

SECTION 5A APPLICATION NO. 61

NATIONAL CLASSIFICATION COMMITTEE--AGREEMENT

Decided December 10, 1998

The Surface Transportation Board indicates that it will renew the bureau agreement of the National Classification Committee for 1 year, after which, absent a clear expression from Congress to the contrary, the agreement will be approved only if it is amended to provide for more effective shipper participation.

BY THE BOARD:

We find that renewal of the bureau agreement of the National Classification Committee (NCC), with some changes, and with the exception of its Uniform Bill of Lading, would not be contrary to the public interest. Thus, we establish a framework under which we will develop more effective procedures for shipper participation consistent with this decision, which will take effect after 1 year absent a clear expression from Congress to the contrary.

BACKGROUND

A. Legislative and Regulatory Background. Since the 1940s, motor carriers have been permitted to collectively determine rates and practices that apply to the transportation they provide. Under the Reed-Bulwinkle Act (Reed-Bulwinkle),¹ now codified (as to motor carriers) at 49 U.S.C. 13703, motor carriers acting collectively could be immunized from the antitrust laws by submitting the agreements governing their collective activities to the Interstate Commerce Commission (ICC) (and now to the Board) for approval.

¹ Pub. L. No. 80-662, 62 Stat. 472.

Government approval would immunize activities covered by such an agreement from operation of the antitrust laws.

Carriers have historically effected collective ratesetting through what are known as rate bureaus. Rate bureaus performed a variety of functions for their members, some of which required antitrust immunity, some of which did not. Most significantly, they set rates collectively and acted as agents for their carrier members by filing tariffs at the ICC reflecting rates that had been collectively determined as well as those that had been individually set. See, generally *Investigation of Motor Carrier Collective Practices*, 7 I.C.C.2d 388, 397 (1991).

Most collectively set rates are established in conjunction with the NCC's classification procedures. Classification, which involves the grouping of commodities with similar transportation characteristics into categories, or "classes," does not involve the actual setting of rates but is a part of the motor carrier ratemaking process. Every commodity that can be shipped by truck is placed into a class with other commodities with similar transportation characteristics, and each class is assigned a number, which increases as transportability becomes more difficult. In order to reach a final price, carriers using the classification typically apply a rate to the class into which the commodity transported falls. Under the current regulatory framework, the rate applied to the class may be determined by a carrier on its own, or it may be set collectively by a motor carrier rate bureau. See, generally *National Classification Committee v. United States*, 746 F.2d 886, 887 (D.C. Cir. 1984). As an example, if a commodity were rated class 70, and the individually or collectively set rate for particular shipments of commodities rated class 70 moving between two particular points were \$5 per hundredweight, then the carrier would charge its customer \$500 for transporting a 10,000 pound shipment.²

The NCC, whose agreement was approved by the ICC in 1956, is the predominant classification body in the motor carrier industry. After the Motor Carrier Act of 1980 (the 1980 Act)³ had substantially reduced Federal motor carrier regulation in order to promote competition, the ICC investigated the activities of the NCC to determine whether they conformed to the aims of the new legislation.⁴ The ICC found that continuing the NCC's antitrust exemption

² As between different classes and equal distances, the rates tend to be proportional to the class 100 rate. Thus, as an example, the class 70 rate may be approximately 70% of the class 100 rate.

³ Pub. L. No. 96-296, 94 Stat. 793.

⁴ That investigation was conducted pursuant to the agency's broad authority to review bureau agreements on request or on its own initiative. See, 49 U.S.C. 13703(c).

was consistent with the new, procompetitive National Transportation Policy,⁵ but only if the classification process were modified so that it focused on only four factors related solely to transportability: density, stowability, liability, and difficulty of handling. Other factors that had previously been considerations in the classification process, such as trade conditions, value of service, and competition with other commodities, could no longer be considered because such "economic" factors bore no relation to the relative transportability of each commodity.⁶ The ICC reasoned that such economic factors should be more appropriately considered in the ratemaking process itself than in the classification process. See, *Investigation*, 367 I.C.C. at 249. The NCC's revised agreement was approved in 1987. *National Classification Committee - Agreement*, Section 5a Application 61 (ICC served May 18, 1987, and May 9, 1988) (NCC 1987).⁷

Seven years later, in the Transportation Industry Regulatory Reform Act of 1994 (TIRRA),⁸ Congress generally eliminated the requirement that motor carriers of general freight file tariffs reflecting their rates at the ICC.⁹ Nevertheless, shortly thereafter, in the *ICC Termination Act of 1995* (*Termination Act*), Congress extended the provisions of Reed-Bulwinkle.¹⁰ In the *Termination Act*, Congress provided that all existing motor carrier bureau agreements would be permitted to remain in effect until December 31, 1998, after which, if renewal is sought, they will continue in effect to the extent that we find that renewal is not contrary to the public interest. 49 U.S.C. 13703(d).

⁵ *Investigation into Motor Carrier Classification*, 367 I.C.C. 243 (1983), modified and clarified, 367 I.C.C. 715 (*Investigation*), aff'd, *National Classification Committee v. United States*, 765 F.2d 1146 (D.C. Cir. 1985).

⁶ Section 14(b) of the 1980 Act also confirmed that bureaus require antitrust immunity to perform their functions and mandated an independent study of motor carrier ratemaking. A majority of the Motor Carrier Ratemaking Study Commission that conducted the study concluded that classification "can facilitate competition by helping carriers establish cost-related rates and by easing the task of rate comparison by shippers." Report, *Collective Ratemaking in the Trucking Industry*, at 455, June 1, 1983.

⁷ Traditionally, motor carrier bureau proceedings have been identified as "Section 5a" proceedings, in reference to section 5a of the Interstate Commerce Act as it existed prior to its 1978 codification as 49 U.S.C. 10706.

⁸ Pub. L. No. 103-311, 108 Stat. 1683.

⁹ TIRRA also required the ICC to analyze its regulatory responsibilities and identify those functions that could be eliminated. In its report, the ICC found that classification "may provide valuable information to trucking firms." ICC, *Study of Interstate Commerce Commission Regulatory Responsibilities*, at 76, October 25, 1994.

¹⁰ The *Termination Act* (Pub. L. 104-88, 109 Stat. 803) also severed the statutory provisions governing motor carrier bureau agreements from those governing railroad rate agreements in section 10706 and recodified them as section 13703.

Thus, Congress in the statute specifically directed the Board to make an affirmative decision by the end of the year with respect to existing agreements.¹¹ In addition, the *Termination Act* eliminated agency oversight of the reasonableness of rates charged for transportation of general freight, except, as here pertinent, for collectively set rates and practices, including freight classifications. 49 U.S.C. 13701(a).

B. *This Proceeding.* We began this proceeding by notice published at 62 Fed. Reg. 60,935 (1997). Opening comments were filed by 38 parties.¹² Nine parties filed reply comments.¹³ All of the commenters supported renewal of the NCC agreement without any conditions, except the following parties: ALC; DOT; HPCDC/NASSTRAC; NITL; TCPC; TIA; and Tucker.¹⁴

¹¹ In a separate proceeding, we have considered whether to renew the separate collective rate-setting bureau agreements of motor carriers. *EC-MAC Motor Carriers Service Association, Inc., et al.*, Section 5a Application No. 118 (Amendment No. 1), *et al.* In a decision issued simultaneously with this one, which, out of deference to a legislative process that is to be initiated in the immediate future will become operative after 1 year absent a clear expression from Congress to the contrary, we have found that antitrust immunity for collective rate-setting would not be contrary to the public interest, but only if the "benchmark rates" are reduced.

¹² Comments were filed by ALC Logistics (ALC); AMA Transportation Company, Inc.; American Trucking Associations, Inc. (ATA); Bobs Pickup and Delivery, Inc.; Brunozzi Transfer & Truck Rental, Inc.; Cargo Express, Inc.; Consolidated Freightways Corporation of Delaware (CF) (whose petition to intervene and to late-file its comments is granted); EC-MAC Motor Carriers Service Association, Inc. (EC-MAC); Falcon Transport, Inc.; G.I. Trucking Company; The Health & Personal Care Distribution Conference, Inc., jointly with The National Small Shipments Traffic Conference, Inc. (HPCDC/NASSTRAC); the State of Michigan; the NCC; The National Industrial Transportation League (NITL); North American Transportation Council, Inc. (NATC); Pacific Inland Tariff Bureau, Inc., jointly with the Middlewest Motor Freight Bureau, Inc.; Pioneer Transport, Inc.; Quaker Transport, Inc.; the Honorable Nick J. Rahall, II, Congress of the United States; Roadway Express, Inc.; Rocky Mountain Tariff Bureau, Inc. (RMTB); Saia Motor Freight Line, Inc.; Shane Distribution Systems; The Simmons Company; Southern Motor Carriers Rate Conference, Inc.; Steel & Machinery Transport, Inc.; Sure Delivery Service, Inc.; Reese H. Taylor, Jr.; Transportation Consumer Protection Council, Inc. (TCPC); Transportation Intermediaries Association (TIA); Tucker Company (Tucker); the United States Department of Transportation (DOT); the State of Washington; and Zipp Express. Other comments that were not served on other parties were placed in the docket in the proceeding.

¹³ Reply comments were filed by ATA, CF, EC-MAC, HPCDC/NASSTRAC, NATC, NITL, NCC, TIA and RMTB.

¹⁴ We also received a letter from several Members of Congress dated November 17, 1998, discussed further later, indicating that Congress intends to review motor carrier issues in connection with the Board's reauthorization next year.

DISCUSSION AND CONCLUSIONS¹⁵

A. *Classification Function.* Although section 13703(a)(2) provides that a rate bureau has the burden of showing that a new agreement should be approved, section 13703(d) states that we are to renew existing agreements *unless* we find renewal to be contrary to the public interest. Thus, we will consider whether the collective setting of classifications is contrary to the public interest.

Viewed conceptually, classification can play a positive role in motor carrier pricing. By providing standardized groupings of commodities based solely on their transportation characteristics, classification can reduce costs to carriers in determining the transportability of the commodities they handle; it can allow them to price their service more efficiently than if they had to assess transportability individually; and, presumably, it can permit them to pass on this efficiency to their shippers in the overall prices charged their customers. Many of the opponents of renewal do not dispute the general benefit of the NCC's classification activities. For example, NITL sees it as procompetitive (opening comments at 8), and DOT notes that the classification system can benefit both shippers and carriers (opening comments at 4).¹⁶

Nevertheless, we understand that classification as it is currently set up can be viewed as unnecessary hairsplitting, and the public perception of the fact that a candy cane with a crook may be classified higher than a candy stick without a crook is not lost on us. Yet, while the candy cane/candy stick issue was one of the more prominently publicized lightning rods for abolishing the ICC, Congress, in enacting the *Termination Act*, did not abolish rate bureaus in general or the classification bureau in particular. And in theory, at least, the hairsplitting is not without basis: the alternative to producing general groupings that provide some basis for decisions about transportability could be to require

¹⁵ In instituting this proceeding, we asked whether NCC's activities require antitrust immunity. While this agency is not charged with the responsibility of interpreting or carrying out those laws, we believe there is a sufficient possibility that the classification activity would, absent immunity, be subject to legal action under the antitrust laws to warrant considering granting immunity. The fact that one shipper group (HPCDC at 4) asserts that the NCC's activities are subject to the antitrust laws indicates that NCC members could face legal action without immunity. Moreover, we must assume from Congress's directive to grant immunity unless we find that the NCC's activities are not in the public interest that Congress believes that the NCC's members could otherwise be subject to the antitrust laws. The Department of Justice has never to our knowledge, in this proceeding or elsewhere, indicated that the NCC's classification activities do not require immunity in order to avoid application of the antitrust laws.

¹⁶ In his comments, at 2, Congressman Rahall stated that "there was never a question" but that Congress intended to extend antitrust immunity for commodity classifications.

carriers to attempt to establish individual standards for density, stowability, liability, and handling, and to apply them to every shipment individually, a process that would not be efficient. Thus, viewed theoretically, the classification system should produce efficiencies for motor carriers that should be passed on to their customers. All things considered, as long as classification is effected in a rational way that gives an adequate voice to the users of the system, we would not find it contrary to the public interest.¹⁷

That brings us to the question whether shippers do in fact have an adequate voice in the classification process. The NCC states that it gives shippers access to summaries of data supporting proposals before it considers them, gives shippers an opportunity to make their views known to the Committee, and conducts voting in public, with the right to protest final NCC action before the Board. Nevertheless, as the various opponents of the current system point out, in many instances, these "rights" do not permit shippers to have any real impact on the process. To the contrary, shippers contend that they are shut out of the process until after a classification action has already been docketed, and they are given only limited access to information and a limited voice throughout the process.

Some of the shipper groups suggest that these concerns could be addressed by granting immunity on the condition that shippers be given equal voting rights as to classification matters. None, however, has explained how we could feasibly require that shippers have voting powers on the NCC equal to those of the carrier members. But while we would not expect to adopt a requirement that shippers be given full voting rights, we do agree with the shippers that the current system is far too one-sided; that the NCC agreement should provide for shipper input from the outset to the completion of the process; and that the entire classification process should be fully open to the public, and all written reports and recommendations must be available to any interested person. Yet, the shippers have not suggested specifically how the existing NCC agreement

¹⁷ Congress has recognized that classification can pose problems if it is implemented in an anticompetitive way. Thus, when it undertook its review of motor carrier regulation that led to the 1980 Act, Congress considered the impact that classification has on the overall cost of transportation, and it withdrew immunity for changes in classification whose sole purpose was to affect single-line rates to individual shippers or individual markets. See, *Investigation*, 367 I.C.C. at 246; H.R. Rep. No. 1069, 96th Cong., 2d Sess. (1980) (Conference Rept.) at 28-29. To further protect against the possibility that the collective determination of classifications might undermine the pro-competitive purposes of the 1980 Act, as previously discussed, the ICC forbade the NCC from considering several economic factors it had previously taken into account in classifying commodities. *Investigation*, 367 I.C.C. at 252. As noted, these modifications have mitigated much of the anticompetitive impact previously associated with the classification process.

should be amended to achieve these public benefits. Therefore, if we were to rule now on whether extension of NCC's immunity would be contrary to the public interest, we would first take further public input as to how the NCC agreement ought to be modified to remedy these concerns.

We will not, however, initiate such an effort at this time, notwithstanding the fact that the statute requires us to determine the extent to which renewal of rate bureau agreements would contravene the public interest. That is because, in a letter dated November 17, 1998, the Republican and Democratic leadership of the Committee on Transportation and Infrastructure of the U.S. House of Representatives asked the Board to defer issuing a final ruling in cases such as this one. The letter, signed by the Honorable Bud Shuster, Chairman; the Honorable James L. Oberstar, Ranking Democratic Member; the Honorable Thomas E. Petri, Chairman, Subcommittee on Surface Transportation; and Nick J. Rahall, II, Ranking Democratic Member, Subcommittee on Surface Transportation, reads as follows:

As you know, the Committee on Transportation and Infrastructure intends to pass legislation next year to reauthorize the Surface Transportation Board. As part of this reauthorization process, we will be reviewing a number of provisions contained in the *JCC Termination Act of 1995 (JCCTA)* related to motor carriers * * *. We therefore urge the Board to refrain from taking action in any case that would set major new policies or overturn existing practices in the motor carrier area before Congress has the opportunity to more fully consider and act upon these issues.

We are pleased that the leadership of the Committee on Transportation and Infrastructure has clearly indicated its intent to pass reauthorization legislation next year. Thus, to permit that process to move forward to completion, we will postpone the effectiveness of our decision. We believe that we can best meet our statutory responsibility, which calls for a decision one way or the other by the end of calendar year 1998, while respecting the legislative process that will be initiated in the immediate future, by extending approval of all existing motor carrier rate bureau agreements that are refiled in a timely manner for 1 year, until December 31, 1999; issuing this decision expressing our views on the matters that the statute requires us to consider; and awaiting the legislation to which the November 17 letter refers. If legislation addressing the rate bureau issue has not been enacted in sufficient time before the end of calendar year 1999, then, absent a clear expression by Congress to the contrary, the Board will initiate a proceeding on how to change NCC's procedures to open up the process and provide for more shipper input. If the proceeding is initiated, and NCC does not take appropriate steps to improve its procedures, then approval of the agreement will not be renewed.

B. *Other Functions.*¹⁸ Two other components of the NMFC are the rules section, containing definitions and rules governing packaging specifications, and the Uniform Bill of Lading (UBL).¹⁹ We will now discuss those functions.

The NCC's rules governing packaging specifications have been recognized as a critical component of the classification system. In *Investigation*, 367 I.C.C. at 341, the ICC explained that "[s]ince class ratings assigned to an article may vary dramatically in relation to how the article is packed and/or packaged, rules must define and set forth the minimum specifications for authorized packing and packaging forms." Later, in again extending antitrust immunity for the NCC's packaging function, the ICC held that "a ban on uniform packaging requirements would result in increased packaging inventories, space in the packaging area, and time spent in maintaining expertise on the numerous requirements." *NCC 1987* at 5. Because of the close relation between packaging and classification, and for the reasons outlined above as to classifications, we find that, if antitrust immunity is extended for classification, then it should be extended for the NCC's collective establishment of packing and packaging standards as well.

On the other hand, publication of the UBL appears to be wholly unrelated to the classification process. Moreover, the value of developing it collectively is less apparent than is the value of collectively determining uniform classifications, as preparing bills of lading requires less technical expertise than assessing transportability of numerous commodities; and, perhaps most importantly, discussions about a UBL do not appear to require immunity at all. As we noted in *Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms*, STB Docket No. ISM 35002 (STB served December 24, 1997) (at 2-3), terms of the bill of lading "relate[s] simply to ways of incorporating provisions into the bill of lading from other sources," and the fact that some of those provisions might relate to items in individual carrier tariffs "does not constitute collective discussion." Indeed, shipper groups have met and discussed a uniform bill of lading without immunity, and we are aware of no legal action against them resulting from such meetings. We see no need to extend antitrust

¹⁸ The ICC authorized the NCC to publish in the NMFC rules that the ICC had promulgated concerning such matters as processing of loss and damage claims and duplicate payment claims. See *Investigation*, 367 I.C.C. at 343. These purely ministerial functions clearly do not require antitrust immunity, and they should not be a part of an agreement sent to the Board for approval.

¹⁹ Under 49 U.S.C. 14706, a for-hire motor carrier "shall issue a receipt or bill of lading for property it receives for transportation * * *." Many carriers use the UBL as a template for entering information concerning the cargo, parties, origin, and destination for each shipment. The UBL also contains other standard terms governing each shipment.

immunity to developing a uniform bill of lading, and no reason why that activity should be covered by a collective ratemaking agreement.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Any request for approval of NCC's rate bureau agreement will be governed by the determinations made in this decision.
2. This decision is effective on December 18, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.