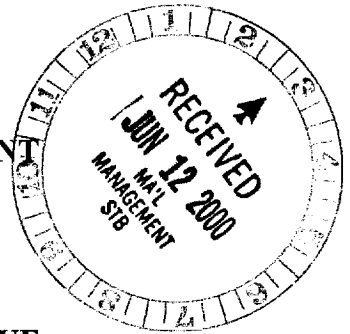


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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



**REBUTTAL OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

**ENTERED
Office of the Secretary**

**JUN 12 2000
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Public Record**

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Due and Dated: June 12, 2000

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SURFACE TRANSPORTATION BOARD**

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

**REBUTTAL OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League (“League”) hereby files its Rebuttal in this proceeding involving the Surface Transportation Board’s (“Board”) solicitation of proposals for increasing shipper participation in the classification process administered by the National Classification Committee (“NCC”). The League’s Rebuttal responds primarily to the comments and positions set forth by the NCC in its submissions to the Board.

REBUTTAL ARGUMENT

In fulfilling its statutory duty under the ICC Termination Act of 1995¹ to determine whether the NCC Agreement should be renewed and allowed to operate with antitrust immunity, the Board determined in a prior proceeding that the NCC Agreement “will be approved only if it is amended to provide for more effective shipper participation.”² This proceeding was then instituted by the Board in February 2000 for the purpose of receiving proposals and comments from the transportation industry as to how to ensure that shippers may participate in the classification-setting process in a more effective and meaningful manner.

¹ See 49 U.S.C. § 13703(d) and (e) (1998).

² Section 5a Application No. 61, *National Classification Committee Agreement*, slip op. (December 18, 1998) (Decision at 1).

Based upon the submissions made thus far by the NCC to the Board it is clear that the NCC has not taken the Board's December 1998 decision or this proceeding seriously. The NCC has failed to offer *any* legitimate proposals to increase shipper participation in the classification-setting process or to otherwise address the concerns and problems associated with the current system that have been identified by shippers. The NCC not only has failed to make its own reasonable proposals for increasing shipper participation, it refuses to acknowledge any shortcomings with the current system. The hundreds of pages that have been filed with the Board in this proceeding by the NCC do little more than argue for preservation of the status quo or attack shipper representatives and organizations that have made reasonable proposals to the Board.

In contrast to the NCC, the League and other shipper organizations have explained their concerns about the current classification system to the Board and have developed proposals to address those concerns. The League's proposals, which are focused on three discrete areas, specifically aim to: (1) improve the notice provided to shippers of NCC activities and proposals; (2) eliminate any bias in the decision-making on NCC proposals; and (3) establish a more fair and neutral process for resolving classification disputes via mandatory arbitration. Further, the NCC opposes the sensible suggestions asserted by the League and other shipper organizations which would lead to a more even-handed system for adopting classifications. These proposals have been described in detail in the League's Opening Comments and Proposals and its Reply Comments and will not be repeated here. Also, as demonstrated in the League's Reply Comments, a number of other commenters in this proceeding support the same or similar objectives. NITL Reply at 2-6.

As shown below, the arguments made by the NCC against the various shipper proposals are fundamentally flawed from both a legal and logical standpoint. Accordingly, the NCC's

desperate attempt to avoid the adoption of any meaningful changes to the operation of the current classification system must be rejected by the Board.

1. **The NCC's Arguments Opposing Direct Shipper Participation in the NCC Are Fundamentally Flawed**

(a) *Shipper Participation in the NCC Is Legally Permissible*

The League and other shipper organizations have proposed that shipper companies or their representatives should serve on the NCC. In doing so, these shippers should have the authority to discuss and vote upon classification proposals. While the League and the National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc. ("Conferences") have suggested that shippers should comprise a 1/3 interest of the NCC, other groups have sought equal representation. Regardless of the degree to which shippers may actually be authorized to serve on the NCC, it is clear that such action offers the most direct and effective way to increase shipper participation in the classification process. Allowing shippers to participate directly in the establishment of classifications, including the decision-making on classification proposals, would provide shippers with a deeper understanding of the workings of the NCC and help to eliminate the perceived bias in classification decision-making. Moreover, because direct shipper participation would establish a more fair and objective system, disputes over classification decisions would be minimized.

The NCC opposes this proposal by claiming that direct shipper participation on the NCC is legally impermissible. This argument is baseless. The NCC also asserts that shippers would be incapable of being objective when considering classification matters, especially re-classification proposals. It is ironic that the NCC even makes this argument, since it is the NCC itself which suffers from a conflict of interest in deciding classification proposals.

The NCC specifically contends that Section 13703(a)(1) of the Interstate Commerce Act ("Act") prohibits direct shipper participation on the NCC. According to the NCC, Section

13703(a)(1) only authorizes motor carriers to collectively establish commodity classifications, with antitrust immunity. NCC Reply, Argument at Tab H, p. 5. But the NCC completely misconstrues Section 13703 and conveniently ignores other relevant provisions in that section of the statute which grant the Board broad authority to condition its approval of the NCC Agreement to ensure that the Agreement serves the public interest. Directly relevant here are Sections 13703(a)(3) and 13703(a)(6). These provisions specifically state:

(3) Conditions. The Board may require compliance with reasonable conditions consistent with this part to assure that the agreement furthers the transportation policy set forth in section 13101.

(6) Effect of approval. If the Board approves the agreement or renews approval of the agreement, it may be made and carried out under its terms *and under the conditions required by the Board*, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties *and other persons* with respect to making or carrying out the agreement.

49 U.S.C. §§ 13101(a)(3) and (6) (emphasis added).

The first cited provision plainly provides the Board with the discretion to determine whether to condition its renewal of a motor carrier agreement and to determine the substance of any conditions that are required. This authority is broad and subject only to the limitation that the conditions imposed be reasonable. Moreover, allowing shippers to directly participate on the NCC would satisfy the conditioning authority cited above because it would ensure that the National Transportation Policy is served by helping to “promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required” and by helping to “meet the needs of shippers, receivers. . . . and consumers. . . .” 49 U.S.C. § 13101(a)(2)(B) and (C).

The second provision establishes that conditions imposed by the Board must be carried out in order for the parties to the agreement to receive the benefit of antitrust immunity. This latter provision also implies that persons other than the primary parties to the agreement may

receive the benefit of antitrust immunity, to the extent that such “other persons” are involved in the carrying out of the agreement. Thus, Section 13703 does not, as the NCC argues, prohibit the Board from authorizing shippers to directly participate in the development and review of classification ratings. Indeed, the imposition of this reasonable requirement is expressly permitted by the statute, to the extent it arises from the exercise of the Board’s conditioning authority.

The NCC also claims that a decision rendered nearly two decades ago by the ICC, in which the Commission decided not to allow shippers *equal* representation on the NCC because it was found that classifications are within the managerial prerogative of the carriers, prohibits the Board from deciding today to allow some degree of shipper representation on the NCC. *See Investigation Into Motor Carrier Classification*, 367 I.C.C. 243 (1983). However, the NCC is wrong again. As noted above, the Board has the express authority to condition its approval of the NCC Agreement and to determine what conditions are appropriate in order for the agreement to serve the public interest. Although the ICC may have determined seventeen years ago that equal representation of shippers on the NCC was not desirable, the Board, in determining whether to renew the NCC Agreement at the direction of Congress, may decide otherwise today, based upon its evaluation of the public interest under current conditions and practices of the motor carrier industry and the transportation marketplace in general.

Moreover, the ICC decision emphasized the agency’s disagreement with *equal* shipper representation on the NCC. The Board certainly is not foreclosed from deciding today that some other degree of shipper representation is appropriate, as has been proposed by the League and the Conferences.

(b) *The Board Could Ensure That Classification Decisions Are Rendered Objectively*

The NCC also opposes direct shipper representation on the committee because it believes that shippers could not objectively evaluate commodity classifications that concern their own or their competitors' products. This concern of the NCC is laughable considering that it is the motor carrier members of the NCC that stand to benefit economically when classification rating increases are adopted, since such increases generally lead to motor carrier rate increases. Thus, shipper participation is needed to help alleviate the existing motor carrier conflict of interest that currently exists, although it would not completely resolve this problem. Nevertheless, as proposed by the League in its Opening Comments and Proposals, if direct shipper participation is required by the Board, safeguards could be adopted to ensure that the shipper parties would not participate in decisions on classification matters in which they have a direct commercial or financial interest. The Board could require that an interested shipper party would have to refrain from participating in the decision-making on any proposal in which it has a direct interest. Also, shipper alternates could be selected to fill-in for any shipper or shipper representative that must rescue itself from classification decision-making based upon its interest in a given proposal. Thus, any potential conflict of interest that could arise from shipper representation on the NCC could be easily avoided.

(c) *Reimbursement of Shipper Costs*

In its Opening Comments, the League proposed that, if shipper service on the NCC is required by the Board, the NCC should be required to reimburse shippers for their expenses directly related to such participation, for items such as travel, hotel, food, and other associated costs. The NCC objects to providing any compensation to shippers or shipper representatives that serve on or appear before the NCC because it claims that the motor carrier members bear their own expenses related to their participation in the NCC. However, the costs of operating the

NCC and for engaging in NCC activities that are paid by the motor carrier members of the NCC are passed through to shippers in the rates that motor carriers charge for their services. Thus, shippers already pay some or all of the NCC operating costs in one form or another. Moreover, to the extent that the Board requires that certain shippers or shipper representatives serve on the NCC, the benefits of such service will flow to all shippers and motor carriers that use the classification system. Accordingly, it would not be fair or reasonable to require the shipper entities and/or representatives that serve on the NCC to bear the entire expense of that participation. That cost should be borne by the NCC itself, which expense is ultimately paid by the shipper customers of the NCC members.

(d) *The NCC's Proposal to Establish an Ad Hoc Group of Shippers and Carriers to Monitor NCC Activities Should be Rejected*

Rather than agree to allowing shippers to actively and effectively participate in NCC classification matters, the NCC proposes that an Ad Hoc group of shippers and carriers be formed for the purpose of reviewing and monitoring the existing procedures and activities of the NCC staff. As envisioned by the NCC, the Ad Hoc Group would observe the daily activities of the NCC staff and could raise questions or concerns with senior staff or the Executive Director. NCC Reply, Foley Reply St. at Tab B, pp. 4-5. However, the Ad Hoc group would have no right to participate in classification activities or decisions, since the NCC contemplates that the group would *not* have access to NCC files and would *not* have voting rights. Under the NCC proposal, participation by shippers would be limited to “the traditional manner of supplying information about the transportation characteristics of their products when research or proposals are in play.” NCC Reply, Foley Reply St. at Tab B, p. 5.

This proposal of the NCC comes nowhere close to addressing the concerns of shippers with respect to the current operation of the NCC, nor would it lead to effective or meaningful shipper participation in the process. The Ad Hoc group as contemplated by the NCC would do

little more than waste the valuable time of shippers and preserve existing NCC procedures. Allowing shippers to shadow the daily activities of NCC staff, without allowing for direct participation in the decision-making process, would be meaningless. Companies and shipper organizations also are not likely to authorize or pay their personnel to review the operations and activities of the NCC staff. Moreover, there apparently would be no obligation on the part of the NCC staff or members to even acknowledge or act upon the suggestions and concerns raised by the Ad Hoc group. Thus, such participation would be pointless and this proposal should be rejected.

2. Shippers Should Have Complete Access to NCC Data

The NCC also opposes the proposal which would allow shippers access to the information and data which is provided to the NCC by shippers and carriers and is relied upon by NCC staff to develop proposals, reports, and recommendations. Requests by shippers for access to such data in prior NCC proceedings have repeatedly been refused and, until this proceeding, the NCC has only provided shippers with summaries of the information relied upon.³

Shippers, however, strongly believe that obtaining access to all of the data and information which forms the basis for a classification proposal, in a timely manner, would clearly lead to more effective shipper participation in the classification process. Accessing all of the data and information would enable shippers to more fully understand the underlying basis for a classification proposal and, if desired, to respond to a proposal in a complete and thorough manner. It would also allow shippers to reach their own conclusions based upon their own analyses of the data.

³ In an apparent response to the Board's initiation of this proceeding, the NCC has just recently decided to make available to shippers all staff-prepared reports and analyses that pertain to commodity reviews, research and proposals.

There is no legitimate justification for the NCC to keep secret the actual facts and data that form the basis of NCC staff reports and recommendations on classification ratings. Unless the NCC has something to hide, it should not fear sharing such data and information with shippers. Providing shippers with *all* relevant factual information would ensure that the classification setting process is truly open and would help to eliminate underlying suspicions that the classification system is administered in a manner which leads most often to rating increases. Moreover, enabling shippers to analyze the same data that is reviewed and analyzed by NCC staff would ensure that the classification-making process is administered in a more fair and even-handed manner.

The NCC's primary concern about this proposal relates to its unsubstantiated claim that the release of such information will cause shippers to retaliate against carriers that provide data to the NCC. The NCC is also concerned about the potential release of proprietary information provided by a shipper to its competitors. The NCC further claims that providing shippers access to the data reviewed and analyzed by NCC staff would have a chilling effect on the submission of data by carriers and shippers. NCC Reply, Argument at Tab H, pp. 1, 4. There is no merit to the NCC's arguments.

First, there is not even a scintilla of evidence offered by the NCC to support its claim of shipper retaliation. Shippers are not interested in obtaining access to the data so that they may somehow "punish" the carriers participating in the classification process. Rather, shippers merely would like to have the opportunity to independently analyze the information relied upon by the NCC in making its proposals and recommendations and to draw their own conclusions. Moreover, the desire of shippers to independently review the data underlying an NCC proposal or recommendation should not be construed as an attack on the integrity of the NCC staff, as portrayed in the NCC's Reply. It is nothing more than an attempt to achieve a more neutral and

objective classification process than currently exists by obtaining equal access to all relevant information relating to NCC activities.

Second, the concern of the NCC over the release of confidential information can be resolved by the use of confidentiality agreements and/or by the redaction of carrier and shipper names and any other commercially sensitive information prior to its release. These devices are used everyday in the business world to protect proprietary information and there is no reason that they could not be employed effectively in the classification-setting process.

Finally, the NCC asserts that shipper groups have conspired to impede the NCC's activities by instructing their members not to provide data to the NCC upon its request for such information. Speaking for itself, the League has *never* engaged in such activities or ever instructed its members not to cooperate with the NCC. Indeed, the League has helped to facilitate shipper participation by informing its members from time to time about certain NCC activities, by publishing information regarding NCC proposals and action in its weekly newsletter. However, it is solely within the discretion of the individual members whether to respond to a specific request from the NCC to provide data relating to a particular commodity that will be reviewed by the NCC.

3. **The NCC Misinterprets Section 13703(a) of the Act in Opposing Shippers' Proposals Concerning Mandatory Arbitration and Neutral Decision-Making of Classification Matters**

The NCC also erroneously asserts that shippers' desire to have classification disputes resolved via an arbitration process, or to require that a neutral standard setting body, such as ANSI, or other independent organization decide classification proposals (unless direct shipper participation in the NCC is required), is unlawful. The NCC specifically asserts that Section 13703(a)(1), exclusively grants to motor carriers that enter into agreements to collectively establish classifications the right to decide classification matters and, thus, prohibits a non-carrier

body from rendering decisions on such matters. But other than NCC's own self-serving and improper interpretation of Section 13703(a)(1), it cites no precedent for its assertion, and that is because there is none.

Although Section 13703(a)(1) permits (but does not require) motor carriers to enter into an agreement to collectively establish classifications, that agreement must be approved by the Board. As previously noted, Section 13703(a)(3) authorizes the Board to impose conditions on its approval of such agreements to ensure that the agreement serves the public interest, which conditions must be reasonable. In order for the Board to fulfill its statutory duty to protect the public interest in approving motor carrier agreements, it is proper for the Board to ensure that any classification system that is collectively operated serves the transportation community as a whole, and not just the interests of the motor carriers that operate that system. Accordingly, the Board has a duty to ensure that classification proposals and disputes are decided and resolved under fair procedures. If the Board were to condition its approval of the NCC Agreement by requiring that a neutral organization determine whether to adopt classification proposals, or by requiring that all classification disputes be resolved by way of arbitration, such conditions would be reasonable and lawful.

Contrary to the NCC's contention, the fact that the existing NCC Agreement states that the NCC shall "finally decide . . . rules, regulations and ratings of the Classification. . . ." (NCC Reply, Argument at Tab H, p. 8) does not prevent the Board from imposing the above described conditions. If such conditions were imposed by the Board, appropriate amendments would need to be made to the NCC Agreement to reflect any new decision-making and appellate procedures that were to be followed. Also, the duty of motor carriers to "establish reasonable classifications" does not translate into the exclusive right to render decisions on all classification proposals and to finally resolve all classification disputes (subject to any protest filed with the

Board). This interpretation would be inconsistent with the Board's conditioning authority set forth in Section 13703(a)(3).

In addition, the NCC wrongly contends that the implementation of these conditions would somehow transfer control of the classification process to shippers. NCC Reply, Argument at Tab H, p. 9. In fact, the adoption of neutral decision-making and appellate procedures would simply ensure that all classification decisions and appeals are *not* controlled totally by a party that maintains a direct interest in adopting classification increases. The procedures proposed by shippers aim to achieve a more fair and even-handed system of adopting classification ratings, that are free from any apparent conflict of interest.

Finally, the NCC claims that arbitrators capable of understanding the classification system could not be found. NCC Reply, Foley Reply St. at Tab B, p. 5. That is ridiculous. Arbitration is commonly used to resolve all kinds of disputes involving transportation transactions, some of which are much more complex than evaluating the four factors of handling, stowability, density, and liability, with respect to a given commodity. Indeed, the Board has adopted specific arbitration rules for handling disputes arising between two rail carriers or a rail carrier and another person, which pertain to subject matters over which the STB has jurisdiction. *See* 49 C.F.R. Part 1108. Arbitration is also used frequently to resolve disputes arising in the maritime context, or to handle transportation contract disputes involving all modes of carriage.

Under the League's arbitration proposal classification disputes would be brought before a three member panel of arbitrators. The shipper party or parties would select and pay for one arbitrator, the NCC would select and pay for another arbitrator, and the third neutral arbitrator would be selected jointly from the roster of arbitrators retained by the STB under its Ex Parte 560 procedures. Under those rules, the roster of arbitrators must be comprised of "persons (other than active government officials) experienced in rail transportation or economic issues similar to

those capable of arising before the STB.” 49 C.F.R. § 1108.6. Thus, at a minimum, at least one arbitrator would have direct transportation related experience. Moreover, it is hard to imagine that either the shipper party(ies) or the NCC would select an arbitrator that did not have any knowledge or experience in the motor carrier industry or other transportation fields. Thus, the concern of the NCC is unfounded and should not be taken seriously by the Board.

As indicated in the League’s Opening Proposals and Comments, it believes that the establishment of a neutral appellate process for handling classification disputes offers the most effective means for improving the existing classification system and should be given the greatest amount of consideration by the Board.

4. The NCC’s Objections to Improving the Notice Provided to Shippers of Classification Proposals Are Unfounded and Should be Rejected

Several shipper organizations, including the League, have indicated their preference to receive earlier notice of classification proposals and more timely and complete access to data and information underlying NCC proposals. In order to ensure that shippers have sufficient time to analyze NCC proposals and data and, if necessary, to respond thereto, the League also proposed that no formal action should be able to be taken by the NCC with respect to a particular classification proposal sooner than 90 days from the time that shippers receive notice of the proposal and access to the data relating to the proposal.

The NCC claims that it cannot comply with these proposals because of the procedures set forth in the existing NCC Agreement. NCC Reply, Foley Reply St. at Tab B, p. 7. Specifically, the NCC asserts that the requirement in the Agreement that the NCC act upon proposals within 120 days of the docketing of the proposal, restricts the NCC from providing shippers with 90 days advance notice. Presumably, the NCC’s inability to comply with the 90 day advance notice requirement stems from the fact that the NCC would not have completed its investigations, studies or analyses of commodities in time to provide shippers with 90 days notice of such

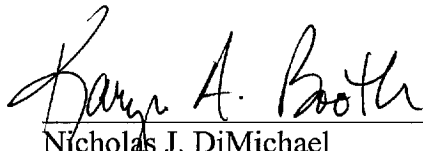
information and to comply with the 120 day rule. However, even if this is the case, this conflict could be resolved by amending the 120 day rule. To the extent that the Board agrees that shippers should be provided an adequate time frame of 90 days within which to review, analyze and respond to classification proposals, then the Board could condition its renewal of the NCC Agreement by requiring that the Agreement be amended to reflect such procedure. Any other provisions of the Agreement that conflict with this requirement could also be modified accordingly.

Finally, the NCC indicates its willingness to accept the proposal made by the League with respect to providing shippers with general notice of classification proposals on its web site and providing specific notice to those shippers that notify the NCC directly, or have previously demonstrated their interest in proposals that relate to one or more particular commodities. NCC Reply, Schrof Verified St. at Tab C, p. 10. The League welcomes the NCC's acceptance of these proposals, as the League believes that they will lead to greater shipper participation in the classification process by broadening the means through which shippers may receive notice of NCC proposals. However, the League would like to clarify that with respect to the provision of specific notice, the League is certainly willing to cooperate with the NCC to provide assistance in notifying its shipper members of any changes in NCC procedures that may be adopted in this proceeding, but the League would expect that individual shippers that desire to receive specific notice of any NCC proposals would undertake to contact the NCC individually, or the NCC would automatically provide such notice based upon its own information and knowledge. This procedure would appear to make the most sense, since it is the individual shipper companies and the NCC itself that are in the best position to communicate to each other the particular commodities that they produce or in which they otherwise have an interest and the classification proposals that are related to such commodities.

CONCLUSION

The League respectfully requests that the Board adopt the proposals set forth by the League in its Opening Proposals and Comments filed in this proceeding on April 11, 2000, which would allow for effective shipper participation in, and would otherwise improve, the classification-setting process. The League further requests that the Board not adopt the proposals made by the NCC, as these proposals would not adequately address shipper concerns regarding the existing classification system or enable shippers to participate in the establishment of classifications in an effective or meaningful way.

Respectfully submitted,

A handwritten signature in black ink, reading "Karyn A. Booth". The signature is written in a cursive style with a horizontal line underneath the name.

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Due and Dated: June 12, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have on this 12th day of June, 2000, served a copy of the foregoing Rebuttal of The National Industrial Transportation League by first-class mail, postage prepaid upon all parties of record.

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

Aimee L. DePew