STB SECTION 5A APPLICATION NO. 61 (SUB-NO. 6)[1]

NATIONAL CLASSIFICATION COMMITTEE — AGREEMENT

Decided November 20, 2001

The Surface Transportation Board renews approval of the National Classification Committee agreement provided that the Committee amends its procedures so as to (1) give shippers more information at an earlier stage in the classification process, and (2) provide for a right of review by a neutral arbitrator of initial NCC classification decisions. These amendments would not alter the statutory right to subsequently challenge the reasonableness of a classification before the Board.

BY THE BOARD:

The member motor carriers of the National Classification Committee (NCC), which is an organization within the National Motor Freight Tariff Association (NMFTA), collectively discuss and establish freight classifications pursuant to an agreement approved by our predecessor, the Interstate Commerce Commission (ICC). In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress provided that regulatory approval of existing motor carrier collective agreements would expire in three years unless renewed by us. *See* 49 U.S.C. 13703(d) (1996).[2] Accordingly, in a notice served November 13, 1997, (*1997 Notice*) and published at 62 Fed. Reg. 60,935 (1997), we initiated the proceeding in Section 5a Application No. 61 (the lead docket) to obtain public comment on whether to renew approval of the NCC Agreement. When the NCC subsequently petitioned for renewal of its agreement, we docketed its request as Section 5a Application No. 61 (Sub-No. 6) (the Sub-No. 6 docket).

In this decision, we consolidate the two proceedings and clarify an earlier decision issued in the lead docket. We also specify changes in NCC procedures — designed to increase shipper participation in the process and promote confidence in the fairness of classification decisions — that we will require as a condition for our continued approval of the NCC Agreement.

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[1] This decision embraces Section 5a Application No. 61, *National Classification Committee — Agreement.*

[2] As discussed *infra*, that provision was later modified in the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (*1999 Act*).

BACKGROUND

I. *Regulatory Approval of Motor Carrier Agreements.*

Under 49 U.S.C. 13703(a)(1), a group of motor carriers (usually referred to as a "rate bureau") may enter into an arrangement to discuss and collectively establish rates. Groups of motor carriers also may enter into arrangements to discuss rate-related matters, including classifications of freight. A rate bureau may request Board approval for its governing agreement under 49 U.S.C. 13703(a)(2), and, if the agreement is approved, the members of the bureau automatically receive antitrust immunity for those collective activities under 49 U.S.C. 13703(a)(6).[3] We may approve an agreement if we find it to be in the public interest. 49 U.S.C. 13703(a)(2). We may impose conditions to assure that the arrangement furthers the transportation policy set forth in 49 U.S.C. 13101. *See* 49 U.S.C. 13703(a)(3).

Approval of a rate bureau agreement is not permanent. We may review an approved agreement, on our own initiative or on request, and change the conditions of, or terminate, approval when necessary to protect the public interest. 49 U.S.C. 13703(c)(1). Moreover, we must now initiate review proceedings every 5 years to determine whether the approval should be withdrawn. 49 U.S.C. 13703(c)(2).

II. *The Role of Classification in the Motor Carrier Industry.*

Motor common carriers have long maintained a collective ratemaking system for setting charges on articles they move in interstate commerce. This is done in two steps. In the first step, commodities are classified (placed into groups) according to their transportation characteristics. In the second step, these classifications are used in conjunction with a rate schedule, which also may

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[3] The American Trucking Associations, Inc. (ATA) objects to our statement in the notice issued on November 13, 1997, (*1997 Notice*) at 2, that under 49 U.S.C. 13703 "we have the authority to immunize approved motor carrier rate bureau agreements from the antitrust laws." ATA correctly points out that it is the statute that conveys such immunity automatically to those agreements that we approve. (Congressman Nick J. Rahall also made that point in a February 2000 letter to the Board.) Of course, when we approve an agreement, antitrust immunity attaches to the activities conducted pursuant to the agreement, whereas if we disapprove an agreement, there is no such immunity. Thus, as a practical matter, our decision as to whether to approve an agreement determines whether there will be antitrust immunity.

be set by a group of motor carriers, to determine the class rate to be charged for an individual shipment.[4]

A commodity's classification rating (expressed as a numeral) is based on its transportation characteristics — density, stowability, handling, and liability.[5] Commodities with the same rating (or with ratings that are close to each other) have transportation characteristics that are considered to be similar.

The higher the classification rating for a particular commodity, the higher the class rates will be for that commodity. *See National Classification Comm. v. United States*, 697 F.2d 344, 345 (D.C. Cir. 1982) (moving commodity to a higher classification has the effect of increasing freight charges to shippers of that commodity). For example, for shipments of the same weight moving between the same points, a commodity with a classification rating of 70 will be transported at a lower rate per 100 pounds than a commodity with a classification rating of 100.

III. *The Existing Procedures for Classifying Freight.*

Under the existing NCC procedures, proposals for a new (first) classification or for a change in a classification (reclassification)[6] may be submitted by any interested party (either a carrier or a shipper) other than NMFTA staff.[7] To start

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[4] The class rate for a specific shipment is determined by locating on a table the applicable classification rating developed by the NCC, the distance of the shipment (or specific origin and destination), and the weight of the shipment. The table yields the resultant rate as determined by the applicable rate-setting bureau (typically expressed in dollars per 100 pounds). The class rate itself, however, is not necessarily the rate that a shipper will pay to move a particular commodity. The rates charged by most motor carriers are expressed as a percentage discount off the class rate. *See* our decision issued today in *Rate Bureau Agreements — EC-MAC Motor Carriers Service Assoc., et al.*, 5 S.T.B. 1065 (2001).

[5] *See Investigation into Motor Carrier Classification*, 367 I.C.C. 243 (1983) (*Motor Carrier Classification*), *aff'd sub nom. National Classification Comm. v. United States*, 765 F.2d 1146 (D.C. Cir. 1985) (the NCC may consider only transportation characteristics and not market or economic factors when classifying freight).

[6] For ease of reference, the term "classification" will refer to both a first classification (for a new product) and reclassification (of an existing product).

[7] Although NMFTA staff may perform research before there is a proposal to change the classification, the Motor Carrier Act of 1980 precluded the staff of carrier bureaus (including the NMFTA) from actually initiating proposals. *See* former 49 U.S.C. 10706(b)(3)(iv); *Motor Carrier Rate Bureaus — Implementation of P.L. 96-296*, 364 I.C.C. 464 (1980), *aff'd in relevant part sub nom. American Trucking Ass'ns v. United States*, 688 F.2d 1337 (11th Cir. 1982), *rev'd on other* (continued...)

the process, the proponent submits to the secretary of the NCC a proposal that describes the desired classification and explains why it is considered appropriate. Information on the transportation characteristics of the commodity is also submitted with the proposal.

The proposal is then referred to one of four classification panels, composed of between 15 and 25 carrier members of the NCC. The proposal is listed in the NCC Docket Bulletin, which provides the date and location of the panel meeting at which the proposal will be considered. All meetings, whether of panels or of the full NCC, are open to the public.

Prior to the public meeting, the NMFTA staff reviews the proposal and supporting information and then makes a recommendation on the proposal. At the public meeting, the panel members discuss the proposal and consider relevant material submitted by the proponent, by NMFTA staff, and by any other interested parties. The panel members then vote on the proposal by written ballot. The proposal may be approved as docketed, approved with modification, disapproved, deferred to the next meeting of the panel, or referred to the entire NCC. The decision of the panel is final unless an appeal is filed with the full NCC.[8] A decision of the full NCC is final unless reconsideration is sought.[9]

A classification rating established by the NCC stands unless we suspend and investigate it. *See* 49 U.S.C. 13703(a)(5)(A) (Board's authority to suspend and investigate). An aggrieved party may file a complaint before us charging that the classification rating is unreasonable. *See* 49 U.S.C. 13701(a)(1)(C) (classifications made collectively must be reasonable); 49 U.S.C. 13701(c) (complaint may be filed with the Board). If we agree, we may prescribe the classification rating to be applied to the commodity. 49 U.S.C. 13701(b).

IV. *The 1998 Decision.*

As noted above, in the ICCTA Congress provided that all existing rate bureau agreements would expire on December 31, 1998, unless renewal was

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[7](...continued)
grounds, ICC v. American Trucking Ass'ns, 467 U.S. 354 (1984) (*ICC v. ATA*).

[8] Within 30 days of a panel decision, an appeal to the full NCC may be taken by (1) the proponent of the proposal, (2) any party of record to the proposal, (3) 8 or more members of the NCC, or (4) 15 or more carriers "participating in the classification."

[9] Reconsideration by the full NCC may be sought within 15 days of publication of a decision that has become final by any person on the basis of (1) additional information not previously available or considered that may affect the basis upon which a decision on a proposal was reached, or (2) a material mistake of fact in the data relied upon in reaching the decision.

sought, in which case they would continue in effect while we considered whether renewal would advance the public interest. *See* former 49 U.S.C.A. 13703(d) and (e) (1996). Accordingly, approximately a year prior to the expiration date, we issued the *1997 Notice* seeking public comment as to whether we should renew approval of the NCC's existing agreement.

As we were about to issue our decision on the renewal issue, the leadership of our House oversight committee wrote a letter asking us to refrain from taking action on this matter until Congress had an opportunity to review motor carrier rate bureau issues during the 1999 session. Consequently, we issued an interim decision in the lead docket, *National Classification Committee — Agreement*, 3 S.T.B. 917 (1998) (*1998 Decision*) in which we evaluated the parties' comments and expressed our views on the types of changes we considered necessary in the NCC Agreement, although we did not require immediate changes on the part of the NCC.

In the *1998 Decision*, we explained that, although the NCC gives shippers some access to its processes, the shippers that commented had convinced us that they do not have a significant role in the classification process under the current system. Most classification proposals are carrier-initiated,[10] and shippers perceive that they are effectively shut out of the process until after a classification proposal has been docketed, and that they are then given only a limited voice in the proceeding. We agreed that the current system is too one-sided, and we expressed our intent, absent a directive to the contrary from Congress, to require that it be modified.

V. *The Motor Carrier Safety Improvement Act of 1999.*

As noted above (*see supra,* note 2), Congress addressed motor carrier bureaus again in the *1999 Act*. In section 227 of that Act, Congress prospectively changed the 3-year renewal process that was set up in the ICCTA to a 5-year periodic review. Section 227 included a savings provision for ongoing cases, now codified at 49 U.S.C. 13703(e)(2).[11]

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[10] Approximately three-quarters of the classification proposals considered in a recent 4-year period were carrier-initiated. NCC Reply Comments, Welsh V.S. at 1.

[11] In a colloquy that occurred early in the consideration of the *1999 Act*, certain members of Congress also expressed concern about our proposal in the *1998 Decision* to no longer approve collective discussions, which have historically taken place under the NCC Agreement, about the Uniform Bill of Lading (UBL). Cong. Rec. H10074 (daily ed. Oct. 14, 1999).

VI. *2000 Decision and Notice.*

In the meantime, the NCC and the ATA filed a request, which various shipper organizations opposed, asking us to reconsider the *1998 Decision*. In a decision served February 11, 2000, in the Sub-No. 6 Docket (*2000 Decision*), we reiterated that, to obtain our approval, the NCC Agreement must be modified to provide for more shipper participation in the classification process.[12] Simultaneously, we issued a public notice in the Sub-No. 6 docket, published at 65 Fed. Reg. 7098 (2000), asking for specific suggestions on ways to amend the NCC Agreement to ensure more shipper participation in classification decisions. We received opening comments,[13] reply comments,[14] and rebuttal comments.[15]

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[12] Also, in the *2000 Decision*, we reversed our earlier position on the UBL issue about which certain members of Congress had expressed concern, and concluded that the NCC Agreement could include provisions for collective discussion of the UBL. But we indicated that we would be sensitive to particular issues that might arise in connection with any particular bill of lading that the NCC may develop and that we would remain available to address specific complaints in this regard. The NCC expresses concern that our statement that bills of lading should provide "actual notice" of limitations on a carrier's liability could be viewed as inconsistent with our decision in ***Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions***, STB Docket No. ISM 35002 (STB served Aug. 4, 1998), at 2, where we acknowledged that disputes regarding motor carrier liability and the enforcement of incorporated provisions in bills of lading must be resolved by the courts. We did not intend to contradict our position of neutrality on the issue of actual notice, and the language in the *2000 Decision* about actual notice should be disregarded.

[13] Opening comments were received from the following parties: ATA; American Textile Manufacturers Institute (ATMI); Associated Traffic Services, Inc. (ATS); Bohman Industrial Transportation Consultants, Inc; Distribution and LTL Carriers Association; Halogenated Solvents Industry Alliance, Inc. (HSIA); J-Line, Inc; NCC; National Small Shipments Traffic Conference, Inc., and The Health and Personal Care Distribution Conference, Inc. (NASSTRAC/HCPDC or "shipper conferences"); National Industrial Transportation League (NITL); North Carolina Traffic League; Roadway Express, Inc.; Rubenstein Logistics Services, Inc.; Rubber Manufacturers Association (RMA); Sara Lee Branded Apparel; Shippers Express; SMART (Secondary Materials and Recycled Textiles); Textile Transportation Managers Conference; and the Transportation Consumer Protection Council, Inc. (TCPC).

[14] Reply comments were received from the following parties: Benton Express, Inc.; HSIA; NCC; NITL; NASSTRAC/HCPDC; RMA; TCPC; and Yellow Freight System, Inc. We received certain additional comments that are not part of the record because they were not served on the parties listed in our procedural order served on April 21, 2000.

[15] Rebuttal comments were received from the following parties: ATA; Estes Express Lines; HSIA; NASSTRAC/HCPDC; NCC; NITL; and the RMA.

PRELIMINARY MATTERS

I. *Consolidation.*

The NCC has asked us to consolidate the Sub-No. 6 docket with the lead docket, as the two proceedings arose under the same statutory provision and address the same subject: whether and under what conditions continued approval of the NCC's existing agreement would be in the public interest. We agree and consolidate the two proceedings.

II. *Moving Forward At This Time.*

A threshold issue in this proceeding has been whether we should proceed at this time. In our *1998 Decision*, we indicated that we would move forward with this proceeding (and with related proceedings involving other rate bureaus) absent a directive from Congress to the contrary. In section 227(d) of the *1999 Act*, Congress expressly directed us not to allow the regional, ratesetting motor carrier bureaus to operate on a nationwide basis, as we had proposed in a related proceeding.[16] Otherwise, however, section 227 did not express any Congressional intent that we not move forward with this proceeding.

To the contrary, in the savings provision of section 227(c)(2) of the *1999 Act*, Congress added 49 U.S.C. 13703(e), which expressly provides that "[n]othing in section 227 * * *, including the amendments made by such section, shall be construed to affect any case brought under [section 13703] that is pending before the Board as of the date of the enactment of this paragraph." The instant proceeding was instituted under section 13703, it was pending on the date of enactment of the *1999 Act* (December 8, 1999), and in an earlier decision we already had determined that we would renew our approval only if the existing NCC Agreement were revised to provide more effective procedures for shipper participation. *1998 Decision* at 917. Accordingly, we construe section 227 of the *1999 Act* as a response to our *1998 Decision*, allowing us to impose

[16] *See EC-MAC Motor Carriers Service Assoc., Inc., et al.*, 3 S.T.B. 926 (1998), at 935 ("Absent a clear expression from Congress to the contrary, we intend to allow bureaus whose agreements are approved after December 31, 1999, to lift the territorial restrictions on the scope of their agreements."). Also, as we have noted, concerns were raised in a colloquy in the House deliberations regarding our expressed intent in this proceeding — which we subsequently abandoned — to disallow collective activity as to the UBL.

appropriate conditions for continued approval of the agreement.[17] In any event, we note that the statute allows us to initiate review proceedings at any time, on our own initiative, and to change the conditions of approval as necessary to protect the public interest. *See* 49 U.S.C. 13703(c)(1).

III. *Requests to Suspend Pending Reclassifications.*

HSIA and NASSTRAC/HCPDC have asked that we direct the NCC to temporarily suspend action on all pending reclassification proposals until procedures are in place to increase shipper participation. Citing *ICC v. ATA*, 467 U.S. at 364-65 (1984), HSIA argues that we may take such action as an adjunct of our explicit statutory power.[18]

Although we are requiring significant changes in the NCC Agreement and in the way the NCC operates, we do not agree that the public interest requires a suspension of the processing of proposed classifications until new procedures are in place.[19] We remain available, however, to consider challenges to the reasonableness of any reclassifications that occur in the interim. Any such reclassification is subject to suspension under 49 U.S.C. 13703(a)(5)(A) if we determine that it may be unreasonable.

DISCUSSION

I. *Overview.*

In their comments responding to the *2000 Decision* and the corresponding notice, the NCC and various motor carrier commenters generally argue that the

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[17] In various letters to the Board, former Congressman Bud Shuster, then-Chairman of the House Committee on Transportation and Infrastructure, and Congressman Nick J. Rahall, then-ranking Democratic Member of the House Subcommittee on Ground Transportation, suggested that the replacement of the 3-year renewal process of former section 13703(d) with the 5-year periodic review process (in section 227(a)(2) of the *1999 Act*) forecloses us from imposing new conditions on rate bureaus prior to the end of 2004. Given the signal that we sent Congress in our *1998 Decision*, and the explicit reply that Congress included in the savings provision, we believe that we can move forward.

[18] In *ICC v. ATA*, the Supreme Court upheld the ICC's authority to retroactively reject tariffs that exceeded bureau powers under approved bureau agreements. The Court held that the agency could "elaborate upon its express statutory remedies when necessary to achieve statutory goals." 467 U.S. at 365.

[19] Such action, we note, would preclude not only upward adjustments in a classification, which shippers may oppose, but also downward adjustments, which shippers may support.

current agreement contains sufficient opportunity for shipper participation, but that shippers simply choose not to take advantage of the opportunities afforded them. The NCC outlines the ways in which it has already opened up the classification process to encourage more shipper input. It also suggests certain ways it could provide additional encouragement for shippers to propose and participate in classification changes.

The shipper interests acknowledge the NCC's recent efforts to improve the classification process. But even with the NCC's proposed changes, the shippers generally argue that the process would still be biased toward carrier-proposed increases in classifications, which ultimately translate into increased rates for most shippers of the commodities involved. The shippers maintain that, absent more procedural fairness in the process, they would still see little reason to participate, with the result that classification decisions would continue to be based solely or primarily on information obtained from carriers.

After considering all of the comments, we reaffirm our earlier conclusions that the public interest requires full shipper participation in the classification process and that shippers will fully participate only if they believe they will get a fair hearing. We conclude that the best way to instill confidence in the fairness of the classification process is to provide for a right to have an initial classification determination (whether the first classification of a product or a reclassification of a product) reviewed by a neutral reviewer, rather than by the NCC as is currently the case. Affording review in a neutral forum, we believe, will foster a sense of fairness that will give shippers the incentive to participate in the entire classification process. This effort to ensure a fairer process is central to the other conditions we will attach to our approval.[20] Of course, all parties will retain the

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[20] ATA argues that the *1999 Act* shifted the burden of persuasion from the rate bureau (to justify renewal of the regulatory approval of a previously approved agreement) to opponents seeking to justify any change in a previously approved agreement. It relies on the new language of section 13703(c)(2), which states: "Any such agreement shall be continued unless the Board determines otherwise." ATA Rebuttal Comments at 6. Because Congress, in our view, continued the ICCTA renewal process through the savings provision of the *1999 Act*, we do not believe that any shift in the burden of proof would apply here. In any case, under both the pre-1999 and current version of section 13703(c), we are charged with changing the conditions of approval to protect the public interest, and we are persuaded that the changes that we are requiring here are necessary to protect the public interest.

ATA also emphasizes that, under section 13703(a)(3), any conditions we impose must further the transportation policy set forth in 49 U.S.C. 13101. The conditions we impose here will do that. Additional participation by shippers should lead to a fairer classification process. Balanced participation by shippers as well as carriers should, in turn, help promote reasonable rates, in furtherance of the objective of section 13101(a)(2)(A), and should help promote a transportation

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right to challenge the reasonableness of a classification before us, either upon the NCC reaching an initial decision or, if a party elects to seek arbitral review of an NCC initial decision, after the arbitrator has issued a final decision.

We will discuss the commenters' suggestions in the order in which a typical classification matter proceeds. We include brief descriptions of the way the NCC currently handles classifications where it will aid the discussion of the suggested changes.

II. *The Research Phase.*

Acting through its member carriers, the NCC initiates classification review matters, which may often lead to research investigations (projects) and to proposals for changes in a classification. The NCC assigns the research task to NMFTA staff, who then routinely obtain information from carrier members that transport the commodity at issue. The NCC states that the staff also attempt to get information from shippers, because the "NCC recognizes that the best classification decisions are based on the most complete information." NCC Reply Comments, Reply V.S. Ringer & Beck at 1. The staff may send numerous survey forms to trade associations, manufacturers, and shippers of the product being researched. When shippers return the requested information, the shipper-supplied data "factors significantly in the classification decision," according to the NCC. *Id.* at 2. However, the staff often receive little or no shipper information. Thus, the research investigation often is based only upon motor carriers' responses, as the NCC acknowledges. *Id.* at 3.

Because the shippers do not appear to trust the NCC's research into classifications, some changes to the NCC Agreement are necessary to encourage shipper participation in the research phase. The NCC has proposed several changes that would make it easier for shippers to conduct their own research studies. For example, the NCC proposes to make its staff available, on a direct-cost reimbursement basis, to assist shippers in conducting research on their products to support NCC review of a current classification. Comments, V.S. Foley at 15 ¶1. The NCC further proposes that "if any changes [are] warranted by a review, a report of those findings would be made to a Classification Panel." *Id.* We find these proposals to be in the public interest and will require the NCC to adhere to this commitment by amending its agreement to direct its staff (1) to afford shippers assistance in conducting research upon request (with direct-cost

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[20](...continued)
system that meets the needs of shippers and receivers, in keeping with section 13101(a)(2)(C).

reimbursement), and (2) to report the results to the NCC when NCC staff-assisted research conducted by a shipper reveals that a change in classification may be warranted.

In addition, the NCC proposes to direct its staff to increase their own efforts to solicit and collect information (from both shippers and carriers) that might support a reduction in the classification rating of commodities. We encourage this increased effort on the NCC's part.

HSIA suggests that we require the NCC's staff to conduct (at its own expense) separate studies or analyses requested by shippers. We do not believe that it would be fair to require the NCC to use its own funds to conduct separate research investigations for shippers. However, with the changes that we are requiring, including the opportunity for resort to a neutral appellate reviewer, shippers may well conclude that it would be cost effective for them to conduct their own studies or to provide more input into the staff's research.

III. *Notification Procedures.*

A. *Current Procedures.*

The NCC currently uses several methods to provide public notice of classification review matters, research investigations, and proposals for change to a classification. Lists of these matters are currently available free of charge on the NMFTA's website (www.nmfta.org). They also are available by subscription to the NMFTA's Docket Bulletin or *Transport Topics*, a national newspaper covering the trucking industry. Because the internet posting should help to increase participation by shippers that do not subscribe to the listed publications, we will require it to be continued as a condition of our approval. The NCC Agreement should be revised accordingly.

B. *Suggested Changes.*

1. *Notice of Dockets.* NITL and SMART propose that the NCC be required to give 90 days' advance notice before commencing formal action on a proposal to create or change a classification. The NCC objects that, although it already provides some general notice (through its website and Docket Bulletin), it cannot give 90 days' notice because of the provision in its current agreement that

proposals must be placed on "the first available docket" and disposed of within 120 days after docketing.[21]

We support a notice period that is sufficient to permit parties to formulate their response to a classification proposal without unduly delaying action on proposals. We find that 60 days' advance notice of proposals is needed, and should be sufficient, to enable parties to gather information and plan their participation in classification matters, as we discuss *infra*. We expect that advance notice will help to encourage shipper participation. Thus, we will require the NCC to modify its agreement to provide for a 60-day advance notice period.

2. *Notice of Research*. Shippers that participate in a particular NCC research project currently receive notice by letter about any public meetings in which the classification of the product(s) researched is to be considered, although the Agreement does not require that such notice be given. NCC Reply Comments, V.S. Beck and Ringer, at 7. The NCC similarly sends letters to all trade associations it has identified as representing shippers of the researched product(s). We will require the NCC to amend its agreement to provide such notice to participating shippers and to identified associations, although the NCC may choose to provide it by e-mail or fax instead of by regular mail.

3. *Database of Shippers*. NITL also suggests requiring the NCC to develop a database of shippers to which it would provide notice of proposals. Included in the database would be shippers that have notified the NCC of their interest in receiving direct notice of proposals concerning the commodity at issue, those that have participated in similar NCC proceedings in the past, and any other shippers that the NCC believes would be affected by a particular classification proposal.

We do not believe that it is either necessary or practical to require the NCC to compile a database or attempt to provide direct notice to individual entities. Rather, we think that it is sufficient for the NMFTA to publish all classification proposals on its website and in its Docket Bulletin. This allows parties interested in NCC matters to monitor the website, and, if they want actual notice, they can, for a modest annual fee, subscribe to NMFTA's Docket Bulletin.

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[21] Prior to the ICCTA, rate bureaus were required to make a final decision on rules or rates docketed with them by the 120th day after the proposal was docketed. *See* former 49 U.S.C. 10706(b)(3)(B)(vii) (1994). That requirement was eliminated by the ICCTA, but the NCC Agreement still contains the 120-day requirement.

IV. *Form of Proposals to Amend the Classification.*

Under the current NCC Agreement, proposals to establish or amend a classification must be in writing, and the NCC may require proposals to be on a form it provides. It provides a 4-page form for that purpose.

The NCC has proposed changes to aid shippers in making proposals to establish or change a classification. Most significantly, upon request, the NMFTA staff will assist shippers in making appropriate proposals.[22] Comments, Foley V.S. at 15 ¶1. We find this proposal to be crucial to public participation and we will require the NCC to implement it. In addition, the NCC offers to accept classification proposals in any form, including via telephone, subject to confirmation by the submitting party. *Id.* at ¶3. While we expect the NCC to be open and flexible in such matters, as it has offered to be, we see no need for us to require acceptance of telephone requests as a condition of our approval.

V. *Access to Evidence and Compilations.*

A. *Public Docket; Period of Availability Prior to Taking Action.*

In reaching a classification decision, the NCC relies on information from sources such as studies, analyses, and the raw data underlying them. Procedural due process requires that all parties should have access to the information that will be considered in reaching a decision so that they will be in a position to present their views most effectively.

To meet this standard, HSIA asks us to require the NCC to maintain a public file or docket of the evidence and comments relating to an individual proposal. Under HSIA's proposal, the NCC would only be allowed to refer in its decisions to the evidence in that file and would be barred from citing extra-docket evidence in related proceedings before the Board.

By establishing limits to the evidence that may be considered, the use of a public docket file would increase procedural due process, increase public confidence in the classification process, and thereby facilitate shipper participation. To this end, we agree that, in reaching a decision on a classification proposal, the NCC should consider only evidence in the public file. This

[22] Such a procedure may improve the prospects for shipper proposals. The NCC's study of 20 consecutive dockets (over a 4-year period) shows that, of 63 proposals made by shippers or shipper interests, 25 (40%) were rejected for not being consistent with established classification guidelines. *See* Reply Comments, Welsh Reply V.S. at 1.

limitation on the evidence that may be considered by the NCC initially will also apply to the arbitrator who, upon request, will review initial decisions, as discussed more fully *infra*. The publicly-available record developed before the NCC would also assist the Board should a complaint be filed alleging that a classification is unreasonable.

HSIA also asked us to require that the information in the public docket be made available for 90 days prior to the NCC taking any action on a related classification proposal. We think that 90 days is excessive and would unduly delay the processing of classification proposals. However, as noted above, we find that 60 days' access to the reports, studies, and raw data underlying a classification proposal should be sufficient for interested parties to analyze and verify the data, without unduly delaying classification proposals. As for other material (including comments) that interested parties wish the NCC to consider in deciding a proposal, it would seem to us that 30 days should be a sufficient time for access, although the NCC may suggest some other suitable period. Whereas interested parties should be afforded some time to analyze any additional materials that are submitted, we believe that imposing a lengthy "black-out" period during which parties may not submit information to the public docket, as HSIA suggests, would tend to eliminate consideration of recent developments.

Of course, fairness requires similar treatment of data underlying studies, no matter what entity prepares the studies. Thus, when shippers or parties other than the NCC intend to rely upon their own studies in support of a classification proposal, they too must make the raw data underlying their studies available to the NCC at least 60 days prior to the NCC taking formal action on the proposal. We expect that any party (outside the NCC) that wishes to propose a change to the classification will produce any underlying data and studies at the same time they submit a proposal. The NCC may then place the proposal on a docket to be considered any time after the passage of 60 days from the time the studies and data are made available to interested parties.

Clear rules for obtaining access to the public files are essential. Accordingly, we will require the NCC to propose specific procedures for interested parties to obtain access to the files, covering matters such as: when, where, and how to obtain material in the files; the format of the information to be inserted into, and recovered from, the file; indexation; the retention period for the file; and perhaps reasonable fees for copying or transmittal. The NCC should consult with shipper organizations in developing the procedures and in determining the amount of time the other material in the public docket must be available prior to the NCC

taking any action on a classification proposal. The NCC shall then propose appropriate changes to its agreement to incorporate these procedures.

B. *Providing Full Copies of Staff Reports and Analyses to Participants in Research and Summaries of Reports and Analyses on Website.*

Currently, the NCC provides copies of reports and analyses prepared by NMFTA staff concerning classification proposals to anyone upon request and free of charge. The NCC now offers also to provide copies (without awaiting a request) to any person who has submitted information on the commodity that is the subject of its reports. We will require the NCC to provide these documents to any party that has participated in the research study on the commodity, although it may choose to provide the report by e-mail or fax instead of by regular mail.

The NCC also proposes to include on the NMFTA website a summary of the subjects to be considered on the next docket as well as summaries of the corresponding reports and analyses. We will require NCC to amend its agreement to provide this information on the NMFTA website.

As for the reports themselves, the NMFTA offers to make them easier to read by making factual material more concise and placing it in a more prominent location. This change, which we encourage, should help shippers both to read the reports and to participate in public meetings.

Because shippers (and related interests) also may perform research and prepare their own reports and analyses, they should of course afford reciprocal treatment to the NCC. In other words, shippers should provide these documents (free of charge) to the NCC, which will be free to disseminate them to member carriers.

C. *Underlying Data and Work Papers.*

1. *Confidentiality.* NASSTRAC/HCPDC, NITL, HSIA, and SMART contend that they cannot mount a meaningful challenge to a proposed classification unless they have access to the studies and data underlying NMFTA staff reports and analyses and proposals before the NCC. The NCC objects that some of the data are "proprietary, privileged information which is given to the NCC with the understanding that it will not be released outside the NCC without the express written consent of the person supplying the information." Reply V.S. of Foley at 8. The NCC expresses concern that a shipper could thus obtain sensitive data provided by a potential or actual competitor. *Id.* The NCC also objects to

shippers having access to privileged information submitted by a carrier. The NCC questions whether we would order shipper groups to "open their files" to the NMFTA so that carriers could examine what a member of the shipper group has furnished to the group.

There are valid reasons to make studies and underlying data available to interested persons. It is the best way to ensure against either errors or bias in reports on classification matters. Full access would allow the accuracy of data and computations to be tested, to the advantage of all parties.[23] Moreover, it is well-established that contested decisions should not be based on secret data or studies that cannot be verified or tested by opponents.

We are sensitive to the NCC's concerns about confidentiality. But, for the most part, information about the physical transportation characteristics of commodities commonly transported in trucks will not involve confidentiality concerns. The commodities are readily available on the open market, where their physical transportation characteristics can be directly observed. To perform its functions, the NCC does not require, and need not request, the type of information that most often raises confidentiality problems, *i.e.*, information on marketing, pricing, production, internal design, and the origins and destinations of individual movements. *See supra* note 4. Protective orders can be used to deal with the rare docket where confidentiality could be a concern.

Simply requiring the proponent of a classification change to produce the data and work papers underlying reports and analyses that will be used to explain and support the proposal is reasonable. Accordingly, we find that the public interest requires that those who produce studies and analyses and who intend to rely upon them in support of a classification proposal — whether they be carrier interests or shipper interests — must make the raw data underlying the studies and analyses available to interested persons.

2. *Source Identification.* One issue of confidentiality merits special mention. The NCC makes a case that carriers should not be subjected to shipper pressure merely for supplying information about the transportation characteristics of commodities they transport. The NCC asserts that carriers have lost business because of their participation in the classification process. Reply Comments,

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[23] Commenters presented examples where data on density were successfully challenged because the opponents had the resources and persistence to mount a challenge to the original data. *See* NASSTRAC/HCPDC Opening and Reply Comments. Full access will give all parties an incentive to check their data prior to submission and will make it easier to discover and correct errors.

Argument at 1. To avoid concerns of possible retaliation, the name of the entity that provided the raw data may be excised. A description such as "shipper/consigner" or "carrier" could be provided instead. In this way, there could be public scrutiny regarding the balance of data from shippers and carriers, but without subjecting an individual shipper or carrier to pressure for having supplied information to the preparer of the study.

D. *Published Data and Compilations.* The reasons for requiring full access to evidence also compel us to grant shippers equal access to certain published data and information concerning classifications. To this end, we adopt the suggestion of ATS that shippers and other interested parties be given access to the NCC's Synopsis of Classification Opinions.[24] Such information would assist shippers in determining whether the NCC is applying the classification system in a non-discriminatory manner. We will also require the NCC to provide all of the information that it has proposed to provide in the statement of Martin E. Foley, filed on April 11, 2000, at 15.

We will not require the NCC to obtain Board permission should it wish to discontinue gathering the information mentioned in the paragraph above. We are requiring only that, if NCC makes this information available to its carrier members, it also make it available to shippers on the same terms and for the same charge. Thus, we will require NCC to make available the "directory of changes" described in Exhibit C of ATS' comments only if NCC provides this information to its carrier members.[25]

VI. *Initial Decision Process.*

A. *Presence of Proponents at Public Meetings.*

NASSTRAC/HCPDC ask that we require the carrier proponent(s) of classifications to appear at meetings at which the proposals are considered. According to the shipper conferences, shippers should be able to present their case directly to the carrier(s) making a proposal, rather than indirectly through what they term the "filter" of NMFTA staff.

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[24] It is possible that the NCC already makes this publication available to shippers. In the body of its comments, ATS claims that the NCC does not, but ATS attached an exhibit to its pleading showing that the publication is available to certain parties at a "non-member" price.

[25] ATS' comments do not clearly reveal whether this information is currently provided to NCC member carriers. Without more details on the cost to NCC of producing this information, we are reluctant to require that NCC begin to provide it if it has ceased doing so.

We do not see why the presence of the carrier proponent is necessary. The proponent of a classification change is not the decisionmaker, and while it might be to a proponent's advantage to appear to answer questions posed by other parties or by the members of the decisional panel, a proponent's failure to appear should not disadvantage an opponent of a proposal. For that reason, and because there could be some basis for the NCC's concern that carrier proponents of rating increases could be "blackballed" for pursuing changes that might be well justified, we do not see a public interest purpose for requiring the presence of the proponent at the meeting in which the proposed action is considered.

B. *Classification Criteria.*

NASSTRAC/HCPDC contend that we should require revisions to the current classification criteria[26] because, they argue, the NCC's current application of the criteria is subjective and the NCC's density guidelines are skewed in the carriers' favor. We need not investigate that issue now. The requirement that NCC decisions be based on record evidence, along with the right to review by a neutral arbitrator, discussed *infra*, should mitigate any such perceived subjectivity on the NCC's part. Therefore, we will not expand this proceeding in the manner suggested.

C. *Consideration of Factors Other Than Transportation Characteristics.*

Some parties' proposals would, directly or indirectly, inject consideration of factors other than transportation characteristics into the classification process. HSIA, for example, proposes that an increase in a classification rating be allowed only when a substantial percentage of motor carriers experience cost increases that equal the rate increase that would result from the increase in the classification rating. SMART seeks a requirement that, before a classification rating could be increased, the NCC document the existence of problems (such as the number of complaints received about the existing classification and the number of shipments for which complaints were made) affecting a minimum of 10% of all shipments within any given classification. SMART also asks for a requirement that the NCC investigate alternatives to taking a classification action that would

[26] As noted above, the ICC concluded (with judicial affirmance) in *Motor Carrier Classification* that density, stowability, liability, and handling are the appropriate criteria to consider when classifying freight.

ultimately result in higher rates, and that the NCC provide a written explanation if it rejects such an alternative.

We will not impose such requirements. The goal of this proceeding is to ensure that the classification process that the NCC administers serves the public interest; it is not to limit the number of proposals for classifications — proposals that could well be in the public interest. Moreover, it would not be appropriate to reintroduce consideration of economic factors into the classification process, for the reasons set forth in *Motor Carrier Classification*.

D. *Initial Decisionmaker.*

Several shipper interests, including NITL and NASSTRAC/HCPDC, maintain that the only way to ensure full shipper participation in the classification process is to have a more balanced or neutral initial decisionmaker. They argue that the carrier-controlled NCC naturally favors proposals that result in increases in classification ratings, which eventually result in higher charges for the transportation services provided by the carriers that make up the NCC.

NITL proposes several different ways of making the outcome fairer to shippers. One suggestion is that one-third of the sitting members of NCC classification panels should be shippers with full voting rights.[27] Alternatively, NITL proposes that decisions be made either by a neutral standard-setting organization (such as the American National Standards Institute)[28] or by university professors familiar with the trucking industry.

The NCC objects to shippers voting on classification matters on the ground that section 13703(a)(1) only authorizes us to approve agreements between motor carriers, not between motor carriers and others. The shippers counter that, because section 13703(a)(6) confers antitrust immunity on "parties and other persons with respect to making or carrying out the agreement," it would be permissible for shippers to vote on classification proposals. Further, they contend that our authority to place conditions on approval of a carrier agreement includes the authority to require carriers to give voting rights to shippers.

The issue of the permissibility of shipper voting is not free from doubt, and we take no position on whether carriers and shippers voluntarily could agree to

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[27] Other commenters support the shipper voting rights proposal. NASSTRAC/HCPDC also suggests one-third shipper representation (Opening Comments at 40); the Textile Transportation Managers Conference suggests that shippers have equal voting representation with carriers (Opening Comments).

[28] Other commenters agree with the alternative of using a neutral standard-setting organization to make classification decisions. *See* Opening Comments of ATMI (at 5) and SMART (at 5).

shipper participation in establishing classifications. But, in our view, it is not necessary or appropriate to require shipper voting because providing a right of review by a neutral entity should foster shipper confidence in the fairness of the process. Similarly, we do not believe that it is necessary or appropriate to require the NCC to "outsource" initial classification decisions to a separate entity.

We note that the existing NCC Agreement assigns initial decisions to be made by panels of 15 to 25 members. In light of our requirement for a right of review by a neutral arbitrator, the NCC may wish to assign initial decisions to the full membership or to some other size subgroup of members.[29] We leave that decision to the NCC, to be indicated in the amended agreement to be filed with us.

VII. *Review by a Neutral Arbitrator.*

A. *Authority to Impose an Arbitration Condition.*

The shippers' strongest concern is essentially that the motor carriers serve as the law clerks, prosecutors, judges, and jury in the classification process. Shippers are discouraged by this process from going back to the motor carrier members of the NCC to file what is in effect an administrative appeal. We believe the best way to provide the necessary assurance of fairness in the collectively established classification process is to require the NCC to provide interested parties with an option of review by a neutral arbitrator.

We realize that NCC may not want an outside party making a classification determination at any point in the process. But in asking us to approve its agreement, NCC seeks protection from the antitrust laws that apply to other industries. Several parties have argued in this proceeding, not without force, that the NCC should not need antitrust immunity for simply setting standards (or classification ratings) based on the four accepted classification criteria. Nevertheless, the NCC insists that, notwithstanding the substantial benefits to carriers (and shippers) of the freight classification system, without antitrust immunity carriers would not act together to establish freight classifications out of a concern that something that the organization would do could possibly run afoul of the antitrust laws. Because the NCC seeks such extraordinary

[29] For ease of reference, we will call the initial decisionmaker the NCC panel, although the NCC may choose to have initial decisions made either by the full NCC membership or some subset (panel).

protection, we will approve its agreement only if we find that the process truly promotes the public interest. We find that it would not promote the public interest if shippers do not participate in classification matters because of a perception of bias in the classification process. The best way to achieve significant participation by shippers, we are convinced, is by providing a right to review by a neutral arbitrator.[30]

Although neutral arbitration at a second (review) level is not the shippers' preferred means to address this concern, we believe that it nevertheless should help to instill a sense that the classification process will be fair and balanced. With a perception of fairness, shippers should have a greater incentive to participate in research, leading to more balanced studies. As a consequence, classification decisions should be made on a more balanced, complete record. And, with a more balanced record, shippers should be more willing to participate at public meetings of the NCC concerning classification proposals, which should result in decisions that are based on the experience of all parties involved.

We reject the NCC's argument that arbitration at this stage would contravene the statutory scheme under which motor carriers collectively establish classifications. Carriers would still establish classifications in the first instance. And the Board would still be available to consider challenges to the reasonableness of classifications determined through this process. The courts would still be available for judicial review. The principal difference is that NCC members would issue only one decision, with review by a neutral available when a party is dissatisfied with the NCC panel's classification action.

B. *Initial Decision Not Final If Arbitral Review Invoked Within 30 Days; Duration of Arbitral Review.*

We will require the NCC to amend its agreement to provide that an aggrieved party may invoke a right to review by a neutral arbitrator within 30 days after an initial decision is made by the NCC panel. If no party timely requests arbitral review, the initial decision of the NCC panel shall become the final classification decision on the 31st day after it is rendered, to be published

[30] If the NCC wants to retain its existing procedures, it can forgo our approval under the conditions set forth here and assume the risk that it will incur antitrust liability for any of its actions. But we will approve its agreement, and thus effectively immunize the NCC and its members from the antitrust laws, only if we are satisfied that its classification procedures are in the public interest. Because we find that the right of review by a neutral arbitrator is key to making the process work as it should, we will require the opportunity for such review as a condition of our approval of the NCC Agreement.

and made effective no earlier than 15 days after publication.[31] The NCC shall amend its agreement to so provide. In its revised agreement, the NCC may impose an outside time limit for completion of the arbitration process, which should correspond to the outside time it takes the full NCC to complete an appeal of a panel decision under the current procedures.

C. *Experience, Selection and Payment of Arbitrators.*

The NCC claims that it would be difficult to find arbitrators capable of understanding the factors considered in arriving at a classification rating. Reply Comments, Reply V.S. of Foley, at 5. We do not agree. As NITL observed, Rebuttal Comments at 12: "Arbitration is commonly used to resolve all kinds of disputes involving transportation transactions, some of which are much more complex than evaluating the four factors of handling, stowability, density, and liability, with respect to a given commodity." The courts have had no trouble understanding classification matters when they have reviewed our decisions, and we have no doubt that qualified, capable arbitrators are available.

We will require the NCC to amend its agreement to provide a procedure for the selection of arbitrators. The American Arbitration Association has existing procedures for selection of a neutral arbitrator for commercial arbitration, and the NCC may wish to adopt those procedures. Or the NCC may devise different procedures, so long as the parties to a review proceeding (both the proponent and any opponents of a proposed classification) agree on the arbitrator selected.[32]

There remains the issue of payment for the arbitrator. One option would be to have the NCC bear the cost because the arbitrator's decision would be the final stage of a process by which carriers collectively establish classifications. However, were the arbitrator paid solely by the NCC, it could cause a perception (even if false) that the arbitrator might favor carrier interests. The public interest would not be served by a requirement that might create a new perception of bias in the classification process. The other option is for the two sides to the arbitration — the proponent(s) and the opponent(s) of the initial determination — to split the cost of the arbitrator. We favor this approach because it comports

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[31] Requiring that the classification not take effect until 15 days after publication would give interested parties time in which to request suspension of a classification. Of course, after the classification takes effect, a party may file a complaint with us challenging its reasonableness.

[32] We see no reason to require a panel of arbitrators. Experience in labor arbitration conducted by panels shows that arbitrators chosen by labor usually side with labor, arbitrators chosen by management usually side with management, and the real decisionmaker is the neutral arbitrator. Using a sole, neutral arbitrator would be less costly, yet lead to the same fair result.

with the notion of neutrality. Therefore, we will require that the two sides in a review matter shall pay equal shares of the fee for the single arbitrator.[33]

D. *The Board's Role.*

NITL proposes that there be only limited Board review of an arbitrator's decision on a classification. NITL suggests that we should overturn an arbitrator's decision only if it exceeds the Board's statutory jurisdiction or does not take its essence from the Interstate Commerce Act.[34] Such a narrow scope of review is warranted when parties voluntarily engage in binding arbitration. However, in this case, the arbitration may not be voluntary (at least on the part of the party supporting the NCC panel's initial determination). Accordingly, the limited role that NITL suggests for us would be contrary to our statutory obligation to determine, upon complaint, the reasonableness of a classification. We will not limit the right of any aggrieved party to file a complaint with us challenging the reasonableness of an arbitrator's classification decision.

When a party files a complaint with us (challenging either an arbitral decision, if applicable, or an initial NCC panel decision), we will apply the traditional criteria for determining the reasonableness of a classification — whether the classification is the same or similar to that of other commodities with similar transportation characteristics of density, stowability, handling, and liability. In doing so, we will look to the public docket that was considered by the NCC panel (and the arbitrator, if applicable).

We note that in complaint proceedings under 49 U.S.C. 13701, the complainant has the burden of persuasion that a classification is unreasonable. In the past, the NCC would not have had occasion to file a complaint about the reasonableness of its own classification action. But the NCC might in the future wish to challenge the reasonableness of a classification determination made by an arbitrator. In such a case, the NCC would bear the burden of persuasion. We do not think that this is an anomalous result; in the past the NCC has borne the burden of persuasion when classifications have been suspended and investigated. *See, e.g., Protest of NCC Action Taken May 3, 1999* (STB Docket No. ISM

[33] In the long run, such an approach should not create a hardship for the NCC or the carriers, as any increased costs associated with arbitration should be offset by the reduced costs associated with eliminating the second layer of NCC decisionmaking. As for shippers, it is likely that arbitration would involve less time and cost than a challenge to the reasonableness of a classification before the Board.

[34] These are the criteria governing our review of decisions in voluntary arbitration that is pursued in lieu of bringing a case before the Board initially. *See* 49 CFR 1108.2(a), 1108.11(c).

35004 (STB served July 16, 1999); *Classification Ratings on Intermediate Bulk Containers*, I&S Docket No. M-30436 (ICC served Aug. 30, 1994).

VIII. *Conclusion and Outline of Future Proceedings in This Matter.*

The changes required as a condition of our approval should improve the classification process by eliminating the perception of bias. This, in turn, should encourage shippers to participate in the entire process from the initiation of research through completion of the process. Central to the improvements are the public availability of the information on which classification decisions are made, including raw data supporting studies and reports.

The changes are summarized in Appendix A. A "time-line" demonstrating when each of the involved activities must be completed is set forth in Appendix B. Some of the changes will require the NCC to propose certain procedures after consultation with shippers. Therefore, we will afford the NCC 60 days to submit its proposed changes for our review, with service upon the other parties. The other parties to this proceeding will then have an opportunity to comment on whether the NCC's changes comport with this decision, and the NCC will have an opportunity to reply.

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

COMMISSIONER BURKES, Commenting:

I am concerned that there are many holes in the arbitral review process that is proposed in this decision. For example, as can be seen in Appendix B, Time Line, under the words "If arbitral review:" there is no established time frame for the completion of this arbitral review. Although parties will retain their statutory right to challenge the reasonableness of classifications, the Board is attempting to inject an open-ended arbitral process that parties are encouraged to use before they come to the Board. Such arbitration proceedings could take months, if not years, to complete. There are also many unanswered questions concerning the arbitral review process, such as who would bear the burden of proof during the process and whether or not the classification would remain in effect or be stayed during the process. I welcome comments from interested parties concerning these and other issues concerning the proposed arbitral review process and other aspects of this decision.

It is ordered:

1. These proceedings are consolidated.

2. The motions for suspension of pending classification proceedings are denied.

3. Approval of the NCC Agreement is made subject to the condition that the changes specified in this decision are suitably incorporated into that Agreement. The NCC is directed to submit a revised proposed agreement to the Board, with service on all parties to this proceeding, by January 22, 2002. Any other party may file a response, if any, with service on all other parties, by February 19, 2002. The NCC shall file a reply, if any, with service on all other parties, by March 5, 2002.

4. This decision is effective on December 20, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Commissioner Burkes commented with a separate expression.

Appendix A

SPECIFIC CHANGES REQUIRED FOR NCC'S AGREEMENT

As a condition to Board approval of the NCC Agreement, the NCC shall adopt the following changes to its Agreement. The NCC shall insert the provisions into appropriate places in its Agreement.

1. *NMFTA Staff Assistance and Reporting*. Upon request, NMFTA staff shall assist shippers in conducting research on the classification of products, with the shipper providing direct-cost reimbursement for this service to the NMFTA. When the research of the NMFTA staff who are assisting shippers reveals that a change in a classification may be warranted, the staff shall report that information to the NCC. Upon request, NMFTA staff shall assist shippers in making appropriate proposals to amend a classification.

2. *Notification*. The NCC shall post on its website notice of classification review matters, research investigations, proposals to establish or change a classification, and summaries of classification reports and analyses supporting the subjects to be considered on its next docket. The notice of a proposal to change a classification shall be posted not less than 60 days prior to any action being taken on the proposed change. The notice shall contain the full text of the proposed change and how to contact the NMFTA staff assigned to the proposal, how to contact the proponent(s) of the proposal, and how to obtain copies of data or studies in the docket file described below.

The NCC shall provide that the deadline for issuance of decisions does not begin to run until the end of the 60-day advance notice period.

Prior to considering a proposed classification change at a public meeting, the NCC shall provide individual notice of the meeting to (1) shippers that participated in NCC-conducted research on the classification of the product(s) that are the subject of a proposed classification change, and

(2) associations of shippers of such product(s). The notice may be by regular mail, e-mail, or by facsimile.

3. *Staff Reports and Analyses.* The NCC, without request and free of charge, shall provide copies of reports and analyses prepared by its staff concerning classification proposals to any party that has participated in the corresponding research study on the commodity.

4. *Access to Evidence; Public Docket.* When advance notice of a proposed change is posted, the proponent(s) of the change shall make available, in the docket file described below, copies of all studies, work papers, supporting raw data, and other information to be used in support of the proposal, subject to protective orders that may be obtained from the Board. The same information shall be made available by opponents of a proposed change when they submit statements in opposition. The studies, work papers, and supporting raw data must be made available in the public docket for at least 60 days prior to NCC taking action on a proposed change. Any other submitted information must be made available in the public docket for 30 days (or some other appropriate duration) prior to the NCC taking action.

The NCC shall propose specific procedures for parties to obtain access to the materials in the public docket file, including: when, where, and how to obtain the material; the format of the information to be inserted into the file; indexation; the retention period for the file; and access to protected information. The NCC may adopt a reasonable fee to recover the cost of copying and transmitting the information, or the parties may agree among themselves to waive such fees in individual cases

The NCC may make additional adjustments to its internal procedures in order to create additional, timely access to evidence or information, provided that such procedures are consistent with the provisions of this decision and apply equally to all parties.

5. *Access to Published Data and Compilations.* The NCC shall make the following published information or compilations available to shippers, to the same extent, on the same terms, and at the same charge that it is made available to its member carriers: (1) The NCC's Synopsis of Classification Opinions, (2) the information offered to be produced in the statement of Martin E. Foley, filed in this proceeding on April 11, 2000, and (3) the "directory of charges" described in Exhibit C of ATS' comments filed in this proceeding on April 12, 2000.

6. *Finality of Decisions.* The initial decision of the NCC shall become final unless, by the 30th day after its publication, an interested party submits to the NCC a notice of review by a neutral arbitrator.

7. *Arbitrator Review.* The NCC shall provide that an aggrieved party may invoke a right to review by a neutral arbitrator within 30 days after an initial decision is made by the panel (or NCC). The NCC shall establish a procedure for selecting an arbitrator, and shall provide a means for the two sides — the proponent(s) and the opponent(s) of the initial decision — to split the cost of the arbitrator equally.

Appendix B

TIME LINE

Day		Action
—	--	Proponent submits a classification proposal to the NCC with supporting studies, analyses, reports, and underlying data.
Day 0[35]	—	NCC schedules the proposal for consideration on its next available docket.
	—	NCC publishes a summary of the proposal and summaries of the supporting studies, analyses, and reports in its Docket Bulletin and simultaneously on its website.
	—	Copies of the supporting studies, analyses, reports, and underlying data are made available in the NCC's public docket.
	—	NCC sends notice of the proposal to (1) shippers that have participated in its staff's research corresponding to the proposal, and (2) trade associations identified as representing shippers of the corresponding products.
30	—	All other evidence, comments, and responses concerning the proposal submitted to NCC and made available in the NCC's public docket.
60	—	Earliest date for NCC (or panel) to take action on the proposal.
120	—	Last date for NCC (or panel) to take action on the proposal.
30 days after initial decision issued	—	Last day to file notice invoking arbitral review of NCC initial decision.
		IF NO ARBITRAL REVIEW:
31 days after decision issued	—	If no notice of arbitral review was filed by the thirtieth day, the NCC's initial decision becomes final.
15 days after initial decision becomes final	—	Earliest day that the NCC's final decision on a classification proposal may become effective.

[35] Day 0, which starts the 120-day period for the NCC to take action on the proposal, is the day on which all of the grouped activities have been completed.

IF ARBITRAL REVIEW:

	—	Arbitrator publishes decision on review of NCC initial decision.
15 days after arbitrator publishes decision	—	Earliest day that arbitrator's decision on review may become effective.