

May 20, 2002

*Via Hand Delivery*

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001



ENTERED  
Office of the Secretary

MAY 20 2002

Part of  
Public Record

Re: Section 5a Application No. 61 (Sub. No. 6);  
*National Classification Committee Agreement*

Dear Secretary Williams:

Please find enclosed for filing an original and ten (10) copies of the National Industrial Transportation League's Comments on Proposed Modifications to the National Classification Committee Section 5a Agreement No. 61. An extra copy of this filing is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Nicholas J. DiMichael  
Karyn A. Booth  
*Attorneys for The National Industrial  
Transportation League*

*Enclosures*

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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

**COMMENTS OF  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

**on**

**PROPOSED MODIFICATIONS TO THE  
NATIONAL CLASSIFICATION COMMITTEE  
SECTION 5a AGREEMENT NO. 61**

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Dated: May 20, 2002

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**COMMENTS OF  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE  
on  
PROPOSED MODIFICATIONS TO THE  
NATIONAL CLASSIFICATION COMMITTEE  
SECTION 5a AGREEMENT NO. 61**

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The National Industrial Transportation League ("League") hereby files its comments on the Proposed Modifications of Presently Approved National Classification Committee Section 5a Agreement No. 61 ("Proposed Modifications"), submitted to the Board by the National Motor Freight Traffic Association, Inc. ("NMFTA") and the National Classification Committee ("Committee") (collectively, "NCC") on March 20, 2002. The NCC's Proposed Modifications to the Section 5a Agreement No. 61 ("NCC Agreement") have been submitted in response to the decision of the Surface Transportation Board served November 20, 2001 ("2001 Decision").

**INTRODUCTION**

The Board's 2001 Decision represented the culmination of very lengthy proceedings to review and reform the operations of the NCC. In its decision, the Board ordered far-reaching changes to the NCC Agreement in order to insure that the Agreement was consistent with the public interest. Specifically, in the 2001 Decision, the Board ordered the NCC to implement two major changes to the NCC Agreement. First, the Board conditioned its approval of the NCC Agreement by requiring changes to the Agreement that were intended to increase shipper

participation in the classification-setting process. The Board found that shippers should receive much greater notice of and access to the studies, underlying reports and analyses generated by the staff of the NCC and to the proposals of the NCC. *See*, 2001 Decision, at 15. Second, the Board ordered the NCC to provide for a more fair and neutral review process of NCC actions on classification proposals, specifically by providing for the option of neutral arbitration of NCC decisions. *Id.*, at 20-21. The specific changes called for by the Board are set forth in Appendix A to the 2001 Decision, entitled "Specific Changes Required for NCC's Agreement," and in Appendix B, entitled "Time Line."

In the NCC's Proposed Modifications, in addition to revising the NCC Agreement for the purpose of conforming the Agreement to the 2001 Decision, the NCC has taken the opportunity to change archaic, confusing or inappropriate language in the Agreement. The NCC attaches its Proposed Agreement as Appendix A and B to its submission to the Board, with Appendix A showing the changes from the prior agreement, and Appendix B with the NCC's proposed changes incorporated.

Although the League agrees with many of the changes proposed by the NCC in its Proposed Modifications, there are several key areas in which the League believes that further changes are critically necessary. These are in two primary areas, and one secondary area.

The League's two primary areas of concern regarding the NCC's Proposed Modifications are: (a) Article IV, Rule 4, "Public Docket Files"; (b) Article V, "Arbitration." These two areas go to the heart of the changes to the National Classification Committee Agreement ordered by the Board, and the League strongly believes that in these two areas the NCC's Proposed Modifications are seriously deficient. In these two areas, in order to assist the Board, the League

has discussed this matter with the National Small Shipments Traffic Conference and the Health and Personal Care Logistics Conference ("Shipper Conferences"). The League and the Shipper Conferences have together developed for the Board common suggested changes to the NCC's Proposed Modifications in these two areas. These suggested changes are attached to these Comments as Appendix A (dealing with Article IV, Rule 4, "Public Docket Files") and Appendix B (dealing with Article V, "Arbitration"). Each Appendix to these Comments shows the suggested changes proposed by the League and the Shipper Conferences to the NCC's Proposed Modifications in strikeout and underline form (Appendix A-1 and B-1) and also includes revised wording for the two sections with all of the proposed changes incorporated (Appendix A-2 and B-2).

In addition, the League's Comments also discuss one secondary area, specifically in Article III, Section 3(c), entitled "Conduct of Business by the Committee or Classification Panel—Notice and Disclosure required prior to a meeting of the Committee or Classification Panel." The changes proposed by the League in this third area are discussed in the text of these Comments.

#### **COMMENTS OF THE LEAGUE**

As noted above, the comments of the League are focused upon the following areas of the NCC Agreement: (a) Article IV, Rule 4, "Public Docket Files"; (b) Article V, "Arbitration"; and, (c) Article III, Section 3(c), "Conduct of Business by the Committee or a Classification Panel--Notice and Disclosure required prior to a meeting of the Committee or Classification Panel." Each of these areas are discussed in turn below.

**A. Article IV, Rule 4. - Public Docket Files**

The Board determined in its 2001 Decision that “[p]rocedural due process requires that all parties should have access to the information that will be considered in reaching a decision so that they will be in a position to present their views most effectively.” 2001 Decision, at 13. In this regard, the Board ruled that the Committee should establish public docket files for classification matters and should rely only the evidence contained in such files in making decisions. *Id.*

Central to the issue of public docket files is the ability of shippers (or, with respect to shipper proposals, the ability of the NCC) to obtain access to the raw data and studies relied upon in making the proposal and in rendering decisions on classification matters. In the past, shippers have been unable to obtain adequate access to such information. Thus, the League concurs with the Board that requiring the establishment of public docket files will improve the classification process and assist in encouraging increased shipper participation in classification matters.

In its 2001 Decision, the Board required the Committee to develop new procedures to allow for access to public docket files after consultation with shipper organizations. The NCC has proposed these procedures in Article IV, Rule 4 of the amended NCC Agreement. While the NCC shared its proposed procedures for obtaining access to public docket files with the League and other shipper organizations, the parties were not able to agree upon all aspects of the final procedures to be incorporated into the NCC Agreement. The League believes that changes to the NCC’s proposals are necessary 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. The League therefore asks the Board to adopt the proposal for Article IV, Rule 4 attached to these Comments as Appendix A.

1. *Confidentiality*

In subsection (a) of Article IV, Rule 4, the parties differ as to the scope of confidentiality that should be afforded to the parties that make classification proposals and submit raw data supporting such proposals. The NCC's Proposed Modifications would automatically afford confidentiality to the source of a proposal and related data or studies provided by such entity. However, the League believes that confidentiality of the source of such information should be provided only where the entity requests non-disclosure of its identity. There is no need, the League believes, to automatically presume the need for confidentiality. Appendix A to these Comments therefore makes confidentiality an optional matter, triggered simply when an entity requests confidentiality.

Furthermore, the League believes that, where the identity of the party making a proposal and providing data is withheld, the Committee should describe generically the type of entity submitting the information (*e.g.* small regional carrier vs. large national carrier). Providing a general description of the entity would greatly 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. It also would address the concern of the NCC of possible retaliation against a carrier that supports a classification change, since the actual identity of the carrier would not be revealed, unless the carrier agreed to such disclosure. See Appendix A to these Comments.

In addition, the League believes that there should be changes to the NCC's Proposed Modifications with respect to the use of protective orders that may be obtained from the Board to address confidentiality concerns related to raw data or studies submitted by a party. Although the Board recognized that the need for protective orders is likely to be a rare occurrence (2001

Decision, at 16), the League believes that, to the extent that complete information contained in reports, analyses, studies, work papers or raw data are withheld from the public docket files, outside counsel or consultants for a party interested in a classification matter should be able to obtain access to the information withheld pursuant to the terms of the protective order. Board protective orders used in other proceedings in which confidentiality is necessary routinely contain such a provision, to balance the need for confidentiality with the need to insure the integrity of the information provided. See, e.g., STB Finance Docket No. 33388, *CSX Corporation, et al., Norfolk Southern Corporation et al. — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corp.*, slip op., Decision No. 1, served Apr. 16, 1997 and Decision No. 4, served May 2, 1997.<sup>1</sup> The specific wording changes to implement this suggestion are shown in Appendix A-1.

## 2. Access Charges

In the last sentence of subsection (b) of Rule 4., the NCC's Proposed Modifications provide that a reasonable charge will be assessed for the copying and furnishing of materials from the Committee's public files. The League believes that the Committee should not be able to earn a profit from such activities. Accordingly, the League proposes that the words ", not to exceed the Committee's cost of copying" be inserted at the end of this subsection. See Appendix A to these Comments.

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<sup>1</sup> In addition, it would be appear to be necessary for an arbitrator reviewing the NCC's decision to review the confidential data, in determining whether or not to uphold the NCC's decision. But if a neutral arbitrator must review the data, it would be unfair for outside counsel and consultants not to have access to the same data, so that they could effectively argue the matter to the independent, neutral arbitrator. As with Board protective orders entered in other contexts cited immediately above, pleadings that would otherwise reveal confidential data could be submitted in both full and redacted form.

3. *Posting of Public Files on the Internet and Viewing of Material at NCC*

In subsection (c) of Rule 4, the NCC's Proposed Modifications permit but do not require the Committee to post public files on the NMFTA web site, by docket and subject matter, including an index of the documents posted. The League believes that requiring the posting of public files on the NMFTA website in an organized and indexed manner, and within a reasonable period of time (e.g. two business days from receipt of the information), would be preferable, since it would ensure the most efficient access to the information and would save costs of postage or facsimile charges. See Appendix A to these Comments. If this change is adopted, a conforming change would also be required to Article III, Section 3.(d). Finally, the League believes that a party should have the opportunity to view the material at the Committee's office, an option that may be particularly useful and cost-effective for the Committee and the shippers involved if the material is voluminous. See Appendix A to these Comments.

**B. Article V – Arbitration**

The League believes that it is critical that changes be ordered to Article V of the NCC's Proposed Modifications, dealing with the selection of a neutral arbitrator for review of the Committee's decisions. The NCC's Proposed Modifications give far too much power to the NCC to influence the choice of a neutral arbitrator; are needlessly expensive and complex; and do not appropriately state the legal standard that the neutral arbitrator should follow. The League urges the Board to adopt the changes to Article V, "Arbitration," that are attached to these Comments as Appendix B.

1. *The List of Potential Neutrals*

Under the NCC's Proposed Modifications, within two business days after a request for arbitration, the Secretary of the NCC shall "develop, prepare or select" a list of neutral arbitrators

from an independent arbitration association. Thereafter, the parties are given three days to confer to determine if they can agree on a neutral from the list. If they cannot, and select two different arbitrators, then the two arbitrators that the parties have already selected "will choose the arbitrator to handle the matter from the remaining arbitrators on the list who were not selected." Thus, "The List" becomes a critically important factor in determining who becomes a neutral, and therefore in determining the overall fairness of the arbitration.

Under the NCC's Proposed Modifications, the selection of that list of potential neutrals is completely within the power of the Committee, unfettered except that it must be chosen from an "independent arbitration association" chosen by the Committee. But even if a list of potential neutrals is supplied by an independent arbitration association, there will inevitably be persons on that list who may, by experience or disposition, be inclined toward the position of the Committee. Under the NCC's Proposed Procedures, the number and identity of the persons chosen for the list of potential neutrals will be entirely up to the NCC. Thus, under the NCC's Proposed Procedures, there is nothing, for example, to restrict the NCC from choosing just three people for the list of potential neutrals supplied to the claimant, thus virtually predetermining who will become the neutral. In addition, the preparation of the list of potential neutrals is hidden from public view until after the arbitration is requested, thus presenting no opportunity for the STB or the public to scrutinize the NCC's choices for the list. Finally, the NCC's Proposed Procedures are needlessly expensive: if the two selected arbitrators cannot agree on a neutral, the two selected persons must select another person from the list. But this means that the parties must pay for the work of the two to select the third.

Changes need to be made to this procedure. The League believes that a list of potential neutrals should be prepared by the NCC in advance of any request for arbitration, and posted on

the NCC's website. This will enable the Board and the public to scrutinize the list, and raise any questions about the list well before any claimants are "under the gun" to select an arbitrator.<sup>2</sup> In addition, the League's suggested changes set forth in Appendix B of these Comments to the NCC's Proposed Modifications specifies that the list should be supplied from the American Arbitration Association (a known independent source of neutrals) "and/or any other reputable neutral independent organization approved in advance by the Board." This advance approval of a non-AAA source of neutrals will provide the Board and the public with a "check" on the independence and neutrality of the arbitration organization which the Committee chooses to supply some or all of the names on the list.

Moreover, the Board should require a minimum number of names be placed on this public list of potential neutrals, to lessen the possibility that the outcome of the arbitration will be unduly influenced by the Committee's selection of the list. This is a critically important change that must be made to the NCC's Proposed Procedures. The procedures set forth in Appendix B to these Comments suggest that the NCC identify fifty (50) neutrals from the names supplied by one or more reputable, neutral independent arbitration associations. The League believes that this number of potential neutrals, plus the STB's advance approval of the independence and neutrality of any non-AAA source of potential neutrals, will insure that there are sufficient persons on the list of potential neutrals to insure that the overall "pool" is broadly fair and acceptable to all potential claimants and to the NCC.

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<sup>2</sup> Under the NCC's Proposed Modifications, the NCC has only two business days to "develop, prepare, or select" a list before it forwards that list to the claimant. Given the short time frame proposed by the NCC to "develop, select or prepare" a list, it would appear that the NCC would in all likelihood have done much of the work to develop a list anyway, since it is highly unlikely that the NCC would be "starting from scratch" upon the filing of a request for arbitration. Since work will have to be done before an arbitration request is filed in any case, the NCC should be required to complete the job of selecting a list of potential neutrals, and post it on its Web site.

## 2. *Selection of the Arbitrator*

As noted above, under the NCC's Proposed Procedures, once the Secretary of the Committee supplies the list of potential neutrals that the Committee (and the Committee alone, without public scrutiny) has developed, then the parties attempt to agree on a neutral, who will decide the specific dispute. If they name two different persons, then the two must attempt to agree on a third from the list. But the NCC's Proposed Modifications raise more questions than they answer. Why pay for two arbitrators to select a third? How do the two agree on a neutral? If the two cannot agree on a neutral, what happens then?

The NCC's Proposed Modifications regarding the selection of the neutral are not acceptable. A better, fairer, and more certain process is possible and desirable.

Under the procedures set forth in Appendix B to these Comments, the League suggests a procedure that is common in commercial arbitrations. Under these Appendix B suggestions, the NCC and the claimants will be given a short opportunity (seven business days) to attempt to agree on a neutral, whether from the list previously prepared or not. After all, if the parties can agree on a person (for example, someone with particular knowledge of the issue at hand, and yet one that both parties respect and trust), and that person is willing to serve, why not permit the parties to agree that that person should be used, whether he or she is a member of an independent arbitration association or not?

However, if the NCC and the claimants cannot agree, then the League's proposed procedures set forth in Appendix B to these Comments would supply a fair, certain, and inexpensive method of coming to a neutral. Under the League's proposed procedures set forth in Appendix B to these Comments, if the parties cannot agree on a neutral within the seven-day

time period, then the Secretary of the NCC would be required to select 15 names randomly from the list of fifty potential neutrals already posted on the NCC's web site, and forward that information via e-mail or fax to the claimants. Then, within five (5) business days, the NCC and the claimants simultaneously select 8 names from the list of fifteen. At least one common name must result. If only one common name results, then that person becomes the neutral. If more than one common name results, then the parties simply rank the common names, and the person with the lowest ranking becomes the presumed neutral. The League's suggested procedures also provides for "ties" in rankings. Finally, in order to insure that there are no conflicts of interest, the League's proposed rules provide that the presumed neutral be interviewed together by both the NCC and the claimants (which interview could be done either in person or by phone), to determine if there is any conflict of interest. If no conflicts of interest are found by the parties to exist, then the presumed neutral becomes the neutral arbitrator. If a conflict of interest is discovered, then the next common person on the list becomes the presumed neutral, with the interview process repeated.

These suggested procedures are much fairer than the procedures set forth in the NCC's Proposed Modifications; explicitly set forth the procedures for selecting a neutral if the parties cannot agree; and provide for much greater certainty that a neutral will in fact be selected. Finally, the League's suggested procedures are less expensive than the NCC's proposed procedures, which requires two nominees to pick a third person to act as the neutral (a task that the two nominees are unlikely to do for free), since no neutral is actually engaged for work until the process is complete.

### 3. *Commencing the Arbitration Process*

Under the NCC's Proposed Modifications, the parties must enter into an arbitration agreement with the chosen neutral. The League does not see the need for this step. If the list of potential neutrals is developed before arbitration is commenced, all persons on the list may be informed of the conditions under which they might be chosen and serve, with advance consent given.<sup>3</sup>

### 4. *Rebuttal Statement of Position*

Under the NCC's Proposed Procedures, the claimant and the Committee may submit to the arbitrator a statement of position as to why the Committee's or a Panel's decision is or is not in conformity with established classification standards. The claimant, however, as the party bringing the appeal, should have the right to submit a rebuttal statement. Such a rebuttal statement will be particularly important because it is very possible that the Committee's or Panel's original decision may modify the proposal brought for disposition. See NCC's Proposed Modifications, Article IV, Rule 6. In disposing of a proposal, the NCC's Proposed Modifications do not require the Committee or a Panel to explain its rationale. *Id.* If the Committee or Panel modifies the proposal, the rationale for the original proposal set forth in any staff analyses may thus be only partially applicable, or not applicable at all. Thus, the Committee's counter-statement of position may be the first opportunity that a claimant has to

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<sup>3</sup> Proposed Rule 4 of the League clarifies that the claimant(s) and the Committee should share in the fees "and expenses" charged for the services of the neutral arbitrator, including "any costs relating to the arbitration process." The sharing of costs and expenses may have been implicit in the NCC's wording, but the League believes that an explicit statement would be better.

understand the basis for the decision, and thus it would be particularly important for the claimant to have the right to submit a rebuttal statement.<sup>4</sup>

5. *Statement of the Arbitrator's Decisionmaking Standard*

In proposed Rule 7 of the NCC's Proposed Modifications, the NCC includes a sentence stating that 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)."

There are two things wrong with the standard stated by the NCC. First, the wording in the Proposed Modifications does not reflect the legal standard expressed in Ex Parte MC-98. In Ex Parte MC-98, the Interstate Commerce Commission found that 11 of the 15 classification factors previously utilized should be consolidated" into 4 condensed classification factors", namely, density, stowability, handling, and liability. 367 I.C.C. at 248. However, the NCC formulation goes further. It states that the arbitrator should determine the reasonableness of classification by "*comparison*" of these four characteristics "*with the transportation characteristics of other commodities that are assigned a comparable rating.*" NCC Proposed Modifications, Article V, Rule 6 [emphasis added]. But the ICC's decision cited makes no mention of a comparison of these four factors with the transportation characteristics of other

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<sup>4</sup> The League is also suggesting a slight increase in the time period for submitting these statements of position, from seven to ten days. Particularly where there are complex proposals being acted on, or where there has been a modification of the original proposal by the Committee or a Panel, it may take some time to analyze a decision and submit a statement of position to the arbitrator.

commodities that are already assigned a comparable rating, as the controlling legal standard. Of course, as an evidentiary matter, it is likely that a party may attempt to justify a particular classification by referring to other comparable commodities. But this is not the controlling legal standard. The difference is subtle, but important. The NCC formulation would establish as the controlling legal standard, existing classifications, since a reasonableness determination would be judged, as a matter of law, on whether a complained of classification is “comparable” to one or more existing classifications. The League believes that the NCC’s wording erroneously elevates existing classifications as the controlling legal standard. It is clear that the ICC’s decision in MC-98 did not do so, and in fact, the ICC specifically left open the possibility that existing classifications might be challenged. See, 367 I.C.C. at 257.

Second, the reference to MC-98 is unnecessary, since the previous sentence in Rule 7 of the Proposed Modifications already states that “[t]he arbitrators conclusions shall be governed by the established regulatory and legal standards and precedent for evaluating the reasonableness of classification provisions.” This sentence would encompass the standards in MC-98, and indeed is a better way of stating the proposition, since it would provide for the possibility that a future Board might change the specific reference to the MC-98 decision cited by in the Proposed Modifications. As the ICC noted in its decision in Ex Parte MC-198, [w]e find no merit in the view that Congress intended the current classification system to be immutable.” 367 I.C.C. §245.

In addition, the Proposed Modifications provide that the arbitrator may only consider the record before the Board, and not the parties’ statements submitted pursuant to the previous proposed Rule. The League believes that the arbitrator should be able to consider not only the record below, but also the parties’ statements. The League would note that, under the NCC’s Proposed Modifications, the arbitrator would not even need to await the parties’ statements

before rendering his or her decision. Clearly, the time period for rendering a decision should run only after the arbitrator has received the parties' statements of position.

6. *Time Periods for Requesting Arbitration and Arbitrator's Decision*

Finally, the League is suggesting that claimants be required to demand arbitration within 15 days of a decision by the National Classification Committee, rather than the thirty days proposed by the NCC. The League believes that claimants should be able to determine whether or not to seek arbitration during that shortened timeframe.<sup>5</sup>

The League also believes that an arbitrator should render a decision within thirty days of receipt of the public record and the parties' statements, rather than forty-five days of the receipt of the public record as proposed in the NCC's Proposed Modifications. The total time period for decision suggested by the League is actually slightly longer than the period proposed by the NCC (55 days versus 45 days), but the League's standard would accommodate the parties' submittal of their statements of position, including a slightly longer time than proposed by the NCC for submitting the claimant's original and the NCC's reply statements, plus a rebuttal statement of position by the claimant(s), the need for which is discussed above. Under the NCC's Proposed Modifications, the arbitrator would be required to render a decision 31 days after receipt of the parties' statements of position, or almost exactly the same time as proposed by the League (30 days).

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<sup>5</sup> That change would also require a change in the rule setting forth the time period for filing a challenge to a classification decision if arbitration is not sought. See Appendix B to these Comments, proposed Rule 8.

C. **Article III, Section 3. - Conduct of Business by the Committee or a Classification Panel**

The time periods that exist for obtaining access to NCC dockets and public files, and for filing submissions with the NCC, are an important aspect of the revised NCC procedures. In its 2001 Decision, the Board stated that data, studies and other information underlying a proposed classification must be made available sixty (60) days in advance of NCC action on the proposed change. The Board further stated that “[a]ny other submitted information must be made available in the public docket for 30 days (or some other appropriate duration) prior to the NCC taking action.” 2001 Decision, Appendix A, Art. 4.

The NCC seeks to address this aspect of the Board’s decision in Article III, Section 3(c). Specifically in Article III.3(c)(2) of the revised Agreement, the NCC proposes that parties interested in an NCC docket may submit statements and supporting data and documentation “no later than thirty (30) days prior to the public meeting.” Proposed Article III.3.(c)(3) provides that “after thirty (30) days but no later than fifteen (15) days prior to the public meeting,” the Committee or any interested party may submit a statement or analysis, “but no new facts, data or evidence.”

The League is concerned that the time periods established by the NCC for submitting statements and supporting data, and for submitting responsive statements but no new facts or evidence, may not provide the parties with sufficient time to respond to NCC proposals. Under the proposed procedures, shippers would have at most thirty (30) days to analyze a docketed proposal and supporting documentation, gather any new facts and evidence, and prepare responsive statements. Although the NCC is required to post notice of the dockets, staff reports, and raw data supporting a proposal sixty (60) days in advance of an NCC meeting on the

proposal, it is not realistic to believe that all interested parties will be aware of such information at such time. Thus, in most cases, shippers will have less than thirty (30) days.

Although the NCC has proposed improved procedures for providing notice of its proposals and meetings in response to the Board's 2001 Decision, business schedules, holidays, vacations, and other factors may prevent interested parties from learning of classification proposals at the earliest possible time. In addition, controversial proposals, as was the case with the classification of acids and poisons, may require substantial research, analysis and written statements.

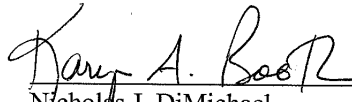
For these reasons, the League believes that Article III.3.(c)(2), which sets the time period for interested parties to file statements in response to a proposal, along with supporting data, should be reduced from thirty days to "no later than fifteen (15) days prior to the public meeting." Likewise, Article III.3.(c)(3), which sets the time period for the NCC or interested parties to file statements without new facts or data, should be revised to require the submission of such information "after fifteen (15) days but no later than seven (7) days prior to the public meeting. . . ."

Adopting these changes to the NCC Agreement would better allocate the time periods for responding to NCC proposals. Moreover, since shippers and the NCC have submitted statements and comments on proposals as late as the day of the public meeting under the current NCC Agreement, the changes proposed here should not be unduly burdensome.

## CONCLUSION

For the foregoing reasons, the League respectfully requests the Board to require the NCC to revise its proposed procedures in accordance with the proposals set forth and attached as Appendix A and B herein.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Karyn A. Booth", is written over a horizontal line.

Nicholas J. DiMichael

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Dated: May 20, 2002

# APPENDIX A

## 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.

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# APPENDIX B

## **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 its 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-fivethirty (4530) 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 thirtyfifteen (3015) 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**

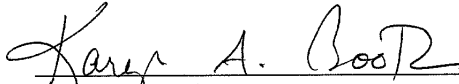
If arbitration is not sought within fifteen (15) days after the classification decision on a proposal is made by the Committee or a Classification Panel, the approved changes may be published to take effect on not less than fifteen (15) days' notice. Should the classification change be protested before 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.

### **CERTIFICATE OF SERVICE**

I hereby certify that I have on this 20<sup>th</sup> day of May, 2002, served a complete and correct copy of the foregoing document upon all parties of record in this proceeding by first class mail, properly addressed and with postage prepaid.

  
Karyn A. Booth