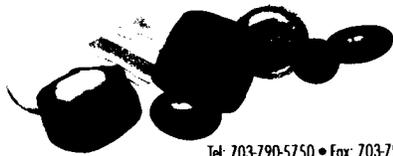


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December 2, 2005

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

FILED
Office of Proceedings
DEC 02 2005
Part of
Public Record



Re: STB Ex Parte No. 656 (Sub-No. 1)

Dear Secretary Williams:

The National Confectioners Association ("NCA") hereby files its comments in the above referenced proceeding initiated by the Surface Transportation Board ("STB" or "Board") to evaluate the continued antitrust exemption for the National Classification Committee ("NCC"), and to investigate whether the NCC has abused its market power in its classification-setting activities. With a review of the continuing soundness of this antitrust exemption now underway, NCA urges the Board to follow the lead of modern economic policy, and the cogent, reasoned voices of manufacturers, Congress, economists and other respected policymakers. We strongly urge you to deny the continuance of this exemption. If the Board decides not to eliminate the antitrust exemption for the NCC, we request that the Board initiate a subsequent proceeding to amend the NCC's procedures in order to allow direct shipper participation in classification-setting activities.

The NCA is the national association for the U.S. candy, chocolate, and gum industry. We have been in existence since 1884 and we represent over 90% of the industry and all its major companies. In August 2005, the NCC changed the description and packaging requirements for candy and increased significantly the classification of such products from class 65 to 92.5.

NCA strongly objects to the process that was used to make this reclassification. NCA first learned of the classification change after it was already adopted by the NCC, based on information obtained from several of our members who were alerted to the new classification when they were subjected to related price increases for their candy shipments. As explained below, NCC based its classification change on inadequate data that was not representative of the vast majority of candy products shipped. NCC failed to notify directly any of the mid-size to large candy manufacturers of the proposed class increase whose volumes comprise the majority of candy shipments. In addition, NCC claims that it notified NCA and a number of other small or foreign-based candy companies of the candy reclassification proposal, however, NCA has no record or recollection of ever receiving such notice.



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After NCA learned of the significant classification increase and we reviewed the NCC's public docket on this matter, we petitioned the NCC to reopen the proceeding to permit the NCA to submit additional density data and other information on the transportation characteristics of candy products in order to rectify the data deficiencies relied upon by the NCC. We also asked the NCC to stay the effectiveness of the 92.5 class increase until the additional data could be analyzed and a more appropriate classification established. *See Exhibit 1* (Nov. 11, 2005 letter from counsel for NCA to the NCC). The NCC denied our requests claiming that its existing procedures do not provide it with the flexibility to take the requested actions. *See Exhibit 2* (Nov. 14, 2005 email from Lisa Winter to counsel for NCA). Accordingly, two candy companies who are members of the NCA had no alternative but to submit new classification proposals to the NCC to change the candy classification back to class 65, which is supported by the density data and other transportation characteristics for their candy products.

We believe that the current classification-setting process is rigid and inefficient and reflects a carrier bias toward increasing classifications based on insufficient or non-representative data. It is well known that the class increases adopted by the NCC result in higher class rates and increased revenues for the Committee's carrier members. The NCC appears to have based the significant class increase for candy on information obtained primarily from its carrier members, absent meaningful or representative information from any shippers. This lack of transparency and accountability is evidence of existing flaws in the NCC's processes and of an abuse of the NCC's market power.

In virtually every other field of commerce, when two competitors conspire together to fix a price, the conduct is presumptively illegal under antitrust laws, subjecting the wrongdoers to criminal penalties and civil liabilities. 15 U.S.C. § 1. As is very well-established, "[c]ertain agreements, such as horizontal price fixing and market allocation are thought so inherently anti-competitive that each is illegal *per se* without inquiry into the harm it has actually caused." *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). Although the NCC does not engage directly in price-fixing activities, their collective class-setting activities have a direct impact on the class rates established by other rate bureaus and charged by individual motor carriers. The NCC class-setting procedures are unnecessary under present market conditions and are the dinosaur of a modern, competitive, 21st century economy.

THE RECLASSIFICATION OF CANDY PRODUCTS

The reclassification of candy arose from NCC in Docket 2005-3, Subject 8. On August 8, 2005, the NCC voted to amend the provisions of item 39970, pertaining to candy, NOI, or chocolate candy, NOI, by updating the description and packaging requirements and increasing the class from 65 to 92.5. The NCC's public docket file for the candy proposal states that preliminary data on the transportation characteristics for candy was initially presented to a Classification Panel on May 4, 2004 and members present at the Panel meeting directed the staff



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to institute a research project on candy and to report its findings to a future panel. *See*, NCC Docket 2005-3, Subject 8, Analysis, p.2.

1. The NCC Failed to Collect Accurate Data that Represented the Majority of Candy Shipments

The research project included a review of 41 candy shipments. The public docket indicates that only three very small candy companies participated in the research. Presumably, most of the data collected and relied upon by the NCC was provided by carrier members of the NCC. Using this research, the NCC concluded that the significant class increase was justified based primarily on the density of candy. In fact, neither candy density, nor its stowability, handling or liability have changed significantly over the years as the research conducted by the NCC might suggest.

It is unclear from the NCC summary data published online what specific candy products were evaluated in the NCC research. This makes it difficult for the industry to thoroughly understand the basis for the change adopted by the NCC. In any event, it is obvious based on a review of the data that the shipments analyzed did not include an accurate representation of the candy products that comprise the vast majority of candy shipments carried by truckers, such as chocolate and hard candy. Only two of the 41 shipments were described as "chocolate bars" or "hard candy." Total pounds of confectionery consumed in the U.S. is about 6.2 billion pounds, with half of that being chocolate. On average, chocolate is a densely packed product. Such a critical research project used as the basis for a significant class increase should have contained data on candy transportation characteristics that are representative of the majority of candy products shipped.

The candy industry has now brought the deficiencies in the research data to the attention of the NCC (since neither the NCA or companies who ship substantial volumes of candy were previously aware of the docket and, thus, did not participate before the NCC as parties of record). However, the process and procedures that must be followed to "undo" the improper class increase for candy are inefficient and the industry is now required to incur unnecessary and improper price increases until the matter can be rectified.

2. Notice of the Proposed Class Increase Was Inadequate

The NCC staff claims it contacted two trade associations (including NCA) and 15 candy companies for information on the transportation characteristics of candy. One of the trade associations, the Snack Food Association, does not represent any candy manufacturers. NCA has no record and no recollection of receiving any mailings from the NCC. Furthermore, none of the obvious, major U.S. candy companies such as Hershey, Mars, Nestle, Cadbury or Wrigley were contacted. Of the 15 companies NCC staff selected (out of an industry of more than 400 companies), only ten can actually be considered candy companies. Of these, one of the



companies listed as a contact by NCC no longer exists and has not for more than 10 years (Brock), one is located in Spain (Chupa Chups), one is located in the U.K. (Churchill's), and one carries mostly baked goods and syrups with only 2-3 candy products (Maple Grove). All are exceptionally small; in total, the sales of the companies apparently contacted represent less than a 1/2 percent of the industry. In no way are these companies representative of the industry and its thousands and thousands of products.

Given the significance and importance of this classification change, resulting in a thirty to sixty percent rate increase for our companies, the NCC procedures are, in our opinion, grossly inadequate. While NCC may claim that it sent letters to the NCA and to the companies listed, follow-up by the NCC via a phone call or email would have been helpful to ensure that notice of the proposal was actually received and that the recipients—in some cases, individuals who are not involved in transportation issues on a daily basis—appreciated the implications of the notice. It is surprising to us that the NCC was not concerned about the lack of involvement or representation by the candy industry in this proceeding. Based on a review of the public docket, it appears that only three very small candy companies submitted data to the NCC out of the 17 companies and associations claimed to have been contacted and that no candy industry personnel testified to, commented on or objected in any way to a very significant increase in rate classifications. Rather than attempting to communicate with the NCA and the candy companies by more direct means than mass-mailings, the NCC simply moved forward to adopt the significant increase without meaningful shipper input.

Even if NCA had received the letter notifying us of the first hearing, it would have been extremely difficult to collect the data needed in only 60 days, as required by the NCC. Notice of hearings should be at least 180 days and shippers should have a minimum of 120-150 days to respond. Such time is a necessity for a thorough survey of our membership and is vital to getting the accurate data needed to assess a classification proposal. The speed and lack of transparency of this process reinforces the conclusion that the NCC is not truly interested in collaboration between shippers and the truckers it represents.

In summary, the notification procedures employed by the NCC are minimal and casual at best, and the research conducted by the NCC in the recent candy proceeding was not a fair representation of the products it impacts. The lack of sufficient shipper participation in the candy reclassification docket and the improper resulting class increase demonstrates the inherent bias that exists in the current class-setting process. The current process lacks appropriate protections and thoroughness found in legal or regulatory proceedings. The STB should rethink the role of the NCC in continuing to set classifications based on the current competitive state of the trucking industry.



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NCC's class-setting activities and conducted under an antiquated exception to the antitrust laws, and the NCA urges the Board to take the long overdue action to eliminate this exemption. At a minimum, the processes and procedures of the NCC should be reevaluated.

The NCA appreciates the opportunity to make its views known in this important proceeding.

Sincerely,

Larry Graham
President

cc: William W. Pugh, Esq., NCC

EXHIBIT 1

November 11, 2005

Via Electronic and Regular Mail

Mr. William W. Pugh, Secretary
National Classification Committee
2200 Mill Road
Alexandria, VA 22314-4687

RE: *Subject 8—Docket No. 2005-3: Reclassification of Candy*

Dear Mr. Pugh:

We represent The National Confectioners Association ("NCA") and are contacting you regarding the recent adoption by the National Classification Committee ("NCC") of a classification increase for shipments of candy or confectionery, NOI, categorized under item 39970 of the National Motor Freight Classification. Specifically, on August 8, 2005, a panel of the NCC voted to approve a proposal to significantly raise the classification for candy from Class 65 to Class 92.5. This change became effective on October 29, 2005.

The NCA has been contacted by a number of its members who were surprised by the classification change and who strongly question whether the adopted increase is justified. The NCA was not aware of the proposal docketed before the NCC to increase the classification for candy and, thus, did not participate in the NCC proceedings with respect to this proposal. A review of the information published on the NMFTA website related to this docket indicates that the NCC attempted to notify NCA of the proposal, but the NCA has no record of having received such notice, nor do any individuals at the association personally recall obtaining the notice. In addition, based on the Proposal Notification List included in the docket, the only other entities apparently contacted by the NCC with respect to this proposal include another trade association whose members manufacture and ship snack foods but not candy, and three very small candy manufacturers that do not sufficiently represent the breadth and diversity of the candy industry.

The prior class 65 rating for candy, itemized under 39970, was in effect for decades and the transportation characteristics for such products have not changed significantly over time. The Report prepared by NCC staff with respect to this docket correctly notes that the density of candy products falls within a wide range depending on the type of candy shipped (e.g. chocolate bars and jelly beans are significantly more dense than aerated confections). However, it is not possible to discern from the Report what specific type of candy shipments were analyzed by NCC staff and whether a sufficient quantity of data, including representative samples based on the volume of candy shipments, was made available by the manufacturers of candy products that would enable the NCC to draw accurate conclusions regarding the densities and other transportation characteristics of candy shipments.¹

¹ Although the Report indicates that "15 potential manufacturers or shippers of candy were contacted," the Proposal Notification List included in Docket 2005-3, Subject 8, identifies only three small companies.

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November 11, 2005
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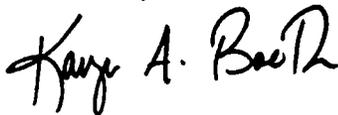
In order to ensure that the candy industry has an opportunity to provide its input to the NCC regarding the classification of candy shipments and to ensure that the NCC has accurate and complete data upon which to base its classification decisions, the NCA respectfully requests that the NCC (1) reopen Docket 2005-3, Subject 8, to enable the candy industry to provide additional information to the NCC on the transportation characteristics of candy shipments, which may lead NCC to reach a different conclusion; (2) stay the implementation of the reclassification of candy to class 92.5 and reinstate the prior class 65 for shipments subject to NMFC Item 39970 until further proceedings in this Docket are concluded; and (3) provide counsel for the NCA with underlying information, studies, data, work papers and analyses provided to and relied upon by the NCC with respect to Docket 2005-3, Subject 8, regarding the reclassification of candy.

Given that the reclassification of candy has been effective for only 13 days, granting a stay of the effective date would not be disruptive to the trucking industry, since many companies are only beginning to implement the change for common carrier transportation service and the change may be irrelevant to the vast majority of shipments that move under negotiated contracts, at least until those contracts expire. Moreover, reopening the docket to ensure that a complete record regarding the transportation characteristics of candy is developed and a full and fair hearing of the issues is presented to the NCC by the industry most affected by the change is appropriate.

Finally, the NCA is contemplating whether to file comments in the pending proceeding at the Surface Transportation Board concerning an investigation into the practices of the NCC (STB Ex Parte No. 656-Sub No. 1). The willingness of the NCC to work with NCA on the important issues raised in this letter is likely to have an impact on the NCA's decision to participate in that administrative proceeding.

We are hopeful that we will be able to work with the NCC to reach a mutually satisfactory resolution to the concerns of the NCA. I would be pleased to discuss the contents of this letter with you by phone or in person at your earliest convenience.

Sincerely,



Karyn A. Booth
Jeffrey O. Moreno

Attorneys for The National Confectioners Association

cc: Joel Ringer

EXHIBIT 2

Dear Mr

Sincerely,

Lisa K. Winter
Senior Classification Specialist
National Motor Freight Traffic Association, Inc.
703-838-1824

12/2/2005

Booth, Karyn

From: Lisa Winter [winter@nmfta.org]
Sent: Monday, November 14, 2005 3:21 PM
To: Booth, Karyn
Cc: Joel Ringer; William Pugh
Subject: Item 39970
Attachments: 2005_3_S08_Analysis.pdf; 2005_3_S08_Disposition.pdf; Directives.pdf; proposal for change form.pdf

Dear Ms. Booth:

Bill Pugh has asked me to contact you in regards to your correspondence on November 11th on Subject 8 of Docket 2005-3 that pertained to the classification of candy.

I believe that Bill explained to you that our 5A agreement does not allow us to grant a stay of the effective date of the changes made to item 39970. With this in mind, I would be happy to work with you, Mr. Lawrence Graham of the National Confectioners Association (NCA) and the candy industry to develop a new proposal. Towards this end, I have attached a proposal for change form. I should note that we must receive your proposal on or before November 22 for it to be listed on Docket 2006-1, which will be considered by a Classification Panel on February 6, 2006. I spoke with Mr. Graham on November 2, and sent him via email the proposal for change form and the NCC policies and directives. At that time I confirmed with him that all correspondence was sent to the correct name and address for the NCA.

By way of background, at the May 4, 2004 Classification Panel meeting, the members present considered a report indicating that the NCC staff had received a number of carrier reports of low density on shipments of candy moving under the provisions of item 39970. The reports showed that shipments of candy had a density range from 5.14 to 14.80 pcf and had a density average of 8.90 pcf. NCC density guidelines for the then current class 65 call for a minimum average density of 22.5 pcf. (Those guidelines are attached hereto as part of the NCC Policies and Directives.) In response to the information considered, the members present at the Panel meeting directed the staff to institute a research project on candy and to report its findings to a future Panel with provisions consistent with NCC policies and guidelines. (On March 4, 2004 two trade associations: the National Confectioners Assn. of the US and the Snack Foods Association and the manufacturers of the candy on which information was received were notified of the meeting.)

In response to the directive of the Classification Panel, the staff contacted manufacturers listed in the Thomas Register of Manufacturers and the two trade associations on June 16, 2004 and on January 7, 2005 and asked them to provide information on the transportation characteristics of candy. It should be noted that only three companies responded to the survey and, consequently, were made parties of record. The usable information received showed that, while candy has a wide range in density—from 5.14 to 40.30 pcf—most of the density figures are clustered around the average density of 11.32 pcf. An average density of 11.32 pcf is associated with a class 92.5, according to NCC density guidelines.

That information was presented at the May 3, 2005 Panel meeting. In response to the information considered the Panel voted to docket a proposal to amend the provisions of item 39970, pertaining to candy, NOI, or chocolate candy, NOI, by updating the description and packaging requirements and increasing the class from 65 to 92.5. (On March 3, 2005, the manufacturers who responded to the survey and the two trade associations were notified of the meeting.)

At the Classification Panel meeting on August 8, 2005, the members present considered the proposal as Docket 2005-3, Subject 8. In response to the information considered, the Panel approved the proposal as docketed. Those changes became effective on October 29, 2005. (On March 9, 2005, the entire docket, which included the analysis of the proposal and the raw data, was sent to the parties of record, including the two trade associations.)

I hope this information is helpful. Please feel free to contact me if you wish to submit a proposal for change or if you have any further questions.

12/2/2005