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BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL



SECTION 5a APPLICATION NO. 61 (Sub-No. 6)
NATIONAL CLASSIFICATION COMMITTEE -- AGREEMENT

COMMENTS OF NATIONAL SMALL SHIPMENTS TRAFFIC
CONFERENCE, INC. AND THE HEALTH AND PERSONAL
CARE LOGISTICS CONFERENCE, INC.

ENTERED
Office of the Secretary

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Public Record

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, DC 20037
(202) 393-5710

Attorney for National Small Shipments
Traffic Conference, Inc. and The
Health and Personal Care Logistics
Conference, Inc.

Due and Dated: May 20, 2002

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CARE LOGISTICS CONFERENCE, INC.

National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and the Health and Personal Care Logistics Conference, Inc. ("H&PCLC")¹ (collectively, "Shipper Conferences"), hereby respectfully submit their comments on the Proposed Modifications of Presently Approved National Classification Committee Section 5a Agreement No. 61 ("Proposed Modification"), filed March 20, 2002 by the National Classification Committee ("NCC").

I. BACKGROUND

Much of the history of this proceeding is set forth in the STB's Decision served November 20, 2001 ("2001 Decision"), pursuant to which these Comments are being filed. See 2001 Decision at 23. Additional details are provided by the Board's earlier decisions and by the numerous comments and filings in the administrative record. The Board's 2001 Decision represents the culmination of lengthy proceeding to reform the

¹ H&PCLC is the same association that formerly participated in this proceeding as the Health and Personal Care Distribution Conference, Inc. The organization's name was changed in March 2002.

operations of the NCC. Continued antitrust immunity for the NCC is conditioned on its compliance with the Board's reforms. See 49 U.S.C. § 13703(a)(3) and (6).

In its 2001 Decision, the Board ordered two key reforms. The first is the requirement that shippers receive "access to the studies and data underlying ... staff reports and analyses and proposals before the NCC." 2001 Decision at 15. The second is the Board's determination that neutral arbitration should be available as an alternative to a protest before the STB where there is dispute concerning NCC action. 2001 Decision at 20-21.

The Shipper Conferences regard these two changes as critical to the success of the Board's effort to reform a classification process that, without these changes, is too susceptible to bias or manipulation. As the Board recognizes, increasing classification ratings lead to increased class rates. 2001 Decision at 3. Despite pervasive discounting, higher class rates mean higher freight rates for most shippers. In fact, the widespread use of readily-comparable discounts may make "stealth" rate increases through upward revisions to commodity class ratings particularly useful to some motor carriers. See the Shipper Conferences' Opening Comments in this proceeding dated April 11, 2000, at pp. 9-11. It is therefore necessary to impose a system of checks and balances on a process that could otherwise amount to price-fixing among competing trucking companies behind a shield of antitrust immunity.

Moreover, the protections the Board has imposed must provide the reality, and not merely the appearance, of preventing abuses by NCC. Ineffective conditions on continued antitrust immunity for the NCC could prove worse than no conditions, by replacing effective antitrust remedies with ineffective regulatory remedies.

Despite falling short of the remedies the Shipper Conferences and other shipper parties sought in this proceeding, the Board's changes can help level the playing field for shippers, particularly if the two main changes operate together. Greater access to file data will do little to help shippers if bias is not eliminated from the decision making process. The option to appeal to a neutral arbitrator will be of limited value if shippers do not have access to the data they need to test NCC's proposals, analyses and decisions. However, real relief in both of these areas -- access to data and arbitration -- should lead to improvements in freight classification.

Many of the elements of the Proposed Modification are acceptable. As will be seen, the changes and clarifications sought by the Shipper Conferences are not extensive. Even with shippers' changes, however, the new NCC Agreement will require adjustments by shippers, carriers and the NCC itself. The practical effects of the 2001 Decision, as implemented in the new Agreement, may turn out to include unintended and adverse impacts, along with anticipated improvements.

The Shipper Conferences expect to work with other shippers, the NCC and its carrier members to address any problems that arise in addressing classification issues under the new Agreement. It should also be noted, however, that the STB is authorized by 49 U.S.C. § 13703(c) to review the new Agreement, "on its own initiative or on request." As the result of such a review, the Board "shall change the conditions of approval or terminate [the agreement] when necessary to protect the public interest."

II. COMMENTS

A. Access to NCC File Data

The first key reform called for by the 2001 Decision is shipper access to NCC file data. Shippers have long believed that established class ratings, at which carriers vigorously compete for shippers' business, are too easily subjected to reviews and revision. Apparently, a single carrier complaint about a single low density shipment can lead to a review matter and a docketed proposal requiring shippers to mount an expensive and burdensome campaign to defend the current class ratings. See, e.g., the discussion of the rubber hose matter in the Shipper Conferences' April 11, 2000 Opening Comments at 16-19. Clearly, shippers need better access to documents and analyses underlying NCC proposals, in order to determine whether proposals are adequately supported.

The provisions of Article IV, Rule 4 in the NCC's Proposed Modification are a step in the right direction, but they do not go far enough. Attached hereto as Appendix A is an amended version of those provisions, developed by the Shipper Conferences, the National Industrial Transportation League and the Halogenated Solvents Industry Alliance. (Appendix A-1 is a redline version, showing additions and deletions; Appendix A-2 is a clean version reflecting the changes). These revisions should be adopted.

The first suggested change is minor, and is intended to permit parties to assess the representativeness of file data. In support of this goal, the NCC could mask identities, but should do so with notations such as "national carrier A", "national carrier B", "national carrier C", etc., so shippers know whether the proposal is supported by many carriers or only one or two.

The second change sought by shippers is the possibility of access to the identity of commenters, subject to an appropriate protective order limiting disclosure of protected information by outside counsel and consultants, as is done routinely in railroad rate cases. Where a protective order is sought, the schedule should be extended.

In subsection (b), shippers would add provisions allowing an examination of file documents at NCC's offices. Where the file is voluminous, or contains documents already in a party's possession, this option could reduce the amount of copying necessary, saving money for shippers and reducing NCC's burden of production. After reviewing the documents at NCC's offices, a shipper could designate specific documents for copying. The meaning of "reasonable charge" for production would be clarified by the addition of the words "not to exceed the Committee's cost of copying." Finally, a time limit would be established under subsection (c) for the posting of document indices on the NMFTA's website, which would be made mandatory rather than voluntary.

These changes would not unduly burden the NCC, and would facilitate the transparency called for in the 2001 Decision.

B. Arbitration Provisions

The second key reform in NCC classification procedures resulting from the 2001 Decision is the Board's creation of a new appellate option. Shippers dissatisfied with NCC initial decisions (by Panels consisting of 12-15 trucking company representatives) formerly had to appeal to the full NCC (consisting of 70-100 trucking company representatives). Shippers sometimes won on appeal, or obtained relief in the form of modifications to objectionable proposals, but many shippers felt that the full NCC too often lis-

tened politely, and then gave the benefit of any doubt to their carrier colleagues and upheld the Panel decision.

Under the 2001 Decision, shippers dissatisfied with initial decisions (whether by a Panel or by the full NCC) will have the option of seeking review by a neutral arbitrator. If shippers do not exercise this option, they may protest the classification change at the STB. If they do exercise this option, their only recourse if dissatisfied with the arbitrator's decision will be to institute a complaint proceeding at the STB.

Electing arbitration may make sense in cases that are unlikely to require STB action. However, a shipper that expects to seek a final determination by the STB may prefer to protest the NCC decision, rather than filing a complaint. Protests do not require a filing fee, while complaints do (the current fee appears to be \$5,400). In addition, in an investigation and suspension proceeding, the NCC would bear the burden of proof; in a complaint proceeding, the complainant (usually, the shipper) would bear the burden of proof.

Under the circumstances, the value of arbitration as a reform of NCC classification processes will be compromised if the arbitration is not designed in such a way as to reflect procedural and substantive fairness. In addition, arbitration procedures should not be unduly burdensome or restrictive. The arbitration option is unlikely to serve its intended function if those who opt for it regret their choice.

The Shipper Conferences have worked with the National Industrial Transportation League on an alternative set of NCC Agreement provisions for arbitration under the 2001 Decision's requirements. The Shippers' Version of Article V -- Arbitration, is attached

hereto as Appendix B. (Appendix B-1 is a redline version, and Appendix B-2 is a clean copy of the Article incorporating the changes.)

One concern for shippers is the speed with which the process would operate. It is true that under the current Agreement, shipper appeals from a Panel decision to the full NCC may take as little as 90 days (assuming NCC meetings at 90 day intervals). But this is a minimum, not a maximum. Both NCC Panels and the full NCC may defer decisions to the next meeting, as discussed in more detail below.

Under the arbitration rules in the Proposed Modification, this 90 day period becomes the maximum duration for arbitration. The first 30 days is set aside for decisions as to whether to seek arbitration. The next 15 days is used for determining the arbitrator. During the final 45 days, the record documents are provided to the arbitrator, the parties file their evidence and arguments, and the arbitrator must review the file, consider the arguments, and produce the arbitral decision.

In the Shippers' Version, the decision whether to arbitrate must be made within 15 days, and prior identification of a list of neutrals may expedite the selection of the arbitrator (though there are procedures for choosing a neutral arbitrator if less formal efforts are unsuccessful).² These changes permit more time for briefing and for the arbitrator to consider (and write) his or her decision.

The NCC's approach in Article V, Rule 6 (Rule 7, in the Shipper's Version) is also too restrictive. Forcing the arbitrator to rely solely on the record before the NCC as to factual issues may be acceptable, but the parties should be able to make policy arguments, and challenge the procedural fairness of proceedings before the NCC, just as they

would on appeal from a Panel to the full NCC. (Indeed, on appeal from a Panel to the full NCC, shippers may supplement the record with additional data, including newly discovered information.) Accordingly, the Shippers' Version expands the scope of what the arbitrator can consider, including the parties' statements.

The fourth sentence of NCC Rule 6 (Shippers' Version Rule 7) provides "The arbitrator's conclusions shall be governed by the established regulatory and legal standards and ICC, STB and court precedent for evaluating the reasonableness of classification provisions." The succeeding sentence is therefore unnecessary. It is also potentially harmful.

In requiring arbitrators to reach decisions based exclusively on the four recognized transportation characteristics of the commodity at issue, in comparison with other commodities, the NCC is assuming a *de novo* review standard. In effect, the arbitrator would merely perform a new classification analysis. But the arbitrator's decision might turn on whether the NCC's decision is adequately supported by credible evidence, or is consistent with procedural due process as defined by the NCC Agreement and ICC and STB precedent.

In addition, the appeal might involve the issue of whether the NCC's standards, or its implementation of those standards, should be sustained. For example, on a number of occasions recently, the NCC has replaced a simple, catch-all item with an item that has eleven sub-categories, with different ratings for different densities. This approach may impose significant administrative burdens on shippers whose customers order mixed shipments. Where the main issue in arbitration is whether the burdens of such an ap-

² These procedures are more likely than NCC's proposed procedures to produce a neutral arbitrator that both sides accept. The NCC's approach allows the NCC Secretary to choose the arbitration associa-

proach outweigh its benefits, the sentence in question from NCC's Proposed Modification would be too restrictive.

The reference to the ICC's decision in Ex Parte No. MC-98 (Sub-No. 1), Investigation into Motor Carrier Classification, 367 I.C.C. 243 (1983), should be deleted. To the extent that decision is applicable, it will be considered pursuant to the Rule's prior sentence as "established regulatory and legal standards and ICC, STB and court precedent." But the new NCC Agreement may remain in effect for many years, and STB (or court) decisions during that time may alter standards for freight classification. It would be anomalous for new law to be ignored by arbitrators because the NCC agreement mandates adherence to a 1983 ICC decision.

With the changes set forth in the Shippers' Version, arbitration should operate in a manner that comports with the 2001 Decision and other applicable law, and is fair to the parties.

C. Other Comments

In the interest of clarity, the Shipper Conferences' other comments will be raised in the order of the Articles and Sections of the NCC's Proposed Modification under which they arise.

Article III, Section 2(b) of the Proposed Modification states that a Classification Panel may approve, disapprove or modify a proposal. Proposed Modification at 17. A comparison of this provision with its predecessor (Article IV, Section 1(b), Proposed Modification at 23) discloses that the NCC has deleted the possibility of a Panel decision to "defer disposition of the proposal until the next meeting of the panel, provided, however, that there shall be no more than one such deferral."

tion, and allows the arbitration association to decide whether a conflict of interest disqualifies an arbitrator.

The Shipper Conferences are aware of many instances in which deferred action has been beneficial. Deferring a proposal to the next cycle may permit conflicting positions to be reconciled, differences to be narrowed, or compromises to be negotiated that permit all disputes to be eliminated.

This "escape valve" may be even more important in the future. Extra time may be needed in the early stages of the parties' adjustment to the new Agreement, and also if a particularly important, complex or controversial classification matter arises. And since it would have discretion to defer action on a proposal, the NCC should not object to modifying the new Agreement to preserve this well-established provision. The Board's decision should clarify, however, that the NCC should not unreasonably decline requests for deferral of proposals.

The new Agreement as proposed by the NCC would continue to call for action on docketed proposals within 120 days, but that requirement is also in the existing Agreement, which permits deferral not only of Panel action from one panel to the next, but also of full NCC appellate action from one full NCC meeting to the next (see Rule 7(d) at Page 29 of the Proposed Modification). As the Board has pointed out, there is no longer any statutory requirement of action within 120 days. See 2001 Decision at 12, n. 20. Accordingly, the Shipper Conferences recommend that the 120 day deadline be deleted.

Article III, Section 3 of the Proposed Modification illustrates the need for the possibility of deferral of a proposal. Under the current Agreement, shippers have less access to data in NCC's files, but more time to prepare their comments. Shipper comments have been received as late as the day of the NCC Panel or Committee meeting, though many

shippers try to file earlier, to permit their evidence and arguments to be circulated to the meetings' attendees.

Under the Proposed Modification, shippers will have access to more data, but less time to prepare their filings. If the NCC discloses the proposal on the 60th day prior to a meeting, and a shipper immediately requests file data, the shipper may have, at most, 28 days in which to review the data gathered by the NCC as to the proposal. In fact, since the notice published 60 days prior to the meeting can (and currently normally does) contain only a summary of the NCC's Staff analysis, shippers will generally not know the NCC Staff's rationale for the proposed change until the file documents are made available. This date could be further delayed if it is necessary to obtain a Protective Order from the STB.³

Once all the file documents are in hand, the shipper or shipper counsel must analyze them, assess the soundness of the Staff's facts and analysis, gather additional information, and consider whether to oppose or seek modification of the proposal. If the decision is made that opposition or a request for modification is in order, the shipper must gather its documents, prepare its statement, and file everything (including workpapers) with the NCC, all in 3 to 4 weeks.

There will no doubt be proposals as to which this timetable is adequate. However, it is also likely that there will be proposals as to which the timetable will be difficult to meet.

³ As the Board is aware from rail rate cases, even the existence of a protective order is sometimes not enough to prevent delays. Railroads routinely cite alleged confidentiality issues as grounds for refusing to provide copies of rail transportation contracts to shippers' outside counsel or consultants without a further order directing them to do so.

If the available timetable is inadequate because the proposal is broad, complex, or highly controversial, rigid adherence to the Article III, Section 3 schedule could be contrary to the public interest. An example of such a proposal is the NCC's proposal to double or triple the class ratings on hundreds of poisonous materials, as discussed in the Shipper Conferences' June 12, 2000 Rebuttal Comments in this proceeding, at 33-37.

That dispute was ultimately resolved, but only because the NCC acceded to the shippers' request to devote additional time to exploring compromise. The new Agreement should not eliminate the possibility of such deferrals, thus forcing shippers to put on their case in less than 30 days even as to the most complex proposals, merely because there will be other proposals that do not require a longer timetable.

One consideration that may mitigate the timing problem discussed above is the Proposed Modification's statement, at 19, that "The Docket Bulletin shall also list classification review matters to be considered at the meeting, including how to contact the staff member assigned and how to obtain a copy of the relevant staff report." Access to these reports has been helpful to shippers in the past, by providing an early warning as to classification issues that may become proposals.

The Proposed Modification does not explicitly provide an opportunity for shippers to address review matters at NCC meetings, but neither does the existing Agreement. Nevertheless, shippers have been allowed to comment on Staff review matter reports, and the Shipper Conferences assume that this practice, which is beneficial to shippers and carriers, would continue under the new Agreement. If this assumption is incorrect, the NCC should explain its position in its reply comments on the Proposed Modification.

Although the foregoing considerations may mitigate problems, it is also important to ask whether NCC's schedule appropriately allocates the 60 days prior to a meeting as between the NCC and shippers. The 2001 Decision suggested, but did not impose, a deadline for shipper comments 30 days prior to the meeting. 2001 Decision at 14. This could often mean shippers' entire case would have to be produced in 30 days, even though the NCC would have had far more time to develop its proposal, particularly when analysis during the classification review matter phase is included.

In addition, NCC proposes to use the 30 days after the shippers' case is filed to rebut the shippers' evidence and arguments, and to prepare for the meeting. All in all, the result is an imbalance in available time for the two sides to prepare, to NCC's advantage.

The Shipper Conferences propose enlarging the 30 day period for shipper filings to 45 days, with a final filing opportunity for the NCC and any interested party not later than 7 days before the meeting. These changes would be implemented by changing subsections (2) and (3) of Article III, Section 3 to read as follows:

(2) No later than fifteen (15) days prior to the public meeting, interested parties may submit statements, including any underlying studies, workpapers, supporting raw data and any other information relating to a docketed proposal to the Secretary of the Committee.

(3) No later than seven (7) days prior to the public meeting, the Committee and any interested party may submit a statement or analysis regarding the information of record, but no new facts, data or evidence will be accepted or considered. The Committee shall include this material in the public docket file.

Article III, Section 3(f) would impose new limits on what the Classification Panel may consider in assessing a docketed proposal. The Shipper Conferences do not object to consideration of the "applicable regulatory and legal standards and precedent establish-

ing the reasonableness of classification provisions." Nor do the Shipper Conferences object to consideration of the "public record," so long as that term is clarified.

In the judgment of the Shipper Conferences, the public record should include all documents in the NCC file, whether or not cited by a party. Otherwise, a Panel could make an assumption contrary to the facts or record, and there would be no possibility of correction. Assume, for example, that a shipper puts on its case 30 days prior to the meeting and the NCC Staff argues, 15 days later, that the shipper is wrong. At the meeting, shipper representatives should not be precluded from attempting to resolve the dispute by referring to file documents not previously cited in the shipper's filing.

Finally, the Shipper Conferences are concerned about the NCC's proposal to have NCC's Policies and Guidelines as one of the three elements by which "the Committee or a Classification Panel will be guided exclusively." These Policies and Guidelines are currently said to be discretionary. The Proposed Modification would appear to make them mandatory. Moreover, where there is a classification dispute, legal principles should be the ultimate standard, and such principles should not be trumped by Policies and Guidelines developed (or changed) unilaterally by NCC.

It is not clear from the proposed Modification how NCC's Policies and Guidelines (which are apparently the same as the "Policies and Directives" on NMFTA's website) are established and modified. If these policies, which are not published in the National Motor Freight Classification itself, can be changed by NCC without the procedural protections called for by the 2001 Decision, then requiring NCC classification decisions to be "guided exclusively" by them would create a huge loophole. The NCC could adopt a questionable policy without shipper knowledge or participation, use that policy to guide

Panels to decisions that are self-serving, and argue that this result is mandated by the terms of NCC's Agreement.

In summary, the Shipper conferences recommend that the last sentence of Article III, Section 3(f) be amended to read as follows:

In considering a docketed proposal, the Committee or a Classification Panel will be guided by

- (1) the applicable regulatory and legal standards and precedent for establishing the reasonableness of classification policies and provisions;
- (2) the public record established by the process set forth in this Agreement, including all file documents; and
- (3) principles of procedural fairness and the arguments of the parties.

Article IV, Rule 6(c), prohibiting discussion of provisions governed by 49 U.S.C. § 14706(c)(1)(C), appears to be unnecessary. The requirement that the NCC be guided in its actions by applicable law is set forth elsewhere in the Proposed Modification, and this requirement would apply even if the Agreement were silent on the obligation of NCC and participants in NCC proceedings to comply with statutes and regulations.

NCC may argue that the provision is harmless, and a useful reminder to NCC members who read the Agreement but not the ICCTA. However, if this is the goal, it would be better achieved by more neutral language tracking the statute, such as: "No discussion, consideration, or approval as to rules to limit liability under 49 U.S.C. § 14706(c) may be undertaken by carriers acting under this Agreement."

The concern of the Shipper Conferences' in this regard is not merely academic. At a recent NCC meeting, there was a proposal to increase class ratings on cigarettes, due

to concerns about losses due to theft. The shipper parties argued against reclassification on the ground that carriers had disclaimed or limited their liability for loss claims on cigarettes to such a degree that an increase in cigarette class ratings was unwarranted. These arguments were initially rejected on the ground that the NCC was precluded by 49 U.S.C. § 14706(c)(1)(C) from considering carriers' actual exposure to liability, and could therefore consider only whether the value of cigarettes had risen, increasing carriers' theoretical (but not actual) exposure to liability.

The NCC subsequently decided to take no action on the proposal, but similar proposals could arise in the future, particularly in light of terrorism concerns and insurance premium increases. The Shipper Conferences were not parties to the cigarette matter, and do not believe the Board should opine in the abstract on whether the statute requires NCC classification decisions to be made without regard to pervasive liability limitations by carriers (although the Conferences believe this is a misreading of the statute).

The point here is rather that if this issue arises again in the future and the Board clarifies that NCC classification determinations can take account of pervasive released value arrangements, it should not be necessary to modify NCC's Agreement to give effect to that STB decision. A revision along the lines suggested by the Shipper Conferences should avoid that result.

Article VI, Section 2 is unclear. That section permits a referendum on an amendment to the NCC Agreement adopted by two thirds of the members at a meeting, so long as a referendum request by the specified number of NCC members is made (it is not clear whether "made" means sent or received) within 40 days after the date of such amendment. However, the section does not specify whether the 40 days runs from the

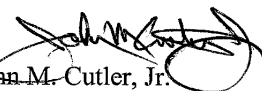
date of the NCC meeting or the date of the STB approval, which is required before an amendment may become effective. NCC might consider clarifying that the 40 day period starts to run on the date of the meeting at which the amendment is approved. This clarification would mean that the STB would not need to consider an amendment that might thereafter be subject to a referendum and rejection by NCC members.

Publication of the NCC Agreement on the NMFTA Website. The Shipper Conferences urge that, for convenient reference, the new NCC Agreement be posted on the NMFTA website. The Agreement contains the rules by which the NCC operates, and access to the Agreement (which is currently neither available on NMFTA's website nor published in the NMFC) should be facilitated, for the benefit of carriers and shippers.

III. CONCLUSION

For the foregoing reasons, the STB should require any new NCC Agreement to reflect the changes in NCC's Proposed Modification, amended as detailed above.

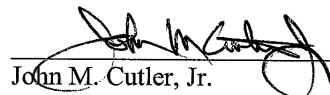
Respectfully submitted,


John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, DC 20037
(202) 393-5710

Attorney for National Small Shipments
Traffic Conference, Inc. and The
Health and Personal Care Logistics
Conference, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of May, 2002, served the foregoing document on all parties of record by first class mail, postage prepaid.


John M. Cutler, Jr.

s:medjoint comments

APPENDIX A-1

ARTICLE IV -- RULES OF PROCEDURE FOR CHANGES IN THE NATIONAL MOTOR FREIGHT CLASSIFICATION

Rule 4. Public Docket Files

(a) Copies of all reports, analyses, studies, work papers, supporting raw data and other information in the Committee's possession relating to a docketed proposal, along with the full text of the proposed change, shall be made available in a public file, subject to any protective orders that may be obtained from the Surface Transportation Board. Protective orders notwithstanding, the The public docket file will not name the entity that provided the raw data, where that entity requests confidentiality, but will describe the type of entity in general terms, to permit the parties to consider whether the information is representative or will it include information that could lead to the name of the entity that provided the raw data. The source of the raw data will be identified as "shipper/receiver A," "national carrier B," or the like. Outside counsel and consultants may seek additional access to any withheld information in the public data files (including the identity of the providers of data) by filing a petition for a protective order with the STB. In such dockets, the earliest day for NCC (or Panel) action will be 60 days after STB action on the petition for a protective order.

(b) Any interested person may obtain the Committee's public file on any docketed proposal by submitting a request in writing by mail, by e-mail or by facsimile to the Committee. The request must specify the Committee's docket and subject numbers, the material(s) sought, and whether the material(s) should ~~is to be~~ furnished by mail or e-mail or made available for courier pick-up, or viewed at the Committee's office. The

material(s) will be mailed, e-mailed or made available for courier pick-up or made available at the Committee's office no later than two (2) business days after the request is received. ~~If the request is received before the docket record is closed, that~~ The material(s) will be furnished as of the date the request is received. ~~After the docket record is closed, any~~ Any material(s) added to the public file subsequent to the date of the request will be furnished, as per the requesting party's instructions, within two (2) business days. A reasonable charge will be assessed for these services, not to exceed the Committee's cost of copying.

(c) ~~The~~ Within two (2) days after receipt of file documents, the Committee ~~may~~ will also post the public docket files on the National Motor Freight Traffic Association's website, organized by docket and subject numbers, each file including an index of documents.

(d) The Committee's public docket files will be retained at the Committee's offices for a period of at least five (5) years. Public files posted on the National Motor Freight Traffic Association's website will be retained there until final disposition, including any arbitration proceeding or proceedings before the Surface Transportation Board.

APPENDIX A-2

ARTICLE IV -- RULES OF PROCEDURE FOR CHANGES IN THE NATIONAL MOTOR FREIGHT CLASSIFICATION

Rule 4. Public Docket Files

(a) Copies of all reports, analyses, studies, work papers, supporting raw data and other information in the Committee's possession relating to a docketed proposal, along with the full text of the proposed change, shall be made available in a public file. The public docket file will not name the entity that provided the raw data, where that entity requests confidentiality, but will describe the type of entity in general terms, to permit the parties to consider whether the information is representative. The source of the raw data will be identified as "shipper/receiver A," "national carrier B," or the like. Outside counsel and consultants may seek additional access to any withheld information in the public data files (including the identity of the providers of data) by filing a petition for a protective order with the STB. In such dockets, the earliest day for NCC (or Panel) action will be 60 days after STB action on the petition for a protective order.

(b) Any interested person may obtain the Committee's public file on any docketed proposal by submitting a request in writing by mail, by e-mail or by facsimile to the Committee. The request must specify the Committee's docket and subject numbers, the material(s) sought, and whether the material(s) should be furnished by mail or e-mail or made available for courier pick-up, or viewed at the Committee's office. The material(s) will be mailed, e-mailed or made available for courier pick-up or made available at the Committee's office no later than two (2) business days after the request is received. The material(s) will be furnished as of the date the request is received. Any

material(s) added to the public file subsequent to the date of the request will be furnished, as per the requesting party's instructions, within two (2) business days. A reasonable charge will be assessed for these services, not to exceed the Committee's cost of copying.

(c) Within two (2) days after receipt of file documents, the Committee will also post the public docket files on the National Motor Freight Traffic Association's website, organized by docket and subject numbers, each file including an index of documents.

(d) The Committee's public docket files will be retained at the Committee's offices for a period of at least five (5) years. Public files posted on the National Motor Freight Traffic Association's website will be retained there until final disposition, including any arbitration proceeding or proceedings before the Surface Transportation Board.

APPENDIX B-1

ARTICLE V – ARBITRATION

Should any party disagree with the disposition of a docketed proposal by the Committee or a Classification Panel, arbitration may be sought by that party subject to the following rules of procedure.

Rule 1. List of Potential Neutral Arbitrators

The Committee shall request and obtain from the American Arbitration Association, and/or from any other reputable neutral independent arbitration organization approved in advance by the Board, a list of at least fifty (50) neutral arbitrators that could be selected to decide a dispute concerning action on a docketed proposal. The list of neutral arbitrators shall be obtained in advance of any request that may be made for arbitration and shall be posted on the NMFTA web site.

Rule 2. Request for Arbitration

The party seeking relief shall be referred to as the claimant and the National Classification Committee (Committee) shall be referred to as the respondent. Within ~~thirty~~fifteen (30~~15~~) days of a classification decision by the Committee or a Classification Panel, claimant(s) shall notify the ~~Secretary of the Committee~~Secretary of the Committee by mail, telephone, e-mail or facsimile ~~telephone, e-mail or facsimile~~ that arbitration is requested of the Committee or Classification Panel action on the docketed proposal.

Rule 2-3. Selection of Arbitrator

(a) Within ~~two~~seven (27) business days after such notice by claimant(s), the Secretary of the Committee shall develop, prepare or select a list of neutral arbitrators from an independent request for arbitration association. The list of neutral arbitrators shall be forwarded by mail ~~has been made~~, e-mail or facsimile to the claimant(s). The claimant(s) and the Secretary of the Committee shall confer by telephone, e-mail or facsimile within three (3) business days after the list of the neutral arbitrators has been received to mutually agree to a neutral arbitrator, whether from the list of neutrals posted on the NMFTA website or otherwise. If the claimant(s) and the Secretary select different neutral arbitrators and cannot agree on a single neutral arbitrator, they will so notify the arbitration association, and the two selected arbitrators will choose the arbitrator to handle the matter from the remaining arbitrators on the list who were not selected. The arbitration association shall be notified by telephone, e-mail or facsimile of the selection of the neutral arbitrator, and the arbitration association shall determine whether the selected neutral arbitrator has a conflict of interest. The claimant(s) and the Secretary of the Committee shall be notified promptly of the results of that inquiry. If a conflict exists, the two originally selected arbitrators will choose another neutral arbitrator until no conflict of interest exists.

(b) If the parties are unable to agree within the time period set forth in paragraph (a), the Secretary of the Committee shall randomly select fifteen (15) names from the total list of arbitrators posted on the NMFTA website. The Committee shall develop procedures providing

for the random selection process. The randomly-selected list of 15 neutral arbitrators shall then be forwarded by e-mail or facsimile to the claimant(s).

(c) Within five (5) business days of receipt of the list, each party shall simultaneously select eight (8) names from the list of fifteen (15) whom it deems potentially acceptable to serve as the neutral arbitrator. If the parties' selections result in one (1) common name, that person shall serve as the neutral arbitrator. If the parties' selections result in more than one common name, each party will rank these candidates, assigning the number "1" to its preferred candidate, the number "2" to its second choice, and so on for all of the commonly selected individuals. The numerical values of the parties' rankings for each candidate will be added together, and the candidate with the lowest total number will be selected as the neutral arbitrator. If two or more candidates have the same lowest total number, the neutral arbitrator will be selected randomly from those candidates that received the lowest total number.

(d) After the neutral arbitrator is selected, that individual will be interviewed together by the parties to determine whether a conflict of interest exists. In the event a conflict of interest is discovered, the parties will select the individual with the second lowest rating to serve as the neutral and repeat the process of determining whether a conflict of interest may exist. If there are no other common names, the Committee will immediately forward a new list of 15 randomly-selected names from the total list, and the process will be repeated.

Rule 3-4. Commencing the Arbitration Process

Prior to Following the commencement selection of the review by the neutral arbitrator, claimant(s) the parties and the Committee will be required to execute an arbitration agreement. Upon receipt of the signed arbitration agreement, the arbitration association arbitrator shall direct the selected neutral arbitrator to commence the proceeding arbitration process. The claimant(s) and the Committee will share equally in the fees and expenses charged for the services of the neutral arbitrator and any costs relating to the arbitration process by the arbitration association, except that each will bear their own legal or representation fees and administrative costs.

Rule 4-5. Transmittal of Public Record

Within one (1) business day after the notice of the selection of a neutral arbitrator, the Secretary of the Committee shall forward by express mail a complete copy of the public record developed during the course of the handling of the docketed proposal before the Committee or a Classification Panel to the arbitrator, and concurrently, a copy (copies) by express mail to the claimant(s).

Rule 5-6. Parties' Statements of Position

Within seventen (710) business days after the notice of the selection of a neutral arbitrator, the claimant(s) may submit to the arbitrator a statement of position as to why the initial classification action by the Committee or a Classification Panel is not in conformity with established classification standards. A copy of the statement shall be provided by express mail, e-mail or facsimile to the Secretary of the Committee. Within seventen (710) business days after the receipt of claimant(s) statement(s), the Committee may submit a response by express mail, e-mail or facsimile to the arbitrator, and shall send a copy by express mail, e-mail, or facsimile to

the claimant(s). Within five (5) business days after the receipt of the Committee's response, the claimant may submit a rebuttal by express mail, e-mail or facsimile to the arbitrator and shall send a copy by express mail, e-mail or facsimile to the Secretary of the Committee.

Rule 6-~~7~~. Decision of Arbitrator

Within ~~forty-five~~thirty (45~~30~~) days after the receipt of the public record and the parties' statements (unless the parties agree to a shorter or longer time period), the arbitrator shall issue a written decision determining whether or not to affirm the challenged classification action. The decision must rely exclusively on the facts, evidence and information which comprise the public record that has been established by the process set forth in this Agreement and the parties' statements. The arbitrator's conclusions shall be governed by the established regulatory and legal standards and ICC, STB and court precedent for evaluating the reasonableness of classification provisions. The reasonableness of the class(es) proposed for any commodity shall be determined exclusively by comparison of that commodity's four recognized transportation characteristics (density, stowability, handling and liability, as defined by the Interstate Commerce Commission in Ex Parte No. MC 98 (Sub No. 1), Investigation Into Motor Carrier Classification, 367 I.C.C. 243 (1983) and related cases) with the transportation characteristics of other commodities that are assigned a comparable class(es). The decision will set forth the essential reasoning that was relied upon in reaching these conclusions. The arbitrator's decision shall be final, subject only to review through the filing of a complaint with the Surface Transportation Board. The Committee may publish any classification action found reasonable by the arbitrator to become effective not less than fifteen (15) days after the arbitrator publishes its decision.

Rule 7-~~8~~. Challenge ofto Classification Decision If Arbitration Is Not Sought

If arbitration is not sought within ~~thirty~~fifteen (30~~15~~) days after the classification decision on a proposal is made by the Committee or a Classification Panel, the approved changes may be published to take effect on not less than fifteen (15) days' notice. Should the classification change be protested before the scheduled effective date, in accord with the Surface Transportation Board's procedures, the protest and any reply by the Committee shall be based on the public record upon which the Committee's or Classification Panel's action was based, unless the party(ies) protesting the classification action establishes that the Committee failed to give notice of the docketed proposal as required by its approved classification procedures.

Rule 8-~~9~~. Challenge ofto the Arbitrator's Decision

If a classification decision by the Committee or a Classification Panel is the subject of an arbitration proceeding, the classification decision, if affirmed by the arbitrator, may not be protested to the Surface Transportation Board but must be challenged only through the filing of a complaint with the Surface Transportation Board.

APPENDIX B-2

ARTICLE V – ARBITRATION

Should any party disagree with the disposition of a docketed proposal by the Committee or a Classification Panel, arbitration may be sought by that party subject to the following rules of procedure.

Rule 1. List of Potential Neutral Arbitrators

The Committee shall request and obtain from the American Arbitration Association, and/or from any other reputable neutral independent arbitration organization approved in advance by the Board, a list of at least fifty (50) neutral arbitrators that could be selected to decide a dispute concerning action on a docketed proposal. The list of neutral arbitrators shall be obtained in advance of any request that may be made for arbitration and shall be posted on the NMFTA web site.

Rule 2. Request for Arbitration

The party seeking relief shall be referred to as the claimant and the National Classification Committee (Committee) shall be referred to as the respondent. Within fifteen (15) days of a classification decision by the Committee or a Classification Panel, claimant(s) shall notify the Secretary of the Committee by mail, telephone, e-mail or facsimile that arbitration is requested of the Committee or Classification Panel action on the docketed proposal.

Rule 3. Selection of Arbitrator

(a) Within seven (7) business days after a request for arbitration has been made, the claimant(s) and the Secretary of the Committee shall confer by telephone to mutually agree to a neutral arbitrator, whether from the list of neutrals posted on the NMFTA website or otherwise.

(b) If the parties are unable to agree within the time period set forth in paragraph (a), the Secretary of the Committee shall randomly select fifteen (15) names from the total list of arbitrators posted on the NMFTA website. The Committee shall develop procedures providing for the random selection process. The randomly-selected list of 15 neutral arbitrators shall then be forwarded by e-mail or facsimile to the claimant(s).

(c) Within five (5) business days of receipt of the list, each party shall simultaneously select eight (8) names from the list of fifteen (15) whom it deems potentially acceptable to serve as the neutral arbitrator. If the parties' selections result in one (1) common name, that person shall serve as the neutral arbitrator. If the parties' selections result in more than one common name, each party will rank these candidates, assigning the number "1" to its preferred candidate, the number "2" to its second choice, and so on for all of the commonly selected individuals. The numerical values of the parties' rankings for each candidate will be added together, and the candidate with the lowest total number will be selected as the neutral arbitrator. If two or more candidates have the same lowest total number, the neutral arbitrator will be selected randomly from those candidates that received the lowest total number.

(d) After the neutral arbitrator is selected, that individual will be interviewed together by the parties to determine whether a conflict of interest exists. In the event a conflict of interest is discovered, the parties will select the individual with the second lowest rating to serve as the neutral and repeat the process of determining whether a conflict of interest may exist. If there are no other common names, the Committee will immediately forward a new list of 15 randomly-selected names from the total list, and the process will be repeated.

Rule 4. Commencing the Arbitration Process

Following the selection of the neutral arbitrator, the parties and the arbitrator shall commence the arbitration process. The claimant(s) and the Committee will share equally in the fees and expenses charged for the services of the neutral arbitrator and any costs relating to the arbitration process, except that each will bear its own legal or representation fees and administrative costs.

Rule 5. Transmittal of Public Record

Within one (1) business day after the notice of the selection of a neutral arbitrator, the Secretary of the Committee shall forward by express mail a complete copy of the public record developed during the course of the handling of the docketed proposal before the Committee or a Classification Panel to the arbitrator, and concurrently, a copy (copies) by express mail to the claimant(s).

Rule 6. Parties' Statements of Position

Within ten (10) business days after the notice of the selection of a neutral arbitrator, the claimant(s) may submit to the arbitrator a statement of position as to why the initial classification action by the Committee or a Classification Panel is not in conformity with established classification standards. A copy of the statement shall be provided by express mail, e-mail or facsimile to the Secretary of the Committee. Within ten (10) business days after the receipt of claimant(s) statement(s), the Committee may submit a response by express mail, e-mail or facsimile to the arbitrator, and shall send a copy by express mail, e-mail, or facsimile to the claimant(s). Within five (5) business days after the receipt of the Committee's response, the claimant may submit a rebuttal by express mail, e-mail or facsimile to the arbitrator and shall send a copy by express mail, e-mail or facsimile to the Secretary of the Committee.

Rule 7. Decision of Arbitrator

Within thirty (30) days after the receipt of the public record and the parties' statements (unless the parties agree to a shorter or longer time period), the arbitrator shall issue a written decision determining whether or not to affirm the challenged classification action. The decision must rely exclusively on the facts, evidence and information which comprise the public record that has been established by the process set forth in this Agreement and the parties' statements. The arbitrator's conclusions shall be governed by the established regulatory and legal standards and ICC, STB and court precedent for evaluating the reasonableness of classification provisions. The decision will set forth the essential reasoning that was relied upon in reaching these conclusions. The arbitrator's decision shall be final, subject only to review through the filing of a complaint with the Surface Transportation Board. The Committee may publish any

classification action found reasonable by the arbitrator to become effective not less than fifteen (15) days after the arbitrator publishes its decision.

Rule 8. Challenge to Classification Decision If Arbitration Is Not Sought

If arbitration is not sought within fifteen (15) days after the classification decision on a proposal is made by the Committee or a Classification Panel, the approved changes may be published to take effect on not less than fifteen (15) days' notice. Should the classification change be protested before the scheduled effective date, in accord with the Surface Transportation Board's procedures the protest and any reply by the Committee shall be based on the public record upon which the Committee's or Classification Panel's action was based, unless the party(ies) protesting the classification action establishes that the Committee failed to give notice of the docketed proposal as required by its approved classification procedures.

Rule 9. Challenge to the Arbitrator's Decision

If a classification decision by the Committee or a Classification Panel is the subject of an arbitration proceeding, the classification decision, if affirmed by the arbitrator, may not be protested to the Surface Transportation Board but must be challenged only through the filing of a complaint with the Surface Transportation Board.