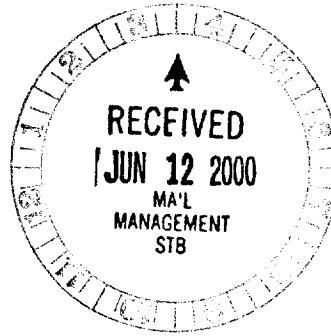


PATTON BOGGS LLP
ATTORNEYS AT LAW



2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

Scott N. Stone
202-457-6335
sstone@pattonboggs.com

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June 12, 2000

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BY HAND

The Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW Suite 700
Washington, DC 20423-0001

Re: Sec. 5a Application No. 61 (Sub-No. 6), National Classification
Committee – Agreement

Dear Secretary Williams:

Enclosed for filing in this docket are the original and 10 copies of the Rebuttal Comments of the Halogenated Solvents Industry Alliance, Inc. Also enclosed is a computer diskette containing a copy of this filing in WordPerfect 5.x.

Please acknowledge receipt of these papers by date-stamping the enclosed duplicate copy and returning it with our messenger. Thank you.

Sincerely,

Scott N. Stone

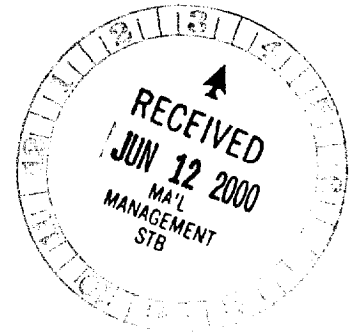
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BEFORE THE
SURFACE TRANSPORTATION BOARD



Sec. 5a Application No. 61 (Sub-No. 6),
NATIONAL CLASSIFICATION COMMITTEE – AGREEMENT

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JUN 12 2000

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REBUTTAL COMMENTS OF THE
HALOGENATED SOLVENTS
INDUSTRY ALLIANCE, INC.,

The Halogenated Solvents Industry Alliance, Inc. ("HSIA") respectfully submits these rebuttal comments in response to the reply comments filed in this docket.

The National Classification Committee (NCC) rests on two arguments, neither of which is responsive to the issues noticed by the Board for comment. NCC's first argument is that no reform of its procedures is required because its current process is fair. Its second argument is that classifications do not affect rates and should not be of concern to shippers.

In addition, the NCC argues, without substantive comment, that HSIA's request to suspend all pending classification proceedings is "not in the public interest."

These points are addressed in turn below.

1. The Inherent Bias of the Current Classification System Requires Reform.

NCC's first argument is essentially that procedural reform is unnecessary because its committees and staff are fair-minded professionals who can be relied on to make only objective, correct decisions. Evidently concerned that its integrity is under attack, NCC labels shipper

criticisms of the current system “scandalous and impertinent.”¹ That sort of language is not helpful to resolving the issues here. In any event, HSIA has never questioned the bona fides of the NCC, but has seriously questioned the validity of some of its results -- notably the recent poisonous materials reclassification, which the NCC has now decided to defer until later this year.² HSIA has also questioned the procedures which at present provide for insufficient shipper participation and NCC accountability. The Board in its February 11, 2000 decision requested comments not on whether, but on how those procedures should be reformed to overcome the current inherent bias in favor of motor carriers.

It seems self-evident to HSIA that a committee of private companies operating under antitrust immunity because of its direct effect on the terms of commercial carriage should be subject to some checks and balances. To require an “on the record” proceeding, as HSIA has suggested in its opening comments, one does not have to conclude that the NCC is composed of corrupt members. Such minimal due process is the norm in regulatory proceedings, for example, despite the fact that decision makers are honest and are generally barred from deciding matters in which they have an economic interest. A fortiori, such procedural openness should be required where decisions are made by persons whose companies stand to gain or lose as a result of the decisions they make. Tellingly, the NCC objects to shipper representation on classification panels (as suggested by NASSTRAC and H&PCDC) because “Obviously, the shipper would be

¹ NCC Reply Comments, Reply V.S. of Foley at 9.

² As example of the incongruous results achieved by the current classification system is mentioned in the Verified Statement of Lisa Winter attached to the NCC Reply Comments. On page 3 of her statement, Ms. Winter refers to a change in DOT regulations permitted the co-loading of food and poisons so long as the poisons are segregated. She notes that NCC took this change in regulations into account in deciding to increase the classification for certain poisons from 55 to 85, rather than to an even higher classification. What she fails to explain is why the classification was not decreased to reflect the eased DOT regulations.

inclined to vote lower classes for his own products and higher classes for the products of his competitors.”³ To advance this argument, while at the same time claiming that the NCC’s members are never swayed by their economic interests, is inconsistent to say the least.

The Board has requested comment on how shippers can improve the classification process, and the NCC’s efforts to simply stonewall any change do not advance the debate. NCC labels the suggestions of shippers in this proceeding as “totally unreasonable, impractical, disruptive and unfair restrictions on the NCC...,”⁴ but offers few specific criticisms of shipper proposals. NCC apparently contends that the shipper proposals are made in bad faith in order not to reform the classification system but effectively abolish it. This is not true. While HSIA’s opening comments frankly expressed the view that motor carrier antitrust immunity should not be continued, HSIA recognized that abolition of such immunity was not currently on the table for discussion. Instead, HSIA made reform proposals in good faith, including proposals to require notice, access to NCC surveys and analyses, an opportunity to comment, and NCC funding of germane shipper-requested analyses. In the absence of specific evidence or arguments showing why such shipper proposals are unworkable, NCC’s broad-brush contentions that they are impractical should be disregarded.

On its face, it is untenable for NCC to take the position that its committees should have full access to information from carriers and staff, but that giving shippers timely notice, access to such information, and a meaningful opportunity to respond to it, are too burdensome and “disruptive.” The NCC position is akin to an administrative agency’s deciding that it should make decisions on the basis of ex parte contacts, while only selectively providing notice to interested parties concerning the basis for its decisions. To the extent the NCC is concerned that

³ Id., V.S. of Schrof at 12.

some data is commercially sensitive, such information could be disclosed subject to protective order.

NCC criticizes HSIA's proposal to have the NCC fund shipper-requested studies, arguing that it would be too difficult and subjective to decide when such studies would be conducted, and how to resolve any disputes about which studies should be conducted.⁵ The answer is that in the first instance NCC and its staff would decide which analyses to perform (including analyses requested by shippers), with any disputes resolved in the same way disputes are resolved today. HSIA's proposal states specifically that shipper-requested studies would be done only if germane to the classification proposal at issue and only if the studies would address points not already addressed by the NCC. If the NCC or its staff refused to undertake a shipper-requested study, that refusal would be among the circumstances open for argument if and when the resulting classification is challenged as lacking in factual or analytic support.

NCC also argues that it cannot give 90 days notice to shippers of reclassification proposals because its 5a agreement requires final action within 120 days of docketing.⁶ The short answer is that following the Board's adoption of reformed procedures in this docket, the 5a agreement will have to be changed.

NCC's reply comments also attempt to deal with some specifics of the poisonous materials proceeding which HSIA and others addressed in their opening comments. NCC argues, for example, that HSIA and others should not complain about a lack of notice on the reclassification because an NCC staff member met with counsel for NASSTRAC three months

⁴ Id., Reply V.S. of Foley at 1-2.

⁵ Id., Reply V.S. of Foley at 5.

⁶ Id., Reply V.S. of Foley at 7-8.

before the NCC panel met and told him about the poisonous materials proceeding.⁷ We understand from NASSTRAC's counsel, Mr. Cutler, that the meeting in question was undertaken while he was representing the Rubber Manufacturers Association on rubber hose issues and that he had not been engaged to represent anyone in the poisonous materials docket. Mr. Cutler cannot be unilaterally appointed by NCC to be the all-purpose counsel and ombudsman for the entire shipper community, such that he has a duty to notify all shippers and shipper groups of information imparted by NCC.

2. Classifications Have a Direct Effect on Rates, Including Contract Rates.

NCC's second major point, that the classification process does not affect rate levels,⁸ is simply untrue, as the ICC and Board have repeatedly recognized.⁹ Even most contract rates are tied to NCC-established classifications. While everyone recognizes that classification and ratemaking are not one and the same, their intimate relationship is the reason the current proceeding is of considerable interest to shippers.

Boiled down, the NCC's reply comments are not really a response to the suggestions put forward by the shipper parties, but rather a defense of the status quo that is entitled to little or no weight by the Board.

⁷ Id., V.S. of Winter.

⁸ Id., NCC Reply Comments, at 2 ("the market dictates actual carrier pricing, not the classification which is simply a tool to aid the pricing process").

⁹ See, e.g., Sec. 5a Application No. 61, National Classification Committee—Agreement (decision served December 18, 1998) ("Most collectively set rates are established in conjunction with the NCC's classification procedures."); Investigation of Collective Ratemaking and Related practices and procedures, 7 I.C.C. 2d 388 (1991); see also National Classification Committee v. United States, 22 F.3d 1174, 1175 (D.C. Cir. 1994).

3. NCC Offers No Reasons Why A Moratorium Should not be Ordered.

The NCC states it would not be in “the public interest” for the Board to grant HSIA’s request to suspend pending classification proceedings until the Board resolves the issues now open for comment.¹⁰ The NCC offers no reasons for this position, however. As HSIA argued in its opening comments, it would be inappropriate for pending classification proceedings to go forward until the issues of enhanced shipper participation and transparency are addressed, given the inherent bias the Board has found in the current process.

Respectfully submitted,



Stephen P. Risotto
Executive Director
Halogenated Solvents Industry Alliance Inc.
2001 L Street, N.W., Suite 506A
Washington, D.C. 20036

Scott N. Stone
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

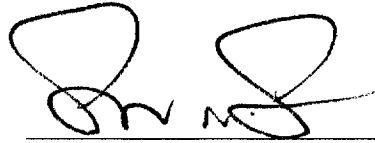
Counsel for the Halogenated Solvents
Industry Alliance, Inc

Dated and due: June 12, 2000

¹⁰ NCC Reply Comments, Reply V.S. of Foley at 14.

CERTIFICATE OF SERVICE

This is to certify that I have, this 12th day of June 2000, caused copies of the foregoing comments to be served upon parties of record in Sec. 5a Application No. 61 (Sub-No. 6),
National Classification Committee – Agreement.

A handwritten signature in black ink, appearing to read "SN Stone", is written above a horizontal line.

Scott N. Stone