

## SECTION 5A APPLICATION NO. 61 (SUB-NO. 6)

## NATIONAL CLASSIFICATION COMMITTEE–AGREEMENT

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*Decided March 21, 2003*

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The Board renews approval of the agreement of the National Classification Committee pursuant to 49 U.S.C. 13703, provided that the agreement is modified as specified in this decision.

BY THE BOARD:

BACKGROUND

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 (NCC Agreement or the 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 3 years unless renewed by us. *See* 49 U.S.C. 13703(d) (1996).<sup>1</sup> Accordingly, in a notice served November 13, 1997, 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 the Agreement, we docketed its request as Section 5a Application No. 61 (Sub-No. 6) (the Sub-No. 6 docket). NCC's previously approved agreement has remained in force during these proceedings.

In our decision in this proceeding *National Classification Committee Agreement*, 5 S.T.B. 1077 (2001) (*2001 Decision*), we renewed our approval of the NCC's bureau agreement, subject to the condition that the agreement be

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<sup>1</sup> That provision was later modified in the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748.

amended in two principal respects.<sup>2</sup> First, we required the NCC to provide shippers with access to specified additional information at an earlier stage in the classification process. Second, we required the NCC to adopt a procedure whereby it would resolve each matter before it by a single decision, either by the NCC as a whole or by a panel of that organization, and would provide parties with the right to seek an initial review of that decision by a neutral arbitrator.<sup>3</sup> We provided that parties dissatisfied with the arbitrator's decision could challenge it at the Board, with complainants bearing the burden of persuasion. No party requested reopening or reconsideration of the *2001 Decision*.

On March 20, 2002, the NCC filed a revised bureau agreement with modifications to bring it into conformity with *2001 Decision*. On May 20, 2002, replies to the NCC's proposal were filed by the following parties: the Halogenated Solvents Industry Alliance, Inc. (Solvents Industry); the National Industrial Transportation League (NITL); and the National Small Shipments Traffic Conference, Inc., jointly with the Health and Personal Care Logistics Conference, Inc. (NASSTRAC/HPCLC). A late reply was filed on May 23, 2002, by Bohman Industrial Traffic Consultants, Inc. (Bohman). On June 6, 2002, the Transportation Consumer Protection Council, Inc., late-filed a brief comment endorsing and adopting the comments of NASSTRAC/HPCLC.

On June 13, 2002, the NCC filed its comments in response. On the same day, a statement was filed by Interstate Dispute Resolution, LLC (IDR). IDR calls itself "a provider of neutral services to promote the resolution of transportation disputes." IDR states that the NCC and its parent, the Motor Freight Traffic Association, retained it to develop an arbitration process to comply with the *2001 Decision*. IDR briefly described the process that was included in the NCC's proposed agreement and stated that it conforms to established dispute resolution procedures.

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<sup>2</sup> The *2001 Decision* was docketed under both the Sub-No. 6 docket and the lead docket. Because this decision addresses a petition filed only in the Sub-No. 6 docket, this decision is being issued in the Sub-No. 6 docket.

<sup>3</sup> The *2001 Decision* did not require parties to seek arbitration. Rather, it provided that they would retain the option of using the current method of seeking a determination of the reasonableness of the NCC's classification determination decisions from the Board by filing petitions for suspension or complaints directly with the agency.

## DISCUSSION AND CONCLUSIONS

The NCC's revised Agreement complies with the requirements set forth in the *2001 Decision* in all material respects. The Agreement clearly and unequivocally provides a right to have a neutral arbitrator review any initial NCC decision, and ensures that shippers will have much greater access to staff assistance, staff reports and analyses, and various data, files, and compilations of information. The entities submitting comments in response to the revised Agreement for the most part acknowledge this, and the concerns they have expressed deal more with the particulars of how the Agreement will work rather than questioning its overall thrust.

All of the substantive changes proposed for, and objections to, the NCC's proposed revised Agreement are discussed below. The remaining changes the NCC made to the revised Agreement, which consist of style changes or deletions of obsolete language, are acceptable and do not need to be discussed. The NCC's proposed revised Agreement will comply with the *2001 Decision* if the NCC makes the changes found necessary in the following discussion.

### I. Public Notice and Public Docket Files

NITL and NASSTRAC/HPCLC, supported by the Solvents Industry and the Transportation Consumer Protection Council, Inc. (the Shipper Groups), jointly prepared a set of changes to the NCC's proposal pertaining to public notice and public docket files. We discuss them according to the corresponding article in the proposed NCC Agreement.

#### *Article IV, Rule 4(a).*

In our *2001 Decision*, we explained that public access to the studies, reports, and underlying data concerning a classification proposal is critical to ensuring that classifications are based on balanced and tested information. But we also recognized the need to protect the confidentiality of the information to prevent competitive harm and to mask the identity of the submitters to prevent retaliation from displeased shippers. The Shipper Groups propose three changes to Article IV, Rule 4(a) of the NCC's revised Agreement, which implements the access/confidentiality requirement. First, the Shipper Groups would weaken the confidentiality protection in the proposed rule by providing that an entity furnishing raw data would be unnamed only "where that entity requests confidentiality." Second, the Shipper Groups would change Rule 4(a) to require

that the masking of the *identity* of the source or sources of file data be accomplished in a manner that does not conceal their *number*.<sup>4</sup> Third, the Shipper Groups propose to modify the NCC's proposed rule to provide that a party may obtain access to "any withheld information in the public files (including the identity of the providers of data)" by filing motions for protective orders with the Board. The NCC opposes all three changes to Article IV, Rule 4(a). We see no reason to require the NCC to modify the Agreement in these respects at this time.

*Confidentiality.* In *2001 Decision* (5 S.T.B. at 1093), we granted the NCC a clear right to excise the name of the shipper or carrier providing the data in order to avoid concerns about possible retaliation for providing the data. The Shipper Groups have not presented any valid reason to make the party actively seek confidentiality rather than have that confidentiality automatically apply. The identity of the provider should have no effect on the utility of the data. The Shipper Groups' proposal, by contrast, could lead to the type of disclosure addressed in our prior decision if a data provider inadvertently omitted a request for confidentiality.

*Identity of Sources.* Similarly, we are concerned that requiring the NCC to identify the source or sources of file data by references to the size or number of carrier proponents could lead to identification of the carriers and could therefore permit retaliation.<sup>5</sup> We consider it important for all interested parties to know whether the provider of data is a carrier or a shipper/receiver because these entities may offer different perspectives on a commodity's transportation characteristics. Beyond this function, however, descriptors about the geographic scope or size of a provider are not particularly relevant to the validity of the data.<sup>6</sup> The Shipper Groups have not offered any persuasive arguments that identification of a proponent as a large, small, regional, or national carrier or that

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<sup>4</sup> This would be done by the use of notations such as "national carrier A," "national carrier B," "national carrier C," etc., so that shippers would know whether the proposal is supported by many carriers or only one or two. The Shipper Groups argue that this would provide clues as to the representativeness of the data without divulging the identity of the provider(s).

<sup>5</sup> The NCC's revised agreement provides that, "The source of the raw data will be identified as 'shipper/receiver,' 'carrier,' or the like."

<sup>6</sup> For example, testimony from five unidentified regional carriers that a commodity is hard to stow is not necessarily any more or less reliable than similar testimony from, say, two unidentified national carriers. Neither the size nor the scope of a particular carrier's operations should be relevant to the import of that carrier's support of a proposed classification.

a proposal is supported by one, two, or many carriers, is necessary or would make the data presented more probative. Classification is based on a commodity's transportation characteristics, irrespective of the size or scope of operations of the entities that supply data. The Shipper Groups have not convinced us that the usefulness of the identity tags they propose for data providers outweighs the risk of source identity and retaliation.

*Protective Orders.* Finally, we see no need for protective orders because, as discussed above, the Shipper Groups have not persuaded us that source identification is required.<sup>7</sup> Moreover, we share the NCC's concern that adoption of this proposal could result in the pro forma filing of protective order requests, which could significantly slow the classification process.

*Article IV, Rule 4(b).*

In our *2001 Decision*, 5 S.T.B. at 1090, we required NCC to make rules that would provide the public with access to the information supporting a proposal. In response, NCC proposed, in Rule 4(b) of Article IV, the process under which such information can be obtained. The Shipper Groups seek certain changes to NCC's proposal. First, they seek to modify the rule in order to provide the option of examining case files in the NCC's offices (rather than by receiving copies via mail or e-mail), arguing that this would reduce the need to copy voluminous files. Second, the Shipper Groups propose to clarify the rule's provision for a "reasonable charge" to obtain the public file for a docketed matter, by adding the words "not to exceed the Committee's cost of copying." The Shipper Groups reason (NITL Comments, at 8) that the NCC "should not be able to earn a profit from such activities. Third, the Shipper Groups would make mandatory the provision specifying that the NCC will publish on its website the entire public docket file<sup>8</sup> as well as "a summary of any proposal and summaries

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<sup>7</sup> The arguments of the Shipper Groups, on this issue and on several other issues, are based on substantially the same evidence and arguments that were before us in the *2001 Decision*. In denying the Groups' request for relief, we do not mean to discourage shippers from evaluating their experience under the new rules and, if those experiences suggest the need for additional changes, proposing them to us.

<sup>8</sup> The Time Line in Appendix B of *2001 Decision* provides that, before "Day 0" can begin, the NCC must publish in its Docket Bulletin and simultaneously on its website "a summary of any proposal and summaries of the supporting studies, analyses, and reports." On its own initiative, the NCC proposes to allow itself to expand website publication to the entire public docket file by  
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of the supporting studies, analyses, and reports.” The Shipper Groups would also require that a document be posted within 2 days of its receipt by the NCC.

We will not adopt the Shipper Groups’ proposal for examining files at the NCC’s offices. The proposal would, in effect, convert the NCC’s offices into a public facility without compensating the NCC for the cost of the resulting disruption. Moreover, the Shippers Groups have not shown that mail and e-mail will not be adequate.

We agree with the Shipper Groups that the NCC should not be able to make money from copying, and that a restriction to the recovery of actual costs for copying is reasonable. However, the NCC is correct in observing that the provision of the files requires transmittal as well as copying, so we will modify the proposal to allow the NCC to recover the cost of transmittal as well as the cost of copying, by adding the words “not to exceed the Committee’s cost of copying and transmittal.”

Finally, the NCC agrees with the Shipper Groups’ proposal to post on its website every docketed file proposal, but would modify it so as to require posting any material that is received after the initial posting of the public docket within 2 *business* days after the “period for receiving” the material (that is, the deadline for its receipt) closes. We accept the NCC’s modification to the Shipper Groups’ posting proposal. We find that a requirement of posting within 2 business days would be less burdensome to the NCC, yet adequate for the public.

## II. Arbitration Process

In our *2001 Decision*, 5 S.T.B. at 1096-97, we found that shippers perceived that the classification system is biased because of what they saw as the lack of an impartial decisionmaking in the early stages of the process. This perception, we reasoned, was likely a factor in the lack of shipper participation in classification matters. To address this perception of bias and to encourage shipper participation, we required NCC to provide the option of appealing an initial NCC decision to a neutral arbitrator. Under the NCC’s proposal,<sup>9</sup> the

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<sup>8</sup>(...continued)

providing, in proposed Article IV, Rule 4(c), that it “may also post the public docket files” on its website.

<sup>9</sup> The NCC states that it developed its proposal in coordination with IDR, an organization dedicated to the arbitration of transportation disputes, and James Barron, a mediation specialist with  
(continued...)

NCC would develop a separate list of potential arbitrators for each proceeding. The parties to a dispute would confer in an attempt to select a neutral arbitrator from that list. If the parties were unable to agree, each party would select one arbitrator, and the two arbitrators would agree on a third arbitrator.

The Shipper Groups maintain that the NCC's arbitration proposal gives that organization too much power to influence the selection of a neutral arbitrator, is needlessly expensive and complex, fails to define the standards to be followed by arbitrators, and has improper deadlines. The Shipper Groups jointly drafted a set of changes. The specific issues raised by the proposed changes to the NCC's proposal are discussed below.

*Deadline for Requesting Arbitration.* The Shipper Groups propose to give parties 15 days to notify the NCC that they will be seeking arbitration of an NCC action, rather than the 30 days adopted by the NCC, arguing that this will allow more time for briefing and evaluation by the arbitrator. We see no need to reduce the deadline for seeking arbitration from 30 to 15 days. Potential appellants other than NITL or NASSTRAC (large associations) might need 30 days to review the NCC's decision and to decide whether to appeal. If, as alleged by the Shipper Groups, more time is needed for briefing, such an adjustment is best made directly to the time allotted for briefing rather than indirectly via adjustment to the time for filing an appeal.<sup>10</sup>

*Initial List of Arbitrator Candidates.* Under the arbitration procedure in the NCC's proposed agreement, the Secretary of the NCC would develop a list of neutral arbitrators from "an independent arbitration association" within 2 business days of a request for arbitration, and the parties would then begin the process of selecting arbitrators from that list. The Shipper Groups criticize this procedure, arguing that development of the list should not be under the exclusive control of the NCC. Instead, they propose requiring the NCC: (1) to develop a master list of 50 potential arbitrators with the assistance of the American Arbitration Association, and/or another reputable body approved by the Board; (2) to post the master list in advance of any request for arbitration; and (3) to select arbitrators from that list.

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<sup>9</sup>(...continued)

IDR.

<sup>10</sup> The briefing schedule will depend on the discretion of the arbitrator and any deadlines established in the private agreement governing his/her employment.

6 S.T.B.

We believe that the process proposed by the Shipper Groups is preferable. Although we have no reason to suspect that the NCC would act in bad faith in selecting arbitrators under its proposed procedures, we agree with the Shipper Groups that the process must be set up in a manner that avoids even the appearance of or potential for bias or undue control by either side. Also, the development of a master list in advance will help parties to head off disputes over arbitrator qualifications prior to any actual arbitration.

The Shipper Groups' proposal for an advance master list appears to be feasible and not unduly complex. The NCC would need to do considerable advance clearance work even under its own suggested procedure, and the Shipper Groups' proposal would merely require the NCC to complete this advance clearance work earlier and to post the results as a list of potential arbitrators on its website.

*Bypassing List of Arbitrator Candidates.* The Shipper Groups propose an informal procedure that would allow the parties an opportunity to bypass the initial master list altogether by giving them 7 business days to select as the arbitrator anyone agreed upon by all parties. This is a common sense approach that could shorten the arbitrator selection process, and we will require the NCC to include this option.

*Selecting Arbitrators from List.* Under the NCC's Article V, Rule 2, the parties to a dispute would confer in an attempt to select a neutral arbitrator within 3 days after the NCC submitted its list of potential arbitrators. If the parties were unable to agree, each party would select one arbitrator, and the two arbitrators would agree on a third arbitrator.

The Shipper Groups propose a far more detailed selection procedure, requiring the Secretary of the NCC to randomly select 15 names from the shippers' proposed list of pre-selected 50 potential arbitrators. Each party would then select eight names from that list. The two groups of eight names would necessarily contain at least one common member. If there were only one common member, the arbitrator chosen would be that common member. If there were more than one common member, the arbitrator chosen would be selected from among them by use of a ranking process. The arbitrator selected via this procedure would then be interviewed to determine whether there was a conflict of interest. If a conflict were found, the process would be repeated.

We will not adopt the Shipper Groups' selection proposal. It is unduly complex and would not add anything to the approach we are adopting. The NCC's proposal, which reflects an established procedure that is used in labor

arbitration proceedings, is preferable. We note that our agreement with the Shipper Groups' proposals for development of an advance list of arbitrator candidates should alleviate many of the concerns about bias.

*Arbitrators' Terms of Service.* Under the NCC's proposed Article V, Rule 3, the parties that will be involved in each individual arbitration are directed first to execute an arbitration agreement. The Shipper Groups would delete the NCC's requirement of an executed advance agreement between the parties involved in the arbitration. According to NITL (Comments, at 14), if there is a permanent list developed in advance, the persons on that list can individually announce in advance the terms under which they will serve and give their advance consent to service under their terms. The NCC replies (Response, at 13) that the American Arbitration Association, one of the bodies proposed by the Shipper Groups as a source of potential arbitrators, does not make its list of arbitrators available until *after* parties have paid a fee.

No matter what process for arbitrator selection is to be used, parties seeking arbitration will have to reach some form of advance agreement with the selected individual arbitrator, or his/her association, governing compensation and other terms of the arbitration. Because individual arbitrations may differ, for example as to the work involved or the time deadlines, the individual agreements may also have to differ. Because of these differences, the necessary agreements may have to be worked out on a case-by-case basis. They may not be able to be worked out in advance or covered through a master agreement in the manner suggested by the Shipper Groups. The master list will thus have to be developed with the understanding that employment terms may have to be worked out in advance of any actual employment of potential arbitrators on the list. For these reasons, we will not adopt the Shipper Groups' proposal to delete the provision for an advance agreement between the parties involved in each individual arbitration.<sup>11</sup>

*Sharing Cost of Arbitration.* In its proposed Article V, Section 3, the NCC would require the parties to share the arbitrator's "fees." The Shipper Groups would add language requiring the parties also to share the "expenses" and "costs" of the arbitration. We agree with the NCC that the term "fees" already encompasses costs and expenses and needs no further clarification. It was clearly our intent in *2001 Decision* that the sharing of fees would include other

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<sup>11</sup> Our decision in this respect should not be interpreted as discouraging the NCC and the Shipper Groups from attempting to develop in advance as many uniform arbitration provisions as can be developed and posting them with the master list of potential arbitrators.

types of expenses that may be necessary for the arbitration to take place, such as arbitrators' travel expenses or the cost of renting facilities or equipment for hearings.

*Deadlines for Opening and Reply Statements.* In its proposed Article V, Rule 5, the NCC would allow the party pursuing arbitration of an NCC decision to file an opening statement within 7 business days of selection of the arbitrator. The NCC would have 7 business days to reply. The Shipper Groups propose increasing both of these filing deadlines from 7 to 10 business days. The NCC did not reply to this specific proposal.

We will adopt the Shipper Groups' proposal to increase the deadline for the filing of the reply statement, but not the initial statement, from 7 to 10 days. Additional time is not needed to file an opening statement because parties will effectively enjoy considerably more time to prepare their opening statements. The notice of arbitration will not be due until 30 days from the NCC's decision, and additional time will have elapsed from the date of the notice until the arbitrator is selected (the date that would commence the 7-day deadline for an initial statement). On the other hand, parties can begin to develop their reply statements only after the initial statements are received. Ten days to file a reply is not unreasonable.

*Rebuttal Statements.* The Shipper Groups propose to allow the party pursuing arbitration to file a rebuttal statement within 5 days. The NCC disagrees with the need for a rebuttal statement, arguing (Response, at 14) that it would create needless delay. The NCC also argues that rebuttal is not needed because an arbitrator's decision is to be based exclusively on the public docket record below and both parties will have an equal opportunity to explain why the NCC's action was or was not correct.

We will allow arbitrators to provide for rebuttal at their discretion. Rebuttal may not be needed in every arbitration. All that is required is that each side have a fair and equal opportunity to attack or to defend the NCC decision on the challenged classification matter. On the other hand, there may be situations where rebuttal statements would significantly enhance the record or allow replies to improperly submitted material without creating undue delay. Accordingly, we will require the NCC to devise a provision allowing arbitrators to grant an opportunity for rebuttal at their discretion. The NCC and the Shipper Groups should consult on an appropriate provision.

*Arbitrator's Decisionmaking Standards.* In *2001 Decision* (5 S.T.B. at 1079), we took note of the four traditional classification criteria established in *Investigation into Motor Carrier Classification*, 367 I.C.C. 243 (1983), *aff'd sub nom.*, *National Classification Comm. v. United States*, 765 F.2d 1146 (D.C. Cir. 1985) (*Motor Carrier Classification*), and we summarized the application of those criteria (at 1099):

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.

To establish a decisionmaking standard in accordance with *2001 Decision*, The NCC provides in its Article V, Rule 6 that:

The reasonableness of the class(es) proposed for any commodity shall be determined exclusively by comparison of that commodity's four recognized transportation characteristics (density, stowability, handling and liability, as defined by the Interstate Commerce Commission in Ex Parte No. MC-98 (Sub-No. 1), *Investigation Into Motor Carrier Classification*, 367 I.C.C. 243 (1983) and related cases) with the transportation characteristics of other commodities that are assigned a comparable class(es).

According to NITL (Comments, at 15-16), the NCC's explanation of the standard in *Motor Carrier Classification* improperly implies that the "other" commodities used in the comparison are already properly classified as to density, stowability, etc. NITL also argues that any reference to that decision is unnecessary since proposed Rule 7 already requires adherence to "established regulatory and legal standards." NITL further argues that the reference to *Motor Carrier Classification* would have to be deleted if in the future the Board were to change the governing standards. The NCC replies (Response, at 14-16, 27-29) that proposed Rule 6 alerts parties to the four classification elements in *Motor Carrier Classification* and does not misstate the legal standards.

The NCC's proposed Article V, Rule 6 correctly summarizes the current legal standards for evaluating the reasonableness of classifications. These standards have not changed for many years, and we see little likelihood of their changing in the predictable future. Thus, we will not remove the provision merely because it might later have to be modified due to a change in our standards.

*Record Considered by Arbitrators.* In their proposed Article V, Rule 7, the Shipper Groups seek to modify the NCC's proposal so as to add that arbitrators

may consider the parties' statements on appeal in addition to the official "public record" created during the NCC proceeding. The NCC objects (Response, at 24-25) that the Shipper Groups' approach would allow appellants to use their statements of position to reopen the record or to introduce improper material into it. According to the NCC, appellants would be able to include additional data, newly discovered information, policy arguments, arguments based on factors other than transportation characteristics, and objections to the procedures below, all alleged to be improper material.

We do not see this as a serious problem. Arbitrators will in fact be considering the statements on appeal, and they will be part of the appellate record. Recognition of this fact would promote clarity and make the rules reflect what will actually take place during arbitral review. Although there is some merit in the NCC's position that the statements should be restricted in their scope and content, and that we did not intend to turn the review into a *de novo* proceeding, we do not believe the Shipper's proposal would have that result. Thus, we will approve the Shipper Groups' modification to the extent that it adds that arbitrators may consider the parties' statements on appeal in addition to the record from below, and we will require the NCC to include language that allows the statements to be considered but that excludes consideration of inappropriate issues and evidence. We urge the parties to collaborate on appropriate language. Ultimately, it will be the arbitrator's decision as to exactly what is permissible.

*Arbitration Decision Deadline.* In its proposed Article V, Rule 6, the NCC provides that arbitration decisions would have to be issued by 45 days after "the receipt of the public record." The Shipper Groups would add that the deadline interval for rendering a decision would not begin to run until the arbitrator has received the statements of position (as well as the "public record" from below) and would reduce that interval from the 45 days proposed by the NCC to 30 days. The parties, however, would be allowed to agree on a shorter or longer time period.

The NCC did not address this proposal. Because the Shipper Groups' approach is reasonable, we will adopt their approach. We will therefore require the NCC to reduce the arbitration decision deadline from 45 to 30 days, and the deadline for issuance of a decision would not begin to run until the parties' statements of position are received for consideration along with the "public record" from below. The statements frame the purpose of the arbitration and its issues, and they must be available to the arbitrator before review begins.

*Option to Keep Present Procedure with Suspension Rights.* Under the present procedure, an initial decision is usually issued by a panel of the NCC's members, and appeals of that decision may be brought to the entire NCC. The NCC decision can also be brought to the Board via a complaint or a petition for suspension. In a complaint, the burden of proof lies with complainant. In a suspension proceeding, the burden of proof lies with the supporter of the action being suspended.

Our *2001 Decision* allows appellants to bring the NCC's initial decisions, whether by a panel or by the entire NCC, directly to arbitration (or to the Board) with no further review within NCC. If no party requests arbitration, or appeals the decision to the Board, the initial NCC decision will become final. The *2001 Decision* also specifically states (5 S.T.B. at 1099) that decisions of arbitrators may be taken to the Board by the filing of complaints with the Board.

The NCC adopted these requirements and added the following provision, which has the effect of eliminating the existing right to petition for suspension of arbitration decisions that *affirm* NCC decisions (Article V, Rule 8):

#### Rule 8. Challenge to Arbitrator's Decision

If a classification decision by the Committee or Classification Panel is the subject of an arbitration proceeding, the classification decision, if affirmed by the arbitrator, may not be protested to the Surface Transportation Board but must be challenged only through the filing of a complaint with the Surface Transportation Board.

The Shipper Organizations did not object to this provision – their proposed Article V, Rule 9 is identical to the language quoted above.

Only Bohman called attention to the effect of this provision. Bohman raises two issues: first, it claims that the current procedure allowing appeals to the full NCC has been working well and should be retained and, second, it wants to retain the option of filing petitions for suspension (in addition to complaints) with the Board. Bohman proposes that we give parties, at least for a trial period, the option of choosing between (a) the present procedure or (b) the arbitration process prescribed in *2001 Decision*. Under this proposal, dissatisfied parties would be able to choose only one method for resolving a classification decision. The NCC replies (Response, at 6) that it would be willing to accommodate Bohman's request for that option but that, if there were multiple parties objecting to the NCC panel's decision, all parties would have to agree on either an appeal to the NCC or arbitration.

We will adopt the option proposed by Bohman. Neither the NCC nor the Shipper Groups have objected to it. Because parties that are dissatisfied with an

NCC decision are not required to pursue arbitration, nothing would be gained by refusing them the option of choosing present procedures, under which decisions of panels may be appealed to the full NCC and thereafter taken to the Board via petition for suspension or complaint. The NCC must provide, however, that if there are multiple dissatisfied parties other than the NCC, this option cannot be exercised unless all dissatisfied parties agree. Bohman did not discuss when and how the exercise of his option should be communicated. We urge the parties to collaborate on a deadline and means of communication that is fair to all parties.

### III. Conduct of Business.

The Shipper Organizations separately proposed modifications to the provisions of the NCC's proposed Agreement pertaining to the way that the NCC would conduct its business. They did not draft a single set of specific wording changes in this area of concern. Many of their proposed changes reflect their desire for more time to develop their cases in classification proceedings, even at the expense of delay in a final decision.

*Deferred Action by Panels.* Although the current NCC Agreement contains a 120-day deadline for panels to dispose of classification proposals, at Article IV, Rule 6(a), it also permits panels to defer action on a proposal one time, thus allowing more time for development of a record prior to taking action. See current Article IV, Section 1(b)(iv). The proposed Agreement retains the same deadline but, at Article II, Section 2, completely eliminates the power of panels to defer action. Thus, an NCC panel would be forced to decide a classification proposal at the first panel meeting at which it came up for consideration. NASSTRAC/HPCLC urge (Comments, at 11) us to add a provision that the NCC may not unreasonably decline requests for deferral of proposals, arguing that more time will occasionally be required and that deferral has proven beneficial in the past. To allow time for deferral, NASSTRAC/HPCLC urge us to delete the requirement in proposed Article IV, Rule 6(a) that docketed proposals be decided by 120 days after docketing.

The NCC disagrees (Response, at 29-30), urging us to retain its 120-day deadline for disposing of docketed proposals. The NCC points out that our Time Line in Appendix B of *2001 Decision* retained this deadline and that no party requested reconsideration of its retention. According to the NCC, both shippers and carriers have successfully operated under that deadline for the past 2 decades. The NCC also responds that deferral will be unnecessary in light of the new procedures created by the *2001 Decision*.

Lacking evidence that fair decisions cannot be rendered under a 120-day deadline, we will not require the NCC to extend it. Likewise, if the 120-day deadline is to be preserved because it has worked in the past, the current allowance of not more than one deferral should be preserved for the same reason. In the earlier stage of this proceeding, the NCC did not claim that the deferral provision proposed for deletion and the 120-day deadline were incompatible. Contrary to what the NCC maintains, we see nothing in our new procedures that would render the deferral that was allowed in the past to be unnecessary in all instances. The NCC will not be required, but rather simply will be permitted, to defer actions. For these reasons, we will require the NCC to reinstate its provision allowing deferral.

*Deadlines for Comments and Replies.* The *2001 Decision* (5 S.T.B. at 1090) requires the NCC to give participants in a docketed proposal 30 days from completion of the docketing and notice requirements to submit comments, which may contain new evidence and new raw data. In Article III, Section 3(c)(2), the NCC meets this requirement but adds a provision in (c)(3) that the NCC and any other party may file rebuttal (no new facts, data, or evidence) “after thirty (30) days but no later than fifteen (15) days prior to the public meeting.”

NITL and NASSTRAC/HPCLC argue that shippers will need more than the 30 days that we have allotted for them to file their initial replies with new evidence. NITL proposes (Comments, at 18-19) that parties be given an additional 15 days to file their reply and an additional 7 days to file their rebuttal. NASSTRAC/HPCLC propose (Comments, at 14) the same extensions, using slightly different wording that would change NCC’s proposed Article III, Sections 3(c)(2) and (c)(3) to read as follows:

(2) *No later than fifteen (15) days prior to the public meeting*, interested parties may submit statements, including any underlying studies, workpapers, supporting raw data and any other information relating to a docketed proposal to the Secretary of the Committee.

(3) *No later than seven (7) days prior to the public meeting*, the Committee and any interested party may submit a statement or analysis regarding the information of record, but no new facts, data or evidence will be accepted or considered. The Committee shall include this material in the public docket file.

The NCC opposes any changes in its proposed deadlines (Response, at 18-19, 26). The NCC maintains that its deadlines were mandated in the *2001 Decision* and that, if the Shipper Groups had any problems with those deadlines, they should have brought the matter to us in accordance with our Rules of Procedure. Moreover, according to the NCC, additional time is not needed

because announced research projects make shippers aware of potential classification actions long before dockets are begun. The NCC also responds that the extension of time for the submission of reply statements represented in NASSTRAC/HPCLC's proposed (c)(3), above, "could well prevent the successful distribution and/or consideration of those statements by the NCC members and other participants in the proceeding."

The opportunity to file rebuttal was not mentioned in the Time Line of Appendix B of *2001 Decision*. Nevertheless, we will approve the NCC's provision for rebuttal because it may prove useful and no party has objected.

The NCC and the Shipper Groups differ only over the filing deadlines. The dispute over these deadlines basically pits the Shipper Groups' interest in having more time to develop comments challenging the NCC decisions against the NCC's interest in having more time to analyze the comments. Given our reaffirmance of the 120-day deadline for the NCC's action in the Time Line of the *2001 Decision*, the comment deadline extensions sought by the Shipper Groups would necessarily come at the expense of the NCC's ability to analyze them. This would be inappropriate in view of the fact that the Shipper Groups did not request reconsideration of our retention of the 120-day deadline. Thus, we will not alter the deadlines in the NCC's proposed Article III, Sections 3(c)(2) and (c)(3).

*Decisions Based on "Public Record."* In Article III, Section 3(f), the NCC proposes to base its decisions exclusively on the "public record," legal and regulatory standards, and posted "policies and guidelines the Committee has established for determining appropriate classification provisions." NASSTRAC/HPCLC state (Comments, at 14-16) that the term "public record" should be clarified to include all material in the docket file established for the proceeding,<sup>12</sup> rather than merely whatever portions of the public docket file are cited in statements submitted to the panel. Their goal is to ensure that, if an unexpected issue arises at a public meeting, they can attempt to resolve the issue by referring to anything in the public docket file for the proceeding, rather than only to the portions of that file that have been cited in a comment. NASSTRAC/HPCLC also object that NCC should not base its decisions on "policies and guidelines" that have not themselves been established pursuant to the procedural safeguards established in *2001 Decision*. To cure their objections,

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<sup>12</sup> We assume that the NCC is referring to the "public docket" file defined in its proposed Article IV, Rule 4(a).

NASSTRAC/HPCLC propose that the last sentence of Article III, Section 3(f) be amended to read as follows:

In considering a docketed proposal, the Committee or a Classification Panel will be guided by:

- (1) the applicable regulatory and legal standards and precedent for establishing the reasonableness of classifications;
- (2) the public record established by the process set forth in this Agreement, including all file documents; and
- (3) principles of procedural fairness and the arguments of the parties.

The NCC replies (Response, at 31) that it is unclear as to the need for these changes.

We will adopt the changes proposed by the NASSTRAC/HPCLC. The changes will ensure that, if an unexpected issue arises at a panel meeting, the parties may attempt to resolve the issue by referring to anything in the public docket file for the proceeding, rather than only to the portions of that file that have been cited in a written comment. This will build additional flexibility into the process without abridging the procedural rights of any party.

NASSTRAC/HPCLC are also correct in arguing that the NCC should not base its decisions on “policies and guidelines” that have not themselves been subjected to the procedural safeguards established in the *2001 Decision*. This does not imply that the NCC may not cite policies or guidelines established in the past without undertaking separate, rulemaking-type proceedings to validate them. The NCC may cite policies or guidelines as long as they are introduced into the public file and other parties have an adequate opportunity to comment on their relevance and accuracy. Whether this opportunity is adequate according to principles of procedural fairness may be challenged on appeal.

*Liability Under Receipts and Bills of Lading.* NASSTRAC/HPCLC object (Comments, at 16) to Article IV, Rule 6(c)’s prohibition of discussion or voting on provisions governed by 49 U.S.C. 14706(c)(1)(c). This statutory provision prohibits bureaus from taking action to limit liability under receipts and bills of lading. NASSTRAC/HPCLC argue that: (1) the provision is unnecessary; (2) if such a provision is retained, it should have “more neutral” language exactly duplicating the statutory language; and (3) the inclusion of such a provision might be interpreted as requiring the NCC to reject a reason advanced by shippers for opposing increases in classification ratings to reflect increased liability risk, i.e., that carriers have already adopted contractual provisions

6 S.T.B.

limiting their liability for loss to such an extent that an increased rating would be unnecessary.

The NCC disagrees (Response, at 32), arguing that: (1) the prohibition was approved by the ICC for inclusion into the agreement over 20 years ago; (2) the NCC is not changing the substance of the prohibition but is merely changing the statutory reference in response to a statutory re-codification; and (3) whether the prohibition should be in the NCC's agreement is not at issue in this proceeding.

We will not require the NCC to delete this provision. The NCC is proposing to change a statutory reference in response to a statutory re-codification, substituting current section 14706(c) for prior section 10730(b). The provision in which the statutory reference appears merely reminds parties about a statutory limitation that prevents the NCC from discussing proposals that would change liability limits. Contrary to what NASSTRAC/HPCLC maintain, the provision does not prevent parties opposing classification rating increases from arguing that carriers have individually adopted contractual provisions limiting their liability to such an extent that an increased rating cannot be justified by increased liability risk. We have no evidence that the existing provision was ever used in such a manner.

*Amendments to NCC's Agreement.* In its initial Comments, the NCC took the opportunity to propose non-substantive changes to Article VI, which governs the procedure by which NCC can change its agreement subject to the approval of the Board. The *2001 Decision* did not require these changes. Under Article VI, both as it presently reads and as it would read after the NCC's proposed changes, the NCC may amend its agreement, subject to Board approval, if a proposed amendment is approved by a two-thirds majority vote of the members present at a valid regular or special meeting of the NCC. Nevertheless, under Section 2, any such an amendment may be put to a referendum vote of all parties to the NCC's agreement "within forty days after the date of such amendment."

NASSTRAC/HPCLC respond (Comments, at 17) that Section 2 of Article VI is unclear. Noting that an amendment may not take effect until it is approved by the Board, they propose to add that the event triggering the 40-day deadline for referendum requests, i.e., the "date of such amendment," refers to the date of the meeting at which the amendment is approved, in order to make it clear that an amendment approved at a meeting cannot be considered to be a final NCC action requiring Board approval until the expiration of the 40-day deadline for a referendum. They do not object to any other provisions of

Article VI as NCC proposes to amend that provision. The NCC does not address this issue in its Response.

We will allow the NCC's proposed changes to Article VI to take effect without change. The changes are not substantive. The source of the Shipper Groups' concern – the lack of a precise definition of the event that triggers the running of the 40-day deadline for a referendum – is within the pre-existing language of the NCC's agreement, not the changes proposed by the NCC. The NCC's pre-existing procedure for proposing changes to its agreement is not an issue in this proceeding.

*NCC Agreement on Website.* NASSTRAC/HPCLC propose (Comments, at 18) that the NCC post its new agreement as finally approved by the Board on the website of its parent National Motor Freight Traffic Association (NMFTA), an action that was not mandated in the *2001 Decision*. The NCC accepted the proposal (Response, at 33), and we approve it.

#### IV. Scope of the Decision

We have issued several decisions in these matters over the past several years, and Congress has passed new laws that are relevant to these proceedings. Our action here is intended to complete the process that we began when we instituted our review of the rate bureau process in 1997. Although the Motor Carrier Safety Improvement Act of 1999 (Safety Act), Pub. L. No. 106-159, 113 Stat. 1748 (December 9, 1999) established, prospectively, a new timetable for our periodic review of rate bureau agreements, the "savings provision" of section 227 (c) of that law, now codified at 49 U.S.C. 13703(e)(2), expressly provided that the changes made to the periodic review duties for collective activities specifically do not apply to cases brought under the rate bureau provisions that were pending at the time the new law was passed.<sup>13</sup> Completion of this proceeding, which was brought under the rate bureau provision and was pending at the time the new law was passed, is consistent with and advances the intent of the savings provision. Therefore, if NCC finalizes its compliance with the conditions we have imposed, this proceeding will be discontinued, and the NCC Agreement will receive final approval that will remain in effect until further order of the agency.

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<sup>13</sup> The effect of the Safety Act on our review of the various bureau agreements is discussed in more detail in *Rate Bureau Agreements-EC-MAC Motor Carriers Assoc., et al.*, 6 S.T.B. 785.

The provisions of 49 U.S.C. 13703(c)(2), adopted in section 227(a) of the Safety Act, establish an independent requirement that, during every 5-year period beginning with the period running through December 31, 2004, the Board shall initiate a proceeding to review all approved rate bureau agreements. Since this decision resolves a pending case (as contemplated in section 13703(c)(2)), we must initiate a new proceeding to comply with the statute.

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

*It is ordered:*

1. Approval of the NCC Agreement is made subject to the condition that the changes specified in this decision are incorporated into the Agreement.
2. NCC is directed to submit to the Board a revised proposed agreement incorporating the changes specified in this decision, with service on all parties to this proceeding, by June 5, 2003.
3. This decision is effective on March 27, 2003.

By the Board, Chairman Nober and Commissioner Morgan.