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April 17, 2006

Vernon A. Williams, Esq.
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Filed Electronically

Re: Ex Parte No. 656 (Sub-No. 1)
Investigation Into the Practices of the National Classification Committee

Dear Secretary Williams:

I am writing on behalf of NASSTRAC, Inc., a party to this proceeding, in reply to the letter filed and posted on the STB's website on March 27, 2006 from The Honorable Nick J. Rahall, member of Congress from West Virginia. Representative Rahall writes in support of continued antitrust immunity for the National Classification Committee (NCC).

To the extent that leave of the Board is needed for NASSTRAC to respond to the Rahall letter, it is hereby requested. There is a direct precedent for this request in this proceeding. On February 27, 2006, five members of Congress (not including Rep. Rahall) filed a brief letter questioning the need for and value of continued antitrust immunity for the NCC. That letter cited recent NCC classification activity affecting candy and confectionery manufacturers in the states represented by the five members. On March 14, a letter was filed by NCC's counsel criticizing the letter from five members of Congress as untimely and seeking leave to file a response.

The Board granted the NCC's request (which NASSTRAC did not oppose). On March 24, the NCC filed a 27 page response to the letter from the five members of Congress, which was less than two pages long. Much of the Argument section of NCC's March 24 filing constituted an objection to Congressional letters like the one sent by the five members (and the one sent by Rep. Rahall).

NASSTRAC can see no reason for the Board to reject this brief reply to the March 27 letter from Rep. Rahall, in light of its decision to allow NCC to reply to the earlier letter from five members of Congress.¹

The goal of Rep. Rahall's letter is plainly to pre-empt the first of the three options before the Board in this proceeding, which are: (1) to terminate NCC antitrust immunity; (2) to impose additional conditions on the NCC; and (3) to maintain the status quo. Rep. Rahall offers two reasons for his position.

First, Rep. Rahall says: "In crafting the 1995 Act [the ICCTA], we sought to maintain the public interest by preserving certain regulatory functions and practices such as antitrust immunity for commodity classifications." However, the proposition that the Board lacks statutory authority under the Act to terminate NCC's antitrust authority is contradicted by the words of the statute. See 49 U.S.C. § 13703(c)(1): "The Board may review an agreement approved under this section, on its own initiative or on request, and shall change the conditions of approval or terminate it when necessary to protect the public interest." See also 49 U.S.C. § 13703(c)(1)(B) and (2).

Rep. Rahall's second argument for continued NCC antitrust immunity rests on his statement that "renewal of the NCC Agreement ... clearly is in the public interest" because "[t]he efficient operation of the motor carrier industry, and its ability to serve both shippers and consumers alike, depends on the continuation of commodity classifications." Rahall letter at 2.

Termination of NCC antitrust immunity would not mean termination of existing commodity classifications or termination of the National Motor Freight Classification (NMFC). Shippers, consignees, carriers and intermediaries would have the option of continuing to use existing class ratings in pricing freight transportation. In the alternative, they could negotiate class ratings and rates, just as they do today. However, future changes in commodity class ratings would either be made bilaterally, through negotiations among the parties, or, if adopted by motor carriers acting collectively, would have to be adopted without antitrust immunity. NASSTRAC submits that either of these approaches is less anticompetitive, and better comports with the public interest, than the status quo.

For these reasons, Rep. Rahall's letter does not provide a sound basis for Board action in this proceeding.

Respectfully submitted,

John M. Cutler, Jr.
Attorney for NASSTRAC, Inc.

¹ NASSTRAC trusts that the NCC will not reply to this letter, just as NASSTRAC did not reply to its extensive March 24 filing.