

**REQUEST FOR EXTENSION OF TIME**  
**EXPEDITED ACTION REQUESTED**

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SURFACE TRANSPORTATION BOARD DECISION

STB Ex Parte No. 656

MOTOR CARRIER BUREAUS - PERIODIC REVIEW PROCEEDING

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

INVESTIGATION INTO THE PRACTICES  
OF THE  
NATIONAL CLASSIFICATION COMMITTEE

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By decision served May 7, 2007, in the above-styled proceeding, the Surface Transportation Board (STB) terminated its approval of the Agreements of all the Motor Carrier “Bureaus” including Section 5a Application No. 61 - the Agreement of the National Classification Committee (NCC). It is the Board’s approval of the NCC’s Agreement which authorizes the collective development and maintenance of the National Motor Freight Classification (NMFC)<sup>1</sup>. The Board made its decision effective September 4, 2007.

The collective development and maintenance of the NMFC has taken place for the past 70 years and, for the last 50 of those 70 years, collective classification-making has had the protection of Section 5a (Reed Bullwinkle) antitrust immunity. This request is for the

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<sup>1</sup> 49 U.S.C. §13703(a) (6) provides: **Effect of approval.**—If the Board approves the agreement or renews approval of the agreement, it may be made and carried out under its terms and under the conditions required by the Board, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

additional time that is needed for the National Motor Freight Traffic Association (NMFTA), the National Classification Committee (NCC), the over 1100 motor carrier participants in the NMFC, and their shipper customers to make the changes in their business operations that will enable them to adapt to a new legal environment that would not include antitrust immunity.

In Support of This Request the NMFTA and NCC State the Following:

The National Motor Freight Classification (NMFC) is of the utmost importance to the NMFTA, the NCC, all NMFC participating carriers and their shipper customers who depend on the NMFC for not only commodity classifications but also: rules, packaging provisions, bills of lading and carrier listings. Terminating the STB's approval of the NCC's Section 5a Agreement on September 4, 2007, would allow these carriers and shippers less than four months for the profound adjustments that must be complete when the NMFC can no longer be maintained on a collective basis by the NCC. We believe that this is not a sufficient amount of time to make the changes that would be required by the removal of Section 5a antitrust immunity that has been in place for over 50 years and a collective classification-making system that has been in effect for over 70 years.

It is important to emphasize that no interests would be harmed by this extension. The STB did not find that the NCC's classification-making activity, as it is presently conducted, is contrary to the public interest. Rather the Board's rationale for terminating its approval of the NCC's Agreement was the following:

[W]e are concerned that the classification process not be abused once the immunized rate bureau system is dismantled. After more than 50 years of government approval of what otherwise would have been per se illegal price-fixing by the rate bureaus, it would be a natural and likely step for some carriers, perhaps unintentionally, to look for ways to use the classification process as a revenue protection device. Such a result would undo the deregulatory aims of today's decision and would perpetuate the prior harms to shippers. Thus, continued approval of NCC's agreement would be contrary to the public interest. (emphasis added) (see decision p. 21)

The decision continued:

Abuse of the classification system would be very difficult for the Board to detect and police. There has been an upward trend in classification ratings in recent history, but it is virtually impossible to identify a single cause for the trend or to determine whether that cause is benign or not. Carriers could, under the present system, systematically and selectively seek ratings increases for those products where shippers have few transportation alternatives, without fear of the behavior being challenged as anticompetitive. It is difficult for the Board to detect this abuse without continual monitoring of the classification process, a function the Board is not well suited to perform. (decision, p. 21)

The best way to ensure that such abuse of the classification process will not take place once the immunized rate bureau system is dismantled is to subject carriers involved in classification to the antitrust laws. (decision, p. 22)

The decision suggests that:

In 1998, the Board opined that there was a "sufficient possibility" that NCC would risk antitrust liability if it continued its classification activities without immunity See EC-MAC I at 5 n.15. However, DOJ's comments in the present record are reassuring that the classification process can be reformed to comply with the antitrust laws, and that DOJ is willing to assist in this regard. Thus, we believe that the risk of antitrust liability can be minimized through consultation with DOJ and reformation of the classification process as appropriate. (emphasis added) (decision, p. 23)

The NMFTA will give very serious consideration to the Board's advice to "reform" the classification process in consultation with the Department of Justice (DOJ). However, it is imperative that the members of the NCC be confident that a new classification system

will not put them at risk and that they will continue to be shielded from antitrust liability while the NCC formulates the changes in its classification-making procedures that will be submitted to the DOJ for approval. At a minimum, prudence would require that, as an initial step, NMFTA should seek the protection of a business review letter from DOJ.<sup>2</sup>

On page 24 of its decision, the Board states: “If the Bureaus are in doubt about the likelihood of exposure to antitrust liability for those activities, they may take advantage of the business review procedure administered by DOJ’s Antitrust Division...” In footnote 76, the Board adds:

While not a shield against antitrust litigation, a favorable business review letter from DOJ will afford significant guidance on permissible activity. Because the DOJ business review process can take some time to complete, interested bureaus may wish to file requests with DOJ as early as possible in the 120-day transition period provided in this decision.

As an indication of our resolve to pursue this matter to a favorable conclusion, NMFTA has retained antitrust counsel for advice in connection with its development of a classification-making process that can receive a business review letter from the DOJ.

In obtaining a business review letter, the NCC would have to allow time for the following activities: (1) developing a suitable classification-making organization and process that would not require immunity from the antitrust laws, (2) preparing a comprehensive and detailed request for a business review letter from the DOJ, (3) obtaining approval of the new classification-making system by the DOJ, and (4)

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<sup>2</sup> Under the Antitrust Division's Business Review Procedure, 28 CFR §50.6 business entities can ascertain the Division's present enforcement intentions with respect to proposed business conduct.

implementing the new system. Such a complex and multifaceted process could not be completed within the presently allotted 120 days.

First, the NCC must be prepared to change its structure and formulate an alternative classification-making procedure that will appropriately evaluate the transportation characteristics of virtually all products moving in commerce and group these products according to their transportability. The groupings that result from this process must reflect the service demands that transportation of a given commodity places upon motor carriers, and the carriers, shippers and others using this new process must be confident that they are not at risk for violations of the antitrust laws.

The NCC's first opportunity to address this subject as a committee will be at its June 4, 2007, meeting. At that time, we would expect an ad hoc committee may be appointed to meet throughout the summer to formulate a new Agreement, describing a new structure for a classification-making entity and new operating procedures that would meet the DOJ's requirements. When the developmental effort is complete, the next step is approval by our members. The absolute first opportunity for the NCC to meet, consider and approve the new Agreement would be at its presently scheduled October 1, 2007, meeting. Following the Board's recommendation, the NCC would then be obliged to prepare a request for a business review letter from the DOJ.

We would note that the Reed Bullwinkle Act, which is the statutory source of the Section 5a antitrust immunity for all of the motor carrier rate bureaus as well as the NCC, was passed by Congress in 1948. The American Trucking Associations (ATA) and the

motor common carriers, who for the previous 20 years had developed and maintained the NMFC, initiated the formulation and development of a new collective classification-making process and suitable organizations to continue the classification-making function that had become available under the Congressional grant of Reed Bullwinkle (Section 5a) antitrust immunity. On three successive occasions, ATA and the participating motor carriers submitted applications to the ICC requesting approval of agreements setting forth three alternate structures for a proposed classification-making entity. The ICC rejected the first two applications for a variety of reasons, including a failure to provide sufficient isolation between the classifiers and the ATA. The ICC finally approved the third application in 1956 – approximately eight years after passage of the Reed Bullwinkle Act authorizing the Section 5a antitrust immunity. In recognition of the importance of the collective classification-making process, during the development of the new system antitrust immunity was provided to protect the maintenance of the NMFC under the collective process that pre-dated the Reed Bullwinkle Act.

The Board's decision makes several references to the changes brought about in the collective rate and classification-making process by the Motor Carrier Act of 1980. For example, in its "Discussions and Conclusions" section, the decision indicates "Our action today represents the final step in a process that began more than a quarter century ago of making the motor carrier industry fully competitive." (see decision p. 5) The decision further states:

The regulatory environment has changed substantially since the bureaus began... A significant turning point was the 1980 Motor Carrier Act, in which Congress essentially repealed interstate motor carrier regulation in order to promote competition. The 1980 Act curtailed the permissible activities of rate bureaus seeking continued regulatory approval. (see decision, pp 6, 7)

In many respects the challenge now facing the NCC is similar to, but actually more complex and daunting than, the task they faced when the NCC was obliged to substantially reform its classification-making procedures in order to bring the Agreement into compliance with the requirements of the Motor Carrier Act of 1980 and the ICC's Ex Parte No. 297 (Sub-No. 5) implementing that legislation. The changes required by the 1980 Act include expediting the classification-making process to make sure that classification proposals were processed to completion within 120 days while also making sure that all decisions involving the NMFC were made by motor carrier representatives rather than members of their staff. The following are only some of the highlights of the NCC's process in amending its Agreement to conform to the 1980 Act and the ICC's decision in Ex Parte No. 297 (Sub-No. 5) implementing the 1980 Act.

**Time Line for the NCC's Amendment of its Classification-Making Procedures to Meet the Requirements of the Motor Carrier Act of 1980**

1. On October 29, 1980, the NCC submitted to the ICC a revised version of its National Motor Freight Classification Agreement which had been substantially amended to comply with its own interpretation of the requirements of Section 14 of the Motor Carrier Act of 1980. [49 U.S.C §10706]
2. The ICC's order served on December 30, 1980, in Ex Parte No. 297 (Sub-No. 5) set forth its own standards which, it determined, must be met in order for rate and classification agreements to comply with the Motor Carrier Act of 1980.
3. By order served May 11, 1981, the Commission set May 26, 1981, as the date for filing amended agreements which would comply with the standards set forth in its December 30, 1980, order. This decision also clarified certain aspects of the Commission's December 30, 1980, decision.
4. On May 26, 1981, the NCC submitted an amended agreement to comply with the ICC's December 30, 1980, decision in Ex Parte 297 (Sub-No. 5).

5. ICC decisions rendered in 1984 and 1985 indicated that the Commission would require further changes to the NCC's proposed Agreement. Consequently, in its June 1985 meeting, the NCC named a special ad hoc committee to initiate formulation of new operating procedures that would meet the ICC's requirements and to develop a new structure and operating procedures for the classification-making entity that would enable the motor carriers to obtain full use of their staff while at the same time complying with the requirements that staff members could not initiate or act on proposals for change to the Classification.
6. The special ad hoc committee met during the summer of 1985 and developed a new structure and further amendments to its proposed procedure and the further amended Agreement.
7. On August 2, 1985, the NCC filed a petition requesting the Commission to postpone for a period of 90 days its action on pending agreements to the NCC's Section 5a Agreement. This was intended to permit the development and filing of the new amendments which would bring the NCC's Agreement into compliance with the requirements that had been identified in certain ICC decisions. The NCC's petition for an extension of time was granted.
8. The NCC considered and approved the amended Agreement in its October 1985 meeting and the new Agreement was filed with the ICC on November 5, 1985.
9. In a March 7, 1986, decision the Commission indicated its concern that the NCC's meeting schedule may result in failure of compliance with the 120-day rule.
10. In a decision rendered May 18, 1987, the ICC provisionally approved these amendments to the NMFC Agreement, subject to certain conditions. The decision discussed the specifics of the Agreement and a number of changes in the Agreement that it found were necessary.
11. On August 20, 1987, the NCC filed further amendments to its Agreement along with comments explaining these amendments and addressing several points raised by the Commission's decision.
12. The Commission's decision finally approving our amended Agreement was served May 9, 1988.

Thus, in two previous instances the process of developing amendments to the NCC's classification-making procedures and obtaining ICC approval of those amendments as meeting the requirements of the Reed Bullwinkle Act (in the first instance) and the

Motor Carrier Act of 1980 (in the second) required several successive revisions to a proposed Section 5a Agreement and several exchanges with the ICC. In both cases, they required almost eight years in order to develop and obtain operating procedures that would meet the requirements of law, as interpreted by the ICC. As the Board's May 7, 2007, decision notes on page 22, Congress has recognized the value of the commodity classification system that is in place<sup>3</sup>. The NCC requests an opportunity to preserve this valuable system. It is not reasonable to expect the NCC to complete the daunting task of developing completely revised procedures that would be suitable for maintaining the NMFC and meeting the requirements of the federal antitrust laws while subject to antitrust liability. We can only assume that when the DOJ reviews the revised classification-making procedures that the NCC submits in connection with its request for a business review letter, the DOJ is likely to require still further amendments as a condition for its approval. The NCC must be given the protection of continuing antitrust immunity while any further amendments needed to satisfy the DOJ's requirements are being formulated.

As previously indicated, the DOJ has established a business review procedure (see 28 CFR §50.6) whereby it will review proposed business conduct and state its enforcement intentions. However, the requirements specified in the DOJ's procedure are rigorous and comprehensive. For example, the following are reproductions of paragraphs 1 and 5 from the DOJ's requirements:

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<sup>3</sup> House Committee on Public Works and Transportation Report that accompanied the Motor Carrier Act of 1980, H.R. Rep. No. 96-1069, 96<sup>th</sup> Cong., 2d Sess. at 28:

[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.

1. A request for a business review letter must be submitted in writing to the Assistant Attorney General.
  
5. The requesting parties are under affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request must be accompanied by all relevant data including the background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any. All parties requesting the review letter must provide the Division with whatever additional information or documents the Division may therefore request in order to review the matter. Such additional information, if furnished orally, shall be promptly confirmed in writing. In connection with any request for review the Division will also conduct whatever independent investigation it believes is appropriate.

It is apparent that the DOJ's review procedure may require considerable time to complete.

Keeping in mind the foregoing, along with the fact that the STB took more than two years to arrive at its decision in the instant proceeding [Ex Parte No. 656 and 656 (Sub-No. 1)], the NCC and NMFTA could not reasonably be expected to develop an alternative classification structure and process, prepare a request for a business review letter, obtain the DOJ's approval of the new structure and process, and implement the new structure and process, all within the 120 days that was allotted by the Board's May 7, 2007, decision. Clearly, the NCC and the NMFTA need the requested extension in order to follow the course of action that is suggested in the Board's decision.

We would emphasize that the proposed extension is also needed in view of the substantial difficulties that would otherwise be imposed on the motor carrier industry by the Board's sweeping decision in the instant proceeding. For example, it should be

recognized that the Classification has been in place for over 70 years and, during this lengthy interval, the NMFC has become the core of our members' systems for evaluating the characteristics of the commodities they transport, and these systems cannot be overhauled and revised within four months. The abrupt termination of antitrust immunity for the collective maintenance of the NMFC on September 4, 2007, would leave our members, especially the smaller carriers, in a quandary. These carriers depend on receiving continuous updates of the Classification. Within the existing Docket schedule and absent the extension, we will be unable to act on any proposals, including shipper proposals, scheduled for the October 2007 Docket as well as future Dockets pending the required revisions to the classification-making procedures. If the NMFC could no longer be updated, our members would be obliged to seek alternative ways of determining and ranking the relative transportability of the products they move. As indicated, our members depend on the NMFC not only for the classes and descriptions found in the Articles section, but also the rules, packaging provisions, bills of lading and listing of carriers. In many instances, this would entail scrapping, or at the very least overhauling, systems that have been in place for many years and retraining personnel. This is obviously a process that would not only impose an economic hardship but require a substantial amount of time.

The difficulties encountered in adjusting to the Board's decision would not be limited to our carrier members. The shipper customers of all our members require a reasonable amount of time in order to adjust a core component of their existing systems and to transportation-related business in a fundamentally different way. It would have the most disruptive effect on small shippers. Having limited in-house technology, small and medium-sized shippers are unprepared for this radical disruption in their businesses and

could not make the necessary changes and adjustments within 120 days. They rely on the Classification and lack an alternative standard which would facilitate comparison of the transportation services offered by competing carriers. The difficulties that would be encountered by our members' customers were emphasized in a letter dated May 2, 2007, from the 225-member North Carolina League of Transportation & Logistics to the Surface Transportation Board. In the letter the League points out that:

70 plus years of the NMFC have proven its value. There is simply no other publication that can rival the value that shippers, carriers and third party logisticians place upon its use. It is a transportation tool used by the smallest company transportation manager with only a few thousand shipping dollars a year, as well as companies with transportation budgets upwards of \$100 million annually. An added bonus is that its cost is very reasonable for such a comprehensive publication.

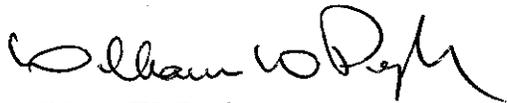
We therefore encourage the Board to grant continued full anti-trust immunity for this valuable resource. Without it, our industry would surely be in a chaotic state. (see attachment A)

Shippers have pointed out that they also participate in the classification-making process under the protection of the antitrust immunity conferred by the NCC's Section 5a Agreement in conjunction with 49 U.S.C. §13703(a) (6) (see fn. 2). Absent an extension, they would no longer be able to participate in the NCC's collective process for changing the NMFC.

**WHEREFORE THE PREMISES CONSIDERED**, and in order to provide the time necessary for adjustments in a collective classification-making mechanism, the essence of which has been in place for 70 years, the Surface Transportation Board is respectfully requested to extend the effective date in the instant proceeding from September 4, 2007, to 18 months

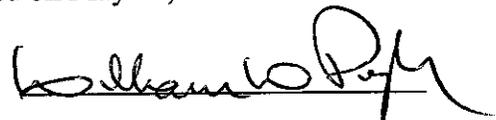
from the present service date or from September 4, 2007, to November 4, 2008. It is submitted that no person would be prejudiced or disadvantaged by granting the relief sought.

Respectfully submitted:



William W. Pugh  
Executive Director and General Counsel  
National Motor Freight Traffic Association, Inc., and  
Secretary to the National Classification Committee  
1001 North Fairfax Street, Suite 600  
Alexandria, Virginia 22314  
703-838-1825  
pugh@nmfta.org

I, William W. Pugh, state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on May 16, 2007.



William W. Pugh

# **ATTACHMENT A**

CHAIRMAN  
Tom Guffria  
NC State Ports Authority  
Wilmington NC

# NORTH CAROLINA LEAGUE OF TRANSPORTATION & LOGISTICS

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May 2, 2007

The Surface Transportation Board  
395 E Street, S.W.  
Washington DC 20423-0001

The Honorable Charles D. Nottingham, Chairman

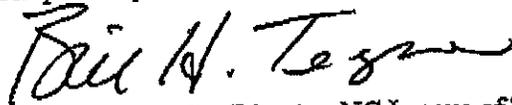
Dear Chairman Nottingham:

The North Carolina League of Transportation and Logistics is a 225-member contingent of dedicated transportation professionals representing shippers, ports, carriers and other concerned organizations. We were chartered in 1929. This letter is transmitted to the Surface Transportation Board in keeping with the action taken by the Board of Governors of the North Carolina League of Transportation and Logistics which on March 2, 2007 voted to support the continuation of antitrust immunity for the National Motor Freight Classification and a subsequent vote of our full membership. Many of our members refer to the NMFC for their day-to-day business of pricing and classifying their freight using the highly successful and fair classification of commodities as well as to reference rules, packing requirements and other valuable information.

70 plus years of the NMFC have proven its value. There is simply no other publication that can rival the value that shippers, carriers and third party logisticians place upon its use. It is a transportation tool used by the smallest company transportation manager with only a few thousand shipping dollars a year, as well as companies with transportation budgets upward of \$100 million annually. An added bonus is that its cost is very reasonable for such a comprehensive publication.

We therefore encourage the Board to grant continued full anti-trust immunity for this valuable resource. Without it, our industry would surely be in a chaotic state.

Respectfully submitted,



Bill H Teague, Ex. Director, NC League of Transportation & Logistics

Copies:

STB Vice Chairman, W. Douglas Buttrey  
STB Board Member, Francis P. Mulvey.  
NCLTL Officers

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# **CERTIFICATE OF SERVICE**

SURFACE TRANSPORTATION BOARD DECISION

STB Ex Parte No. 656

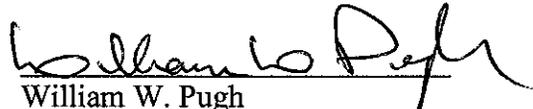
MOTOR CARRIER BUREAUS - PERIODIC REVIEW PROCEEDING

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

INVESTIGATION INTO THE PRACTICES  
OF THE  
NATIONAL CLASSIFICATION COMMITTEE

CERTIFICATE OF SERVICE

I hereby certify that I have sent to all parties of record copies of the Request for Extension of Time Expedited Action Requested by first class mail, postage prepaid, on this 18<sup>th</sup> day of May, 2007.

  
William W. Pugh  
Executive Director and General Counsel  
National Motor Freight Traffic Association  
1001 N. Fairfax Street  
Alexandria, Virginia 22314  
(703) 838-1825

Dated: May 18, 2007