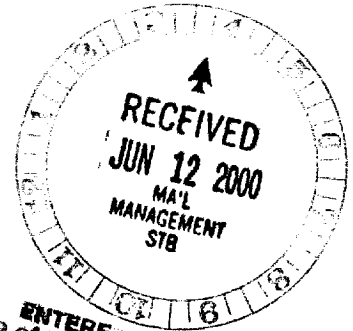


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ORIGINAL

Before The
Surface Transportation Board

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



Rebuttal Comments
Of
The National Classification Committee

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Before The
Surface Transportation Board

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

Rebuttal Comments of the
National Classification Committee

The National Classification Committee (NCC), through its counsel, submits these comments consisting of the joint statement of Joel L. Ringer and George M. Beck, NMFTA's Senior Classification Specialist, the statement of Lisa K Winter, NMFTA's Classification Specialist; and of counsel addressing: various allegations made in the Reply Comments filed in this proceeding jointly by the National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc., hereinafter referred to as the Conferences; the Rubber Manufacturers Association and the Halogenated Solvents Industry Alliance, Inc., adopting the Conferences' reply; The National Industrial Transportation League, hereafter referred to as NITL; and The Transportation Consumer Protection Council, Inc., hereafter referred to as TCPC. The NCC respectfully responds to the allegations made in those statements as follows:



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I.

PREFATORY REBUTTAL STATEMENT AND REQUEST TO CONFRONT ADVERSE INFORMATION

A. Prefatory Rebuttal Statement

Essentially, the involved shipper associations take the positions in their Opening and Reply Comments that they should control classification actions by having an equal or proportional vote; that final proposals on classification matters should rest with somebody other than the carrier member National Classification Committee (NCC), or that all classifications should be the product of “negotiations” between the shippers and the carriers. The bottom line is that carriers should not be able to establish the classifications of the freight they transport in their vehicles— especially, and apparently only, when class increases are involved.

A number of factors militate against those unwarranted revisions of the classification process. First, the Interstate Commerce Act authorizes carriers to collectively formulate classifications. Through the many legislative changes that have taken place in the past two decades Congress could readily have amended the statute to authorize shippers to act with carriers in the establishment of classifications. Significantly, Congress during its deliberations on the rate bureau provisions in the Motor Carrier Safety Improvement Act of 1999 was aware of the STB’s statements in Section 5a No. 61, National Classification Committee— Agreement, regarding increased shipper participation in the classification process and could have changed the statutory scheme to include shippers— it did not do so.

Second, Congress has committed to the STB’s jurisdiction the determination as to whether a classification prescribed by the NCC is reasonable. The STB cannot abnegate that

responsibility to some “other body,” with no or little authority to reverse decisions reached in some other forum, as some shipper associations have suggested.

Third, the arguments charging bias and unfairness on the part of the NCC are grounded on the contention that there is a disproportionate number of classification increases initiated by the carrier members. As the uncontested record shows that contention is baseless. No matter how the number of classification increases are viewed, or even distorted by the Conferences, the unassailable fact remains that there is a demonstrated balance in the classification actions taken by the NCC. Of the 1,506 classification proposals docketed during the ten-year period from 1989 through 1999, 307, or 20.39% of the total proposals involved class increases only; 252, or 16.73%, involved both class increases and reductions; and 225, or 14.94%, were class reductions only. In fact, when one only considers the 784 classification proposals involving changes in class ratings, as the National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, (the Conferences) argue in favor of, the reasonable relationship between those changes is not altered. Class increases only account for 39.2% of the total; class increases and reductions for 32.2%; and class reductions only comprised 28.7% of the class changes. Manifestly, those results evidence the fairness of the classification process as administered by the carriers. Not addressed by any of the shipper conferences is the showing that of the 52 proposed classification increases that were protested since 1980, 42, or about 80%, were neither suspended nor investigated, and about 95% of those proposals ultimately became effective even after full investigation as to the reasonableness of certain of those classification changes by the ICC and Surface Transportation Board (STB or Board), or after remand by the court of ICC decisions finding that several of the classifications erroneously were not shown to be reasonable. How could a biased and unfair system produce those results? The

answer is obvious, and the unsubstantiated allegations of certain shipper association representatives to the contrary have no merit.

Additionally, the Conferences candidly admit that shippers wish to avoid class increases. Indeed, the vehemence of the opposition of certain of the shipper groups participating in this proceeding to the recent or pending classification changes or reviews of cloth and fabric, poison materials, belts or belting, hose or tubing, and tobacco products attests to the verity of that admission. One cannot deny that the transportation characteristics of articles change as new technologies change the physical composition of products or different methods of packaging are utilized, which changes require reclassifications. How objective or fair would affected shippers be in assessing the merits of a classification increase on their products? Interestingly, the Conferences argue that only carriers propose classification increases. That fact alone validates that shippers are not and cannot be impartial in classification matters.

Given the competitive relationships which exist among carriers and among shippers, little exposition is required that the commercially sensitive information provided to the NCC regarding products, markets, customers, and values must be kept confidential. That fact is attested to by both carriers and shippers on this record. In similar vein, carriers will not submit information regarding products they are transporting if the fact that they have requested that products be reviewed by the NCC is open to public scrutiny. It is no secret that throughout the years carriers identified with such requests or resulting proposals have lost the business of shippers whose products were involved.

The NCC, upon request and without cost, currently makes available to anyone copies of all NMFTA staff reports and analyses regarding classification matters. The NCC has also proposed that it will make those reports and analyses available on its web page; and that the

formats of those documents will be revised by presenting the factual information in an easily readable manner. So too, NMFTA staff reports on commodities will be provided to any person who has supplied information on an involved article. Moreover, "justification" statements which are provided in the Docket Bulletin will be expanded to include data on the transportation characteristics of the involved commodity or commodities which are available to the National Motor Freight Traffic Association (NMFTA) staff at that time. Thus, any interested person readily will have available the very same information provided to the NCC and the Classification Panels, and upon which their classification actions are based. Certainly, with the implementation of those NCC suggested proposals there is no process which is more open to the public, and conducive to shipper participation, than the procedures by which the NCC conducts its classification activities.

It is obvious that not even that openness will satisfy some of the shipper association representatives. The issue then becomes what justification would warrant the unbridled invasion of the NCC files that is sought. The only real excuse that has been presented by certain shipper groups is that such access is "necessary" to make sure that NMFTA staff is not selecting only that data which supports an increase— a very serious allegation. However, other than that bald allegation there is not a single fact to substantiate that spurious attack on the integrity of NMFTA's staff. Conversely, militating against enabling shipper representatives to rummage at will through the NCC's files is the harmful effect such access would have on shippers and carriers alike in exposing sensitive commercial information to competitors. That exposure would gravely interfere with the classification process and needlessly disrupt a vital source of information essential to the classification process.

The accuracy and reliability of the information obtained by the NMFTA staff and reported to the NCC as a basis for their classification actions is well attested to by the success the NCC has had over many years in justifying classification increases to the ICC and the STB. In no instance has it ever been shown that data in the NMFTA's staff's possession was not fairly and accurately reported to the NCC—and the involved shipper associations have not documented or otherwise evidenced their unfounded allegation on this record. That contention must be rejected as unsubstantiated.

Finally, it is important to keep the matter of classification making in perspective. As customers, the shipper groups, no doubt, would like to control every element of the prices and services offered by their carriers. Certainly the proposals they have offered in this proceeding would accomplish that result for the classification activity. It should be recognized that freight classification is a useful tool that promotes the equitable distribution of the transportation burden. In most industries such activities would be confidential. Shippers have a recognizable interest in activities that are conducted under the NCC's sec. 5a Agreement only because these activities are conducted on a collective basis under limited immunity from the antitrust laws. However, the shippers' legitimate concerns extend only to the point where it is necessary to insure that the NCC's collective process does not harm the public interest. The ICC has determined that classification making decisions remain "within the management prerogative of carriers"¹. Surely regulatory oversight that is required to protect the public interest has not reached the point where motor carriers must accept their customers as equal partners in the pricing of their transportation services.

¹ Investigation into Motor Carrier Classification, 367 I. C.C. 243, 255 (1983).

B. Request to Confront Adverse Factual Information

In 1956, the ICC approved the National Classification Committee Agreement and pursuant to sec. 5a of the Interstate Commerce Act [49 U.S.C. §5b] the NCC's collective classification making activities that were conducted in accord with this Agreement received antitrust immunity. For the next forty-five years, working under this grant of immunity, the motor carrier participants have collectively revised the NMFC to meet their transportation needs. They have established organizations for this purpose (the NMFTA and the NCC) and they have developed their own individual pricing systems based on the NMFC's provisions. These individual systems have grown in complexity and sophistication - particularly since the advent of electronic data processing.

The Classification system has remained viable for many years because it is recognized as an equitable and pro-competitive system that meets the needs of the shippers and carriers who use it. In the legislative history of the Motor Carrier Act of 1980, Congress specifically recognized the value of the classification. It stated:

... [T]he committee is of the view that the commodity classification system currently in place is a useful tool for shippers, receivers and transporters of regulated freight so all 'know what they are talking about' thereby contributing to an efficient and economical transportation system. [H.R. No. 96 -1069, 96 Cong., 2nd Sess., page 28 (1980)]

In Ex Parte No. MC-98 (Sub-No. 1), Investigation Into Motor Carrier Classification, 364 I.C.C. 906 (1981), 367 I. C.C. 243 (1983), and 367 I.C.C. 715 (1983), the ICC conducted an extensive review of the motor carrier classification system. Recognizing the merits of the system and its role for the future, the Commissioner stated:

Carriers will always need a way of listing their prices. Classifying articles according to the relative transportation characteristics is one way of starting to assemble a rational pricing system. (364 ICC at 911).

In view of the foregoing, it is apparent that the Classification system represents a considerable investment of time, effort and expense by motor carriers and it is an asset that is of great value for the carriers. While the shippers also have an interest in the functioning of the motor carrier's classification system, their interest is obviously not nearly as important as that of the carriers.² The instant proceeding has the potential of negatively impacting the procedures of the NCC's Sec. 5a Agreement- procedures that are at the heart of the motor carriers' classification system. Inasmuch as the activities of the NCC are protected by antitrust immunity only so long as they are conducted in strict accord with these authorized procedures, it is of the utmost importance to the participants that these procedures continue to be workable and responsive to the needs of the classification process. Because this proceeding could negatively impact the substantive rights and ability of the carriers collectively to establish classifications under their presently approved Sec. 5a procedures, the NCC must be provided certain minimal due process rights, (see, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed 2d 548 (1972), including the opportunity to confront and rebut any adverse evidence that is submitted in the last scheduled filing of this proceeding.

The NCC has had the opportunity to confront and rebut adverse evidence in all of the ICC's major proceedings involving the NMFC that have been conducted within recent memory. These include: Ex Parte No. MC-98 (Sub-No. 1) Investigation into Motor Freight Classification, as well as proceedings where the NCC's Sec. 5a Agreement was at issue, i.e., Section 5a Application No. 61 National Classification Committee - Agreement, Decision decided May 7, 1987 (not printed) and Ex Parte No. 297 (Sub-No. 5), Motor Carrier Rate Bureaus

² The use of the Classification is optional to the shipper as well as the carriers. Any shipper has the opportunity to negotiate with its carrier for changes in any of its provisions or alternatively it may use a carrier that does not participate in the Classification.

Implementation of P.L. 96-296, Decision, (served December 30, 1980). The fundamental right to confront adverse information requires that any subsequent decision be based on information to which the party whose interest is effected is provided the opportunity to respond.

The Rubber Manufacturers Association and the Shipper Conferences have seized on what they contend is an unacceptable gap in the information included in a research project report that the staff prepared for a classification panel. Based on this purported omission they demand access to all of the sensitive confidential information in the possession of the NCC's Staff in order to prevent the issuance of similarly "deficient" reports in the future. The NCC's rebuttal explains that the alleged gap consists of information was in the possession of the shippers and that the carriers had requested them to supply this information, but the shippers ignored their request. The rebuttal statements filed in the instant proceeding on June 12, 2000, are likely to contain similar spurious arguments based on new facts that the NCC has not had the opportunity to confront.

For these reasons, the NCC requests the opportunity to respond to any factual allegations that are included in the statements filed in this last stage of the Sec. 5a Application No. 61 proceeding. It is submitted that this request it is supported by the weight of applicable precedent. Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (W.D.N.Y. 1963) involved the ICC's suspension of rates that were proposed by a trucking company, Davis & Randall (D&R). A principal issue was D&R's inability to rebut the adverse testimony of an expert witness who opined that the proposed rates would bring in more revenue than necessary to cover the truck company's costs of moving the freight. Judge Friendly was unimpressed by the fact that D&R had the opportunity to petition for rehearing or reconsideration of the agency's adverse decision that was based in part on this expert testimony. He gave the following

explanation as to why the opportunity for an appeal would not cure the carrier's denial of due process: "Argumentative criticism of expert testimony", he declared, "cannot be refuted by such a petition nearly so well as by the expert himself, who can often bring new facts to his support; and for commissioners, as for judges, freedom of decision is at least subconsciously constricted once a position has been publicly taken." The Commission's enforcement of the challenged order was enjoined, without prejudice to future action. (see also, Ohio Bell Telephone Co. v. Public Utility Commission 301 U.S. 724, 728 (1937). In Williston Basin Inter. Pipeline Co. v. F.E.R.C. 165 F.3d. 54, 63 (D.C. Cir. 1999) the court explained:

It is well-established that '[a] party is entitled ... to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.' Bowman Transp. Inc. v. Arkansas Best-Freight System, Inc. 419 U.S. 281, 288 n.4, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)

More specifically, NCC respectfully requests the opportunity to respond to factual information that may be submitted in this proceeding on the date set for the rebuttal statements (June 12, 2000), and proposes to do so within 30 days or by July 5, 2000.



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Rebuttal Statement of George M. Beck and Joel L. Ringer

This Statement is submitted jointly by George M. Beck and Joel L. Ringer, Senior Classification Specialists for the National Motor Freight Traffic Association, Inc., 2200 Mill Road, Alexandria, Virginia 22314, in rebuttal of certain misleading and erroneous comments made by opponents of the National Classification Committee's Section 5a Agreement.

Opening the NCC's Files Would Deprive the Committee of the Information It Needs To Maintain the *National Motor Freight Classification*

The National Small Shipments Traffic Conference and the Health and Personal Care Distribution Conference (Conferences or NASSTRAC) demand access to the NCC's files. They claim that access is necessary to ensure that the underlying data used by the NCC to effect classification changes is authoritative and accurate. However, it appears that they have another motive, namely to stop the flow of information to the NCC and to destroy the classification system. We make this bold statement because the Conferences are well aware that if the NCC's records are made available to anyone who wants to rummage through the files, including one's direct competitors, in short order no one will submit relevant product data. And this would bring the classification process to a grinding halt.

Mr. Bruce Hocum is President of Rubenstein Logistics Services, Inc., and a party to the instant proceeding. He has represented shippers before the NCC many times over the past quarter century and finds the current classification system to be "fair and equitable." In his Statement to the STB dated April 4, 2000, Mr. Hocum observed, "I have found from experience that the more data we can provide to the NCC, the better the results." But he also warned that his shipper clients "do not want the dimensions, weight, price or any other characteristics of their products discussed with or revealed to competing interests. Normally,

this is highly confidential data and in all of these past years I have never had any leaks in this information.”

The current classification activity on poisonous materials, of which NASSTRAC is a party, provides an illustration of the shippers’ strong desire to protect proprietary information.

Subject 10 of NCC Docket 2000-1, which proposed to reclassify poisonous materials, was disapproved by the full NCC on appeal at the Committee’s open, public meeting on May 1, 2000. This action was taken in response to shipper commitments that they would cooperate with the NCC and furnish comprehensive information relating to the transportation characteristics of poisons.¹ Lisa K. Winter, Classification Specialist for the NCC has since heard from one of the shippers involved, Mallinckrodt, Inc. In a telephone conversation on Wednesday, May 17, 2000, Mr. Robert Temper, who has represented Mallinckrodt throughout this matter, stated that he has developed extensive data on the transportation characteristics of the poisonous materials shipped by his company. When Mrs. Winter commented that the NCC was looking forward to receiving and reviewing Mallinckrodt’s raw data, Mr. Temper indicated that he was apprehensive about furnishing the information since another shipper participating in this effort, Fisher Scientific Company, is a competitor of his. And he does not want his competitor to have access to his data. (See accompanying Statement of Lisa K. Winter.)

The NCC remains hopeful that Mallinckrodt will honor its commitment to submit the data. And Mallinckrodt can rest assured that the NCC will honor *its* commitment to protect

¹ This action was discussed in our Reply Statement, dated May 11, 2000, at page 5.

the confidentiality of the company's information, as has always been the Committee's practice. Nevertheless, the point is made. If the NCC is forced to allow unfettered access to its files, shippers will simply not submit information on their products and risk having it fall into the hands of their competitors. As a consequence, the NCC would lose a vital source of classification information and would no longer be able to obtain the data it needs to fulfill its statutory obligation to establish and maintain reasonable classifications.

The Conferences *know* this.

In this connection, it is pertinent that Mr. Temper and Mallinckrodt have been working closely with Counsel for the Conferences in connection with the classification of poisonous materials, and they jointly attended several of the NCC and Classification Panel meetings where the matter was considered. It should be apparent that the Conferences are well aware of Mallinckrodt's concerns regarding the release of commercially sensitive product information. One must, therefore, question the Conferences' true motives in pushing for access to such information.

There is also more than a tinge of hypocrisy in the Conferences' demand. As we discuss in our Reply Statement, the Conferences often fail to submit data of their own despite ample notice and opportunity to do so. (For instance, while they have assured the STB that they intend to honor their commitment to the NCC, at this writing **the Conferences have provided no specific data on poisonous materials even though they have known about the NCC's research since at least October 1999—over seven months ago!**) Moreover, NASSTRAC has advised its shipper members not to cooperate with the NCC by furnishing relevant information on their products. Yet, the Conferences feel it is their right to examine the data that *others* might submit to the NCC.

For Similar Competitive Reasons, the NCC Does Not Give Carriers Access to Confidential Information Either

The Conferences continue to mislead the STB by insisting that the NCC relies primarily on carrier-furnished data to support classification changes.² This is not true, of course, as we have previously demonstrated. Nevertheless, we acknowledge that, in addition to obtaining information from shippers and firsthand observation, the NMFTA's staff does receive data from carrier participants of the *National Motor Freight Classification* relating to the transportation characteristics of products that move through their systems. These carriers do not want this sensitive information shared with other carriers any more than shippers want to share *their* information with other shippers. Carriers do not want their competitors to have access to information relating to their shipper customers, their traffic lanes or the nature and characteristics of the freight they handle.

For this reason, the NCC does not make the raw data and backup files available to carriers either. There is no double standard here. Even carrier representatives who serve on the NCC itself do not see this material. **Carriers receive the classification reports and analyses that are prepared by the NMFTA's staff, which profile *all* of the relevant facts obtained from *all* sources without identifying specific products, shippers or carriers. These are the very same reports and analyses that the NCC now freely makes available to shippers and anyone else expressing an interest.** The Conferences are demanding access to commercially sensitive information that the NCC carriers themselves do not have; confidential information that is not necessary, *in that form*, to the decision-making process.

² At page 9 of their Reply Comments, dated May 11, 2000, the Conferences once again allege that the NMFTA's staff, on behalf of the NCC, "tends to rely on 'Shipment Information Forms' supplied by carriers."

Just like shippers, carriers will stop submitting product information to the NCC if that information is made available to their competitors. They will also not risk economic retaliation from their customers should the fact that they have provided the NCC with information on their products be made known to shippers. This is why the Conferences are so determined to find out *who* is supplying the NCC with information—perhaps even more than what that information is.

**The Conferences Grossly Mischaracterize the Recent
Classification Review of Belts or Belting**

In their Opening Comments, the Conferences referred to a recent proposal on rubber hose in an attempt to discredit the NCC's research procedures, the validity of the data the NCC uses to support classification changes and the classification process itself. In our Reply, we discuss the proposed reclassification of rubber hose in considerable detail.³ And in so doing we not only reveal the Conference's allegations to be fallacious, but we demonstrate that shippers are well served by the approved Section 5a procedures.

The Conferences are at it again, this time distorting the circumstances surrounding the NCC's research of belts or belting.⁴

NCC Research Project 744 investigated the transportation characteristics of the myriad belts or belting classified in items 23320 and 23340 of the *NMFC*, applying on "Belts or Belting, elevator, conveyor or transmission, rubber, plastic or woven fabric, other than 'V' type," and "Belts or Belting, NOI," respectively. The research did not center on rubber belts or 'V'-type belts, as erroneously stated by the Conferences. And contrary to the

³ Reply Statement of George M. Beck and Joel L. Ringer, at pages 7 through 11.

⁴ Conferences' Reply Comments, at pages 9 through 13.

Conferences' assertions, the NCC did not rely solely on carrier-submitted Shipment Information Forms for data.⁵

During the course of the research, 126 shippers were contacted directly by mail and asked to provide specific information relating to the transportation characteristics of belts or belting. Those shippers that did not respond to our initial mailing in November 1999 were contacted a second time in December 1999 and again asked to provide information. The Rubber Manufacturers Association (RMA) was contacted directly by mail, too.⁶ Only two shippers chose to participate in the survey. The data they furnished was supplemented with data submitted by carriers, and all of the information obtained was included in the research project report.⁷

The Conferences try to make much of the fact that the NCC's survey found no densities between 12 and 22 pounds per cubic foot (actually, 21.63 pounds per cubic foot). This is because, according to the RMA and two major shippers, Gates Rubber Company and Goodyear Tire & Rubber Company, most 'V'-type rubber belts—one of the many types of belts involved—fall in the 12 to 22 pcf range.⁸ But the research project report did not say that there were no belts or belting in the 12 to 22 pcf range, only that no information had been furnished on such belts or belting. Indeed, the report itself, which detailed the results of

⁵ At page 10 of their Reply Comments, the Conferences yet again refer to "...the Staff's reliance on Shipment Information Forms from carriers..." But just because they say it ad nauseam does not make it so. As we have clearly demonstrated, and will continue to demonstrate, the NCC and the NMFTA's staff go to considerable lengths to obtain data from shippers as well as carriers. And the NCC endeavors to base its classification decisions on the most complete record that can be developed.

⁶ Ms. Ann Wilson, RMA's Vice President for Government Affairs, and Mr. Kevin Ott, Vice President of RMA's General Products Group, were each sent a letter and survey questionnaire.

⁷ The research project report, prepared for the Classification Panel that met on May 2, 2000, was made available to all interested parties, including Counsel for the Conferences who participated as Counsel for the RMA and on behalf of Gates Rubber Company. A copy of the project report was appended to the Conferences' Reply Comments.

⁸ Conferences' Reply Comments, at page 10.

the NCC's survey—there was no proposal being considered—points out that our analysis was “based on the known data.”⁹

The Conferences are disingenuous at best in alleging “carrier bias in reporting data to [the] NCC.”¹⁰ In connection with the belts or belting investigation, the NMFTA's staff contacted 126 shippers, each twice, in an effort to obtain “extensive,” “authoritative,” “accurate” shipper data. And with two exceptions, the shippers failed to provide that data. Both Gates Rubber Company and Goodyear Tire & Rubber Company were included in our research survey, contacted directly by us and asked to submit information relative to the transportation characteristics of their belts or belting. Neither company bothered to respond. The RMA was also contacted directly by us and asked to provide assistance in connection with our survey. They, too, did not bother to respond. If the research project report on belts or belting was less than complete, it was not due to any carrier bias. It was because shippers and their representatives deliberately chose not to submit relevant data of their own. If they *had* wanted to submit data, they had ample time to do so; the shippers and RMA were surveyed months before the matter came before a Classification Panel.

Why didn't more shippers participate in the NCC's investigation of belts or belting? In their Reply Comments, the Conferences offer an explanation. “[T]here are limits to the amount of time shippers can devote to gathering...information...It is burdensome enough for a Goodyear or a Gates logistics professional to have to divert his or her attention from day-

⁹ See page 2 of the research project report attached to the Conferences' Reply Comments.

¹⁰ Conferences' Reply Comments, at page 11.

to-day duties in order to gather information on commodity transportation characteristics for the NCC.”¹¹

Counsel for the Conferences gave a different explanation at the Classification Panel meeting where the classification of belts or belting was considered. At that meeting on May 2, 2000, the Panel noted that Gates, Goodyear and other shippers had not participated in the NCC’s survey on belts or belting despite having knowledge of the research investigation for at least several months. (In addition to the direct-mail notifications, the NCC’s research of belts or belting has long been noticed on the NMFTA’s Web site, and the Panel’s consideration of the matter at the May 2 meeting was noticed in the NCC’s Docket Bulletin as well as on the Web site.) In responding to the Panel, Counsel for the Conferences, acting in his capacity as Counsel for the RMA and on behalf of Gates, said “Often your docket will say such and such a commodity as a research project – shippers tend not to throw a bunch of information at you merely because the product is named as a research project. What triggers a reaction is the report.” Holding up his copy of the research project report, he went on to say, “This is dated April 19, and this is what triggers the response of the [shippers].”

So while the Conferences complain and complain to the STB that shippers have insufficient notice of the NCC’s classification-making activities, they are saying to us that shippers tend to ignore the extensive notice provided by the NCC of its research investigations, which are generally conducted months before any consideration is given to a possible reclassification. And while the Conferences complain and complain to the STB that the research project reports prepared by the NMFTA’s staff include insufficient shipper data, they are saying to us that shippers tend to wait until after the NCC concludes its research, and

¹¹ Conferences’ Reply Comments, at page 12.

the project report is written and presented to the NCC or a Classification Panel, before they will furnish their data, if at all.

Certainly not all shippers act as the Conferences suggest. Many shippers do respond to the NCC's research requests and furnish meaningful data in a timely fashion so that it may be incorporated into the classification reports. And many shippers work cooperatively with the NCC for the development of mutually acceptable classifications consistent with recognized classification criteria. But there is no doubt that some shippers do act as the Conferences state. And in our experience, those shippers who choose not to participate in the NCC's research surveys and choose to ignore classification notifications are likely to be the first to complain about the NCC's classification-making activities and the classification process.

Belts or belting offer a case in point. At the May 2 Classification Panel meeting where the classification of belts or belting was considered Mr. Paul Fortney, Senior Transportation Analyst for Goodyear, made an oral presentation. Despite the fact that Goodyear had repeatedly ignored the NCC's request for information on the transportation characteristics of its products, Mr. Fortney was quick to discredit the information presented in the research project report and quick to castigate the Panel for considering a reclassification of belts or belting based on that information. Mr. Fortney came armed with some specific data on Goodyear's products; data that apparently had been too "burdensome" to collect and send to the NCC months before.

Wouldn't it have been more time- and cost-effective for Goodyear and the other shippers to have submitted the requested data to the NCC in the first place so the project report could have reflected that data?

The NMFTA's Staff Does Not Recommend the Docketing Of Any Classification Proposal

The Conferences believe they've really hit upon something with regard to the sample provisions shown in the research project report on belts or belting. "To the Shipper Conferences, this looks very much like a suggestion or recommendation by the Staff,"¹² implying that the NMFTA's staff has overstepped its bounds by recommending the docketing of a proposal. However, such sample provisions are not recommendations to docket a proposal, and their inclusion in staff-prepared research project reports is completely appropriate.

When the NCC or a Classification Panel initiates a research project, it is customary for the Committee or Panel to direct the NMFTA's staff to include in the project report—in addition to all of the relevant facts gathered—possible provisions consistent with NCC guidelines and policies.¹³ There is nothing secretive about this. The directive to include such provisions in the project report is made plain to all parties attending the open, public meeting. The sample provisions are not a recommendation of what proposal should be docketed or that a proposal should be docketed at all. They are intended only to illustrate classification provisions that would be consistent with NCC guidelines, policies and precedent, based on the staff's expertise and in light of the facts available. The provisions assist the NCC and its Classification Panels in their deliberations, and they can provide focus to shipper/carrier discussions, as the Conferences' Reply Comments attest.

¹² Conferences' Reply Comments, at page 11.

¹³ Sample provisions involving the assignment of classes are included in research project reports only when there is a specific directive to do so.

Inclusion of such provisions in staff-prepared classification reports is consistent with the Interstate Commerce Commission's Decision in Ex Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus – Implementation of P.L. 96-296*, December 19, 1980 (served December 30, 1980).¹⁴ In that Decision, it was recognized of bureau staff "that these individuals have a good deal of expertise and that their recommendations are valuable to the member carriers."

At the same time, the Ex Parte No. 297 (Sub-No. 5) Decision found that staff members "should not initiate or submit...proposals nor make final determinations to adopt, reject, or otherwise dispose of proposals." This the NMFTA's staff does not do. At no time do we docket, direct the docketing or recommend the docketing of any classification proposal. Nor do we make any decisions or recommendations with respect to the disposition of any classification proposal. It is the NCC's or Classification Panel's call as to what classification action, if any, is to be taken. And if the Committee or Panel decides that a proposal should be docketed, it is *they* who determine what form such a proposal should take. Anyone who has attended an NCC or Panel meeting and participated in or observed the proceedings knows this.

With respect to the research project report on belts or belting, the Classification Panel did not docket the sample provisions shown. In fact, the Panel did not docket any proposal and instead directed the staff to work with the shippers and conduct further research.

¹⁴ 364 I.C.C. 464 (1980).

**The NCC's Review of Belts or Belting Provides Further Evidence
That There Is No Bias in the Current Classification System
Towards Class Increases**

In our previous Statements, we demonstrated that allegations made by the Conferences, the National Industrial Transportation League (NIT League) and others that the NCC's current Section 5a procedures create an inherent bias towards class increases are completely unfounded. The NCC's classification review of belts or belting further refutes those allegations.

The sample provisions in the research project report, reflective of the information available at the time the report was prepared, show classes for belts or belting predicated on density, with class 100 assigned where density is less than 15 pcf and class 65 assigned where density is 15 or greater pcf.¹⁵ The present provisions for belts or belting in *NMFC* items 23320 and 23340 assign classes 70 and 77.5, respectively. So the sample provisions would have yielded both increases and reductions. The Conferences recognize this: "Some...ratings would have gone up and some down."¹⁶

As already mentioned herein, the Conferences state that most 'V'-type rubber belts have densities between 12 pcf and 22 pcf. Thus, a significant number of 'V'-type rubber belts would have achieved a *reduction* to class 65 had the sample provisions been adopted.

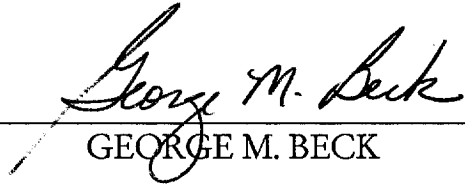
Mr. Fortney, appearing at the May 2 Classification Panel meeting on behalf of Goodyear Tire & Rubber Company, reported specific densities of 15.3 pcf, 15.4 pcf, 16.8 pcf and 35.0 pcf. Had the sample provisions shown in the NCC's research project report been adopted, *all* would have achieved a class reduction.

¹⁵ See page 3 ("ATTACHMENT") of the research project report appended to the Conferences' Reply Comments.

¹⁶ Conferences' Reply Comments, at page 10.

VERIFICATION

We, George M. Beck and Joel L. Ringer, verify under penalty of perjury, that the foregoing is true and correct. Further, we certify that we are qualified and authorized to file this statement. Executed on June 7, 2000.



GEORGE M. BECK



JOEL L. RINGER

STATEMENT OF LISA K. WINTER

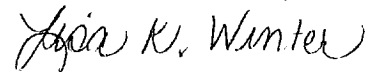
My name is Lisa K. Winter. I am the Classification Specialist charged with handling Docket 2000-1, Subject 10, the proposal involving poisonous materials. At the May 1, 2000 meeting of the NCC, the Committee members present agreed to disapprove the involved proposal in response to assurances by shippers of poisons that they would, in turn, provide detailed information on the transportation characteristics of their products.

On May 9, 2000 I sent a letter to the involved shippers reiterating what had transpired at the meeting and offering help if needed in compiling the information on the transportation characteristics of poisonous materials. I also included a survey form for them to use to record the data.

On Wednesday, May 17, 2000, one the shippers involved in the poisonous materials proposal as well as this proceeding, Mr. Robert Temper of Mallinckrodt, Inc., called me. In that telephone conversation Mr. Temper indicated that he had compiled extensive data (803 figures) on poisons shipped by Mallinckrodt. When I indicated that the NCC was looking forward to receiving and reviewing that data, Mr. Temper voiced his concern that he did not want other shippers having access to that data. Specifically, he mentioned that he was apprehensive furnishing the data since another shipper participating in this effort, Fisher Scientific Company, is Mallinckrodt's competitor. He stated that he does not want his competitor seeing the information.

Respectfully submitted,

NATIONAL CLASSIFICATION COMMITTEE



Lisa K. Winter
Classification Specialist

Dated: June 12, 2000



III. REBUTTAL ARGUMENT

The Conferences' attack on present classification standards and the NCC's classification procedures as being subjective and unfair are without merit. Commencing with the regulation of motor carriage in 1935, for over six decades motor carriers have had the duty to establish classifications of the freight they transport in interstate commerce, and the burden to demonstrate that any change made in a classification provision is reasonable. See former Section 316(b) and (g) of 49 U.S.C., and Motor Class Rating on Candy or Confectionery, 353 I.C.C. 315, 325-26 (1977). And for over four decades the National Motor Freight Classification has been the product of the collective activity of the motor carrier members of the National Classification Committee under agreement prescribing the procedures and conditions as approved by the former Interstate Commerce Commission pursuant to former Sections 5a and 10706(b) of 49 U.S.C. See National Classification Committee – Agreement, 299 I.C.C. 519 (1956).

The statutory mandates governing the motor carriers' establishment of the National Motor Freight Classification have not substantially changed throughout the legislative revisions affecting motor carriage that have occurred over the past two decades. Under present Section 13703(a) of 49 U.S.C., motor carriers still can and do establish the provisions of the National Motor Freight Classification (NMFC) collectively under agency-approved procedures. And, as has always been the case, the motor carriers have the burden of establishing that those collectively-made classification changes are reasonable. [See 49 U.S.C. § 13701(a)].

Over the course of legislative changes in the provisions governing the approval of collective activities conducted by motor carriers with antitrust immunity, the value and importance of the freight classification has been consistently recognized. (See, also, NCC's Reply Comments, pp. 12-17.) In enacting the substantial changes in motor carrier regulation which were incorporated into the Motor Carrier Act of 1980, Congress specifically indicated that proposed changes in commodity classifications were to be continued. As previously indicated, in discussing the intended ramifications of that Act, the House Report stated that:

[T]he Committee is of the view that the commodity classification system currently in place is a useful tool for shippers, receivers and transporters of regulated freight [s]o all "know what they are talking about" thereby contributing to an efficient and economical transportation system. (H.R. No. 96-1069, 96th Cong., 2d Sess., p. 28 (1980).)

Throughout the many legislative changes that have occurred since 1980, Congress carefully has preserved the collective establishment of the motor carrier freight classification. In his January 7, 1998 Comments in the prior proceeding in Section 5a Agreement No. 61, National Classification Committee – Agreement, Congressman Nick J. Rahall, II, currently Ranking Democratic Member of the Committee on Transportation and Infrastructure, revisited Congress' acknowledged regard for the motor carriers' freight classification. As pertinent, in discussing the deliberations in the House which ultimately created the Interstate Commerce Commission Termination Act of 1995, Congressman Rahall related that:

In fact, in the House of Representatives, there was never a question that we would not maintain immunity for commodity classifications with provision for this practice included in every draft of H.R. 2539 considered, from its introduction, through the Committee process, and as passed by the House. (Rep. Rahall Comments, p. 2.)

Further, in explaining the basis for his support for continuing antitrust immunity for the NMFC, Congressman Rahall stated that:

I believed then, as I do today, that the efficient operation of the motor carrier industry, and its ability to serve both shippers and consumers alike, depended on the continuation of commodity classifications. In this regard, the hearing record developed during consideration of the 1995 Act (as well as records developed in preceding legislative actions going back to 1980) clearly showed that motor carriers could not, and would not, meet collectively without immunity. It is a fact that tremendous volumes of traffic move in LTL service, rather than under contract for FAK, but subject to their proper classification. No system other than the National Classification Committee Agreement provides for the grouping of products with comparable characteristics, or the separation of products that are dissimilar, for transportation purposes. (Rep. Rahall Comments, p. 3.)

Obviously, Congress does not share the low regard for freight classification that some shipper association representatives have expressed in this proceeding. Additionally, the criticisms leveled at classification standards and the NCC's classification procedures are unfounded.

First, the classification standards applied by the NCC in assessing proposals are neither subjective nor the product of motor carrier invention. As far back as 1943, the Interstate Commerce Commission in Motor Carrier Rates in New England, 47 M.C.C. 657, 660-661, categorized and designated the then 15 transportation characteristics which must be considered by motor carriers in establishing classification ratings. Then, some 35 years later in 1978, the ICC instituted an investigation into the motor carrier classification in Ex Parte No. MC-98 (Sub-No. 1). That proceeding spanned a five-year period, and as pertinent, in Investigation Into Motor Carrier Classification, 367 I.C.C. 715 (1983), the ICC, upon reconsideration, finally revised the previously recognized 15 elements of classification.

Excluded were the elements of trade conditions, value of service, and competition with other commodities which were concluded to be economic factors, and more properly were to be considered as part of the carrier ratemaking process. The remaining 11 elements were condensed into four composite classification factors: (1) density; (2) stowability, which includes excessive weight or excessive length; (3) ease or difficulty of handling goods, which includes the necessity of special care or attention; and (4) liability which considers also value per pound, the susceptibility to theft, liability to damage, liability to damage other commodities with which it is transported, liability to spontaneous combustion or explosion, and perishability.¹

Second, those are the very same standards which have guided the NCC in establishing classification changes for the past 27 years. Moreover, as previously pointed out, there is nothing subjective in either the evaluation of those characteristics or the assignment of classification ratings. The NCC's burden in justifying classification change is, and always has been, the showing that the class rating proposed bears a reasonable relationship to the class ratings presently applicable on articles exhibiting the same or comparable transportation characteristics. (See Batteries in D.C. and PA. Over Tidewater Exp. Lines, 18 M.C.C. 118 (1939); Motor Class. Rating On Candy or Confectionery, 353 I.C.C. 314 (1977); and Investigation and Suspension Docket No. M-30436, Classification Ratings On Intermediate Bulk Containers, National Motor Freight Classification, Decision, dated August 30, 1994, at pp. 6-7 (not printed).

¹ Ironically, in that proceeding the same Conferences which are here challenging the objectivity of the present classification standards, in support of the NCC, successfully disputed the ICC's ranking of the importance of the recognized liability factors, with the Conferences demonstrating how the importance of each of the six underlying liability factors changes with the nature of the article. (See 367 I.C.C. at 717.)

There is no mystique regarding freight classification as some shipper associations contend. The standards by which classifications are established and are shown to be reasonable are agency- and not carrier-created. Those standards are applied by the carriers in conformity with the guidelines established by the ICC, and applied today by the STB.

Equally vexing are the criticisms of the procedures under which the carriers establish classifications. The inferences and allegations raised essentially maintain that the NCC's procedures are biased and unfair. Yet, in seeking unfairly to fault the NCC for the obvious purpose of gaining control over those procedures, the involved shipper associations fail to acknowledge that the Interstate Commerce Commission prescribed the very procedures under which the NCC operates.

Providing the public with an opportunity to be heard and to present information on classification proposals is a traditional and inherent part of the classification process. See Less-Than-Truckload Rating, Book Matches, C.F.A. Ten., 10 M.C.C. 595 (1938). From its inception, the NCC has conducted its activities under procedures for the joint consideration, initiation, or establishment of classifications which were approved by the Interstate Commerce Commission. In National Classification Committee – Agreement, 299 I.C.C. 519, 522 (1956), the ICC described those procedures as follows:

The agreement established a code of procedure which enables applicants to utilize an effective means for joint consideration, initiation, and establishment of classification matters. It furnishes a means to avoid destructive competition, promote sound economic conditions, protect shipping interests, and allow carriers an independence of action, free and unrestrained. The collective procedure in conformity with the terms of the agreement is not prohibited by any provisions of section 5a and it will aid motor carriers to maintain reasonable and nondiscriminatory classifications of property in furtherance of the national transportation policy. (Emphasis added.)

The Motor Carrier Act of 1980 promulgated a number of requirements that were to be incorporated into rate bureau procedures, including revisions applicable to collective classification-making activities. (See former Section 10706(b) of 49 U.S.C., as amended by Section 14 of the Motor Carrier Act of 1980, Pub. L. No. 96-196 (1980).) In Motor Carrier Rate Bureaus – Implementation of P.L. 96-296, 364 I.C.C. 464 (1981), as clarified and modified at 364 I.C.C. 921 (1981), the ICC interpreted and implemented the requirements applicable to rate bureau procedures.

In response to the Motor Carrier Act of 1980, the NCC initially filed an application with the ICC seeking approval of amendments to its procedures to comply with the requirements of Section 14 of the Motor Carrier Act of 1980. In response to the ICC's decisions interpreting and implementing the Motor Carrier Act's rate bureau provisions, and to findings made in Charge For Shipments Moving On Order – Notify Bills, the NCC amended and supplemented its 1981 filing, and, on July 6, 1986 submitted an amended agreement in substitution of the original filing.

In Section 5a Application No. 61, National Classification Committee – Agreement, Decision served on May 18, 1987 (not published), the ICC, after thoroughly reviewing every aspect of the proposed revisions and specifically addressing the issues of employee activities, open meetings, and the final disposition of classification matters, provisionally approved the application pending a final decision of the agency on the NCC's incorporation of the modifications which were to be made. Amendments in conformity with that Decision subsequently were submitted to the ICC and final approval of the NCC's Section 5a Agreement and procedures was granted in the ICC's Decision in Section 5a Application No. 61, National Classification Committee – Agreement, served on May 9, 1988 (not published).

The finally approved procedures addressed every aspect of the NCC's classification activities including, as pertinent: the appropriate role of NMFTA staff in the classification process, which is to provide expert analysis and technical assistance to member carriers or shippers in developing or evaluating a proposal; keeping independent action proposals confidential; the specific requirements to be observed in conducting open meetings; and the disposition of docketed matters by the NCC and its Classification Panels. Except for the NCC's voluntary expansion of the media by which information regarding classification proposals and activities are made public, and the increased availability of staff reports and analyses to interested persons discussed in the NCC's Opening and Reply Comments, the procedures followed by the NCC in conducting classification matters are precisely those which were approved by the ICC in 1988.

The extended history of the evolution of the standards governing freight classification and the NCC's procedures has been provided so that the STB can assess the Conferences' contentions regarding the NCC's classification process based on fact and not unsubstantiated and adversarial allegations. The Conferences summarize their position as follows:

There appears to be little dispute among the parties that if the NCC is to retain antitrust immunity, fairness and objectivity should characterize its operations. This means fair and objective procedures, fair and objective results, as reflected in the National Motor Freight Classification ("NMFC"). To the extent that the Comments filed to date reflect disagreements among the parties, the disagreements involve whether the NCC's present operations meet the accepted criteria. (Conferences' Comments, p. 5.)

If, indeed, the Conferences have summarized the issues, the answers are immediate and self-evident. The fairness and objectivity of the standards cannot be questioned as they have evolved and been refined by the ICC throughout that agency's regulatory course. The

fairness and objectivity of the procedures speak for themselves. They are the products of an Act of Congress, agency rulemaking, and regulatory oversight which involved reviews and attendance by ICC Commissioners and staff at NCC and Classification Panel meetings through 1994. There have been no compliance survey reports indicating that the NCC's agency-approved procedures were, in any way, being conducted in an unfair or biased manner. Rather, the survey reports confirmed that the NCC's classification-making activities were being conducted in full compliance with its Section 5a Agreement. In fact, as indicated in the NCC's Reply Comments, the end result of an extensive investigation into the classification process conducted by the ICC because of the contention of a former NASSTRAC attorney that the staff were initiating proposals was that those allegations were unsubstantiated, and that the staff and the NCC were acting strictly within the approved Section 5a procedures. There can be no question, notwithstanding the Conferences' unsupported allegations, that the NCC's present operations meet the criteria of fairness and objectivity. If the measures already implemented regarding notice and the availability of reports and analyses, as well as those additional steps proposed in the NCC's Opening Comments, enhance the classification process—so much the better for all. But there is no basis for the Conferences' contention that the process needs “extensive reforms.”

The Conferences' attempt to evade the comments in Volume II of the NCC's Opening Comments attesting to the fairness of the NCC's classification procedures lack candor. They attempt to mischaracterize those statements as only supporting the retention of antitrust immunity, and not the necessity for “reforms.” (Conferences' Comments, p. 5, fn. 4.) The lack of verity of that contention is fully demonstrated by referencing just a few of those comments.

Reece H. Taylor, Jr., a former Chairman of the ICC stated that:

Today, the NCC's system operates "in the sunshine" and continues to function in strict accordance with all of the ICC-imposed directives. Any shipper or interested person is afforded both the right and the opportunity (i) to propose changes in the NMFC; (ii) to present views personally or in writing; (iii) to participate in the discussion of proposed changes in open public meetings of the NCC; (iv) to provide NMFTA's staff with details on the transportation characteristics of a product; (v) to appeal any decision made by a Classification Panel; and (vi) to protest such a decision to the STB and ask for its suspension and investigation. (NCC's Opening Comments, Vol. II, Statement of Reece H. Taylor, Jr., pp. 3-4.)

Former ICC Vice Chairman J.J. Simmons, III, commented that:

I'm convinced that the classification system, which contains only provisions specifically authorized by the ICC and operates in strict accord with the ICC prescribed procedures, is in the public interest. Frankly, it will be difficult to find a collective activity which is more in the public interest than the ICC's classification system. I urge the Board to renew the NCC's 5a Agreement. (NCC's Opening Comments, Vol. II, Statement of J.J. Simmons, III, p. 4.)

The Executive Vice President of the North Carolina Traffic League stated:

Another important aspect of the NMFC is the direct access to the classification process provided to shippers under the procedures by which the classification is established. Shippers can submit proposals for establishing or changing the classification assigned to their products, can avail themselves of the classification expertise of NCC staff in formulating and supporting their proposals, can work with the carrier members in the development of the facts and data upon which the resulting classification will be based. Shippers, therefore, are able to promptly change the classes assigned to or applicable on their products whenever new technology, product design or packaging results in an improvement in the transportation characteristics of their commodities. (NCC's Opening Comments, Vol. II, Statement of Bill Teague, p. 2.)

A representative of Borden Foods Corporation, Columbus, OH, commented that:

The Classification System provides a remedy for shippers of all sizes and types to classify their products and product packaging with the confidence that they will have an equal and fair say in the process. Borden Foods Corporation supports the NCC 5a Agreement Renewal. (NCC's Opening Comments, Vol. II, Statement of L.R. Widemand.)

Thermo Industries, Inc., Charlotte, NC stated that "we believe the NMFC is a fair and equitable basis for the establishment and application of motor carrier freight rates." (NCC's Opening Comments, Vol. II, Statement of Edmund R. Piesciuk.)

The California Department of General Services commented on the NCC's classification process as follows:

Another important and valuable feature of the classification system is our opportunity to take a proactive role in development of classification proposals. We have the right to partake in meetings, submit statements, and propose changes we deem necessary and share our views with the NMFC regarding any classification matter. Appropriate changes to the NMFC can be made. If we are dissatisfied with the disposition of a proposal by a classification panel, we are given the opportunity to appeal the panel's action, first to the full NCC, and ultimately to the Surface Transportation Board. (NCC's Opening Comments, Vol. II, Statement of David R. Wallace, California State Traffic Manager, p. 1.).

Mr. Raynard F. Bohman, Jr., president of The Bohman Group, Chatham, MA, a shipper representative who has made many appearances before the NCC and the Classification Panels stated that:

Over the past 18 years, I have repeatedly observed the committee members trying their level best to apply the NCC Density and Value Guidelines and other criteria fairly. It has not been an easy role for NCC members to play—putting on an entirely different hat once they got into the meeting room, with some of their own customers present—but I haven't found any members being arbitrary or unfair. They have been very conscientious in trying to make certain the process works the same for everyone. (NCC's Opening Comments, Vol. II, Statement of Raynard F. Bohman, Jr.)

Mr. Bruce D. Hocum, of Rubenstein Logistics Services, Inc., Golden Valley, MN, commented on the classification system as follows:

The present public docket service that is provided by the National Classification Committee serves as a public notice to everyone in the industry of any suggested changes. The public can attend any open meeting and discuss their needs. Any shipper who comes up with a new product or feels that the present ratings do not fit their needs can docket a proposal and have the rating changed. There is nothing secretive or coercive about the system. (NCC's Opening Comments, Vol. II, Statement of Bruce D. Hocum, pp. 1-2.)

Other statements attesting to the fairness and objectivity of the NCC's classification process could be evidenced as well. The point is the Conferences have gone too far in attempting to fabricate a case for "reform," and in misstating the substance of the comments which support the NCC's classification process.

A commonly pointed-to indicator of the purported unfairness of the system by the Conferences is the number of class increases processed by the NCC. In the NCC's Opening Comments, a survey was conducted of the 1,506 classification proposals processed over the course of the 75 dockets conducted during 1989 through 1999. Anticipating the unsubstantiated contention previously made by the Conferences that the vast majority of proposals are for increases only, it was shown that 307 of the 1,506 proposals, or 20.39% were for class increases only, 252, or 16.73% involved class increases and reductions; and 225, or 14.94% were for class reductions only. (See Attachment B to Matthew Welsh Statement, the NCC's Docket Coordinator.)

In their Reply comments, the Conferences attempt to engage in a "numbers game" to overcome that showing. They assert that if the proposals regarding packaging, clarifications and obsolete items are excluded, there are 784 proposals left. If one would then combine the

class increase items only and the items which involved class increases and reductions, i.e. some 559 proposals, then “71% involved proposals ... sought, in whole or in part, to increase commodity class ratings.” (Conferences’ Reply, p. 14.) Of course, that analysis avoids the fact that 252 of those proposals involved significant class reductions. Certainly, conversely, following the Conferences’ logic, it would be equally valid for the NCC to contend that by combining reductions with proposals involving reductions and increases, i.e. 477 proposals, “60.8% involved proposals that sought, in whole or in part, to decrease commodity class ratings.”

If the Conferences truly wish to analyze those 784 proposals by themselves, a more realistic and fairer breakdown of those proposals, giving effect to the actual impact of the changes, would show the following:

<u>Category</u>	<u>Number of Proposals</u>	<u>Percent of 859 Proposals</u>
Class Increases Only	307	39.2%
Increases and Reductions	252	32.2%
Class Reductions Only	<u>225</u>	<u>28.7%</u>
	784	100.0%

That distribution demonstrates a reasonable and fairly allocated number of proposals within all those categories. Patently, there is no merit to the Conferences’ contention that the classification process administered by the NCC predominately results in increases.

Conspicuously absent from any of the shipper association Reply Comments is any discussion of the overwhelming success the NCC has had in demonstrating the reasonableness of challenged classification proposals before the ICC, the STB and the courts. As shown, over the past two decades, 52 proposed classification increases were protested.

Of those, 42, or about 80 percent, were neither suspended nor investigated by the ICC and/or the STB. Ultimately, more than 95 percent of the 52 proposals became effective. If the NCC's classification process is so biased and its information-gathering so defective, how do the complaining shipper associations explain the demonstrated reasonableness and lawfulness of those classification changes in any and all forums in which they have been challenged? That obvious failure to establish the use of the classification process to generate disproportionate class increases or to evidence that the class increases proposed are unjustified, and/or unreasonable, undercuts their self-serving allegations attacking the classification system.

Without doubt, the Conferences have orchestrated a concerted attack that is being advanced at every opportunity by those shipper groups participating in this proceeding in opposition to the NCC classification procedures. In protesting recently proposed revisions to Items 49265 and 49540, et al., providing that shipments of Cloth, Fabric or Piece Goods be classified under density provisions, the American Textile Manufacturers Institute (ATMI) launched into a number of familiar attacks on the classification process stated here. In its Decision in Docket No. ISM 35007, Protest And Petition For Suspension And Investigation, decided January 20, 2000, the STB found that the classification changes have not been shown to be unreasonable, and rejected ATMI's contention that because the classification proposal was processed under the current procedures it should be suspended. The STB stated that:

We have instituted a proceeding to explore ways of improving shipper participation in the classification process (footnote omitted); however, we find no merit to ATMI's contention that the Board's concern with the current process warrants suspension and investigation of the proposed amendments. The current

process was approved by the ICC, and there has been no showing that the currently approved procedures were not correctly followed with the development and implementation of the protested amendments. (Decision, p. 4.)

Plainly, those same conclusions are warranted on this record concerning the Conferences' unsubstantiated contentions and insinuations regarding the general performance of the NCC member carriers and the NMFTA staff members in fulfilling their duties under the NCC's approved Section 5a Agreement.

The role of the Conferences as the orchestrator of the opposition to the NCC's Section 5a Agreement is manifest. As is seen by the reply comments, the Rubber Manufacturers Association and the Halogenated Solvents Industry Alliance endorse and defer to the Conferences' Reply Comments. However, there is another relationship common among the opposing shipper association commenters of which the STB should be keenly aware. That connection is that those parties are either in the process of opposing classification increase proposals or recently have been unsuccessful in opposing a classification change.

Three commenters, American Textile Manufacturers Institute (ATMI), the Secondary Materials and Recycled Textiles (SMART), and the Textile Transportation Managers Conference (TTMC) all complain about the provisions applicable on Cloth, Fabric or Piece Goods as per items 49265 and 49540, et al., which were found by the STB not to have been shown to be unreasonable in Docket No. ISM-35007, discussed above. Those classification changes, although protested, were permitted to become effective as scheduled on January 22, 2000. ATMI filed a protest, and SMART failed to timely file a protest but was involved in the matter. TTMC predicated its comments in this proceeding objecting to the NCC's procedures based on that classification action. The objectivity of the comments of those

organizations is open to question. Plainly, they are disturbed by the classification change which occurred and now seek to disrupt the process by which that proposal was implemented, or take the decisionmaking out of the carriers' hands. Raynard F. Bohman, Jr., a consultant who has represented many shippers before the NCC over the past 20 years, perhaps best summarized what spurs the opposition of those groups. He stated:

Of course, not all the committee's decisions have been popular. In some cases, shippers who had been enjoying unwarranted low ratings because the freight's descriptions and ratings hadn't been renewed in years, were disturbed when they learned they were going to have to pay the piper. (NCC's Opening Comments, Vol. II, Statement of Raynard F. Bohman, Jr.)

Counsel for the Conferences is representing NASSTRAC and a shipper in the ongoing reclassification of poison materials; and is representing the Rubber Manufacturers Association in the review matter involving "Belts or Belting"; both of which matters counsel has not been shy about interjecting and complaining about in this proceeding. The Halogenated Solvents Industry Alliance is also a participant in the reclassification of poison materials.

Further, the executive director of the Transportation Consumer Protection Council is representing, as counsel, the tobacco industry in the current review of the classification of tobacco products.

Given the adversarial position of those parties a significant issue is presented as to their objectivity in assessing the classification process—particularly where their attacks on the NCC and the NMFTA's staff are personal and unsubstantiated.

In the NCC's Opening Comments, Martin E. Foley outlined the steps which have already been taken to increase public access to classification actions. Also, Mr. Foley

identified nine specific proposals which the NCC would implement or is in the process of undertaking to further facilitate shipper participation. (See NCC's Opening Comments, Statement of Martin E. Foley, pp. 14-15.) Unfortunately, but not surprisingly, the commenting shipper groups barely acknowledge those proposals. The only changes that will satisfy their interests is if shippers are the decisionmakers on classification matters or, by various other means, the carriers are prevented from having final say on classification changes. Further, not being satisfied with having available the very information upon which the NCC's classification decisions are based, the shipper associations insist they be provided complete access to the NCC's files and all confidential and proprietary information which have been submitted by carriers and shippers; and/or that the classification be frozen. The principal proponent of those actions is the Conferences, which also are speaking on behalf of the Rubber Manufacturers Association and the Halogenated Solvents Industry Alliance.

Not unexpectedly without giving any serious consideration to the NCC's proposals, the Conferences dismiss them summarily stating that none "satisfy the Shipper Conferences' concerns." (Reply Comments, p. 8.) However, before discussing the Conferences' requested changes, the NCC would point out that the real motivation behind the attack on the classification process and the purpose for the sought involvement by shippers in the decisionmaking, has finally come to light. Counsel for the Conferences makes several admissions in the Reply Comments which reveal that the actual objective is not to increase shipper participation but to undermine classification changes. It is acknowledged by the Conferences' counsel that "in general, most shippers are more interested in avoiding increases in the class ratings of their products than in obtaining reductions in their class ratings." (Conferences Reply Comments, p. 15.) And, the Conferences continue to seek "a

moratorium on reclassification, or at least a moratorium on contested reclassification, until after the Board has decided what new conditions to impose on the NCC, and those conditions have been implemented.” (Conferences’ Reply Comments, p. 17.)

What those positions actually equate to is that any classification actions which benefit its shipper members, such as reductions, packaging changes, clarifications or the cancellation of obsolete entries, are perfectly acceptable. But the NCC should not be permitted to increase classification ratings because the Conferences’ shipper members wish to avoid such classification actions, albeit as reasonable and necessary as those reclassifications may be. Given the intent of the Conferences, what credibility can be given to the requested inclusion of shippers in the deliberation process regarding classification changes? If shippers generally wish to avoid classification increases how objective will their deliberations be in assessing the merits of proposals for class increases on their products?² How objective will their deliberations be when class increases or reductions are proposed on competitor’s products? Congress did not place the authority for freight classification in the shippers’ hands, and the Conferences candid admission regarding shipper avoidance of increases validates that decision.

This proceeding is not about the reasonableness of the poison materials proposal. But, one would not know that from the opportunities counsel for the Conferences has taken to interject unsupported allegations regarding the merits of that reclassification matter here. For example, reference is made to “the poisonous materials docket item that was cited by

² Little speculation is necessary of how the American Textile Manufacturer Institute, SMART, and the Textile Transportation Managers Conference would have voted in the reclassification of “Cloth, Fabric or Piece Goods,” as provided in Items 49265 and 49540, et al., -- even though the STB unanimously voted not to suspend or investigate those reclassifications in Docket No. ISM 35007.

HSIA and the Shipper Conferences as presenting the greatest threat of an unjustified (and extreme) class rate increase.” (Conferences Reply Comments, p. 17. That rhetoric is obviously designed to set the stage for a subsequent challenge by the Conferences of any reclassification of poison materials, but truly is not properly put in issue here.

To the extent that counsel believes that the procedures by which the reclassification of poison materials is being processed should be reviewed, and a moratorium imposed until the completion of that review, it is pointed out that that proposal has been and is being handled in accordance with the NCC’s authorized procedures—a fact which counsel cannot dispute. Also, and importantly, the statement of Lisa K. Winter in the NCC’s Reply Comments demonstrates that counsel’s statements as to when he received notice of that reclassification and the information regarding the involved commodity report and proposal analysis are erroneous. In fact, he was provided the requested data three months before the public meeting on the proposal; had a meeting with NMFTA’s staff to respond to questions he had regarding the review matter on poisonous materials; and has failed to supply any data requested by staff from him. Plainly, the NCC’s good faith efforts to cooperate with the Conferences on that reclassification cannot be turned into legitimate grounds for postponing the reclassification of a proposal, the reasonableness of which is yet to be tested, or for freezing any other classification matters pending before the NCC.³

The Conferences pay passing recognition to the many enhancements the NCC has proposed and/or implemented to make classification information available to the public, but,

³ The Halogenated Solvents Industry Alliance also requests a moratorium on the reclassification of poisonous materials but, like the Conferences, fails to present any legal or factual basis for that unjustified interference with the classification process and procedures approved by law.

not unexpectedly, demand more. (Conferences' Reply Comments, p. 8.) Review of what is sought and how they participate in classification matters shows that classification "in the sunshine" is not the Conferences' true objective. Why do the Conferences need to know which carrier has brought a classification matter to the attention of the NCC? It is no secret that carriers have suffered the loss of a shipper's business because of the initiation of or participation in a reclassification. Other than intimidating carriers from reporting matters which might require study or review, what importance does the identify of a carrier play in the formulation of reasonable classifications, especially where any information supplied by a carrier will be related in the commodity report or other analysis which is presented to the NCC or a Classification Panel and is available to the public.

Specific responses to various contentions made by the Conferences and other shipper groups on the information obtained by the NMFTA staff and provided to the Conferences are set forth in the accompanying joint Rebuttal Statement of Joel L. Ringer and George M. Beck and will not be repeated. Yet, the need for confidentiality which must be maintained to preserve the flow of information from carriers and shippers vital to the classification process must be emphasized. As previously indicated, Bruce D. Hocum, President, Rubenstein Logistics Services, Inc., Golden Valley, MN, has verified that one of the most frequently asked questions from the shippers he represents in classification matters is whether their data will be "held in confidence." The many reasons shippers, i.e. competitors, do not want such information made public requires no exposition. How widespread is that concern? As indicated in the joint Rebuttal Statement of Messrs. Beck and Ringer, Mr. Robert Temper, of Mallinckrodt, a shipper of poison materials, and represented by counsel for the Conferences, indicated that he was apprehensive about furnishing the information he had developed on the

transportation characteristics of his company's products because a competitor of his company was also involved. Mr. Temper did not want that party to have access to his data. It is obvious that the representative from Mallinckrodt would not be satisfied with the Conferences' suggestion that counsel for that competitor or a company employee could review that data subject to a protective order.⁴ Confidentiality is a key and necessary condition to the free flow of data upon which the classification depends.

Furthermore, what credibility can be given on this record to the contention that access to the underlying data must be had to test the trustworthiness or accuracy of the staff's analysis or to prepare the information to be submitted by a shipper. (Conferences' Reply Comments, p. 8.) First, the Conferences' spurious allegations as to the inaccuracy of staff research regarding belts and rubber hoses was shown to have been a ploy by the involved parties of withholding information and then challenging that absence, or faulting the staff for not resurveying products that were known not to have changed. (See joint Reply Comments, Messrs. Beck and Ringer, pp. 7-11; and joint Rebuttal Comments, Messrs. Beck and Ringer, pp. 5-9.) Never in the 60-year history of the National Motor Freight Classification has the integrity of the NMFTA's staff's analyses of the transportation characteristics of articles been shown to have been compromised in a reclassification. The abject failure of the Conferences' counsel to substantiate that serious claim speaks for itself, and evidences that no credibility can or should be given to that reprehensible allegation.

⁴ Many of the same reasons for preserving the proprietary, confidential data from competitors which exists for shippers also exists for carriers who do not wish competing carriers to obtain sensitive information

One must also question the approach that is utilized by the Conferences' counsel in obstructing reclassifications. As has been shown, the adversarial strategy he has implemented is not to have his shippers supply information on the transportation characteristics of the products under review, and then attack a report or analysis for the absence of that data which his shippers have been directed to withhold. Some would call that strategy clever, others devious. But, the end result is that the carriers are hindered in the fulfillment their statutory duty to establish reasonable classifications for the freight they transport, and the shipping community is disadvantaged because the equitable distribution of the transportation burden which should result is unduly delayed or prevented—thereby enabling some shippers to evade the proper classification of their articles.

In some respects the demands of the shipper groups for information underlying the classification analyses prepared by the NCC's staff are tantamount to requests for permission to usurp the STB's role in overseeing the collective process by adversaries who admittedly do not have a neutral approach the classification activities. From another perspective, the shipper groups' request for this underlying data is analogous to requesting the STB for information under the Freedom of Information Act (FOIA). While the FOIA is intended to provide public access to information that is within the possession of federal agencies, the public's right to obtain this information is limited by nine exemptions. Most of the underlying information that the shipper groups are requesting from the NCC would come within two of these exemptions.

Exemption 5 applies to staff memoranda and other documents that are prepared prior to the time the agency makes its policy decision and address legal and policy issues that are

regarding the products transported, shippers served, and traffic lanes in which movements are occurring.

an integral part of the decision-making process Jordan v. United States Department of Justice 591 F. 2d 753, 774 (D.C. Cir.1978) (en banc). This exemption would cover the staff's analyses of classification proposals; research projects and review matters that are prepared in advance to support decision-making by the NCC and its panels. Yet, the NCC has voluntarily decided to make the staff analyses available to the public so that interested persons will have the same comprehensive information that the decision-makers (i.e., the NCC members) rely on as the principal basis of for their classification determinations.

Exemption 4 ("trade secrets") would apply to much of the confidential and commercially sensitive data the NCC receives from shippers and carriers. While the shipper groups argue that they need this underlying information in order to oversee the classification process, it has been explained that the protection of its confidentiality is, in fact, essential to the process. The previous example demonstrates the concerns of Mallinckrodt's Mr. Temper that, should the confidentiality of his company's data be compromised, his competitors would gain a significant commercial advantage. Protecting confidential information that is submitted by carriers is equally important because shippers are known to withdraw freight in order to punish carriers who cooperate in the NCC's classification projects. Consequently, information submitted shippers or carriers is within the confidential commercial information category that is protected by FOIA's Exemption 4. In National Parks and Conservation Assn. v. Morton 498 F. 2d 765, 770 (1974) the United States Court of Appeals for the D.C. Circuit explained:

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm

to the competitive position of the person from whom the information was obtained.

For the same reasons that prompted Congress to enact Exemption 4, the NCC should be permitted to withhold the raw data or underlying information obtained by its staff, i.e., the information should be protected if it is not customarily disclosed to the public and its disclosure would be likely to impair the NCC's ability to obtain information in the future or if disclosure would cause substantial competitive injury to the submitter. Clearly much of the underlying information sought by the shipper groups would be protected by Exemption 4.

Much of the Reply Comments of the National Industrial Transportation League (NITL) is dedicated to a repetition of its Opening Comments and has already been responded to by the NCC. One prefatory comment must be made. In addressing the alleged need for "an open and balanced appellate process," NITL makes a serious and objectionable allegation that "this system is largely perceived by shippers to be 'rigged' rather than fair and neutral." (Reply, p. 5.) The League cannot hide behind the anonymity of unnamed shippers in making such an outrageous contention. If that is counsel's view of the process so be it, but a serious charge of that nature requires substantiation before it is made by counsel—which is missing here. Also, contrary to that unsubstantiated contention is record evidence from long-time shipper representatives refuting that position.

For example, D.R. Carnahan, president, Associated Traffic Services, Inc., has stated that:

Over the past 30 years of using the NMFC, I have also submitted proposals on behalf of my shipper clients to the National Classification Committee to amend the NMFC where the existing classification was not appropriate. I have found this process to be both easy to use and the results fair. (Comments, p. 2.)

Raynard F. Bohman, President, Bohman Industrial Traffic Consultants, described his long experience before the NCC as follows:

I have represented most of our trade association clients and individual clients before the previous National Classification Board, and the National Classification Committee, on numerous occasions and may well have made more appearances before those bodies than anyone currently in active practice.

Based on my long experience before the Committee and working with its staff, I have found its members to be fair, reasonable, open and helpful. For anyone to say or infer that they are arbitrary or unreasonable couldn't be further from the truth, at least based on my dealings with them.

I've sat in on many of the NCC Panel and full Committee open meetings over the years and witnessed them up and down many subjects on the dockets, but never have I felt that any of their votes were arbitrary or did not follow established-and-known guidelines. (Comments, p. 1.)

Bruce D. Hocum, president, Rubenstein Logistics Services, Inc., has related that:]

I can tell you first hand that the individuals working for this organization [the NCC] are extremely helpful and will bend over backwards to assist me in any way possible. Not only is the staff extremely capable, there are occasions when I will contact the NCC carriers direct and ask for their assistance. These carriers are extremely helpful to us.

* * *

In my experience I have found shippers to have unrestricted opportunities to participate in the classification system. The system is fair and equitable and as long as the facts are represented works great. (Comments, pp.1-2.)

(See, also, comments in NCC's Opening Comments, Vol. II.)

Which then is the accurate and fair assessment of the classification process--the views of shipper representatives who have represented clients for many years before the NCC, or the generalized and identity-concealed assertion of NITL counsel?

The NITL's contention that "the NCC has apparently chosen not to take seriously the Board's request for proposals to increase shipper participation in the classification process" is as inaccurate as is its contention that the NCC "failed to set forth any proposals that would lead to effective and meaningful shipper participation." (NITL Reply Comments, p. 6.)

Martin E. Foley, NMFTA's Executive Director and Secretary to the NCC, described seven steps which already have been taken to ensure greater shipper awareness and participation in the classification process—without direction from the STB, and nine proposals which the NCC believes are responsive to the STB's requests for methodologies for increasing shipper participation. These include sweeping measures whereby: (1) NMFTA staff, on a direct reimbursable cost basis, would go to a shipper's facility on request to review the transportation characteristics of the products for possible reclassifications; (2) Any shipper or its representatives could introduce a subject for discussion at an open meeting; (3) NMFTA staff would accept, subject to confirmation, a classification proposal from interested persons over the phone; (4) The NCC's web page on the Internet would be expanded to include all classification matters, as well as staff reports and analyses; (5) Without request, copies of the staff's reports on commodities will be provided to any person who has submitted information on the involved article; (6) Staff reports and analyses will be reformatted to enable readers to spend less time reviewing pertinent classification material; (7) Information on the transportation characteristics of an article known to the staff at that time will be included in justification statements; (8) NMFTA staff will solicit information seeking data to support class reductions and shippers would be advised if an initial review indicated that lower classes might be warranted and offer assistance in formulating a proposal for a reduction; and (9) Arrangements could be made to enable shippers or their representatives to participate

in a public meeting on a classification matter via a telephone conference call. (See Opening Statement of Martin E. Foley, pp. 14-15.)

These revisions are substantial and would require considerable effort by NMFTA staff and expense to the NCC. Each is designed to facilitate shipper access to classification information and the process, and further assists shippers in presenting proposals to the NCC through the use of NMFTA staff. The NITL's benign criticism of those wide-ranging measures that "the NCC devoted only a single page to its proposals for increasing shipper participation" is utter nonsense and evidences the unreasonably negative stance that organization has taken.

The NCC recognizes that based on many of the same unsupported contentions from many of the same shipper groups participating in this proceeding, the STB was led to believe that, as an initial view, "some changes may be appropriate." It is also evident that the agency was of that view because of its belief that "there remains a need for procedural safeguards to ensure that proposals generated by NCC staff or its member carriers are not based toward classification changes that predominantly result in increased rates." (STB Decision, served February 11, 2000 (not published).) At the outset, the thrust of the STB's decision, contrary to the NITL's assertions, clearly was not that the STB determined that changes "are required." The STB, based on some very preliminary conclusions, stated that "some changes may be appropriate." So too, there was no finding that the current classification system must be "reformed," as NITL suggests. To summarily dismiss the actions already taken by the NCC to assist shippers in participating in the classification process and to virtually ignore the nine substantive proposals for additional enhancement of the process, as NITL does, truly evidences which organization actually has a "closed mind." This is particularly surprising

coming from NITL, the organization which took the position in the former proceeding in Section 5a Application No. 61 that “the League believes the Board does not need to continue to afford the NCC Agreement antitrust immunity, since activities performed by the members of the NCC Agreement within the scope of the agency’s decisions would not violate the antitrust laws.” (See NITL’s January 29, 1998 Comments in Section 5a Application No. 61, p. 1.)

Moreover, NITL originally disagreed with the STB that classification changes “result in rate increases.” Again, in its January 29, 1998 Comments NITL stated that:

The classification and other standard setting activities of the NCC Agreement do not involve collective price fixing, bid rigging, market allocation, or any other apparent per se violation of the antitrust laws. While an indirect relationship may be said to exist between the classification ratings established by the NCC and class rates charged by regional rate bureaus and individual carriers, this indirect relationship plainly does not equate to collective price-fixing by the NCC, at least so long as the NCC operates solely within the constraints set by the agency. (Emphasis added.) (January 29, 1998 NITL Comments, p. 6.)

Hence, NITL recognized, and so advised the STB, that there is not a direct relationship between classification changes and rate increases.⁵ So too, there is not a single fact of record in this proceeding, or in the prior proceeding, which substantiates the incorrect conclusion by the STB that the NCC is predisposed towards “classification changes that predominately result in increased rates.” (STB’s February 11, 2000 Decision, p. 3, fn. 4.) Rather, the

⁵ By the same token, the NCC would point out that the STB spoke in error when it concluded that there are “proposals generated by NCC’s staff...” (STB’s February 11, 2000 Decision, p. 3, fn. 4.) NCC staff do not make classification proposals, and the ICC’s extensive investigation of the prior NASSTRAC allegation proved that they do not. There is no substantiation of that serious allegation here or in the prior proceeding.

record shows that there is a fair balance of classification changes that result in increases, increases and reductions, and reductions in classification ratings—not rates.

Hence, NITL's criticism of the NCC for explaining that "existing NCC procedures and activities that the witnesses claim are fair to shippers, as opposed to setting forth new ideas that are intended to increase shipper participation and improve upon the current system," entirely misses the mark. (NITL Reply Comments, p. 7.) The NCC believes that many misstatements were made regarding those procedures and that the record in this proceeding must not rely on incorrect and unsubstantiated allegations that the agency-approved procedures governed by statutory requirements are biased or unfair. The NCC does take issue with the NITL that "new ideas" were not addressed by the NCC to increase shipper participation. The ideas already implemented and those proposed have been discussed. The truth of the matter is that NITL, for all too obvious reasons, has chosen to ignore those measures.

As to those matters which the NITL did comment upon there are substantial errors.

(1) The primary means for shippers to learn about pending classification proposals is not through a subscription to the Docket Bulletin. (NITL Reply Comments, p. 7.) That information is available free of charge on the NMFTA's web site. Additionally, any person who submits data in response to a request by NMFTA staff are notified, in advance, of the date, time, and location of any public meeting where the classification matter is to be considered. (2) NITL's inquiry regarding what information would be provided on NMFTA's proposed expansion of its web site, i.e. whether there would only be a summary of such activities, is puzzling. (NITL Reply Comments, p. 8.) As indicated in proposal 4 in Mr. Foley's Opening Statement, all classification-making activities will be included on the web

page. Summaries will be provided of the subjects to be considered on the next docket, as well as staff classification reports and analyses. As was also indicated, it is the NCC's present practice, at no charge, to make available to any person who requests copies the reports and analyses prepared by NMFTA's staff for the NCC and the Classification Panels.

To contend that "nowhere in its comments does the NCC address shippers' most serious concerns over the decision-making in classification matters and the appellate process for handling classifications disputes," must be viewed with a jaundiced eye. (NITL Reply Comments, p. 8.) Before the shipper groups filed their Opening Comments the NCC could not divine what their contentions would be. The NCC submits that NITL's identified concerns are fully addressed in the NCC's Reply and in these Rebuttal Comments.

A cursory review of NITL's remaining comments establishes that the strategy is simply to attempt to put a negative spin on every proposal. For instance, the NCC's proposal to have staff assist shippers in reviewing the transportation characteristics of their products, and to assist them in seeking changes should they be warranted, is interpreted as a sinister plot to trap the unwary. (NITL Reply Comments, pp. 8-9.) How does the NCC respond to such unjustified and unsubstantiated prejudgment? Perhaps the best response is to point to the letters of record from small shippers who have been assisted by NMFTA staff to obtain reductions, and to point out to NITL's counsel the danger of negative thinking.

Once again NITL predicates their concerns on "the perceived bias and conflict-of-interest" purportedly associated with the NCC's procedures. (NITL Comments, p. 9.) Perception is often misleading. Where, on this record, has any bias or conflict-of-interest on the NCC's part been substantiated, particularly where the NCC's handling of classification matters has been and is in strict compliance with procedures prescribed by the ICC and

dictated by law. Proof is demanded when such allegations are made. None has been forthcoming. To the contrary, the NCC has evidenced a fair balance of classification proposals as between increases, increases and reductions, and reductions—hardly, a biased exercise of their statutory duty. So too, the unchallenged history of the NCC’s success in demonstrating the reasonableness of protested classification increases to the ICC and the STB speaks for itself.

Lastly, the NITL makes much of an alleged, unspecified need for change in the handling of classification matters. It is submitted that a better assessment of the classification process is presented by Raynard F. Bohman, Jr., an individual who has represented many shippers and shipper associations before the NCC over the past 20 years. He states that:

I have been racking my brain trying to come up with some suggestions that might be offered to make the whole process more shipper-receiver user-friendly, but quite frankly, the only one I have at this time would be an earlier issue date of NCC dockets so that the shipping public would have more advance notice of what changes to the NMFC are being proposed. Right now its only about two to three weeks advance notice. (April 5, 2000 Comments, p. 2.)

Obviously, Mr. Bohman’s objective and constructive suggestion is a far cry from the adversarial, “nothing works” position adopted by NITL.

The Transportation Consumer Protection Council, Inc. (TCPC) takes much the same tact as NITL gratuitously contending that “the carriers would preserve the status quo with only nominal shipper participation in the classification process, and then continue to allow any classification changes made be amplified by the changes made to the class rates by the Rate Bureaus.” (TCPC Reply comments, p. 2.) What evidence underpins those self-serving contentions? As was shown in the NCC’s Opening Comments, during 75 NCC and Panel

Meetings conducted from 1989 through 1999, there was a total of 1,206 personal appearances; 904 were for specific docket subjects; 147 were for review matters; and 155 were observers of the classification process. Some 417 companies were represented. (See Matthew Welsh Statement, Attachment A.) Additionally, since 1989 over 65 shipper trade associations have participated in classification activities. (See Opening Statement of George M. Beck and Joel L. Ringer, pp. 16-17.) That is hardly nominal shipper participation.

It is not the objective of the NCC to preserve the status quo. However, the NCC does not believe that changes which are detrimental to the implementation of the classification should be grounded on flagrant misstatements regarding the workings of the classification process and the integrity of the NCC carrier members and the NMFTA staff. The STB's decisions look to the increase of shipper participation, and the NCC has responded by demonstrating unsolicited changes it has made to increase shipper awareness of classification matters and the basis for classification changes, as well as proposals as to additional steps which could be implemented to enhance shipper participation. On its part, TCPC simply dismisses those measures as being limited "to the area of notice and dissemination of information." (TCPC Reply Comments, p. 5.) Yet, the NCC submits that those are two vital areas by which shipper participation in the classification process can be and has been enhanced.

The real point of TCPC's presentation is the desire to control the decision-making process and the appeals of classification decisions. (TCPC Reply Comments, p. 5.) This is a strange about-face by an organization which in its Opening Comments in rejecting the idea that shippers could vote on classification matters, candidly admitted that:

[T]he Council does not believe there is any practical or workable means by which shippers can participate. The concept of shippers participating in a carrier ratemaking function is just as illogical as having carriers participate in shippers' manufacturers' pricing decisions. (TCPC Opening Comments, p. 2.)

In any event, the Conferences have added great weight to the correctness of TCPC's original position when, as indicated above, it freely admits that shippers don't want classification increases. In fact, no shipper has ever initiated a classification increase proposal. That being the case who could ever make a bona fide case for shipper impartiality in proposing or approving necessary classification increases on their products? Neither shippers, nor some other non-carrier body, can make the objective, fair classification decisions that have been made by the carriers over the past six decades—which fact is documented by the overwhelming and uncontested success the NCC has had in establishing the reasonableness of the classification increases it has established.

Strangely, in lauding the alleged positions of other shipper groups, TCPC erroneously attributes to them the proposals, deemed meritorious by TCPC, regarding advanced notice of possible changes, access to supporting evidence/documentation, and shipper ability to comment and provide input by the use of e-mail and the posting of relevant documents on the NCC's web site. (TCPC Reply Comments, p. 6.) Those are the NCC's changes and proposals—changes which the NITL and the Conferences have criticized as insufficient to satisfy their requirements.

Finally, TCPC's contention that changes in the classification are "amplified" by changes in the class rates implemented by the Rate Bureaus is incorrect. As was well recognized in Charge For Shipments Moving On Order—Notify Bills, 367 I.C.C. 330 (1983), the classification function and the ratemaking function are entirely separate and

distinct. Conspicuously absent from the TCPC's statement, and that of any other shipper group advancing that same contention, is any documented evidence of any instance where the relationship they allege has occurred. Indeed, in its Opening Comments, TCPC in suggesting that classifications should somehow be negotiated between carriers and shippers, acknowledged that rates are so individually negotiated. (TCPC Comments, p. 8.) While the classification may be part of a carrier's pricing system, the actual rate is the product of negotiation. A change in a classification does not dictate a change in a rate as TCPC incorrectly attempts to argue.

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IV.
NOTICE OF LIABILITY LIMITATIONS IS NOT RELEVANT
TO THIS PROCEEDING

By petition filed April 11, 2000, the National Classification Committee (NCC) requested the STB to remove the first full paragraph from Page 7 of its February 11, 2000 decision in Sec. 5a Application No. 61 National Classification Committee Agreement - the immediate successor to the instant proceeding [Sec 5a Application No. 61 (Sub No. 6)]¹. The NCC objected to the paragraph and in particular to the gratuitous statement that: "We have recognized in the past that any liability limitation imposed by a bill of lading should be effected in a way that gives the shipper actual notice of the arrangement being undertaken" (emphasis added). The NCC's objections included the grounds that it is irrelevant to the proceeding, that it is erroneous, and that it violates the STB's commitment to neutrality on this controversial issue. Three shipper groups: National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc. (NASSTRAC or the Conferences), National Industrial Transportation League (NITL) and Transportation Consumer Protection Council (TCPC) all have opposed NCC's contention that the issue of notice of liability limitations is irrelevant to

¹ In its decision served February 11th 2000, the STB inserted the following paragraph that dealt with an entirely different issue, that is the reasonableness of various provisions of the UBOL. It stated:

However, we will be sensitive to any challenge that may be raised about any particular bill of lading that NCC may develop. HPCDC/NASSTRAC have identified several provisions in NCC's UBL that are of concern to their members. We have recognized in the past that any liability limitations imposed by a bill of lading should be effected in a way that gives the shipper actual notice of the arrangement being undertaken [footnote 14]. We intend to allow continued collective action on bills of lading, but we will remain available to address complaints about the terms of any bill of lading that NCC may produce.

Curiously, Footnote 14 cites Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions, STB Docket ISM 35002 (STB served December 24th, 1997) - the decision in which the STB reached the opposite determination, i.e., that actual notice was not necessary.

this proceeding. They argue that, having made various arguments regarding the Uniform Bill of Lading (UBOL) the NCC can not complain about the relevance of this paragraph and, they argue that in fact, the matter of notice of liability limitations should be properly considered even in the instant (Sub-No. 6) proceeding which focuses on improving shipper participation in the NCC's classification making process. Some background is necessary to an understanding of why notice of liability limitation is not an appropriate issue in either this (Sub-No. 6) proceeding or the previous phase of this overall Sec. 5a Application No. 61 proceeding involving renewal of the UBOL.

The type and degree of notice that is required for limitation of the carriers' liability has been an issue since the Carmack Amendment was passed in 1906. Much of this controversy centered on tariff provisions known as "inadvertence clauses" which serve to release the carrier's liability if the shipper has failed to specify a valuation of its products pursuant to the applicable tariff provisions. Before the Trucking Industry Regulatory Reform Act of 1994 (TIRRA) was enacted, the issue of whether a carrier has the right to establish such tariff provisions was addressed again and apparently finally resolved by the ICC in its 1989 decision in MC-C30102 – National Small Shipments Traffic Conference, Inc .and Drug and Toilet Preparation Traffic Conference, Inc. v. Consolidated Freightways Corp. In that case, the Conferences unsuccessfully urged the ICC to find that inadvertence clauses within the filed tariffs of ten named motor carriers were, per se, unlawful and should be ordered canceled. The Commission unanimously disagreed finding the involved liability limiting tariff provisions to be lawful in view of a "virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs" (Decision P. 5). The Conferences appealed the ICC's decision to the United States

Court of Appeals for the Third Circuit, but the Court upheld both the decision and the lawfulness of inadvertence clauses.

The UBOL became a more prominent part of the controversy when in 1991, the NCC proposed to amend the UBOL to include a "Note 2" advising shippers that the carriers' liability was subject to limitation through the use of inadvertence clauses within their tariffs. The Conferences attempted to convince the ICC that Note 2 was unlawful in that it would limit the carrier's liability without actual notice, but the ICC disagreed and Note 2 was upheld once again [Board of Suspension Case No. 71547, (1991)].

When filed rates were eliminated by TIRRA, and the I.C.C. Termination Act of 1995 (ICCTA) Congress specifically changed the law to codify its intention to retain the carriers' pre-TIRRA right to limit their liability through inadvertence clauses and it explained this change in its Conference Report [H. R. Report No. 422, 104th Cong., 1st Sess, 222-23 (1995)]. During the Spring and Summer of 1997, an ad-hoc committee consisting of six carrier representatives of NMFTA and six shipper representatives of the National Small Shipments Traffic Conference, Inc. (the Conference) negotiated a completely revised UBOL that would be consistent with TIRRA and ICCTA and the repeal of the filed rate doctrine. The most difficult issue to resolve was the wording of Note 2 - giving the shippers notice of the carriers' liability limitations. However, ultimately the shipper/carrier ad hoc committee reached agreement. The Conference approved the UBOL first and sent its representatives to urge the NCC's members to approve the joint shipper/carrier proposal. A transcript of the representations made to the NCC by the Conference's spokesman is attached as Appendix A. Following its approval by the NCC, the UBOL was protested by TCPC, thus initiating ISM 35002. TCPC argued that the new UBOL and its Note 2 would unlawfully permit the carriers to enforce liability limitations without giving

the shippers actual notice. The STB disagreed explaining once again that under the Carmack Amendment [§14706(c)] actual notice was not required.

Seven months after the STB's decision in ISM 35002, the Conferences petitioned the STB to remove, from its decision, the interpretation of the Carmack Amendment that was in agreement with the carriers' position on this crucially important issue, i.e., the required notice of liability limitations. In granting the Conferences' request, the Board found that this interpretation was unnecessary to its decision and that it preferred not to take sides on this issue so that the matter could be decided by the courts.

The STB revisited this issue in its decision of February 11, 2000, in Section 5a Application No. 61 (a proceeding which has no relevance to the Carmack Amendment or the required notice of liability limitations). This decision included a paragraph that reinterpreted §14706(c) - only this time the provision was interpreted to agree with the shippers, i.e., that actual notice is a prerequisite to liability limitation by the carriers. Thus, in the space of two years and two months the STB initially interpreted the required notice of liability limitation (§14706(c)) to agree with the carriers, then withdrew its interpretation (leaving the matter to the courts) and, finally, in an unrelated proceeding, it reversed its prior position to adopt an interpretation in agreement with the shippers - while inexplicably citing its initial decision as authority.

The NCC petitioned the STB to remove the paragraph for a variety of reasons including that it is unnecessary to the issues of this proceeding, erroneous and unsupported by the record. In support of its petition, NCC cited the precedent of STB's action in ISM 35002 granting the Conference's 1998 request to strike its interpretation of §14706(c) on the basis that the interpretation was unnecessary to the decision.

Inasmuch as the NCC's petition specifically addressed the STB's decision in the initial proceeding, i.e., Sec. 5a Application No. 61, it was filed in that proceeding. However, through a clerical error, a cover sheet was stapled to that petition that inadvertently designated "(Sub-No. 6)," i.e., the instant proceeding. The Conferences submitted their reply in the initial (Sec. 5a) phase of the proceeding, although their reply referenced the arguments made in the instant (Sub-No. 6) phrase of the proceeding. On the other hand, the replies submitted by NITL and TCPC were filed in the instant (Sub-No. 6) proceeding, but address issues and arguments of the previous proceeding. Moreover, TCPC's reply supported the Board's determination that any liability limitations imposed by a bill of lading should be effected in a way that gives the shipper actual notice of the arrangement being undertaken." Additionally, TCPC specifically endorsed the suggestions made by the Conferences – thus incorporating by reference the arguments the Conferences has made in this proceeding and in the initial (Sec. 5a) proceeding.

The shipper groups seek to interject into the instant proceeding [Sec. 5a Application No. 61 (Sub-No. 6)] the long standing and contentious issue of notice of liability limitations under the Carmack Amendment – a matter that has no relevance to the issues of this proceeding, present or past. This issue would involve interpretation of the Carmack Amendment [49 U.S.C §14706 (c)] - including consideration of the Congressional intent in passing the 1995 version of this statute, and whether shippers have the obligation to ask their carriers as to the liability limitations within their tariffs. In view of the precedent created by the August 4, 1998, decision in ISM 35002,² it would be inconceivable for the agency to find that this same issue is relevant to

² This is the ISM 35002 decision where the STB removed its interpretation of the Carmack Amendment requirements regarding notice of liability limitation as irrelevant to its consideration of the reasonableness of the UBOL, and left this matter for decision by the courts.

either phase of the instant proceeding [Sec. 5a Application No. 61 and Sec. 5a Application No. 61 (Sub-No. 6)].

In the first phase of this proceeding, the STB questioned whether the UBOL should be included within the antitrust immunity provided by the NCC's Sec. 5a Agreement. This inquiry involved the consideration of whether the bill of lading was an integral part of the NMFC and the need for antitrust immunity to protect collective action on the bill of lading. However, any consideration of the UBOL was removed as an issue by the STB's decision of February 11th 2000, and simultaneously the present (Sub-No. 6) phase of this proceeding was instituted to seek suggested methodologies for increasing shipper participation in the NCC's classification process. Obviously, the new issue of Sub-No. 6 has no relevance to the determination of whether motor carriers should be permitted to limit their liability based on actual notice as opposed to the constructive notice that is provided by the UBOL along with their tariffs.

Ignoring the narrow focus of the Sub-No. 6 proceeding, all three of the shipper groups apparently see it as an opportunity to reverse ICC/STB decisions on an entire wish list of differences they have had with motor carriers and even rail carriers going back for almost 100 years. The shipper groups have seized on the fact that the UBOL was an issue in the initial phase of this proceeding considering renewal of the NCC's Sec. 5a Agreement. They now argue that notice of liability limitation or any matter related to the UBOL, no matter how remotely, has become "fair game" for incorporation into the instant (Sub-No. 6) proceeding.³ Further,

³ An analogy might be found in the field of recorded music where more than one category of legal issues has arisen. For example, recently there has been much discussion as to whether teenage children, and more particularly their parents, should have a label on the CD or cassette to warn them of potentially offensive lyrics within the recorded music. In some ways this is a rough analogy to the warning required of liability limitations in the carriers tariffs.

An issue roughly analogous to the question of whether collective action on the UBOL should be covered by the NCC's antitrust immunity was the subject of a Supreme Court's decision in Broadcast Music Inc. v.

they attempt to ridicule the NCC for stating in its petition, "it is apparent that the reasonableness of the UBOL and the carriers' notice of liability limitation are matters that are unrelated to the NCC's collective process and have never been issues in this proceeding." The underlined language is important. It clearly refers to the reasonableness of provisions such as the UBOL's preamble and Note 2 – matters that have not been at issue in this proceeding nor have any of the other specific terms and conditions of UBOL. Unfortunately, when the Conferences paraphrased and quoted this statement, they selectively excised the underlined language making it appear that the NCC refuses to acknowledge even its own opposition to removing the UBOL from the protection of antitrust immunity under its 5a Agreement (See NASSTRAC Reply p 4). Contrary to the unfounded allegations of the shipper groups, NCC does not refuse to recognize that some issues regarding antitrust immunity for the UBOL formerly were considerations in this proceeding. Further, the NCC has never suggested that the reasonableness of the UBOL's provisions could not be challenged. Rather its position is that antitrust immunity for the UBOL under the NCC's Sec. 5a Agreement is an issue that is completely different from and unrelated to Carmack Amendment requirements for notice of liability limitation.

CBS. In Broadcast Music ASCAP was a membership organization that collectively licensed the performance or use of the works of its member composers and artists. ASCAP "fixed" the price for all its members' works, although was possible for each member to reach a separate agreement. The issue was whether that arrangement was violative of the antitrust laws. In contrast, one of the questions discussed in this proceeding was whether the bill of lading activities would be violative of the antitrust laws, absent the NCC's immunity.

The Conferences, NITL, TCPC and others insist that the consideration of whether or not the UBOL is properly included within the NCC Sec. 5a Agreement also properly raises the issue of the notice that is a necessary prerequisite to liability limitation. This argument by the shipper groups is somewhat analogous to arguing that the label warning children and their parents of offensive rock lyrics in recorded music is an issue properly considered within the context of determining whether ASCAP violated the antitrust laws when handling the licensing of the works of its members. The only thread these dissimilar issues have in common is the fact that both have some relationship to recorded music – just as the issues of liability limitation has only thing in common with the issues of antitrust immunity for the UBOL (considered in the initial phase of the Sec. 5a proceeding) or improving shipper participation in the classification process (considered in this phase of the Sec. 5a proceeding) i.e., some remote relation to the UBOL.

In two paragraphs of contorted logic, the Conferences argues (on p. 5 of its May 1, 2000 reply)⁴ that if, as NCC insists, maintenance of the UBOL is part and parcel of its recognized Sec. 5a activities then, according to the Conferences, every provision of the UBOL, as well as every issue that has even a remote connection to that document, is appropriately considered in this (Sub 6) proceeding. The Conferences ignore the fact that this proceeding has nothing to do with the UBOL but, rather, is devoted to improving shipper participation in classification-making process. The Conferences erroneously conclude: "If, however, antitrust immunity is to be preserved for collective consideration of the bill of lading, the issue of whether the Board should impose conditions under 49 U.S.C. §13703(a)(3) is an appropriate issue for consideration in the Sub-No. 6 proceeding." That argument is completely illogical for the reasons discussed herein. While issues such as notice of liability limitation may have some connection to the UBOL, they have no relationship whatever to the principal issue of this proceeding, namely, improving shipper participation to the classification process.⁵

The Conference's argument (at pp.5,6) surprisingly suggests that they have no compunctions about attacking certain provisions of the new UBOL because they were little more than observers in its development, sitting on the sidelines and making a few suggestions - that purportedly the NMFTA usually chose to ignore. Contrary to the Conference's assertions, and as explained herein, the UBOL is the joint product of the shipper members of that group along with the carrier members of NMFTA and it reflects the compromises by and agreements of both groups that were reached over 5 months of negotiation - presumably in good faith. A

⁴ TCPC has adopted this argument by reference.

⁵We would also note that contrary to The Conferences' contention, §13703(a)(3) applies to new Sec. 5a agreements that are submitted for approval for the first time, not to the NCC's agreement which is unchanged and has long standing approval by the ICC/STB.

principal subject of their attacks are focused on the UBOL's Note 2 providing notice of liability limitation. Note 2 resulted from was a compromise reached after intense negotiation. However, as revealed by the transcript that is included in Appendix A spokesmen for the Conferences appeared at the NCC's meeting and urged the NCC members to adopt the new BOL. Further, NMFTA has been meticulous in obtaining agreement from THE CONFERENCES before making any changes (no matter how insignificant) to the UBOL⁶.

NITL, NASSTRAC and TCPC all attempt to justify the STB's sudden reversal of its interpretation of §14706(c) so as to now find that the carriers must provide actual notice of liability limitations. While acknowledging the STB's reversal of its interpretation they suggest that the change may have been based on the DOT's Report to Congress on the results of its recent Cargo Liability Study. The Conferences (at p.6) excerpts a portion of a sentence taken from the STB's December 24th decision in an attempt to support its erroneous argument. The fallacy of this argument, as well as the argument of NITL is revealed by the full context of the STB's decision following context of the Conference's excerpt which is underlined:

[I]n the absence of filed tariffs and the 'filed rate doctrine,' the carriers clearly have a greater responsibility to insure that shippers are made aware of the applicable provisions, and courts may well disallow attempts to enforce incorporated provisions were it can be shown that the carriers failed to provide adequate notice of such provisions to shippers. See H.R. Rep. No. 422, 104th Cong. 1st Sess. 222-23 (1995) (Pending completion of Department of Transportation study, *intent of statute* is to permit motor carriers to establish released rates, so long as they provide to shippers, on request, 'the rate, classification, rules, and practices upon which any rate applicable to a shipment is based.'). We believe NMFTA's amendment to the Uniform Straight Bill of Lading assists in alerting shippers to the carriers' responsibility of disclosure. (emphasis added)

⁶ It seems that after these long negotiations on the UBOL, the Conferences would like to keep the carrier's concessions but ask the STB to void the concessions the shippers made.

NMFTA's bill of lading would prominently disclosed to the shipper in note 2 the fact that limitations on liability may exist and that information regarding these and other non-filed-tariff provisions is available.

The context reveals the many flaws in the shipper groups' rationale. For example, the STB's December 19, 1997, decision interpreted the law as it is presently written, determining that Congress had authorized constructive notice of liability limitations. However the STB also recognized that the law could be changed by Congress depending on how it reacted to DOT's Report on Carmack Reform. Yet, until Congress changes the law, constructive notice, and not actual notice, is all that is required for liability limitations. And that was not changed by the DOT's Report. In fact, in its report, DOT found that, as presently written, the Carmack Amendment does not require actual notice. And it is noteworthy that in comments submitted to DOT in connection with its study, NITL and TCPC have stated that the Carmack Amendment does not require actual notice and they urged DOT to recommend that the law should be changed so that it would require actual notice (see Appendix B). The point is that, to date, Congress has not adopted the shipper groups' suggestions and, as previously recognized by the STB and DOT (in its Cargo Liability Study) and as even NITL and TCPC conceded (in representations made to DOT), the Carmack Amendment, as it is presently written, does not require actual notice of liability limitations.

The shipper groups apparently recognize that the February 11, 2000 decision in this Sec. 5a Application No. 61 proceeding did not provide an appropriate context for STB's reinterpretation of the Carmack Amendment (i.e., to require actual notice) because that decision did not meet the requirements for rulemaking under §553 of the Administrative Procedures Act. They suggest, however, that the present (Sub 6) proceeding would meet the requirements of §553 because the shipper groups – have given the necessary notice of this issue – and they

further suggest that the STB should take advantage of this opportunity to interpret 49 U.S.C. §14706(c) (Conferences' comments p. 7). In response, we would point out that the requirements that apply to notice of liability limitations directly affect the interests of thousands of motor carriers nationwide, the majority of which are not members of the NMFTA and would not have a direct interest in the NMFC. Section 553 of the APA requires notice and an opportunity to participate that clearly have not been met in a proceeding that has been instituted to improve shipper participation in the NCC's classification-making procedures. To the contrary, §553 requires a proceeding in which interested persons – including persons that have no interest in the NCC's Sec. 5a Agreement would have notice and an opportunity to state their views on the record. This is necessary to satisfy the minimum due process requirements for STB's reinterpretation of §14706(c), or its requiring changes to UBOL based on such a reinterpretation.

Section 5a Application No. 61 (Sub-No. 6) is devoted to facilitating shipper participation in the NCC's classification process. Clearly, it is not the appropriate proceeding to decide what is the proper interpretation of the liability limitation requirements of the Carmack Amendment [49 U.S.C. § 14706(c)].

NATIONAL CLASSIFICATION COMMITTEE HEARING -- October 6, 1997

Docket 976 - Subject

Transcript of Remarks by Shipper Representatives

DAN SWEENEY:

Good Morning, I am still Dan Sweeney. And I was an Ad Hoc member of the Ad Hoc Committee, which meant that I was called upon when the Ad Hoc Committee wanted an attorney present.

First, I will introduce Joe Cutrona, who is the Gene Foley of NASSTRAC and he will state a few well chosen words that will be followed by Randy Schaeffer, who will make a very short substantive speech, talking about the main points of the bill. After that time, we will be available for discussion or questions.

JOE CUTRONA:

I have been in this position for NASSTRAC for almost 20 years now, and I think we have all been in some [what] of an adversarial position during most of those years. When Gene Foley called me and said why don't we get together, we have been asked to do this with an Ad Hoc Committee, shippers and carriers, members of our Board, members of your Board, and see if we can't work out a consensus position on the Bill of Lading. A bill of lading that is neutral, a bill of lading that is updated, after all its been outdated every since the Interstate Commerce Commission was done away with in 1995. So, it sounded like a good idea. We got together, a planning group, met, and set out the criteria for the group. The make up of the group, which ended up as Gene told you, was six members of his group and six members of our group, all shippers and carriers and our decision was that the group would meet without legal aid during initial discussions and when we got down to the point where issues were raised, which were legal issues, definitely would bring in our attorneys to solve those legal issues, and they did an excellent job. They were great help and moved the process forward very effectively. We think what we came up with is indeed a neutral bill of lading. I think Gene will agree with that. It doesn't give anyone an advantage, it leaves things where they were, so far as the law is concerned, and I think that everybody is going to find it a much more usable bill of lading. In setting it up we used the criteria that was established by ATA for electronic transmission, put it into a format that was adaptable to that and we tried to eliminate things that were unnecessary, retain things that were essential and come up with something that everybody could understand. And, with that I will call on Randy Shaeffer of Air Products and Chemicals, who is a member of NASSTRAC Board of Directors to give you some of the details.

**Outside of this Proceeding, the Shipper Groups Have Interpreted
§14706(c)(1) in Complete Agreement with NMFTA**

In this proceeding, the shipper groups are urging the STB to find that, under the Carmack Amendment [49 U.S.C. §14706(c)(1) (A) and (B)], carriers must provide the shippers with actual notice in order to limit their liability. Yet, in connection with DOT's Cargo Liability Study, NITL and TCPC just as emphatically asserted precisely opposite interpretation. In a letter dated April 1, 1996, to Mr. Paul Larsen of DOT's Office of General Counsel, TCPC's attorney states:

For the first time, effective January 1, 1996, motor carriers were permitted to limit their liability in unfiled tariffs without the written consent of their shippers. (emphasis added).

He went further to urge DOT to recommend that:

The Amendment to Carmack permitted unilateral liability limitations without written agreement of the shippers, as provided in 49 U.S.C. §14706(c)(1)(B) must be repealed. (emphasis added).

TCPC's attorney expressed similar views in his article published in the February 1997, issue of The Transportation Lawyer (p.14) and in a letter to the Journal of Commerce, that was published February 13, 1996.

In connection with DOT's Carmack Reform Study, pleadings submitted by NITL have represented the view that, under ICCTA:

Motor carriers are able to unilaterally limit their liability by the adoption of released rates in unfiled and privately maintained tariffs or rate schedules, in other words, without first providing notice to their customers. See 49 U.S.C. §14706(c)(1)(B). A shipper must know to request *all* of the applicable shipping terms from the carrier, including liability limitations prior to shipment, in order to obtain notice. 49 U.S.C. §13710(a) NIT League Stmt. P. 4), (emphasis added).

NITL added:

... As noted above, under the current statute, a motor carrier appears to be able to unilaterally limit its liability by establishing a released rate in its unfiled and privately maintained price circulars. The carrier need to inform the shipper of the liability limitation 'agreed to' only if the shipper requests the information pursuant to 49 U.S.C. §13710(a). (ft.nt. omitted) (NITL Stmtnt p.8) (emphasis added).

It seems that outside of this proceeding, the protestants are in full agreement with NMFTA's interpretation of this provision of the Carmack Amendment [§14706(c)(1)].



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V.
CONCLUSION

For the reasons set forth in its Opening, Reply and these Rebuttal Comments, the NCC submits that the current, approved classification-making procedures do give the shippers a reasonable and fair opportunity to participate in the classification process. To the extent that greater facilitation of that participation can be effectuated the NCC submits that, giving due consideration to the steps already taken to increase the awareness of interested persons through the addition of readily accessible media providing notice and information on classification matters, the additional proposals advanced by the NCC in this proceeding unquestionably will further that objective.

The allegations of certain shipper associations that the classification standards and procedures are subjective, biased, unfair or prejudiced in favor of the carriers, are unsubstantiated and patently untrue. The standards relied upon by the NCC are those which were prescribed and modified by the ICC. The procedures utilized are those which were approved and modified by the ICC as required by law. Objectively, to demonstrate the reasonableness of a classification the carriers must show that the ratings proposed are the same or similar to those applied on other commodities having the same or comparable transportation characteristics. Never, through investigations or as the result of the conduct of numerous compliance surveys, did the ICC find that the NCC misapplied those standards or did not act fully in accord with the approved procedures. In fact, when the allegation was made that the NMFTA staff was acting beyond the scope of their lawful functions, the ICC's investigation found that contention was totally unsubstantiated.

The uncontested record shows, also, that the NCC has been eminently reasonable regarding classifications and reclassifications. Not only is there an undeniable and equitable balance between increases, increases and reductions, and reductions, but also, as to the increases, when contested, the NCC successfully demonstrated to the ICC and STB that those classification proposals were eminently reasonable.

Congress has entrusted the responsibility for classification-making to the carriers, and the authority to collectively and finally establish classifications cannot be turned over to shippers or some “outside body” as some participating shipper associations request. Therefore, there is no legal basis which authorizes or permits shipper voting on classification matters, or the divesting from the NCC the final decision-making authority in classification matters. The Surface Transportation Board remains the final arbiter of the reasonableness of freight classifications, and that statutory duty cannot be abnegated to some other body as some other shipper associations suggest.

Various shipper associations have attempted to use this proceeding as an opportunity to urge the STB to decide a very contentious but completely unrelated issue that has been a subject of controversy between carriers and shippers for many years. That is, whether, under the Carmack Amendment, carriers may lawfully limit their liability through tariff provisions known as inadvertence clauses – provided that written notice of these provisions appears on the carriers’ bill of lading. Within the last two years and two months, the STB has taken three difference positions on this issue, with the last interpretation having been made in the improper context of its decision concluding the first phase of this proceeding which is directed to renewal of the NCC’s Sec. 5a Agreement. In its petition filed April 11, 2000, in the first phase of this proceeding, the NCC has urged the STB to remove its determination

that carriers must provide their customers actual notice of their liability limitations that are covered by inadvertence clauses. The NCC would also submit that this issue concerning the requirements of liability limitation under the Carmack Amendment is not properly considered within the instant proceeding (Sub-No. 6).

Finally, the NCC's Sec. 5a Agreement is of great value to the motor carriers and renewing the approval of the Agreement is a matter of the utmost importance to them. Consequently, under the applicable due process requirements the NCC should be permitted to confront and rebut the contrary evidence included within the statements that are filed in this proceeding on the June 12, 2000, filing date. The NCC respectfully requests the opportunity to respond to such factual information within 30 days or by July 5, 2000.

Respectfully submitted,



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Due and Dated: June 12, 2000

Certificate of Service

I hereby certify that I have this 12th day of June 2000, served a true and correct copy of the foregoing Rebuttal Comments 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.

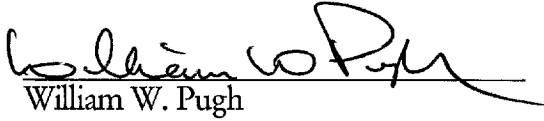

William W. Pugh

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