturers Association. Once again they argued that, while the hose classified in item 100120 exhibits a wide range of densities with figures as low as 6 pcf (or perhaps lower), shipments will generally exceed 15 pcf.

In response to the shippers' comments, a Panel member made a motion to modify the proposal to establish an extended full-density scale for hose. Such provisions, identical to those found reasonable by the STB for cloth, fabric or piece goods,<sup>14</sup> would have maintained class 70 for hose having a density of 15 but less than 22.5 pcf while assigning *reduced* classes of 65 for hose having a density of 22.5 but less than 30 pcf and 60 for hose having a

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<sup>13</sup> Item 100120 requires a density of at least 6 pcf. Nevertheless, carrier reports revealed shippers classifying hose having densities as low as 5.82 pcf per item 100120, at class 70. Under NCC guidelines, a density of 5.82 pcf is associated with a class 175.

<sup>14</sup> STB Docket No. ISM 35007, decided January 20, 2000.

density of 30 or greater pcf. Despite the potential for class reductions, the shippers in attendance opposed the suggested modification. In view of the shippers' position, and in light of the shipper/carrier compromise agreed to in 1990, the motion to modify the proposal failed, and the Panel disapproved the proposal. Thus, the provisions of item 100120 were retained yet again, as the shippers wished.

After all this, with item 100120 left intact, one might ask why three proposals were docketed within ten years to cancel the entry? The answer, as has been discussed, is that information had come to the NCC's attention—in fact there had been a continuous flow of information—indicating that the transportation characteristics of the hose named in item 100120 were inconsistent with NCC guidelines for the class 70 assigned. While NCC guidelines for class 70 call for a minimum average density of 15 pcf, hose with densities as low as 5.82 pcf was identified as being shipped per item 100120.

And why did the NCC not survey shippers in 1996 and 1999 prior to the docketing of the respective proposals? Because the NCC had already conducted an extensive shipper survey as recently as 1990, contacting 292 shippers and a trade association. And the information that led to the docketing of the proposals in 1996 and 1999 was compatible with that obtained in 1990. Moreover, it must be remembered that the articles involved here are rubber hose, not computers or some other product that has frequently changing characteristics. The NCC believed, and still believes, that the information obtained through the 1990 research survey continued to be valid in 1996 and 1999. And this is not just our opinion. In its Statement to the NCC dated November 4, 1999, submitted in connection with the 1999 proposal, the Goodyear Tire & Rubber Company said "Of major importance is the

fact that the basic shipping characteristics of rubber hose has not change [sic] since your last inquiries into this subject in...1990 and again... in...1996.”

In his Statement dated November 9, 1999, Counsel for the Conferences, acting in his capacity as attorney for the Rubber Manufacturers Association, said “Shippers have frequently argued that they do not have an effective voice in classification matters of great concern to them.” He went on to say that the proposal to reclassify rubber hose “provides a perfect example of why changes are needed.” Wrong.

A review of the facts shows that the proposal to reclassify rubber hose provides a perfect example of why changes are *not* needed.

In 1990, 1996 and 1999 shippers and shipper groups having an interest in the classification of the involved rubber hose availed themselves of the opportunity, under the NCC’s existing Section 5a procedures, to participate in the process. And all three times the shippers prevailed. Despite a steady stream of carrier reports indicating that the provisions of item 100120 are not consistent with NCC guidelines for the transportation characteristics exhibited, the NCC retained the provisions, as the shippers requested. Significantly, in doing so the NCC relied mainly on shipper-supplied data.

Groundless accusations notwithstanding, the NCC’s Section 5a Agreement does indeed give shippers an effective voice in classification matters of great concern to them.

### **The NCC Strives For Fairness and Equity**

The Conferences portray the classification process as adversarial; shippers versus carriers, winners and losers. They suggest the NCC functions mainly to increase classes. “NCC members have an incentive to approve increased classifications” because they “benefit

from increases in Class ratings through the trucking industry's rate structure."<sup>15</sup> NMFTA "staffers," employed by the trucking industry, enable this effort. Shippers, meanwhile, desperately defend against the onslaught.<sup>16</sup>

A damning portrait, but one that's not borne out by the facts.

The two of us have a total of almost 52 years' experience with NMFTA and the *National Motor Freight Classification*.<sup>17</sup> In all that time, we have never been directed to seek out opportunities for class increases to the exclusion of reductions or other classification amendments that might be appropriate.

Our primary role is to receive from various sources—shippers, carriers, firsthand observations—information relating to the transportation characteristics of commodities moving in commerce and to report that information to the NCC or one of its Classification Panels. In making their classification determinations, members of the NCC want to look at *all* relevant information available, and they want it presented in an unbiased manner. It is our job to make that happen.

Reports and analyses prepared by the NMFTA's staff involving the assignment of classes include an unbiased discussion of the four transportation characteristics prescribed by the ICC/STB: density, stowability, handling and liability.<sup>18</sup> The information is then related to established NCC guidelines, policies and precedent. There is no attempt to "cook" the data. If, based on recognized classification criteria, the information obtained points to a class reduction, the report or analysis will show that. Of course, if an increase is indicated, the

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<sup>15</sup> Conferences' Opening Comments, at pages 15 and 16.

<sup>16</sup> NIT League expresses similar sentiments at page 10 of its Opening Proposals and Comments.

<sup>17</sup> Mr. Beck has been employed by NMFTA since July 1971, and Mr. Ringer has been employed by NMFTA since June 1977.

<sup>18</sup> *Investigation Into Motor Carrier Classification*, 367 I.C.C. 243, 258 and 367 I.C.C. 715-717 (1983).

report or analysis will show that, too. But to our knowledge, no one connected with the NMFTA or NCC has ever intentionally manipulated data, "lost" data or falsified data to support or justify a class increase or any other classification action.

As importantly, in adjudging the merits of any possible reclassification, the NCC applies its classification principles fairly, regardless of whether an increase or reduction results. Class assignments are based upon an impartial evaluation of the four ICC/STB-prescribed transportation characteristics as they relate to the NCC's guidelines, policies and precedent.

Mr. Ray Bohman, a respected transportation consultant and author who has represented numerous shippers and shipper groups before the NCC and its Classification Panels, attested to the fairness of the current classification system earlier in this proceeding.

In his Statement dated January 23, 1998, Mr. Bohman said:

Over the past 18 years, I have repeatedly observed the [NCC] members trying their level best to apply the NCC Density and Value Guidelines and other criteria fairly....I haven't found any members being arbitrary or unfair. They have been very conscientious in trying to make certain the process works the same way for everyone.

In a Statement dated April 5, 2000, Mr. Bohman has submitted additional comments along these same lines:

Based on my long experience before the [NCC] and working with its staff, I have found its members to be fair, reasonable, open and helpful. For anyone to say or infer that they are arbitrary or unreasonable couldn't be further from the truth, at least based on my dealings with them.

I've sat in on many of the NCC Panel and full Committee open meetings over the years and witnessed them up and down many subject on the dockets, but never have I felt that any of their votes were arbitrary or did not follow established – and known – guidelines.

Time and again I've seen proponents come before Panels or the full Committee seeking changes in existing rules, descriptions, ratings or packaging requirements – or new ones – only to find out that their proposals didn't meet NCC guidelines and should never have been proposed in the first place. In many, many instances, a Panel or the full Committee has leaned over backwards to come up with a compromise that would give the proponent some relief, yet still stay within NCC Guidelines.

In a Statement dated April 4, 2000, Mr. Bruce Hocum, President of Rubenstein Logistics Services, Inc., who has represented shippers before the NCC on many occasions since the mid-1970s, notes:

The [classification] system is fair and equitable and as long as the facts are represented, the system works great.

And in Comments dated April 5, 2000, Mr. Don Carnahan, President of Associated Traffic Services, Inc., states:

Over the past 30 years of using the NMFC, I have also submitted proposals on behalf of my shipper clients to the National Classification Committee to amend the NMFC where the existing classification was not appropriate. I have found this process to be both easy to use and the results fair.

It should be clear that it is in the NCC's best interest to effect classification changes fairly and impartially. It does the carriers no good to pursue unfounded class increases and risk losing customers. Moreover, unjustified class increases, or any insupportable classification changes, could not survive protest to the STB.

**Class Assignments Must Be Supported  
By the Facts Presented**

Unfortunately, some shippers who choose to participate in the classification-making process have unrealistic expectations. By this we mean that the classification sought—including retention of an existing classification that is proposed to be changed—is inconsistent with the transportation characteristics of the product(s) involved. As Ray

Bohman has observed, "Time and again I've seen proponents come before Panels or the full Committee seeking changes...only to find out that their proposals didn't meet NCC guidelines and should never have been proposed in the first place." The classification of cremation boxes or trays is a case in point.

Subject 7 of NCC Docket 963 (August 1996) was a proposal by a Classification Panel to assign class 150 to cremation boxes or trays and related articles. In keeping with NCC policy, manufacturers of the involved products were notified of the proposal. One company, Custom Air Trays, Inc., of Virginia Beach, Virginia, came forward and offered to work with the carriers to develop classification descriptions using industry-recognized terms along with classes reflective of the products' transportation characteristics.

In light of this shipper's participation, the Classification Panel that met on August 5, 1996, disapproved the proposal and directed the NMFTA's staff to work with the shipper to develop a new proposal for the next docket. The Panel also voted to place on the next docket a proposal of its own.<sup>19</sup>

This cooperative effort resulted in Subjects 13 and 14 of Docket 964 (November 1996). Subject 14 was docketed by Custom Air Trays and proposed a class 77.5 for cremation boxes or trays. Subject 13 was the Panel proposal for class 150.<sup>20</sup>

The proposals were considered by the Classification Panel that met on November 5, 1996. Cremation boxes or trays were shown to exhibit an average density of 8.02 pcf, with no unusual or significant stowability, handling or liability characteristics. Under the NCC's guidelines, the shipper's proposed class 77.5 is associated with a minimum average density

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<sup>19</sup> This is sometimes done to give the next Classification Panel additional flexibility in the assignment of classes.

<sup>20</sup> As with the proposal on the previous docket, these proposals involved other, related products too.

of 13.5 pcf, while the class 150 on the Panel proposal is associated with a minimum average density of 6 pcf. The average of 8.02 pcf meets the NCC's minimum-average-density guideline of 8 pcf for class 110. Accordingly, the Panel that met on November 5, 1996, approved the proposals as modified and under Subject 14 (the shipper's proposal) established item 38808 for "Boxes or Trays, cremation, fibreboard or fibreboard and wood combined, KD," at class 110.

A competing shipper and party of record, McDonald Containers of Daytona Beach, Florida, exercised its right to appeal the Panel dispositions to the full NCC.<sup>21</sup> It was the position of McDonald Containers that the products involved should be assigned class 50.

Class 50 is the lowest class assigned in the *NMFC*, and under the NCC's guidelines, it is associated with a minimum average density of 50 pcf. As indicated, cremation boxes or trays were shown to exhibit an average density of 8.02 pcf. In fact, the highest density of record was 17.14 pcf. Accordingly, the NCC, at its open, public meeting on February 11, 1997, upheld the Panel dispositions. Item 38808 went into effect.

Subject 17 of Docket 974 (August 1997) was a proposal by another shipper of cremation boxes or trays, Eagle Container Corporation of San Marcos, California, to assign class 50. Information submitted together with that from the previous records yielded an average density of 8.24 pcf, again with no unusual or significant stowability, handling or liability characteristics. This information confirmed that the transportation characteristics of cremation boxes or trays were consistent with NCC guidelines for the class 110 assigned in

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<sup>21</sup> NCC Appeals 1052 and 1053.

item 38808. The Classification Panel that met on August 4, 1997, therefore, disapproved the proposal.

Once again, McDonald Containers appealed the Panel disposition.<sup>22</sup> No new data was submitted. And since the facts of record supported retention of class 110, the NCC, at its meeting on October 6, 1997, upheld the Panel disposition disapproving the proposal.

Subject 5 of Docket 983 (June 1998) was a proposal by yet another shipper of cremation boxes or trays, Jack Frediani Cremation Products of Sonora, California, to assign class 50. Information submitted by the shipper proponent indicated a density of 9.42 pcf, somewhat higher than the average densities of 8.02 pcf and 8.24 pcf considered on the earlier records but still far below the NCC's minimum average density of 50 pcf for the proposed class 50. The Classification Panel that met on June 9, 1998, therefore, disapproved this proposal.

*Again*, McDonald Containers appealed the Panel disposition,<sup>23</sup> and *again* no new data was submitted. Since *again* the facts of record did not justify the proposed class 50, the NCC, at its meeting on October 5, 1998, upheld the Panel disposition disapproving the proposal.

There have been no further attempts to amend the classification of cremation boxes or trays.

We can certainly understand how shippers of cremation boxes or trays would prefer a class 50 to a 110, and we appreciate the efforts of those who participated in the classification process. However, the simple fact is that the transportation characteristics of the

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<sup>22</sup> NCC Appeal 1058.

<sup>23</sup> NCC Appeal 1063.

commodities involved did not warrant the proposed class, based on recognized classification criteria. Consequently, the shippers' reclassification efforts did not succeed.

On the other hand, where information submitted conforms to classification criteria, the NCC does not hesitate to approve class reductions. A shipper proposal listed on the most recent NCC docket provides a good example.

Subject 14 of Docket 2000-2 (May 2000) was a proposal by Kay Home Products, Inc., of Cleveland, Ohio, to amend the provisions of item 26350, applying on "Grills or Grill Kits, cooking, outdoor type, charcoal burning, consisting of metal pan or burner, grill top and charcoal." The item had been established by action taken on Subject 7 of Docket 2000-1 (February 2000). Class 200 had been assigned in light of shipment densities of 2 to 4 pcf and certain handling and liability considerations. Kay Home Products believed its products had more favorable characteristics, and with the assistance of the NMFTA's staff, the shipper crafted a proposal to assign reduced classes based on density. Specifically, class 92.5 was proposed for densities of 10.5 but less than 15 pcf, and class 70 was proposed for densities of 15 or greater pcf. The shipper also proposed to amend the item description by adding the words "with or without cooking utensils" to clarify the nature of the products involved.

Information submitted by Kay Home Products showed indeed more favorable transportation characteristics than those previously considered. The shipper's products were shown to have a density of 16.2 pcf, with no unusual or significant stowing, handling or liability considerations. These characteristics were shown to meet NCC guidelines for the class 70 proposed, which call for a minimum average density of 15 pcf. Likewise, the assignment of class 92.5 to densities of 10.5 but less than 15 pcf would be consistent with

NCC guidelines, which call for a minimum average density of 10.5 pcf. And the addition of clarifying language would be in keeping with NCC policy.

A representative of Kay Home Products appeared before the Classification Panel that met on May 2, 2000. Because the shipper's proposal was in accord with NCC guidelines and policies, the Panel approved it as docketed. The amended provisions of item 26350, with their class reductions, are scheduled to become effective July 22, 2000.

Why doesn't the STB hear more about the many class reductions approved by the NCC and its Classification Panels? Probably because when the NCC reduces classes the NIT League doesn't run to the STB suggesting that a third of the Committee be comprised of shipper representatives, the Transportation Consumer Protection Council doesn't call for a "frozen" *NMFC*, and NASSTRAC doesn't complain about meritless classification *reduction* proposals.

### **The NCC's Appeal Process Is Not Biased Against Shippers**

Proposal dispositions of the NCC's Classification Panels may be appealed to the NCC for consideration by the full body at one of its open, public meetings. And actions of the NCC are subject to protest to the STB. For decades this system has proved effective in addressing and safeguarding the interests of all parties who have a stake in the *NMFC*.

Nevertheless, the Conferences now argue that there is an "inherent conflict of interest" when the full NCC hears appeals of Classification Panel decisions. And while they recognize that shippers have the right of protest before the STB, they claim "shippers would prefer to have an appellant mechanism that will obviate or minimize the need for protests."

consideration of the information provided as it relates to NCC guidelines, policies and precedent.

Of course, whether the NCC overturns or upholds the decision of a Classification Panel, its actions are subject to protest to the STB. In addition to not substantiating a need to amend the NCC's appeal process, the Conferences fail to give an explanation of why shippers want an alternative to STB protest. They also neglect to name those shippers who would "prefer" an alternative. One reason *the Conferences* might be looking for an alternative is their weak record of prevailing on classification protests before the experts at the STB. In any event, the Conferences provide no justification at all why an alternative to STB review—whether it be arbitration or some other mechanism—is needed.

NIT League, on the other hand, does attempt to explain why it is not happy with the STB's protest procedure: "it can be expensive and offers uncertain results."<sup>27</sup> We cannot comment on the STB's fee schedule, but we are puzzled by NIT League's statement regarding "uncertain results." Is the League suggesting that the STB does not arrive at its decisions fairly and objectively? Or is it looking for guarantees beyond death and taxes? *All* adjudication and decision-making offers uncertain results, even that of an impartial, three-member panel of arbitrators.

Another group that alleges unfairness in the NCC's appeal process is the Secondary Materials and Recycled Textiles Association (SMART). In its Statement in this proceeding, dated April 11, 2000, SMART relates its experience before the NCC in connection with the recent reclassification of cloth, fabric or piece goods, as classified in item 49265 and former

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<sup>27</sup> NIT League's Opening Proposals and Comments, at page 13.

The Conferences, therefore, “urge” the STB to create, and require the NCC to participate in, “an arbitration option.”<sup>24</sup>

Similarly, NIT League contends that the NCC’s appeal process is not viewed by shippers as being fair, and for this reason, the league is suggesting that appeals be made to a three-member panel of arbitrators, “with limited review...by the STB.”<sup>25</sup>

Neither the Conferences nor NIT League furnishes any evidence whatsoever to support the contention that the NCC’s appeal process is biased against shippers (or anyone) and in need of change.<sup>26</sup> Moreover, analysis of NCC appeal actions shows just the opposite to be true. The Committee thoughtfully considers appellant statements and will overturn decisions of its Classification Panel where such action is supported by the facts presented. Conversely, where the information available shows that the Classification Panel applied accepted classification criteria properly, and no relevant information has been presented on appeal indicating otherwise, the NCC has no basis for altering the Panel’s determination and will probably uphold the Panel’s disposition.

We have reviewed NCC appeal actions starting with the most-recent one (poisons) at the Committee’s open, public meeting on May 1, 2000, and going back to its meeting on February 6, 1996. During that span, the NCC heard a total of 21 appeals involving the assignment of classes. Of those 21, five (or 24 percent) resulted in the NCC disapproving the decision of the Panel; and where a reclassification resulted, the NCC established provisions more acceptable to the shipper appellant(s). In all cases, the action taken by the NCC was in

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<sup>24</sup> Conferences’ Opening Comments, at pages 40 and 41.

<sup>25</sup> NIT League’s Opening Proposals and Comments, at page 13.

<sup>26</sup> Under the NCC’s Section 5a procedures, carriers may appeal the decision of a Classification Panel, but typically appeals are brought by, or on behalf of, shippers.

item 49540 of the *NMFC*. The particulars of this reclassification are well known to the STB, having been the subject of two protests.<sup>28</sup> and we will not rehash them here.<sup>29</sup> However, SMART makes certain misleading comments concerning the NCC's appeal process that we feel compelled to respond to.

At pages 5 and 6 of its Statement, SMART mischaracterizes the NCC's appeal process as follows:

...we were required to face a body made up exclusively of trucking industry members—all of whom stood to gain financially if the proposed reclassification was implemented. After the brief presentation allowed under NCC rules, we were questioned by NCC members who...were confused about the basis of the proposed reclassification....After this, an anonymous vote was taken and we were dismissed.

About the only accurate statement here is that the NCC is "made up exclusively of trucking industry members."

The NCC's appeal process is not a standoff between shippers and carriers, as the tone of SMART's comments seems to suggest. Meetings of the NCC and its Classification Panels are well noticed and open to the public to give anyone with an interest the opportunity to attend. These sessions provide a forum where shippers and carriers can freely exchange information, ideas and opinions relating to classification matters. There is no hostility on the part of the NCC towards shippers or others who choose to attend. On the contrary, the NCC appreciates their time and effort, and the Committee looks to those parties for relevant information on the classification issue(s) at hand. SMART chose to attend the NCC meeting

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<sup>28</sup> STB Docket No. ISM 35004, decided July 15, 1999, and STB Docket No. ISM 35007, decided January 20, 2000.

<sup>29</sup> Suffice it to say, the STB, in its January 20, 2000, decision in Docket No. ISM 35007, found the provisions ultimately approved by the NCC to be reasonable and, therefore, denied the request for suspension and investigation.

where the appeal was heard, and they were welcomed and treated courteously and respectfully by the Committee and the NMFTA's staff.

Contrary to SMART's remarks, NCC rules do not restrict the time allotted to shippers or others who wish to make a presentation. The NCC *does* try to keep its meetings on schedule and allots a certain amount of time for subjects that come before it. But those time assignments are flexible, and it is by no means uncommon for speakers to go beyond (sometimes well beyond) the time allotted. Individuals who appear before the NCC are given full opportunity to make their presentations as well as ask and answer any and all questions. So it was with SMART.

NCC members will ask questions of shippers or other presenters to get a better understanding of the products and classification issues involved. That's one reason for the open, public meetings, and it helps assure that the NCC will make informed decisions. But just because members of the NCC ask questions does not mean they are "confused."

Votes taken by the NCC on appeals are by written ballot, but they are *not* anonymous. Pursuant to the NCC's Section 5a Agreement, the voting records of the NCC, with member names and how they voted, are freely available to any interested party upon request. And the results of the Committee's appeal votes are announced at the meeting.

Once the appeal has concluded, shippers and other interested parties are free to leave, but they are not "dismissed." The NCC's meetings are open to the public, and anyone may stay and observe the proceedings.

SMART contends that members of the NCC "stood to gain financially" from the reclassification being considered. But of course, the *NMFC* contains no rates or charges. Each carrier establishes its own rates and is free to negotiate with its shipper customers in

this respect, regardless of the classification. If a reclassification and the rate ultimately charged results in the carrier losing a customer, how does the carrier gain financially?

Based on analysis of the transportation characteristics of the products involved, SMART did not prevail on appeal. SMART says “the amount and type of information [it] presented was unfairly restricted under NCC procedures.”<sup>30</sup> However, the information that the NCC is allowed to consider is not restricted by the Committee’s procedures but by the findings of the Interstate Commerce Commission in *Ex Parte No. MC-98 (Sub-No. 1), Investigation Into Motor Carrier Classification*. The ICC concluded that classification determinations must be based solely on an evaluation of four transportation characteristics:

1. Density;
2. Stowability, which includes excessive weight or excessive length;
3. Ease or difficulty of handling, which includes special care or attention necessary to handle the goods; and
4. Liability, which includes value per pound, susceptibility to theft, liability to damage, perishability, propensity to damage other commodities with which transported and propensity to spontaneous combustion or explosion.

Ironically, in asking for an “independent board or arbitration panel” to handle appeals, SMART calls for “The appellate body [to] be allowed to hear and consider information beyond the primary shipping characteristics. They should be allowed, for instance, to consider the economic impacts that would result from the implementation of a proposed reclassification.”<sup>31</sup> It is ironic because prior to the ICC’s decision in *Ex Parte No. MC-98 (Sub-No. 1)*, the NCC was allowed to consider economic issues. Competition with other commodities, trade conditions and value of service had long been recognized transportation characteristics. However, in *Ex Parte No. MC-98 (Sub-No. 1)*, the ICC determined that

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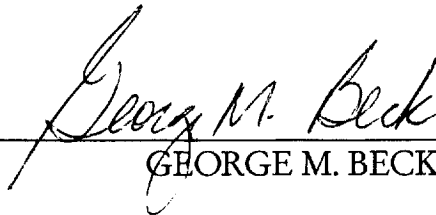
<sup>30</sup> SMART’s Statement, at page 5.

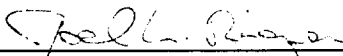
<sup>31</sup> SMART’s Statement, at page 6.

those characteristics were economic considerations having nothing to do with the relative transportability of a commodity and properly falling within the purview of the ratemaker, not the classification maker. Accordingly, the ICC ordered that the NCC no longer take those characteristics into account when making classification decisions. The irony goes further; in that proceeding carriers and the NCC argued for retention of those economic considerations in the classification-making process, while shippers and shipper groups argued that they be eliminated. The shippers got what they wanted.

## VERIFICATION

We, George M. Beck and Joel L. Ringer, verify under penalty of perjury, that the foregoing is true and correct. Further, we certify that we are qualified and authorized to file this statement. Executed on May 10, 2000.

  
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GEORGE M. BECK

  
\_\_\_\_\_  
JOEL L. RINGER

**REPLY STATEMENT  
OF  
MATTHEW WELSH**

## **REPLY STATEMENT OF MATTHEW WELSH**

My name is Matthew Welsh. I am employed by the National Motor Freight Traffic Association, as Docket Coordinator for the National Classification Committee (NCC). I previously submitted a statement in the NCC's April 11, 2000 Opening Comments in this proceeding.

Martin E. Foley, Secretary of the National Classification Committee, has requested that I perform a survey of the National Classification Committee's consideration of and action on shipper and Classification Panel proposals to amend the National Motor Freight Classification for the past 20 NCC Dockets, encompassing a period of four years. Proposals for clarification, removal of obsolete items and packaging were not analyzed in this survey. My examination of shipper and carrier proposals included all of the proposed amendments to classes published in the NMFC. Proposals considered at the May 2, 2000 Classification Panel meeting were not included in the master survey but are reported in the text of this statement.

My review of the Classification Panel actions for the past twenty dockets revealed that if the facts of record were consistent with NCC Guidelines, the proposal, whether initiated by an individual manufacturer, shipper organization or carrier classification panel, was approved over 90% of the time. Shippers or their representatives submitted 63 proposals during that timeframe. A total of 36 shipper proposals out of the 38 that conformed or were generally consistent with classification guidelines, i.e. 94.7 percent, were approved. The remaining 25 shipper proposals were disapproved by the NCC because the proposed amendments were not consistent with established classification guidelines.

A total of 186 proposals were initiated by the carrier Classification Panels in that same period. The NCC approved as docketed or as modified 170 of these carrier proposals, i.e., 91.4 percent, based upon their being consistent with classification guidelines. The remaining 16 carrier proposals were denied because the NCC determined that additional research was necessary or an evaluation of the facts of record revealed that the information was not consistent with established classification standards.

The members of a Classification Panel considered five proposals on Docket 2000-2 at the public meeting on May 2, 2000 that were docketed by individual manufacturers or industry groups. The Panel determined that four of the five proposals were consistent with NCC Guidelines and voted to approve those four proposals. The fifth proposal was disapproved, and the proponent was informed that the transportation characteristics did not warrant the proposed class, according to NCC guidelines. The manufacturer presented information at the public meeting that his company had revised the manner in which the commodities were packaged. He stated that future shipments should have superior transportation characteristics. The Panel directed the staff to work with the manufacturer to compile data on the transportation characteristics exhibited by the packaging innovations and to report the facts to a future Classification Panel for evaluation.

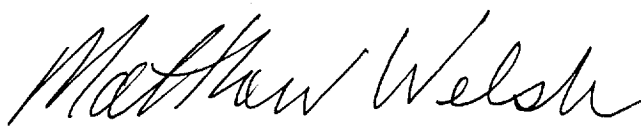
Respectfully submitted,

A handwritten signature in black ink that reads "Matthew Welsh". The signature is written in a cursive, flowing style.

Matthew Welsh

## VERIFICATION

I, Matthew Welsh, verify under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on May 10, 2000.

A handwritten signature in cursive script, reading "Matthew Welsh", written in dark ink.

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MATTHEW WELSH

**STATEMENT  
OF  
LISA K. WINTER**

## **STATEMENT OF LISA K. WINTER**

My name is Lisa K. Winter, and I am employed by the National Motor Freight Traffic Association, Inc. (NMFTA) as a Classification Specialist. My business address is 2200 Mill Road, Alexandria, Virginia, 22314. I commenced my employment with NMFTA in June, 1986. From March 1989 to June 1994, I served as a Senior Research Analyst. I have been a Classification Specialist since June, 1994. In my current position with NMFTA, and through my prior classification experience, I have been involved on a daily basis with the interpretation, development and maintenance of the classification provisions published in the National Motor Freight Classification (NMFC). As a Classification Specialist, I am required to have knowledge of, and be conversant with, the contents of the NMFC. I have provided technical expertise to assist carriers in handling proposals to effectuate classification changes. Additionally, for the past ten years, I have been the staff member assigned to handle most docket subjects involving hazardous materials. I have also participated in seminars on the United States Department of Transportation (DOT) hazardous materials regulations. As the individual most familiar with the poisonous materials proposal, I have been asked to review the allegations made in the Opening Comments in the STB's proceeding on the NCC's 5a Agreement, with respect to shipper involvement.

## **Background of Proposal on Poisonous Materials (Docket 2000-1, Subject 10)**

On September 28, 1995, the NMFTA's staff received a request from a member carrier to research materials that are poisonous by inhalation.

On October 5, 1998, the NCC considered an interim status report on the research into liquids that are poisonous by inhalation. It then approved a motion to expand the research to include all poisonous materials.

The staff contacted 338 potential manufacturers in connection with the research project on poisonous materials. Those same manufacturers as well as five trade associations were notified of the proposal, which was considered at the February 7, 2000 meeting. Thirteen individuals representing five manufacturers and four trade associations expressed an interest in the proposal. The same individuals were notified that the Classification Panel's disposition of this subject was appealed to the National Classification Committee, meeting on May 1, 2000.

On October 28, 1999 the staff met with Counsel for Appellant NASSTRAC. It answered questions and provided NASSTRAC with its analysis of the data on poisonous materials. It further requested that NASSTRAC provide additional data on the transportation characteristics of poisonous materials. (NASSTRAC has not provided any data on the transportation characteristics of poisonous materials.)

At the November 9, 1999 Panel meeting, the members present considered a Research Project Report on Poisonous Materials. The report indicated that poisonous materials have a density range from 9.53 to 47.49 pcf and have an average density of 27.30 pcf. It further indicated that the stowing, handling and liability characteristics associated with transporting poisonous materials are unusual and significant when compared with general boxed freight. The report indicated that the degree of hazard presented by the involved poison is commensurate with the degree of difficulty in stowing and handling and the liability assumed by the carrier. After considering the relevant data, the Panel meeting on November 9, 1999 voted to docket the instant proposal.

At the February 7, 2000 Classification Panel meeting, the members present considered this proposal. In its presentation during the open, public meeting, the staff stated that the proposal cited out-of-date coloaded prohibitions with respect to poisons in Packing Group III. In the past, poisonous materials in Packing Group III could not be coloaded with food or feed. Recently, the regulations have changed allowing the involved materials to be coloaded with food or feed as long as the poisons and food are segregated in the trailer. In light of the information presented at the meeting, the Panel modified the proposal to provide a class 85 to poisonous materials in Packing Group III.

## **Responses to Specific Comments Regarding Shipper Participation**

Throughout the Opening Comments of the National Small Shipments Traffic Conference, Inc.(NASSTRAC), Mr. Cutler makes erroneous statements regarding his participation in the classification process with respect to poisonous materials. On page 20 he states: “Shippers sought data as the basis for such an extraordinary reclassification.” Mr. Cutler did seek data and received data on the transportation characteristics of poisonous materials three months before the vote on the proposal.

On October 28, 1999 the staff met with Mr. Cutler and answered all questions he had regarding the review matter on poisonous materials. Further, the staff provided him with its analysis of the transportation characteristics of poisonous materials. The information provided him was the same information that was considered by the Panel when it docketed this proposal.

Further the staff solicited information from him on that date. Particularly the staff requested any information on the density, handling, stowability and liability of poisons that showed anything different than what was included in analysis of the transportation characteristics. He has not provided any information on the transportation characteristics of poisonous materials.

Mr. Cutler goes on to say on page 20 that “When the matter came to a vote, shippers arguments were brushed aside and the proposal was approved with a minor

amendment.” With respect to the comment that the shippers were “brushed aside,” again, no factual data regarding the transportation characteristics was provided by shippers or their representatives. While the carriers present at the February Panel meeting allowed all interested parties all the time they needed to make their comments on the subject, the shippers’ arguments were not predicated on anything that the carriers may legally consider. So, without further information on the density, stowability, handling or liability characteristics and without promise of any further data, the carriers brought the matter to a vote. However, far from making a “minor amendment,” the Panel elected to modify the proposal to assign a class 85 rather than a class 200 to all poisonous materials in Packing Group III. The modification affected hundreds of poisons and resulted in a seven class reduction to the proposed class.

Again on page 20, Mr. Cutler states that the analysis was not provided to shippers until a few days before the meeting. In fact, at the November 9, 1999 Classification Panel meeting, where the proposal to change the classification for poisonous materials was docketed, he was given a copy of the proposed changes. The analysis of the proposal was mailed to Mr. Cutler on Thursday, January 27, 2000 in anticipation of his request. On Monday, January 31, Mr. Cutler called and asked for the Docket Coordinator to send him a copy of the analysis overnight. He claimed that he had not received the one sent to him on the previous Thursday. He received it Tuesday, February 1. (He admits that the NCC provided him with a complete (70 page) analysis of the proposal.) Again, the facts of record had not changed substantially since October.

Rather than the “few days” Mr. Cutler claims to have had the information, he had a full three months.

On page 21 Mr. Cutler states that the NCC draws “self-serving conclusions.” The conclusions drawn in the analysis of the proposal on poisonous materials were predicated on the transportation characteristics of the involved materials and how those transportation characteristics relate to NCC policies and guidelines. The opposing shippers have not provided any data that contradicts the facts of record. In fact, their arguments only make vague references to density, stowing, handling and liability. This indicates that the information shown in the reports is accurate.

On page 26 Mr. Cutler says that there was no real effort by the NCC to substantiate the extraordinary increase in class.....” He goes on to say that the analysis “contained...anecdotal ‘evidence’ and non sequiturs like two references to the 1984 Union Carbide plant accident in Bhopal (which did not involve transportation).”

The incident in Bhopal is extremely relevant to this subject. It was the reason why the DOT changed the way it classified Poisons. It also led to the understanding of a great liability the carriers assume when transporting them.

In developing the old hazard classification system, the DOT (and the ICC before it) primarily used accident experience to make judgements about the hazards posed by materials and about the adequacy of packaging methods to minimize the

potential for releases of material during transportation. Also, it only considered the safety of people in the immediate area of the accident and assumed that accidents almost always would involve a fire. This method proved to be inadequate when a discharge of methyl isocyanate occurred at a pesticide plant of Union Carbide in Bhopal, and more than two thousand people died immediately as a result. While the involved material was classified by the DOT as a flammable liquid, fire was not involved, and the DOT material classification provided no inference that such a release would pose a major threat to public safety. As a direct result of that incident, the DOT developed the current method of classifying poisons. (See Docket HM-196, Packaging and Placarding Requirements for Liquids Toxic by Inhalation, Final Rule.)

In the Opening Comments of The Halogenated Solvents Industry Alliance (HSIA), Mr. Stone states on Page 5 that “The staff analysis was not made available until a week or two before the public meeting of the NCC Panel considering the proposed change.” (Mr. Stone admits on the same page that, prior to the HSIA request for the analysis of the proposal, a member informed the Executive Director of HSIA of the proposed changes to the classification of poisons.) In fact, as stated in the explanation of the background on poisonous materials, the staff contacted 338 potential manufacturers in connection with the research project (in 1999) on poisonous materials. Those same manufacturers as well as five trade associations were notified of the proposal, which was considered at the February 7, 2000 meeting. Thirteen individuals representing five manufacturers and four trade associations expressed an interest in the proposal. The same

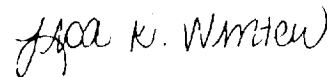
individuals were notified that the Classification Panel's disposition of this subject was appealed to the National Classification Committee, meeting on May 1, 2000.

### **Conclusion**

- Three hundred and thirty-eight potential manufacturers were contacted in 1999 and again in January, 2000.
- Five trade associations were notified in January of the upcoming proposal to change the classification of poisonous materials.
- Mr. Cutler, Counsel to NASSTRAC had a copy of the facts of record on October 28, 1999—a full three months before the proposal was considered by the Panel.
- Mr. Cutler received a copy of the proposal at the November 9, 1999 Classification Panel meeting.
- Mr. Cutler received the analysis of the proposal a week before the February Classification Panel meeting.
- No information on the transportation characteristics of poisonous materials has been provided by the shippers opposed to the proposal to change the classification of poisons.

Respectfully submitted,

NATIONAL CLASSIFICATION COMMITTEE



Lisa K. Winter  
Classification Specialist

Dated: April 24, 2000

## ARGUMENT

### 1. No Valid Need Has Been Shown for Access to Underlying Data

Perhaps the most disturbing aspect of the comments submitted is the Conferences' baseless insinuations about the integrity of NMFTA's staff as justification for engaging in fishing expeditions into the NCC's files. No sound reason exists or has been presented warranting the invasion that the Conferences, and certain other shipper associations, propose under the guise of checking on the "self-serving conclusions drawn from an indeterminate number of submissions by only one side (the trucking industry...)." (Conferences Comments, p. 21.) That statement is impertinent and without justification.

As indicated in its Opening Comments, the NCC has initiated the program of making available to interested persons all staff-prepared reports and analyses that pertain to commodity reviews, research and proposals. The placing of that information on NMFTA's web page also is being explored. By making that data available any interested person will have available all the information reviewed by the NCC and Classification Panels regarding classification proposals that will be before them.

It is difficult not to take offense at the Conferences' comments which attack the professionalism of NMFTA's staff in reporting the data received. Sound reasons exist for not allowing shipper counsel to delve at will into the underlying files. As pertains to carrier reports it is absolutely essential that the carrier not be exposed to shipper pressure for supplying that information. It should come as no surprise that carriers have lost business because of their participation in the classification process. It should also come as no surprise that carriers will be reluctant to submit commodity information if it is publicly accessible—irrespective of the

promise that a reviewing party would keep that information confidential. By the same token shippers have expressed their desire that information provided by them regarding their products not be subject to public scrutiny—particularly by competitors. The Conferences' proposal can only have a negative impact on the classification process, and is totally unjustified.

In light of the very serious allegation made by the Conferences proof should be demanded before that baseless contention is afforded any credibility by the STB. The NCC would respectfully point out that never has it been alleged or shown in any classification proceeding or investigation that NMFTA's staff has "distilled" or otherwise tampered with information. With all the classification proceedings and investigations regarding the motor carrier classification which have been conducted by the ICC and the STB, if such illicit activity had occurred it would have been detected and would have resulted in serious consequences for the NCC. The absence of any such actions speaks for itself.

It should be remembered that since 1980 there have been 64 protested classification changes considered by the ICC and the STB. The protestants in those proceedings were the very shippers of the articles at issue and/or their shipper associations or representatives. Without question, if any information was reported or relied upon by the NCC in establishing the protested classification provisions was inaccurate or insufficient, those deficiencies would have been evident from the information before the agency relevant to establishing the reasonableness of those proposed changes. Again, the absence of any such findings in any of those proceedings speaks for itself.

Even though the Conferences and other shipper associations insist on a right to have an equal voice in establishing classification matters, none are willing to make data within their possession available to the NCC while asserting that they should somehow have the ability to

review any and all information within the NCC's possession. This is especially difficult to justify when the Conferences, and others, have interfered with the carriers' pursuit of their statutory duty to establish reasonable classifications by advising their shipper members not to comply with information requests by NMFTA's staff. But also, the purpose for which the Conferences assert they need the data is suspect. The Conferences state that "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." Then they state that "full access must be provided and must be provided early enough to permit analysis and data collection by shippers." (Conferences' Comments, p. 21.) However, at the most recent Classification Panel meeting held on May 2, 2000 on NCC Docket 2000-2 in Alexandria, VA, counsel for the Conferences, there representing the Rubber Manufacturers Association (RMA) took a position blatantly inconsistent and contradictory to that put forth in this proceeding.

As detailed in the included statement of John L. Nason, a member of the NCC, who participated in the May 2 Classification Panel meeting, the representative for the RMA criticized the staff-prepared report for not including density data on the involved belts or belting of which his members were aware. In addressing those alleged deficiencies and the staff's efforts to obtain data, it was indicated that the staff had requested information from 126 companies, of which only two companies supplied information. Present at that meeting were some of the same industry representatives who had been contacted and failed to respond to the staff's requests, but now were contending that the classification project should be abandoned because of the absence of their withheld information. In fact, the representative from Goodyear Tire and Rubber acknowledged receipt of the staff's request for data but indicated he was too busy to respond. Yet, the representatives in attendance, including counsel for the RMA, stated that they

would not submit any information until a proposal was docketed or notice of the classification provisions that would be presented to a panel were identified.

The motivation behind that strategy is all too transparent. By invading the NCC's files it can be determined if any information is present concerning the products of member or individual shippers. If not present, the shippers will not provide any information and then challenge the classification proposal before the NCC and/or the STB as not being based on the information regarding their products. If such individuals are permitted to utilize that ploy to impede or deter the implementation of needed classification changes—solely to their self-interest—what prospect exists that the carriers, in fulfillment of their statutory duty will be able to establish reasonable classifications? What about those shippers who will be required to bear a disproportionate share of the transportation burden because certain shipper groups have hit upon a device to delay or stop reasonable classification changes that would have them bear the share of the transportation burden warranted by their products.

That strategy is patently not in the public interest and should not be countenanced by the STB by permitting access to the vehicle by which that devious goal could be achieved. The underlying files referenced are proprietary and confidential, and permitting access to them would seriously chill the NCC's access to classification data—a task made even more difficult by the concerted program of some shippers to not submit requested data to defeat classification changes. As the examples provided in the NCC's Opening and Reply Comments demonstrate, when it appears that sufficient information does not substantiate a classification matter the NCC is quick to terminate that subject or work with shippers and/or conduct additional research on the involved products. In view of the success of the NCC in showing that its classification proposals are reasonable before the ICC and the STB, there can be no doubt that the NCC's

classification decisions are based on information evidencing the correctness of its classification actions.

## **2. The Law Does Not Permit Shipper Participation On The NCC**

The demand of shippers that they have representatives on the NCC is not new. That same contention was raised and rejected by the ICC in Investigation Into Motor Carrier Classification, 367 I.C.C. 243 (1983). There, the ICC concluded that:

Shipper participation in the classification process.— A number of shippers argue that they should be able to participate as equal partners in the carrier classification process. We do not agree. The classification is properly within the managerial prerogative of the carriers, although shippers have the right to be heard under the rate bureau agreement. Shippers may seek redress from the Commission if their interests are not protected in the classification process. (367 I.C.C. at 355.)

Nevertheless, some of the shipper associations submitting comments have renewed that argument here. The statute, as currently written, does not permit that result. Throughout the history of the statutory provisions which permit collective activities with antitrust immunity, the authority to enter into such agreements has been restricted to motor carriers. (See, e.g., 49 U.S.C. § 13703(a)(1).) So too, the authority to establish the procedures for the joint consideration, initiation or establishment of classifications and related rules has been provided specifically to motor carriers. Under what authority could the STB expand its jurisdiction to include shippers within the four corners of Section 13703; and under what authority would the STB be able to exert jurisdiction over such shippers with respect to collective activities conducted under Section 13703?

Those concerns have a very significant impact on motor carriers participating in the NCC's Section 5a Agreement. Under Section 13701(a)(1)(C), classifications made by motor

carriers under Section 13703 must be reasonable. If shippers have an equal voice, or any control of the decisional process, and can thereby defeat carrier efforts to establish reasonable and needed classification changes, how can the statutory duty of the carriers be fulfilled? Also, what recourse could be had by the carriers in such instances when the STB would be without authority over those very shippers? Any such shipper participation in the classification process would seriously interfere or destroy the managerial prerogative of the carriers with respect to the National Motor Freight Classification.

The Transportation Consumer Protection Council, Inc. (TCPC), itself a shipper association, presents a very candid affirmation of the NCC's opposition to shippers having voting rights or any form of veto power over the classification process. TCPC states:

[T]he Council does not believe there is any practical or workable means by which shippers can participate. The concept of shippers participating in a carrier ratemaking function is just as illogical as having carriers participate in shippers' manufacturers' pricing decisions. (TCPC Comments, p. 2.)

That statement underscores why classification must remain within the carriers' "managerial prerogative."

As was pointed out in Classification of Canned Goods, *supra*, the ultimate purpose of classification is to ensure that through the classes (ratings) assigned, each article "shall bear its fair share of the transportation burden." Would shippers whose products are to be reclassified with higher classes because of changed transportation characteristics be objective in that determination? Given the nature of the opposition that has been brought against the classification process by shipper organizations which have had products reclassified, and notwithstanding the very important fact that those classification actions were found reasonable

by the STB, there can be no doubt that those necessary and justified changes would not have occurred.

What about the circumstances that would arise when the products of competitors were under consideration for increases or reductions? How objective would the voting shippers be? Those considerations are not relevant when carriers consider classification changes and is one of the main reasons why classification, throughout the numerous legislative changes which have occurred during the last twenty years, has been left in the hands of the carriers. The equitable distribution of the transportation burden among shippers cannot be achieved when the subjective interests of those very shippers, or a benefit to their competitors, would be involved.

### **3. Neither the "Outsourcing" of Classification Decisions Nor Binding Arbitration Is Permitted by Law**

The National Industrial Transportation League (NITL) and the Conferences urge that classification decisions should be shunted to some neutral body, and that binding arbitration should replace the appeal process to the NCC. Neither proposal complies with the law.

Under Section 13703(a) the collective establishment of classifications and related rules pursuant to agreements which, if approved by the STB, are carried out with antitrust immunity has been exclusively conferred upon motor carriers. That substantive right of motor carriers, even if terminated by the STB, could not be conferred upon a non-carrier body.

Congress again has spoken in the Motor Carrier Safety Improvement Act of 1999 in continuing to confer the right of collectively establishing classifications on motor carriers. That authority cannot be usurped to satisfy the unsubstantiated contentions of some shipper associations that the classification system, as administered by the NCC, is purportedly unfair. That self-serving contention is not supported by other shipper representatives who have regularly appeared before the NCC in classification matters, or confirmed by any of the

investigations or compliance reviews conducted by the ICC over many years. As noted, two former ICC Commissioners, Chairman Reece H. Taylor, Jr. and Vice Chairman J.J. Simmons, III, who actually attended many NCC and Classification Panel meetings, do not share the views of the opponents of the classification process either as to the fairness of the ICC-approved procedures under which the NCC operates, which procedures were prescribed by Congress in the Motor Carrier Act of 1980, or as to the fairness of the NCC's classification-making activities. In fact, perhaps the best test of the correctness of the classification decisions reached by the NCC is the success the motor carriers have had over the past 20 years in establishing before the ICC and the STB that classification proposals involving increases have been reasonable under the agency's classification standards.

Similarly defective is the suggestion that appeals not be handled by the NCC. Again, the motor carrier members of the NCC have the right and the duty to establish reasonable classifications—a task they have successfully carried out for more than six decades. The right to establish classifications must include the authority to decide finally what action is to be taken in a classification matter or that authorization is meaningless. Concomitantly, under its approved Section 5a Agreement, Article III, Section 1, Powers and Duties of the Committee, the NCC is the body authorized to “investigate and consider matters affecting the classification of commodities, initiate proposals for changes in the National Motor Freight Classification... and finally decide, fix and prescribe the context, provisions, rules, regulations and ratings of the Classification....” Additionally, how could the motor carriers fulfill their statutory duty to establish “reasonable” classifications if the determinations as to what those classification provisions was to be did not rest with them?

Equally deficient is the suggestion that the “reasonableness” of a classification determination by the NCC be subject to binding arbitration, and that the STB have limited authority to review any decision by the arbitrators. The statutory scheme by which Congress has determined that classifications be established is plain. Carriers are authorized to collectively establish classifications, and the determination of the reasonableness of those classification provisions is committed solely to the STB’s jurisdiction. Nowhere in the statute is the STB authorized to delegate its authority to some inexperienced body for determination of the “reasonableness” of classifications, or is the jurisdiction of the agency to make such determinations to be abnegated to satisfy unsubstantiated concerns expressed by some as to the fairness of the NCC’s classification process— a process guided by requirements prescribed by the exacting standards of the law and procedures that have been approved by the ICC.

The foregoing proposals are merely attempts by some to prevent motor carriers from establishing classifications or reclassifications of the freight they handle in their vehicles. In other words, those shipper associations are attempting to put in place an ill-conceived process whereby they control what classifications are established— a procedure which TCPC recognizes “is just as illogical as having carriers participate in shippers’ manufacturers’ pricing decisions.”

#### **4. The Proposed Imposition of Shipper Costs On the NCC Is Unwarranted**

NCC member motor carriers bear all costs incurred in the processing and handling of all classification matters. Various shipper associations suggest that the carriers should bear all of their expenses as well. Such proposals are without justification. For example, the Halogenated Solvents Industry Alliance, Inc. (HSIA) proposes that to increase shipper participation, the STB should:

[R]equire the NCC and rate bureaus to pay the reasonable costs of non-duplicative studies or analysis requested by shippers, when those studies are designed to address issues (i) that are germane to the proposed reclassification or other collective action and (ii) that have not been addressed by the NCC/rate bureau or its members in their public docket evidence, or as to which the evidence submitted by NCC/rate bureau or its members is subject to reasonable good-faith dispute based upon disputed facts, different interpretations of the facts, or different views regarding appropriate methodologies. (HSIA Comments, p. 7.)

That suggestion, as well as the proposals by others, that the NCC should pay all the costs associated with shipper participation in NCC and/or Panel meetings [including attorneys' fees?], evidences that those parties are more interested in impairing if not terminating the classification process than reasonably increasing their participation. First, regarding HSIA's suggestion, who would determine if any of those criteria allegedly requiring an outsourced study is present? Would that determination be made by the requesting shipper? What control would the NCC have to assure the costs incurred are reasonable? Further, why is any of those measures necessary when all the shipper has to do is submit its information regarding the transportation characteristics of its articles to the NMFTA's staff for inclusion in the report(s) that is made to the NCC and interested shippers and others on a classification matter—a process that has worked so well for so many years and continues to do so.

The NCC is aware that counsel for the Conferences, and probably some others, advise their shipper members not to cooperate with the requests for information and data made by NMFTA staff. While that course may be viewed by some as a good litigation strategy, it is not helpful in enabling the carriers to establish classifications so that the transportation burden is equitably spread among all the users of motor carrier transportation services. In any event, it is ironic that the large shippers, including Fortune 500 companies, which belong to NITL and the Conferences would seek to impose the costs of attending NCC meetings upon the carrier

industry which already bears the full cost of implementing the classification and provides many services free of charge to the shippers to facilitate their filing of proposals and participation in the process. Also, if cost is a legitimate consideration, shippers can elect to submit written comments which are distributed to the NCC carrier member prior to their consideration of the involved classification matter. So too, as indicated in its Opening Comments, the NCC is reviewing the availability of shipper participation by telephone conference. Those alternatives are inexpensive and obviate the need for the complained-of expenses.

The additional demands for compensation by some shipper groups simply go too far and are without justification. They are afforded the opportunity to participate fully in classification matters processed by the NCC to have their views and the information they may care to submit considered by the member motor carriers. The option is theirs and they, not the carriers, should bear the cost of exercising their right to appear. To impose those costs on the carriers, even if such action could be justified or legal, would only serve to divert funds necessary for the establishment of classifications and could well jeopardize the financial viability of the NCC—facts certainly not lost on the shipper proponents.

#### **5. The Impartiality and Public Benefit of the Carriers' Administration Of the Classification Process is Well Acknowledged**

A number of the shipper association comments attack the impartiality and/or fairness of the NCC in executing their classification-making duties. Even though those allegations are unsubstantiated any disclaimer by the NCC of the verity of those contentions obviously would be labeled as self-serving by those groups. Rather than engage in such a fruitless exchange reference will be made to various ICC findings and Congressional statements regarding the National Motor Freight Classification which speak for themselves.

In National Classification Committee – Agreement, 292 I.C.C. 519, 522 (1956), the ICC, in granting final approval to the NCC’s Section 5a Agreement, concluded that:

The agreement establishes a code of procedure which enables applicants to utilize an effective means for joint consideration, initiation and establishment of classification matters. It furnishes a means to avoid destructive competition, promote sound economic conditions, protect shipping interests, and allow carriers an independence of action, free and unrestrained. The collective procedure in conformity with the terms of the agreement is not prohibited by any provisions of Section 5a and it will aid motor carriers to maintain reasonable and nondiscriminatory classifications of property in furtherance of the national transportation policy.

The ICC thus concluded that “the agreement is necessary to the effectuation, and is in furtherance, of the national transportation policy...,” and that it therefore should be approved. (299 I.C.C. at 523.)

The legislative history of the Motor Carrier Act of 1980 unequivocally reconfirmed the value of the motor carrier classification to the entire transportation community. It was stated that:

... [T]he Committee is of the view that the commodity classification system currently in place is a useful tool for shippers, receivers and transporters of regulated freight [s]o all “know what they are talking about” thereby contributing to an efficient and economical transportation system. (H.R. Rept. No. 96-1069, 96<sup>th</sup> Cong., 2d Sess., p. 28 (1980).)

Significantly, in ensuring that the public continued to have the benefits of the motor carrier freight classification available, Congress limited the discretion the ICC then possessed in approving Section 5a Agreements. In defining and narrowing that authority Congress stated that:

In other parts of the rate bureau section of the bill, the Committee has proposed to reduce the amount of discretion that the Commission has to approve or disapprove rate bureau agreements. This reduction in Commission discretion goes hand-in-hand with the other reforms proposed in the rate bureau process. This is a clear example of Congress defining the limits which it believes the Commission should follow in reducing the discretion of the Commission to expand those limits. When the parties to an agreement meet all the conditions in the section, there is a presumption that the Commission should find the agreement to be in the public interest. [H.R. Rept. No. 96-1069, 96<sup>th</sup> Cong., 2d Sess., p. 29 (1980).]

The ICC acknowledged that limitation in provisionally approving the NCC's Agreement which had been amended in response to the requirements of the Motor Carrier Act of 1980 in Section 5a Application No. 61, National Classification Committee - Agreement, served May 18, 1987 (not published). It stated that "under 49 U.S.C. §10706(b)(2) we are required to approve a collective ratemaking agreement when we find that it fulfills the statutory requirements and is not inconsistent with the national transportation policy (NTP)." With respect to the conformity of the NCC's classification activities with the NTP, the ICC concluded that:

A uniform classification system, to the extent the industry chooses to use one, meets many of the motor transportation policy goals of 49 U.S.C. 10101(a). Classification can promote efficiency, encourage sound economic conditions in transportation, and allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public.

\* \* \*

We conclude that collective and uniform action by NCC in the classification of freight is consistent with the NTP. (Decision, p. 4.)

The independent Motor Carrier Ratemaking Study Commission (Study Commission), which was established by the Motor Carrier Act of 1980 to study collective ratemaking, and the continued need for antitrust immunity for that joint carrier activity, had reached very similar

conclusions regarding the classification. After conducting extensive hearings and investigations the Study Commission, which consisted of ten members, including three Senators, three Congressmen and four members of the public appointed by the President, concluded that:

Classification can facilitate competition by helping carriers establish cost-related rates and by easing the task of rate comparison by shippers. Classification can also reduce transaction costs involved in the pricing of motor carrier services. (See report, *Collective Ratemaking In The Trucking Industry*, p. 455, June 1, 1983).

In considering what would be the appropriate classification system, the Study Commission concluded that it would be a system “with basically the same organizational structure and procedures as the current one.” (See Report, pp. 455-457.)

Another extensive review of the classification system was conducted by the ICC in Ex Parte No. MC-98 (Sub-No. 1), Investigation Into Motor Carrier Classification, 364 I.C.C. 906 (1981), 367 I.C.C. 243 (1983), and 367 I.C.C. 715 (1983). In preliminarily assessing the merits of the classification system and its role for the future, the ICC stated that:

Carriers will always need a way of listing their prices. Classifying articles according to their relative transportation characteristics is one way of starting to assemble a rational pricing system. (364 I.C.C. at 911.)

Again, in its subsequent review of its interim decision in that proceeding, the ICC reiterated that “the usefulness of the current commodity classification is not disputed.” (367 I.C.C. at 245.)

On further review the ICC abandoned the elimination of the single rating number or class, the elimination of value per pound as a relevant transportation characteristic, and the ordering of the transportation characteristics as to their relative importance, which it had initially proposed. In a separate opinion, then Commissioner Gradison concluded that:

I agree with the outcome of this decision, which abandons the Commission's ill-advised proposal to replace the National Motor Freight Classification with an inefficient and unworkable "information based system" in which individual rate bureaus, and perhaps even individual carriers, would have published separate classifications. The decision properly reflects the chaos and needless confusion that this proposal would have visited upon the shipping public. The decision retains the essential elements of the National Motor Freight Classification, while removing from it the vestiges of the collective ratemaking system.

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... [T]he Classification is the useful product of many decades of careful work. It helps both carriers and shippers to do their work more efficiently. The Congress has recognized this and has found that the Classification will be as useful under the system in which carriers make individual rates as it was under the system in which carriers make collective rate decisions. It assists new entrants into the motor carrier industry to make rational rate decisions, and it promotes the cost based rate system mandated by the Motor Carrier Act of 1980. (367 I.C.C. at 259-260.)

Even when Congress subsequently broadened the powers of the ICC in the administration of the Interstate Commerce Act, it excluded classification matters from the reach of that new authority. In the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), 49 U.S.C. § 10505 was amended to expand the ICC's authority to exempt various motor carrier activities from regulation. Notably, however, Congress established specific limitations on the ICC's new exemption authority so that it would not be exercised "to relieve a motor carrier of property or other person from the application or enforcement of the provisions of section 10706..." [the section then governing collective rate and classification making]. Specifically, Congress, as pertinent, excluded from that exemption authority, "any law, rule regulation, standard, or order pertaining... to antitrust immunity for... [the] classification of commodities (including uniform packaging rules), uniform bills of lading,..." Thus, in TIRRA, Congress

expressly excluded from the ICC's broadened exemption authority any element of collective classification making that was, and is, protected by antitrust immunity.<sup>1</sup>

In the Interstate Commerce Commission Termination Act of 1995 (ICCTA) Congress once more recognized and preserved the continued public interest value of the collectively-made motor carrier freight classification. In 49 U.S.C. § 13703(a), as pertinent, provision was made for the continued establishment of agreements between carriers to collectively make classifications; it was provided in Section 13703(a)(6) that the antitrust laws do not apply to parties and other persons regarding the making or carrying out of such an approved agreement; and former Section 13703(e) effectively grandfathered existing approved agreements as if they took effect on the effective date of the legislation.

While former Section 13703(d) provided that agreements would expire three years after the date of approval, Congress specified that renewal could be sought by the parties to the agreement, and that the STB “shall approve” the renewal unless such action is shown not to be in the public interest. Congress also provided that the parties to an agreement could continue to act thereunder while their request for renewal was pending.

Congress also defined the circumstances in which the STB would be empowered to change or modify the conditions or approval of an agreement. As provided in 49 U.S.C. §13703(c), the STB, when reviewing an agreement approved under Section 13703, either upon its own motion or on request, can change that approval or the conditions on which approval was predicated only if such revision is “necessary to protect the public interest.”

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<sup>1</sup> It is also noted that in Section 601(h)(3)(A)(iv) of the Federal Aviation Administration Authorization Act of 1994, Congress, while preempting state economic regulation of motor carriers, preserved the authority of a state to grant antitrust immunity for classifications upon carrier request and where such state regulation is no more burdensome than the federal regulation.

The January 7, 1998 comments of the Hon. Nick J. Rahall, II, Member, U.S. House of Representatives in the STB-initiated and then pending proceeding in Section 5a Application No. 61, National Classification Committee – Agreement, strongly evidences Congress' design in the ICC Termination Act of 1995 (ICCTA) of preserving the motor carrier classification system. Congressman Rahall, the ranking Democratic Member, and former Chairman, of the Subcommittee on Surface Transportation of the House Committee on Transportation and Infrastructure, in voicing his support for continued antitrust immunity for the NCC, stated that:

... [T]hose of us charged with actually crafting both the 1994 and 1995 Acts [TIRRA and ICCTA] sought to maintain the public interest by preserving certain regulatory functions and practices such as antitrust immunity for commodity classifications. To wit, the language that was used (now U.S.C. 13703(d)) emphasizes that if the parties to the agreement seek renewal, it will be provided unless the Board finds that renewal is not in the public interest. It follows then that unless the Board finds that renewal is not in the public interest, immunity is continued by §13703(a)(6).

In fact, in the House of Representatives, there never was a question that we would not maintain immunity for commodity classifications with provision for this practice included in every draft of H.R. 2539 considered, from its introduction through the Committee process, and as passed by the House. (Cong. Rahall Comments, p. 2.)

Referring to his support of the most recent legislation for continued antitrust immunity for the classification, Congressman Rahall indicated that:

I believed then, as I do today, that the efficient operation of the motor carrier industry, and its ability to serve both shippers and consumers alike, depended on the continuation of commodity classifications. In this regard, the hearing record developed during consideration of the 1995 Act (as well as records developed in preceding legislative actions going back to 1980) clearly showed that motor carriers could not, and would not, meet collectively without immunity. It is a fact that tremendous volumes of traffic move in LTL service, rather than under contract for FAK, but subject to their proper classification. No system other than the

National Classification Committee Agreement provides for the grouping of products with comparable characteristics, of the separation of products that are dissimilar, for transportation purposes. (Cong. Rahall Comments, p. 3.)

In his January 26, 1998 comments in Section 5a Application No. 61, Reece H. Taylor, Jr., former Chairman of the ICC from June 1981 to December 1985, summarized shipper participation in the classification process as follows:

Today, the NCC's system operates "in the sunshine" and continues to function in strict accordance with all of the ICC-imposed directives. Any shipper or other interested person is afforded both the right and the opportunity (i) to propose changes in the NMFC; (ii) to present views personally or in writing; (iii) to participate in the discussion of proposed changes in open public meetings of the NCC; (iv) to provide NMFTA's staff with details on the transportation characteristics of a product; (v) to appeal any decision made by a Classification Panel; and (vi) to protest such a decision to the STB and ask for its suspension and investigation.

I have had the chance to observe the operations of the NCC first hand. Furthermore, it is my understanding that both during and after my ICC tenure, the Commission's staff religiously monitored every meeting of the NCC and its Classification Panels. This close oversight served to ensure that the NCC's system does function in the public interest by operating in strict accord with all of the ICC's prescribed procedures. (See Vol. II, NCC's Opening Comments.)

In that same proceeding, J.J. Simmons, III, a former Vice Chairman of the ICC, who served that agency for a total of 12 years and left on December 31, 1996, stated that:

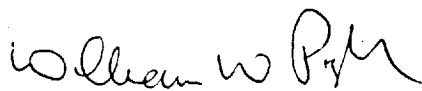
will be difficult to find a collective activity which is more in the public interest than the NCC's classification system. I urge the Board to renew the NCC's 5a Agreement. (See Vol. II, NCC's Opening Comments.)

If the patent unfairness alleged here by some shipper associations existed, it certainly would have been obvious to those Commissioners and agency staff who actually attended and monitored those classification meetings.

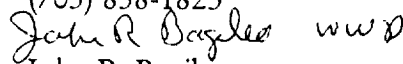
Moreover, in the Motor Carrier Safety Improvement Act of 1999, Congress rescinded the three-year automatic termination and renewal process in former Section 13703(d), and replaced it with a provision whereby the STB is to review Section 5a Agreements during each 5-year period from the effective date of the Act. Congress mandated no change with respect to the establishment of the classification by motor carriers or the jurisdiction of the STB in assessing the reasonableness of classification changes.

No process has been subjected to the extensive review that the classification has through the various investigations and rulemaking proceedings which have been conducted regarding the classification function and procedures followed by the NCC. The classification process and standards which exist today are the product of those administrative reviews. Additionally, the procedures followed are those which were mandated by the Motor Carrier Act of 1980 and prescribed by the ICC. The unfairness which some shipper associations allude to is more the product of fertile imaginations than the realities of the procedurally open and responsive manner in which classification-making is conducted by the NCC.

Respectfully submitted,



William W. Pugh  
2200 Mill Road  
Alexandria, VA 22314  
(703) 838-1825



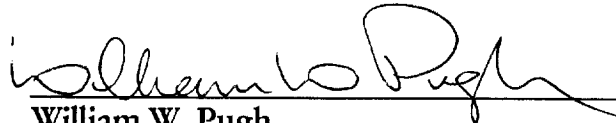
John R. Bagileo  
1101 30<sup>th</sup> Street, NW #300  
Washington, DC 20007  
(202) 944-3734

Counsel for the National Classification Committee

Dated: May 11, 2000

# CERTIFICATE OF SERVICE

I hereby certify that I have this 11<sup>th</sup> day of May, 2000, served a true and correct copy of the foregoing Reply Comments upon all parties of record identified in the Surface Transportation Board's service listed dated April 20, 2000 by first class mail, postage prepaid.

  
William W. Pugh