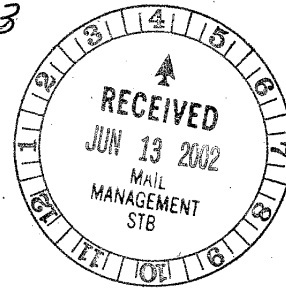


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Before The
Surface Transportation Board



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

Response To Comments Regarding Proposed
Modifications Of Presently Approved
National Classification Committee
Section 5a Agreement No. 61

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Due and Dated: June 13, 2002

Before The
Surface Transportation Board



Section 5a Application No. 61 (Sub-No. 6)
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Response To Comments Regarding Proposed
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The National Motor Freight Traffic Association, Inc. (NMFTA) and the National Classification Committee (NCC), by counsel, file this response to comments regarding the NCC's March 20, 2002 proposed modifications of its Section 5a Agreement No. 61 submitted by Bohman Industrial Traffic Consultants, Inc. (Bohman); the Halogenated Solvents Industry Alliance, Inc. (HSIA);¹ the National Industrial Transportation League (NITL); jointly by the National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Logistics Conference, Inc. (collectively referred to as NASSTRAC); and the Transportation Consumer Protection Council, Inc. (TCPC).² In reply, NMFTA and the NCC respectfully state as follows:

¹Halogenated Solvents Industry Alliance, Inc.'s comments support those submitted by NITL and NASSTRAC.

²The Transportation Consumer Protection Council, Inc. adopts the NASSTRAC comments.

I.
Prefatory Statement

As late as 1995, former Section 10702(a) of 49 U.S.C., required motor carriers to establish classifications of the freight they transported. Concomitantly, under Section 10701(a) of 49 U.S.C., any such classifications established by motor carriers pursuant to that statutory duty had to be reasonable. Today, Section 13701(a) of 49 U.S.C. continues the requirement that classifications collectively established by motor carriers under agreements approved under Section 13703 must be reasonable. However, reasonableness aside, it cannot be disputed that shippers are opposed to any classification changes that result in increased ratings. Unfortunately, that singular opposition, even when such classification ratings are reasonable, apparently has fueled the allegations by some shippers of a "perception of bias" concerning the classification process, which "perception" underpins the changes mandated by the Surface Transportation Board in its November 20, 2001 Decision.

It should be remembered that the current classification process is the product of Congressional mandates in the Motor Carrier Act of 1980, i.e. former Section 10706(a) of 49 U.S.C., and the detailed and specific requirements set forth in the implementing regulations of the Interstate Commerce Commission, see, e.g. Ex Parte No. 297 (Sub-No. 5), Motor Carrier Rate Bureaus—Implementation of P.L. 96-296, 364 I.C.C. 464 (1980). The reasonableness of the classification changes resulting under those procedures is well documented in this record. Of the 52 proposed classification increases protested over the past two decades, 42, or 80 percent, were neither suspended nor investigated by the ICC or the STB. More than 95 percent of the 52 proposals became effective as published, and two of the major proceedings found unreasonable by the ICC involving furnaces and poisons were reversed in Court and remanded to the agency.

The furnaces proposal was found reasonable as originally published, and substantial increases were established on poisons through an Ad Hoc Committee of carriers and shippers.

As the May 17, 2002 comments submitted by Raynard F. Bohman, Jr., President of Bohman Industrial Traffic Consultants, Inc., attest, not all shipper representatives agree that the final disposition of a classification proposal should be taken out of the hands of the NCC. In objecting to an exclusive arbitration review process, Mr. Bohman points out that:

For years, classification decisions made by NCC Classification Panels have been subject to appeals to the full National Classification Committee by dissatisfied parties of record (or a minimum number of NCC members or carriers participating in the National Motor Freight Classification). Further, parties dissatisfied with decisions made by the full NCC have been able to protest such NCC decisions to the Surface Transportation Board through timely petitions for suspension. Now, to retain its antitrust immunity, the present appellate process would have to be dismantled—a process that has worked well over the years.

Yes, the majority of appeals of Classification Panel decisions to the full Committee have [been] upheld by the Committee; however, a number of appeals have either modified Panel decisions or disapproved them. As examples, see Appeal 1055—Subject 16 of NCC Docket 971; Appeal 1056—Subject 12 of NCC Docket 971; Appeal 1067—Subject 15 of NCC Docket 992; Appeal 940—Subject 5 of Docket 869, and Appeal 1064—Subject 10 of Docket 985.

It is highly unlikely that those appeals would have been resolved in the manner in which they were had the Panel decisions been subject to arbitration. (Bohman Comments, p. 2.)

While believing that the current classification procedures do result in a fair and equitable opportunity for shippers and other interested persons to participate fully in the classification process, the NCC nonetheless accepted the STB's Decision and made every effort to comply with the revised procedures to mitigate any perception of bias and give certain shipper organizations additional incentives to participate in the classification process. No party to the proceeding contested the STB's November 20, 2001 Decision. No petitions for reconsideration

of any of the requirements and conclusions set forth therein were filed. To demonstrate the NCC's good faith compliance with the agency's determinations, in its March 20, 2002 Proposed Modifications, the NCC specifically identified its compliance with each of the specific changes set forth in Appendix A to the Decision, as well as with the time lines recommended in Appendix B. Additionally, the NCC identified its incorporation into the proposed modifications of the specific provisions the STB had discussed regarding the contemplated arbitration process.

Given those efforts, the NCC was greatly disappointed when the comments of some shipper associations were received which, rather than responding to the NCC's compliance with the STB's Decision, sought to reargue positions already rejected by the agency or to introduce additional requirements, including more stringent requirements than the STB had determined were necessary or justified. Under the guise of criticizing the NCC's proposed modifications, several of the shipper associations attempt to overturn the STB's Decision in a number of crucial respects. Some of the matters specifically addressed, and now apparently challenged by some shipper organizations, include the STB's findings:

1. Rejecting the HSIA contention that the public docket be available 90 days prior to NCC action, and concluding that: "[W]e find that 60 days' access to the reports, studies, and raw data underlying a classification proposal should be sufficient for interested parties to analyze and verify the data, without unduly delaying classification proposals." (Decision, p. 14);
2. Rejecting various shipper association contentions that their ability to assess the representativeness of the underlying data depended upon their ability to know who submitted the information, and concluding that substantial reasons existed for maintaining the confidentiality of those identities. The agency stated that: "To avoid concerns of possible retaliation, the name of the entity that provided the raw data may be excised. A description such as 'shipper/consigner' or 'carrier' could be provided instead." (Decision, p. 16);
3. Rejecting NASSTRAC/HCPDC's contention that the current classification criteria are subjective and skewed in the carriers' favor, and those of HSIA and SMART that other factors should apply, and reaffirming "that density, stowability, liability, and handling are the appropriate criteria to consider when classifying freight." (Decision, p. 17, fn. 25);

4. Rejecting NITL's proposed limitation on the authority of the STB to review an arbitrator's decision "only if it exceeds the Board's statutory jurisdiction or does not take its essence from the Interstate Commerce Act," and reaffirming that the traditional criteria for determining the reasonableness of a classification is "whether the classification is the same or similar to that of other commodities with similar transportation characteristics of density, stowability, handling, and liability." (Decision, p. 22);
5. Rejecting the contention by various shipper associations that the NCC alone should bear the total expense of the arbitration process, and concluding that "the proponent(s) and the opponent(s) of the initial determination...[should] split the cost of the arbitrator." (Decision, p. 21); and
6. In rejecting the NITL's argument that the agency's review of an arbitrator's decision should be limited, the STB further indicated that the basis for its review of a classification decision would be "the public docket that was considered by the NCC panel (and the arbitrator, if applicable)." (Decision, p. 22)

Although there are shipper suggestions and requests made that are given weight herein, many of the comments submitted either improperly seek to overturn the foregoing STB findings or to prolong the classification process through extended or open-ended time frames by including the opportunity for deferrals and protective orders, as well as with regard to the arbitration procedures. Those contentions are beyond the scope of this stage of the proceeding and should have been raised through petitions for reconsideration of the STB's November 20 Decision. It should be recognized that a number of the participating shipper organizations have been opposed to any classification proposals that would result in increased ratings. As discussed below, the belated changes in the recommended procedures they now interject are either designed to impair the implementation of those procedural changes, irrespective of their compliance with the STB's recommendations, or to delay the establishment of classification changes, irrespective of the carriers' statutory duty to establish reasonable classifications.

II.
Response of NMFTA and NCC To Shipper Comments

1. Comments of Bohman Industrial Traffic Consultants, Inc. (Bohman)

Except for the arbitration provisions, Bohman supports all the changes proposed by the NCC to its Section 5a Agreement. It objects, however, to removal of an appeal to the NCC, and the requirement that a final classification decision be rendered by an arbitrator. Bohman believes the present appeal process has worked well over the years, and that shippers should have the opportunity to select the resolution process they deem fairest to them. Hence, it is requested that the alternative of an appeal to the NCC or the arbitration process be made available—at least on a trial basis. (Bohman Comments, pp. 2-3.) Obviously, not all shippers share the “perception of bias” expressed by some shipper organizations, and prefer an appeal to the NCC.

It is believed that although the alternative requested by Bohman was not expressly considered in the STB’s Decision, such approach would not be inconsistent or incompatible with the agency’s requirement. The STB concluded that:

We believe the best way to provide the necessary assurance of fairness in the collectively established classification process is to require the NCC to provide interested parties with an option of review by a neutral arbitrator. (Decision, p. 19.)

Should the STB find, as requested by Bohman, that an appeal to the full NCC should be retained as another option, in addition to arbitration, the NCC would accommodate that alternative.

However, in the event of multiple parties to a classification proposal, all the parties would have to elect either an NCC appeal or arbitration. In the event the parties could not agree, then arbitration would have to be selected for a final decision.

2. Comments of the National Industrial Transportation League (NITL)

NITL states that, with several differences, its comments are in accord with those of NASSTRAC on the matters of the Public Docket File and Arbitration. Accordingly, all common matters discussed in this section will be jointly applicable to the NASSTRAC, HSIA and TCPC comments.³

Alleging that certain changes are required in the NCC's modifications to its Section 5a Agreement "to conform to the requirements stated by the Board in its 2001 Decision and/or for fair and efficient administration of the Board's conditions,"⁴ NITL argues that confidentiality should be accorded to the source of a proposal and related data or studies only when requested, and, even when requested, the NCC should provide a general description of "the type of entity submitting the information." NITL contends, without any specificity, that such identification is necessary to "assist parties who are evaluating the information by putting the proposal and data in context and in enabling a determination to be made as to whether such information is broadly or narrowly representative of the commodity classification being considered." (NITL Comments, pp. 6-7.)

Initially, it must be pointed out that for over two decades, and as is provided in the NCC's current and modified procedures, "Upon request, the name of the proponent of a proposal for collective action shall be promptly divulged to any person." Moreover, "In the case of a proposal docketed by the Committee or a Classification Panel, the member moving to docket, the

³ HSIA adopts, in large part, the comments of NITL and NASSTRAC, and its comments will be addressed below in conjunction with those of NASSTRAC.

⁴ NITL's argument that its modifications are necessary for conformance to the STB's 2001 Decision is curious in light of the fact that many of NITL's modifications would instead make substantial changes in the Decision.

member seconding the motion and a tally of the votes promptly will be divulged.” Therefore, NITL’s contention that it must know the “source of a proposal” is entirely misplaced and has no relevance.

NITL’s suggestion that a carrier or shipper who submits data to the NCC should have to specifically request nondisclosure of its identity is nothing less than a trap for the unwary. Its effect would be to maximize the chance that a carrier or shipper would be damaged through inadvertent disclosure of its identity. If a carrier or shipper unknowingly or through oversight neglects to request confidentiality, its identity would be fair game and its business compromised.

NCC objects to NITL’s untimely and improper attempt to reverse the STB’s findings in its November 20, 2001 Decision that confidentiality was necessary regarding the source of information to prevent “subjecting an individual shipper or carrier to pressure for having supplied information to the preparer of the study.” The STB deemed it adequate if the source of the data is identified as “shipper/consigner” or “carrier.” (Decision, p. 16.) In response to that finding, in modified Article IV, Rules of Procedure for Changes in the National Motor Freight Classification, Rule 4, Public Docket Files, subsection (a), the NCC provides that “the public docket file will not name the entity that provided the raw data, nor will it include information that could lead to the name of the entity that provided the raw data.” Further, that rule provides that “The source of the raw data will be identified as ‘shipper/receiver,’ ‘carrier,’ or the like.” Plainly, that rule is in conformity with the STB’s findings, and provides the generic description NITL claims it needs. Again, it appears that NITL has not carefully considered the NCC’s proposed modified procedures which fully address that matter.

NITL's suggestion that the need for complete access to the information contained in the reports, analyses, studies, work papers or raw data is necessary to determine whether matters have been "withheld from the public docket files" (NITL Comments, p. 8), is an unwarranted and impertinent attack on the integrity of NMFTA's staff, and has never been shown to occur in any classification matter handled by the NCC. Moreover, proposed Article IV, Rule 4, Public Docket Files, (a) specifies that "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 the public file." Disclosure of all information and data is not subject to the discretion of the NCC, but is a specific requirement of its Section 5a Agreement as modified. Therefore, NITL's concerns regarding the detection of withheld information has no foundation in fact or the procedures proposed by the NCC, and has nothing to do with the actual identification of the entity providing the data.

NITL's belated attempts to end run the need for the source confidentiality recognized by the STB in its November 20 Decision are not entitled to any weight at this stage of the proceeding, and are otherwise totally lacking in merit.

In a footnote NITL seeks to justify its need to know the identity of the person supplying the data by contending that confidential information would be in the hands of a neutral arbitrator reviewing the public docket. Therefore, it asserts that it should have access to that confidential data as well. (NITL Comments, p. 8, fn. 1.) That contention is based on an erroneous premise. The public docket file will not contain that confidential information. Thus, the prejudice which NITL rests its contention upon will not exist. Importantly, NITL has not, and cannot, establish any relationship between knowing the identity of the carrier or shipper supplying data and the representativeness of the information. The data speaks for itself. Also, it can be assumed that if

NITL is participating in a classification proceeding it is representing actual shipper interests affected by the classification change. They certainly can determine from the data of record, given the fact that their own products are involved, whether the information is representative of the products under consideration. In that instance as well, the identity of the shipper supplying the data is not needed to make that assessment.

NITL objects to the NCC's proposal in subsection (b) of Rule 4 contending that the NCC's provision for assessing a "reasonable charge" for reproduction of documents should be augmented with the qualification "not to exceed the Committee's cost of copying." NITL argues that the NCC "should not be able to earn a profit from such activities." (NITL Comments, p. 8.) Once again NITL ignores the fact that the NCC is simply tracking the STB's language in the November 20 Decision which, with respect to public access to the files, indicated that the NCC could charge "reasonable fees for copying or transmittal." (Decision, p. 14.) The proposal to restrict the fees to the "cost of copying" raises the issue of whether the NCC's direct and indirect costs may be included. Also, under any definition, the cost of copying alone would not include the recovery of the NCC's costs of transmittal. Should any party have a problem with the reasonableness of the fees to be assessed for copying and transmitting the information that certainly could be addressed with the NCC, or possibly the STB. However, the restriction which NITL seeks to impose is not reasonable and conflicts with the intent of the STB's November 20 Decision.

NITL also comments that rather than being permissive, the NCC should be required to post the public files on the NMFTA website. (NITL Comments, p. 9.) In subsection (c) of modified Rule 4, it is provided that the NCC "may" post the public docket file on a classification matter on the NMFTA website. Inasmuch as a number of proposals, i.e., packaging,

clarifications, removal of obsolete items, may not require the posting of the public file on the website because of the absence of interested persons, and the proposal itself is already posted on the website, the NCC believed that an economy of effort could be achieved through the posting of public docket files only in which parties have expressed an interest. Nevertheless, the NCC is willing to change that provision to require that every docketed proposal file be posted. However, the proposed condition of allowing only two business days to achieve that posting can be unreasonable. First, any initial posting of a public docket must allow 60 days before action on a classification matter is taken. Hence, there is no need to require a two-day time frame for publication as that 60-day period will always apply. The NCC is willing to post any information and data on the NMFTA website which is received after the initial posting of the public docket within two business days after the 30-day period for submitting that material closes. Requiring posting within two business days after each filing is received is unduly burdensome.

The NCC is opposed to any requirement which NITL seeks that a party should have the right to view the public docket files at the NMFTA's offices. The NMFTA's offices are not a public facility and are not designed to be so used. Because of consolidation, space is at a premium and there are no areas separate from the staff to accommodate that activity. Also staff time would have to be expended to review the material after any such inspection to ensure that the information was reassembled in accord with the index and all documents were accounted for in the public docket file. It is difficult to understand how viewing a public file at NMFTA's offices in Alexandria, VA would be more cost-effective for the shippers or the NCC when that information is available on the web or would be e-mailed or mailed to the parties or made available for pick-up by their courier. Certainly, considerable expense would be incurred by the shippers in sending their attorneys and /or staff to the NMFTA's offices, and NMFTA would

have staff resources diverted in accommodating the presence of the parties in the offices and ensuring that all materials continue to be available in the docket files after such inspections. Additionally, NMFTA's classification staff work in open cubicles and communicate with shippers and carriers on a daily basis. Given the presence of outside parties, staff would have to take additional efforts to maintain the confidentiality of persons spoken to and/or information received, and may well be unable to have an open exchange with each other on classification matters because of that presence. Requiring examination of the public files at NMFTA's offices would be disruptive to the staff and to NMFTA's operations, which include proprietary activities apart from classification, and is totally unnecessary because of the access to the public files otherwise made available to the parties under the NCC's procedures. There is no justification for such intrusion into NMFTA's offices.

NITL's criticisms of the arbitration process proposed by the NCC are disappointing. The STB left to the NCC the responsibility of providing a procedure for the selection of arbitrators. (Decision, p. 21.) In responding to that responsibility, a number of arbitration associations were contacted to determine which possessed arbitrators having experience with transportation-related issues. Interstate Dispute Resolution (IDR), an organization dedicated to the arbitration of transportation disputes, was located. Through a number of contacts, including two meetings with James Barron, a mediation specialist and the individual administering the IDR arbitration process, the NCC developed, with Mr. Barron's review and input, procedures for the handling of classification matters consistent with IDR's procedures. NITL, as well as the other shipper associations which have submitted comments, are or should be aware of that fact. Mr. Barron also developed a preliminary list of ten representative neutrals whom he selected because he believed they would be particularly qualified for handling transportation matters. A number of

the individuals identified by Mr. Barron are also qualified to act as arbitrators on the STB's roster which was compiled pursuant to the STB's procedures in STB Ex Parte No. 586, Arbitration – Various Matters Relating To Its use As An Effective Means of Resolving Disputes That Are Subject To The Board's Jurisdiction. Even though a large number of the arbitrators identified represented shipper interests, the NCC had full confidence in the integrity of those individuals to render a decision based on the facts of record in the public docket. Moreover, IDR would release its list of arbitrators to the NCC for distribution to parties seeking arbitration before the services of IDR are retained.

It is unfortunate that NITL has concluded that the NCC intended to control which arbitrators were provided to the parties. That was never the design of the procedures developed by the NCC. The entire list provided by IDR or any other arbitration association selected by the NCC would be provided to the parties. If NITL's unfounded suspicions can be eased the NCC is perfectly willing to amend its procedures to provide that the list as submitted by the independent arbitration association will be transmitted to the parties.

It is ironic that after contending that the arbitration procedures outlined by the NCC "are needlessly expensive and complex," the shipper associations delve into a selection process of a neutral arbitrator that is open-ended time-wise and presents an opportunity where no agreement could be reached. First, had the shipper associations checked with the American Arbitration Association they should have been aware that organization does not make its list of neutrals available until after the parties have paid the fee to use its arbitration process. In any event, offering a list of 50 neutrals unduly complicates the selection process and makes the selection of a single individual less likely, as does the selection of eight neutrals to locate a single agreed-upon arbitrator. Certainly, NITL cannot seriously believe that the ranking process they suggest

for the resolution of "ties" is less complex than the long-utilized procedure proposed by the NCC to select a neutral.

As the NCC learned through inquiries with various arbitration organizations, the process of the two neutral arbitrators selected by each party designating the third is the common practice.

It was believed that to facilitate the timely handling of classification matters, that the same process would be more expeditious in the event that the parties to a disputed classification change could not agree on the same individual. The procedure suggested by the shipper associations could result in a charade of disputed choices thereby needlessly prolonging the selection process and delaying final action on the classification proposal. As the STB is aware, there is direct benefit to a shipper in delaying the establishment of a classification increase, notwithstanding the fact that the change is reasonable and consonant with the carriers' statutory duty to establish reasonable classifications.

Significantly, any determination by the NCC or a Classification Panel must be based on the facts of record contained in the public docket file, and any modification of a proposal will be predicated on the completed record. The arbitrator will base his or her decision on whether the classification action, as originally proposed or as modified, conforms with legally established classification standards, and claimant will have ample opportunity to state its position in a final statement before the NCC or the Classification Panel or in its statement to the arbitrator.

NITL challenges the contents of Rule 6 of Article V, which it misidentifies as Rule 7, as not setting forth the correct standard for the arbitrator's review of challenged initial classification changes. (NITL Comments, pp. 15-16.) Once more, NITL seeks to bypass the findings of the STB in its November 20 Decision and open up the decisional process to extraneous matters long

argued by various shipper associations and rejected by the ICC and STB in determining the reasonableness of classification changes.

The language in Rule 6, contrary to NITL's assertion, correctly sets forth the standards for adjudging the reasonableness of classification actions. As noted in the NCC's Prefatory Statement, supra, the STB found that "density, stowability, liability and handling are the appropriate criteria to consider when classifying freight"; and that the determination of the reasonableness of a classification is "whether the classification is the same or similar to that of other commodities with similar transportation characteristics of density, stowability, handling and liability." (See Decision, p. 17, fn. 25 and p. 22.) Hence, there is absolutely no merit to NITL's contention that the NCC or the STB has misstated the standards applicable to classification matters. See, also, Motor Class Rating on Candy or Confectionary, 353 I.C.C. 314 (1977); and Classification Ratings, Drinking Straws, 335 I.C.C. 1 (1969). As demonstrated, Rule 6 not only tracks the STB's decision, but also correctly states long-established classification principles. See, e.g., Director General v. Viscose Co., 254 U.S. 498, 503 (1921); and Classification of Canned Goods, 98 I.C.C. 166, 176 (1925).⁵

It is somewhat ironic that NITL criticizes the NCC for including a reference to Ex Parte No. MC-98 (Sub-No. 1), Investigation Into Motor Carrier Classification, 367 I.C.C. 243 (1983) and related cases into Rule 6, while criticizing a purported failure to "reference the four condensed classification factors." The entire purpose of including reference to Ex Parte No.

⁵ NITL seeks to mislead the STB in arguing that the ICC's Decision in Ex Parte No. MC-98 (Sub-No. 1), Investigation Into Motor Carrier Classification, 367 I.C.C. 243 (1983), makes no mention of a comparison of an article's transportation characteristics with those of other classified articles for the purpose of assigning a classification rating. (NITL Comments, pp. 15-16). Such comparisons are and always have been an inherent part of the classification process and the primary basis for establishing the reasonableness of a classification proposal.

MC-98 is to alert shippers who may not be fully aware of the four classification elements, and their consist, of the ICC decision where those elements were discussed in detail. It is difficult to understand how providing such information to others can be objected to by NITL.

NITL suggests that a “presumed neutral” could be interviewed in person or by phone by both claimant and the NCC to determine a conflict of interest. (NITL Comments, p. 13.) How is that process less expensive than the procedure suggested by NCC, which in accord with standard practice, has the arbitration association make that determination? All the process suggested by NITL will accomplish is to delay the selection process. If a conflict is found or alleged, the next common neutral, if there is one, goes through the same interview process. Apparently, if that neutral has a conflict, real or alleged, the selection process starts all over again creating additional delay. The distinction NITL seeks to draw between sharing of the arbitrator’s fees, which is the STB’s language (Decision, pp. 21-22), and the “costs and expenses” it seeks to substitute is not apparent. (Comments, p. 14, fn. 3.) The fees assessed under the arbitration agreement encompass such costs and expenses and require no further clarification.

NITL objects to the requirement that the parties must enter into an arbitration agreement “with the chosen neutral.” (NITL Comments, p. 14.) That statement is in error. Pursuant to Article V, Rule 3, the agreement is with the arbitration association which oversees the availability of neutrals, their qualifications, the determination of conflicts of interest, and the completion of the arbitration process in accord with the approved Section 5a Agreement procedures. Such agreements are standard procedure in utilizing the services of arbitration associations, and it is unlikely that any such organization will permit the use of its neutrals or supervise the process without an agreement signed by the parties utilizing their services.

NITL argues that a claimant should have the right to file a rebuttal statement with the arbitrator. (NITL Comments, p. 14.) However, given the nature of the classification process with its established agency-prescribed standards, and the fact that the arbitrator's decision is to be based exclusively on the public docket record, there appears no justification for delaying the decision awaiting a rebuttal statement when both parties have the opportunity to state why the classification action is or is not reasonable, i.e., in accord with established classification factors. The contention that a rebuttal statement might be necessary if the proposal is modified is not justified. Pursuant to Article III, Section 3, subparagraphs (c) 2 and 3, interested persons are entitled to submit any evidence they believe relevant to the classification determination and a final statement as to the overall impact of the information of record. Any determination by the NCC or a Classification Panel must be based on that public docket record, and any modification of a proposal will be predicated on the completed record. The arbitrator will base his or her decision on whether the classification action, as originally proposed or as modified, conforms with recognized classification standards, and claimant will have ample opportunity to state its position in a final statement before the NCC or the Classification Panel or before the arbitrator.

If NITL believed the STB erroneously referenced the applicable classification standards in its November 20 Decision, the proper vehicle for challenging those established classification criteria was a petition for reconsideration. This, the objecting shipper associations failed to do. To attempt to overcome that failure through the guise of challenging Article V, Rule 6 which simply identifies the STB-recognized classification criteria is disingenuous and wrong as a matter of law. Furthermore, the intent behind this untimely attack is all too apparent.

The STB's Decision is explicit that the reasonableness of the classification decision initially reached by the NCC or a Classification Panel is to be based on the information contained

in the public docket file. (See, e.g. Decision, p. 17.) The arguments made by some of the same shipper associations submitting comments at this stage of the proceeding that various conditions or factors other than transportation characteristics should be interjected into the decision-making process by the arbitrator were summarily rejected by the STB. (See Decision, p. 18.) Once more, certain shipper associations seek to impermissibly broaden those criteria through the avenue of additional proposed statements submitted to the arbitrator. Of course, should an arbitrator be misled into assessing the reasonableness of a classification proposal based on matters other than transportation characteristics, the NCC would be put to the expense and burden of challenging the arbitrator's decision through a complaint proceeding at the STB. Even though that effort would ultimately be successful, during the entire period that process was pursued, a reasonable classification change would be delayed—an unjustified benefit for the shippers of the affected products. That result would be patently unfair to the NCC, and obviously was not the intent of the STB.

NITL's final contentions relate to the STB-established time lines pertaining to the submission of information and data. Now, it contends that the 30-day period provided in the NCC's procedures, which mirror the STB's finding, may not be sufficient. (NITL Comments, pp. 18-19.) Although presented as criticisms of the NCC's proposed procedures, which track the STB's time line in Appendix B to the November 20 Decision, those contentions are not entitled to any weight. If those time periods presented any legitimate problem to NITL, it should have brought that matter timely before the STB in accord with the agency's Rules of Procedure. It failed to do so.

The attack on the 30-day period within which parties can analyze data and submit information offers no evidence to substantiate that contention, other than speculation. To the

contrary, shippers are aware of potential classification actions long before the 30-day period begins to run. Most substantive classification changes go through the processes of a commodity report and a research project long before they become classification proposals. Notice of those commodity reports and research projects are provided in the NCC's Docket Bulletin and through other sources, and those matters are all considered at meetings open to the public. In fact, NITL and other shipper associations have participated at those early stages of commodity reviews over the years. With the enhanced notice procedures proposed there will be no excuse or reason for a shipper not to be apprised of an upcoming classification matter. No legitimate showing has been made that the STB erred in concluding that 30 days is sufficient time to present shipper data regarding a classification proposal.

NITL also requests that the time for filing statements under Article III, Section 3(c)(3), be extended to 7 days prior to the public meeting. Extending the period could well prevent the successful distribution and/or consideration of those statements by NCC members and other participants in the proceeding. The 15-day period recommended by the NCC gives all parties a reasonable opportunity to respond to the completed public docket record and for the decision makers to consider such summaries and restatements of the data as may be required.

3. Joint Comments of National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Logistics Conference, Inc. (Jointly NASSTRAC), Halogenated Solvents Industry Alliance, Inc. (HSIA), and Transportation Consumer Protection Council, Inc. (TCPC).

NASSTRAC broadly argues that the revisions required by the STB are necessary "to reform a classification process that, without these changes, is too susceptible to bias or manipulation." (NASSTRAC Comments, p. 3.) While the NCC has made a good faith effort to fully implement those revisions in its proposed modified procedures, it does take issue with

NASSTRAC's disparaging rhetoric regarding the current classification procedures created by statute and the ICC's implementing regulations.

NASSTRAC has failed to evidence a single instance of a classification proposal handled under those procedures which was the product of "bias or manipulation." The only purported support for that serious and unsubstantiated allegation are the increased class ratings that have been processed. However, those increases have never been fairly assessed on this record. As the NCC pointed out, of the 784 classification proposals processed over the course of the 75 dockets conducted by the NCC from 1989 through 1999, which number excludes packaging proposals, clarifications and the removal of obsolete items; 307, or 39.2 percent, consisted of class increases only; 252, or 32.2 percent, consisted of class increases and reductions; and 225, or 28.7 percent, consisted solely of class reductions. (See NCC's June 12, 2000 Rebuttal Comments, Argument, p. 12.) That balance refutes the bald assertion that the process is designed only to produce increased class ratings.

Equally offensive is NASSTRAC's assertion that "the protections the Board has imposed must provide the reality, and not merely the appearance, of preventing abuses by NCC."

(NASSTRAC Comments, p. 3.) Rather than solely constituting "protections," the STB made it clear that the changes required in the NCC's procedures are "designed to increase shipper participation in the process and promote confidence in the fairness of classification decisions...."

(Decision, p. 2.) Nowhere on this record has NASSTRAC, or any other shipper association, evidenced any abuses by the NCC. To the contrary, Raynard F. Bohman, Jr. of Bohman Industrial Traffic Consultants, Inc., an individual who has appeared before the NCC as a shipper representative in more classification matters than any other party to this proceeding, has requested that the right to appeal to the full NCC, the current process, be restored as an

alternative to resort to a “neutral arbitrator.” Patently, Mr. Bohman, based on his long experience in classification matters, does not view the NCC as “biased,” “manipulative” or “abusive.”

Although not acknowledged, many other shippers and shipper representatives contradicted the serious assertions made by NASSTRAC and certain others, and commented on the fairness of the current system. See, e.g., Comments of the North Carolina Traffic League; The Bohman Group; Rubenstein Logistics Services, Inc.; Borden Foods Corporation; Thermo Industries, Inc.; the California Department of General Services; as well as the statements of former ICC Chairman Reece H. Taylor, Jr. and former ICC Vice Chairman, J.J. Simmons III. (NCC’s April 11, 2000 Comments, Vol. II.) NASSTRAC’s self-serving criticism of the NCC’s classification actions to obtain undue leverage in the classification process is without justification.

The STB agreed that source retaliation by shippers was a realistic concern. Indeed, the STB referred to the issue as one that “merits special mention.” The STB acknowledged unequivocally that through Comments filed earlier in this proceeding “The NCC [has made] a case that carriers should not be subjected to shipper pressure merely for supplying information about the transportation characteristics of commodities they transport.” Of course, shipper concerns respecting source identification are no less valid.⁶ Accordingly, the STB’s Decision provides that a description of the source as “shipper/consigner” or “carrier” would be adequate. (Decision, p. 16.) As an alternative NASSTRAC suggests that the NCC identify carriers as

⁶ The NCC’s Comments made the case that carriers cannot afford to risk economic retaliation and that shippers will cease furnishing data to the NCC rather than risk having sensitive, proprietary information – such as value data and market share, which are valid considerations in classification matters – fall into the hands of attorneys and consultants who represent their competitors.

“national carrier A,” “national carrier B,” “national carrier C,” etc. It contends that information will somehow enable NASSTRAC to assess “the representativeness of the file data,” and know the number of carriers supporting the proposal. (NASSTRAC Comments, p. 5.) So identifying the carriers certainly would assist a shipper in identifying or narrowing which carrier or carriers providing services to it supplied the information. That is precisely what the STB determined should not be allowed. Moreover, there is no correlation between which carrier submits data and the representativeness of that data. The information speaks for itself and certainly the involved shippers are able to establish how representative the product information is given their knowledge of their own products and the markets involved. Also, it is immaterial whether a proposal is supported by one or two or many carriers. Classification is based on the transportation characteristics of the commodity at issue and not who is supplying the data or how many sources have done so. Irrespective of who is supplying the data, carrier or shipper, or their number, that is no indication of carrier or shipper support or opposition to a proposal.

In addition to NASSTRAC having presented no valid rationale for disclosing the identity of information sources, its contention that the filing of a protective order should delay the classification process for 60 days after the request is acted upon by the STB invites mischief. (NASSTRAC Comments, p. 6, and App. A-1, Rule 4(a).) A direct benefit accrues to a shipper whenever a reasonable, increased classification rating is delayed. There would be every incentive for the pro forma filing of a protective order request whenever a classification increase was involved just to delay the process. Importantly, as well, the alleged need to know the source really adds nothing to the assessment of the “representativeness” of the data. The data will be shown to be or not to be representative on its own merit. Obtaining a protective order revealing

the identity of the source under that guise would not be warranted and should be denied.

However, the net result of such a futile filing would be delay.

The reasons presented for inspecting documents in the NMFTA's offices are not sound. (NASSTRAC Comments, p. 6.) As indicated, the NMFTA is not a public office and has size constraints. All documents in the public file are available on the website, and no reason exists for access to NMFTA's offices. It is far less expensive for shippers to download the documents from the website than to send representatives to Alexandria, VA to do what is totally accessible through the Internet. NMFTA's staff is limited. Thus, it is disruptive to make an employee available to copy such documents as a shipper might designate—especially when that same document would be available on the website. The production of a document involves more than a bare cost of copying. There is an employee's time and other direct and indirect expenses which are incurred. Also, the cost of transmittal may be involved. The STB has provided that a "reasonable fee" may be charged. That charge is yet to be determined, but certainly cannot be limited as NASSTRAC suggests.

NCC does not object to a requirement that all public docket files be posted at NMFTA's website, and would so amend its procedures. However, the requirement that the NCC post on the web "[w]ithin two (2) days after receipt of file documents" as suggested by NASSTRAC is unduly burdensome. That time frame fails to account for weekends and/or holidays. It is more reasonable to have such posting occur within two (2) business days after the period for receiving such information closes, e.g., after the 30-day period in which interested parties can submit their data, and after the 15-day period in which statements summarizing the information can be submitted by the interested persons and the NCC.

NASSTRAC's self-serving characterization of the NCC appeal process as giving "the benefit of any doubt to their carrier colleagues, and upholding the Panel decision," is without merit. As the ICC's and STB's responses to shipper challenges of classification actions taken initially or on appeal to the NCC or by a Classification Panel evidence, those actions were based on the transportation characteristics of the articles, and were found reasonable by those agencies on that basis in over 95 percent of the proposals challenged during a 20-year period. As indicated, other shippers obviously do not agree with that assessment and have requested that the right to appeal to the NCC be restored.

Once again a shipper association seeks to revise, for its own convenience, the time line established by the STB, and not heretofore objected to through the proper procedural avenues. NASSTRAC proposes to revise the 30-day period recommended by the STB for seeking arbitration to a 15-day period. (NASSTRAC Comments, p. 8.) There is no reason for that modification. The NCC was assured by Interstate Dispute Resolution that the time frames established by the STB, and as incorporated into the NCC's proposed arbitration procedures, are wholly consistent with that required for the arbitrator to render his or her decision.

NASSTRAC seeks to place an entirely different spin on the arbitration process than was intended by the STB. Because of the "perception of bias" alleged by certain shipper associations, parties were enabled to challenge an initial classification decision by the NCC or a Classification Panel to an arbitrator. The STB directed that the responsibility of the arbitrator would be to determine whether the NCC decisions are "based on record evidence," i.e. the public record upon which the NCC based its classification action. (See, e.g., Decision, pp. 17-18.) Now, without contesting the STB's parameters for the arbitrator's review to the agency, NASSTRAC seeks to supplant the agency's findings and conclusions through the guise of

criticizing the NCC's procedures implementing the STB's decision. Now, in seeking to resurrect arguments that have been expressly rejected by the STB (see Decision, p. 18), NASSTRAC would have the arbitrator's review include factors other than transportation characteristics; namely "policy arguments, and ... the procedural fairness of proceedings before the NCC" (NASSTRAC Comments, pp. 8-9.) In other words, NASSTRAC proposes to use the arbitration process as a forum to argue issues other than those upon which the NCC's classification is based, i.e. the transportation characteristics of the commodities. NASSTRAC's contentions are inappropriate and would only serve to confuse, delay and impair the actual issue the STB intends the arbitrator to resolve.

Another contention which must be viewed with a jaundiced eye is NASSTRAC's argument that on appeal to the arbitrator the shipper should be able to "supplement the record with additional data, including newly discovered information." (NASSTRAC Comments, pp. 9-10.) The STB's stated intent in prescribing the sweeping revisions in the NCC's procedures is to "increase shipper participation in the process." Thus, the agency sought to encourage shippers to fully participate in the classification process and to submit their data and information for consideration in the NCC's initial determination of the classification proposal.

This record evidences the tactics that have been encountered by the NCC on the part of some shippers in seeking to challenge the information upon which a classification proposal is based. (See, e.g., NCC's June 12, 2000 Rebuttal Comments, Verified Statement of George M. Beck and Joel L. Ringer, Senior Classification Specialists, pp. 1-12.) Permitting shippers to submit data after the public docket is closed, or to submit purportedly newly discovered data, would merely be a license to some shippers to delay or disrupt the implementation of a justified classification change. In response to shipper demands, the STB has imposed substantial burdens

on the NCC in the processing of classification changes and for incorporating and making available the data submitted by shippers in the public docket files. The NCC has incorporated those changes, virtually verbatim into its procedures, and the STB should not permit those requirements, which resulted from certain shipper allegations regarding "fairness," to be circumvented by those same interests to serve their "bias" against classification changes that result in justified increased ratings.

NASSTRAC's acknowledgment that "Shipper comments have been received as late as the day of the NCC Panel or Committee meeting ...," underscores the necessity for retaining the time sequence established in Appendix B of the STB's Decision. (See NASSTRAC Comments, pp. 11-12.) Receiving information on the day of the meeting does not give the NCC, or other interested persons, a fair opportunity to review or test the accuracy of the late-submitted data. The STB procedure is reasonable and provides all participants in the classification process the ability to fairly and accurately present their information.

Additionally, NASSTRAC's complaint that the prescribed time frame may sometimes be difficult to meet requires further exposition. (NASSTRAC Comments, pp. 12-13.) It is rare that any classification proposal initiated by a Classification Panel or the NCC has not been the subject of a commodity report and/or a research project. As NASSTRAC notes, those reports and research projects are noticed in the Docket Bulletin and are discussed at open meetings. Thus, long before any subject evolves into a proposal the public is aware that a matter is being reviewed. Accordingly, the window to develop data extends far in advance of the 30-day period after which a proposal is docketed and within which information is to be submitted. Regarding the poisons proposal referenced by NASSTRAC, both NASSTRAC and NITL had notice of a proposal many months before it was docketed and, notwithstanding repeated statements by those

parties that the shippers would provide data, they did not. (See NCC's May 11, 2000 Reply Comments, Verified Reply Statement of George M. Beck and Joel L. Ringer, Senior Classification Specialists, pp. 1-6.)

The STB left no doubt as to the criteria that were to be utilized by the arbitrator in assessing the reasonableness of the NCC's initial classification determinations. (See Decision, p. 17, fn. 25 and p. 22.) Those include the analysis of the commodities' density, stowability, liability and handling characteristics, and a comparison of the classification prescribed with those applicable on other articles having the same or similar transportation characteristics—standards developed and long applied by the ICC and now the STB. For NASSTRAC to assert that in incorporating those specific standards into its procedures the NCC "is assuming a de novo review standard," defies comprehension. (See NASSTRAC Comments, p. 9.) What is clear is that NASSTRAC is attempting to interject into the arbitration process extraneous matters or issues long raised and rejected by the ICC and the STB.

For example, NASSTRAC inaccurately contends that "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." It further asserts that "This approach may impose significant administrative burdens on shippers whose customers order mixed shipments." (NASSTRAC Comments, p. 9). That contention lacks candor. What NASSTRAC is obtusely referencing is the use of a density-based classification item which, in accord with established density characteristics, assigns classes appropriate to specific density breaks. Such a classification item is used when dealing with a wide range of related products exhibiting diverse densities where averages would not properly reflect the controlling density characteristics of the commodities. (See, e.g., Item 157242, Subs 1 through 11 of the NMFC, applicable on Plastic or

Rubber Articles, Other Than Expanded Group, Traffic or Road Markers, including Cones, Barrels, Drums or Posts.) Density-based ratings and breaks have been established in the Classification for decades with ICC and STB approval. The very same argument of shipper inconvenience has been raised numerous times over the years in opposition to the establishment of density-based provisions and has been summarily rejected in every instance by the ICC and the STB.⁷ NASSTRAC apparently now views this as an opportunity to reverse that agency determination, and put the matter in the hands of an arbitrator who might be misled as to the relevance of that self-serving contention. Permitting an opposing party to open the door to such rejected arguments will not create confidence in an arbitration process that is intended to review the reasonableness of a classification based on the transportation characteristics established on the article or articles reviewed by the NCC.

The NCC also objects to NASSTRAC's contention that NCC's reference to Ex Parte No. MC-98 (Sub-No. 1) in its procedures should be deleted. (NASSTRAC Comments, p. 10.) That proceeding developed the transportation characteristics to be assessed in classification matters and provides a comprehensive description of each of the twelve factors actually included within the four recognized elements. Not only does the inclusion of that agency decision establish, in accord with the STB's Decision, the criteria that an arbitrator is to consider, but it will provide valuable information and assistance to shippers not conversant with the classification system to participate in the process with full knowledge of applicable standards. The criteria established in Ex Parte No. MC-98 (Sub-No. 1) apply today and have for over two decades. Certainly,

⁷ See, e.g., STB Docket No. ISM 35007, Protest and Petition for Suspension and Investigation, Decision (decided January 20, 2000, not published); and STB Docket No. ISM 35007, Petition for Reconsideration and Stay, Decision (decided March 28, 2000, not published).

NASSTRAC cannot be serious in its argument that should the law change an arbitrator might be misled by the ICC decision. (See NASSTRAC Comments, p. 10.) If, indeed, the standards should change the NCC would so advise the parties and amend its Agreement accordingly. So too, any such change obviously would be brought to the attention of an arbitrator long before a decision was issued. NASSTRAC's speculative contention that the standards might change at some indefinite time in the future offers no rational basis for excluding reference to the agency proceeding in which the currently applicable classification standards were discussed and established.

NASSTRAC's remaining comments will be discussed seriatim, Article III, Section 2(b). NASSTRAC suggests that this provision be modified to reincorporate the ability of a Classification Panel to defer the handling of a proposal to the next Panel. In addition to requesting that the provision be restored NASSTRAC requests that the STB require that "the NCC should not unreasonably decline requests for deferral of proposals." (NASSTRAC Comments, pp. 10-11.) The NCC deferred the handling of proposals when shippers requested an opportunity to work with staff to develop information or requested more time to develop information. As this record demonstrates, many times those good faith efforts by the NCC to develop shipper information were not fulfilled by the requesting shipper organizations. Nevertheless, the reason deferral has been deleted is that the new procedures created by the STB, and good faith shipper participation anticipated in assembling the public docket record, renders such action an unnecessary delay in the handling of necessary classification actions. If a legitimate situation arises where it is demonstrated that a body of information or data exists which would be made available, a proposal can be denied and redocketed. In that way the public

docket record can be supplemented, and all parties will have the opportunity to update their data and comment on the newly produced information.

NASSTRAC's contention that the NCC should be required to abandon the handling of docketed proposals within 120 days has no basis. (NASSTRAC Comments, p. 11.) The STB recognized that ICCTA did not require action on classification proposals by the 120th day after docketing, but confirmed that the NCC's Agreement retained that time period. (See November 20 Decision, p. 12 and fn. 20.)⁸ Accordingly, in establishing its Time Line in Appendix B, the STB utilized the 120-day time frame, and the NCC so modified its procedures to conform to those requirements. NASSTRAC has no legitimate excuse for failing to object to the STB's Time Line until now. Moreover, irrespective of whether the statutory requirement has changed, there is no reason why the NCC cannot continue the handling of docket proposals within 120 days after docketing, particularly where both shippers and carriers have successfully operated under that time period during the past two decades. The NCC has opted to retain the 120-day period because that time frame assists shippers and carriers in obtaining justified classification changes on a timely basis.

⁸ The ICC/STB requirement that classification proposals must be processed to final disposition within 120 days was established in Ex Parte No. 297, Rate Bureau Investigation, 349 I.C.C. 811 (1975), 351 I.C.C. 449 (1976). It predates the statutory provision and survives to the present as a requirement of the STB by virtue of the savings provision of Section 204 of Title II of Public Law 104-88 the Interstate Commerce Commission Termination Act of 1995.

No sound reasons have been presented by NASSTRAC for changing the schedule for submitting data to the NCC for the public docket file. (NASSTRAC Comments, p. 14.) Other than its convenience and speculation about complex proposals, NASSTRAC does not demonstrate why the STB's time schedule will not work. As noted, because of the advance notice of commodity reviews and research projects, and their discussion at open meetings at which shippers can, and as NASSTRAC acknowledges do, participate, there is no excuse for not knowing about the pendency of a classification proposal many months before it is docketed. There is little difference between shippers presenting data and information to the NCC on products the shippers themselves manufacture or sell in 30 days, and parties to modified procedure proceedings before the STB submitting their evidence within 30 days or shorter periods of time. NASSTRAC presents no justification for a different result.

NCC is unclear as to NASSTRAC's contention that "the public record should include all documents in the NCC file, whether or not cited by a party." (NASSTRAC Comments, p. 15.) What documents, other than those regarding the proposal, notices, staff reports and analyses, and data and information relative to the transportation characteristics of the commodities referenced in the STB's decision and incorporated into the NCC's modified procedures, as well as all information submitted by shippers and interested persons and final statements, does NASSTRAC wish included? What documents not cited by a party does NASSTRAC have in mind? The NCC truly does not comprehend NASSTRAC's contention that there is some risk that "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." (NASSTRAC Comments, p. 15.)

NASSTRAC has misstated the role of NCC policies and directives in the classification process. (NASSTRAC Comments, pp. 15-16.) As NASSTRAC notes, these guidelines are posted on the NMFTA website and consist of density guidelines, which track the density/class relationships long found reasonable by the ICC and applied by the STB, and value guidelines. The value guidelines seek to indicate maximum average values associated with the articles grouped by the various classes, and are updated biennially based on the Producer Price Index at a noticed, open public meeting. The guidelines are provided both as information to the public as to density and value criteria, and to the NCC members to promote uniformity in the Classification and ensure that the same or similar commodities are assigned the same or similar ratings. There is nothing sinister about the incorporation of those guidelines into the classification process as NASSTRAC suggests. All NCC classification policies and guidelines are addressed at noticed, open public meetings, and could not produce the sub rosa classification actions claimed by NASSTRAC.

NASSTRAC's criticism of Article IV, Rule 6(c) providing that "Members may not discuss or vote on provisions governed by Section 14706(c)(1)(C) of Title 49 of the United States Code" is misplaced. That provision has been in NCC's Section 5a Agreement for some 20 years in response to the statutory requirement of the Motor Carrier Act of 1980, and was an amendment specifically required by the ICC to be included in the NCC's Agreement as specified in Ex Parte No. 297 (Sub-No. 5). The only modification here is to change the reference from former Section 10730(b) to the current statutory reference. A closer reading of NASSTRAC's recommendation reveals it goes beyond this proceeding, and is a transparent effort to address other matters not before the STB here.

NCC has no objection to the publication of the modified Section 5a Agreement on NMFTA's website, and had already determined to do so once final approval has been obtained from the STB. (NASSTRAC Comments, p. 18.)

In Appendix B-1 to its Comments, NASSTRAC has set forth the arbitration procedures it jointly developed with NITL. NCC largely has responded to those procedures as set forth in NITL's comments, but would address several additional matters here.

As Commissioner Burkes aptly pointed out in his comments in the STB's Decision, "there are many holes in the arbitral review process that is proposed in this decision." He further stated that "Although parties will retain their statutory right to challenge the reasonableness of classifications, the Board is attempting to inject an open-ended arbitral process that parties are encouraged to use before they come to the Board." (See Decision, p. 24.) Taking counsel of those concerns, and seeking to closely implement the arbitration concepts offered by the STB, the NCC expended considerable time and effort to contact and work with an arbitration association that should be acceptable to all parties, and which possessed transportation expertise relevant to classification issues. That search was difficult, but contact ultimately was made with James P. Barron, Esq., a mediation specialist, and the head of Interstate Dispute Resolution (IDR), an organization located in Boston, MA and specializing in transportation issues.

Over the course of many telephone conversations, e-mails and personal meetings, an arbitration procedure was developed that is compatible with those used by IDR, and is set forth in Article V, Rules 1 through 8 of the NCC's modified Agreement. Mr. Barron provided the NCC with 10 representative arbitrators accessible to IDR. A number of those individuals represented shippers and were also qualified to act as arbitrators in STB matters. It was never the NCC's intent to selectively pick which arbitrators could be used. Rather, the list as provided

by Mr. Barron was to be provided to the claimants. The selection referenced in Rule 2 was with respect to obtaining a list of neutral arbitrators from an independent arbitration association and not, as several shipper associations allege, of the individuals to be provided. The NCC has no objection to clarifying its intent in Rule 2 if the STB deems such modification necessary.

However, the alternative arbitration process suggested by certain shipper associations creates the specter of the open-ended arbitral process Commissioner Burkes expressed concern about in the STB's decision. The American Arbitration Association (AAA) does not release a list of its arbitrators without the payment of its filing fee. To choose from 50 arbitrators, most if not all of whom would be unknown to the parties, would be a substantial task, particularly under the complex selection and ranking procedures outlined by those shipper associations. Also, the process of the parties questioning the arbitrators to determine potential conflicts is time consuming and expensive. IDR takes responsibility for determining such conflicts and is in a better position to do so than shippers not represented by counsel or even by counsel not experienced in transportation matters or freight classification. Further, IDR has indicated that its neutral arbitrators are willing, without charge, to select a third neutral should the parties not be able to select a single neutral. NASSTRAC and NITL have taken a straightforward, workable arbitration process and created a procedural maze. Their alternative procedures should not supplant those proposed by the NCC.

III. Conclusion

The "bias" of certain shipper associations against the establishment of increased classification ratings is manifest on this record. Many of the changes they suggest are designed not to facilitate or improve the STB's requirements but to interpose needless delay and

complexity into the newly created classification process. Even the STB's sweeping revisions could not go far enough to satisfy those interests.

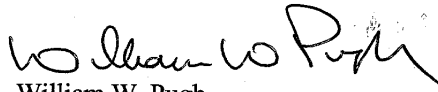
The NCC does not oppose incorporation of the following changes into its proposed modifications:

1. Provide for an alternative appeal to the NCC of an initial classification decision by a Classification Panel;
2. Post all public docket files on NMFTA's website;
3. Post the NCC's modified Section 5a Agreement as finally approved by the STB on NMFTA's website;
4. Make any clarifications the STB deems necessary that the NCC will provide to claimants the list of neutral arbitrators provided to it by an independent arbitration association.

Respectfully submitted,

Handwritten signature of John R. Bagileo in black ink, followed by the initials "wvp".

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Handwritten signature of William W. Pugh in black ink.

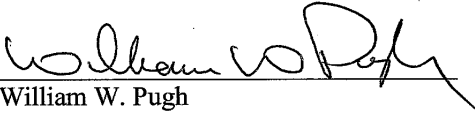
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Classification Committee

Due and Dated: June 13, 2002

Certificate of Service

I hereby certify that I have this 13th day of June 2002, served a true and correct copy of the foregoing Response to Comments Regarding Proposed Modifications of Presently Approved National Classification Committee Section 5a Agreement No. 61, upon all parties of record identified in the Surface Transportation Board's service list dated April 20, 2000, properly addressed, by first class mail, and with postage prepaid.


William W. Pugh