

SECTION 5A APPLICATION NO. 61 (SUB-NO. 6)
NATIONAL CLASSIFICATION COMMITTEE – AGREEMENT

Decided October 9, 2003

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

BY THE BOARD:

BACKGROUND

In its decision, *National Classification Committee–Agreement*, 5 S.T.B. 1077 (2001) (the *November 2001 Decision*), the Board renewed its approval of the agreement by which the member motor carriers of the National Classification Committee (NCC) collectively discuss and establish freight classifications, subject to two conditions designed to bolster the participation of shippers in the classification process.¹ First, NCC was required to provide shippers with access to specified additional information at an earlier stage in the classification process. Second, NCC was required to adopt a procedure whereby it would resolve each matter before it by a single decision and would provide parties with the right to seek an initial review of that decision by a neutral arbitrator. NCC submitted a draft revised agreement in an attempt to comply with the *November 2001 Decision*.

In its decision, *National Classification Committee–Agreement*, 6 S.T.B. 765 (2003) (the *March 2003 Decision*), the Board resolved numerous issues concerning the adequacy of the draft revised agreement that NCC submitted in an attempt to comply with the *November 2001 Decision*.

On June 5, 2003, NCC filed a new draft revised agreement in an attempt to comply with the findings in the *March 2003 Decision*.² No comments on NCC's revised draft have been received.

¹ See also the Board's decision in Section 5a Application No. 61, *National Classification Committee – Agreement*, 3 S.T.B. 917 (1998), where the agency found that more effective participation by shippers was necessary but postponed requesting public input as to how this could be accomplished.

² NCC's filing was further explained in a letter filed on June 12, 2003.

DISCUSSION AND CONCLUSIONS

NCC has made a good faith effort to comply with the *March 2003 Decision*. NCC's revised draft agreement filed on June 5, 2003, raises only two issues that require changes: (1) the permissible use of protective orders; and (2) the exercise of the statutory right to petition for suspension of decisions affirmed by arbitrators. NCC's submission raises a third issue that does *not* require further change, i.e., NCC's attempt to comply with the Board's instruction to create a master list of potential arbitrators. These three issues are discussed below. If NCC makes the two modifications discussed below and submits a revised agreement to the Board for inspection, the revised agreement will be summarily approved in a subsequent decision.

I. Protective Orders

Article IV, Rule 4(a) of NCC's original draft revised agreement provided as follows:

(a) Copies of all reports, analyses, studies, work papers, supporting raw data and other information in the Committee's possession relating to a docketed proposal, along with the full text of the proposed change, shall be made available in a public file, subject to any protective orders that may be obtained from the Surface Transportation Board. Protective orders notwithstanding, the public docket file will not name the entity that provided the raw data, nor will it include information that could lead to the name of the entity that provided the raw data. The source of the raw data will be identified as "shipper/receiver," "carrier," or the like.

In the *March 2003 Decision*, 6 S.T.B. at 767-69, the Board rejected several changes to this provision, proposed by the Shipper Groups, including one that would have modified this rule to provide that a party may use protective orders as a device to obtain access to "any withheld information in the public files (including the identity of the providers of data)." In explaining its rejection of the proposal for expanded use of protective orders, the agency stated, *id.* at 769:

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 [footnote omitted]. 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.

In its subsequent draft revised agreement, filed on June 5, 2003, NCC changed Article IV, Rule 4(a) to eliminate any reference to protective orders, revising this provision to read as follows:

(a) Copies of all reports, analyses, studies, work papers, supporting raw data and other information in the Committee's possession relating to a docketed proposal, along with the full text of the proposed change, shall be made available in a public file. The public docket file will not name the entity that provided the raw data, nor will it include information that could lead to the name of the entity that provided the raw data. The source of the raw data will be identified as "shipper/receiver," "carrier," or the like.

In support of this change, NCC relied on the above quoted language stating that "* * * we see no need for protective orders * * * ."

7 S.T.B.

NCC will be required to adhere to the language of Article IV, Rule 4(a), as set forth in its original draft revised agreement. In the *March 2003 Decision*, the Board merely rejected the Shipper Groups' proposal to authorize protective orders as a means to discover source identification information. That decision neither required nor authorized any change to NCC's original draft revised Rule 4(a). In stating that "we see no need for protective orders," the Board did not rule that protective orders may never be issued to any party under any circumstances. Rather, the agency intended only to prohibit their use to discover source information.

II. Petitions for Suspension of NCC Decisions Affirmed by Arbitrators

In the *March 2003 Decision*, 6 S.T.B. at 777-78, the Board held that NCC must allow arbitration decisions *affirming* NCC or NCC panel decisions to be taken to the Board either by petition for suspension or by complaint, thereby rejecting language in NCC's proposed Article V, Rule 8 that would have effectively prohibited exercise of the existing statutory right to petition for suspension of classification changes where those changes were approved by an arbitrator.³ NCC did not implement this aspect of *March 2003 Decision* but, instead, kept the language of the Rule 8 that it proposed earlier, which reads as follows:

Rule 8. Challenge of the Arbitrator's Decision.

If a classification decision by the Committee or a Classification Panel is the subject of an arbitration proceeding, the classification proceeding, 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.

NCC may come into compliance on this matter if it modifies proposed Article V, Rule 8, to read as follows:

Rule 8. Challenge of the Arbitrator's Decision

If a classification decision by the Committee or a Classification Panel is the subject of an arbitration proceeding, the classification proceeding, if affirmed by the arbitrator, may be taken to the Surface Transportation Board either by complaint or by a timely filed petition for suspension of any affirmed classification changes.

³ This problem does not arise if the NCC decision is rejected on arbitration. In that situation, NCC will be taking no action, and there can thus be no pending classification change that can be the subject of a petition for suspension.

III. Master List of Potential Arbitrators

In the *March 2003 Decision*, the Board adopted the Shipper Groups' proposal that a master list of neutral arbitrators be developed in advance and published on the website of NCC's parent, the National Motor Freight Traffic Association. The Shipper Groups proposed that the list have 50 names of potential arbitrators. The Shipper Groups also proposed that the master list be developed with the assistance of the American Arbitration Association, and/or another reputable body approved by the Board.

In its response filed on June 5, 2003, supplemented by a letter filed on June 12, 2003, NCC describes problems that it has had with implementation of the Shipper Groups' proposal. According to NCC, the American Arbitration Association (AAA) is not willing to enter into a contractual relationship with NCC to provide arbitrators. The root of the problem seems to be that AAA's provision of 50 arbitrators for an advance master list would not be financially justified by the number of cases that would be heard annually. Another arbitration association, BostonSolv, LLP, of Boston MA, also refused to participate, for reasons that were not clearly stated by NCC. Attempting to deal with these problems, NCC has retained Interstate Dispute Resolution, LLC (IDR), to administer its arbitration program. IDR has agreed to provide a list of not less than 10 neutral arbitrators. Selection of the arbitrators would be governed by NCC's proposed Article V, Rule 2(a), as follows:

(a) The Secretary of the Committee shall post on the National Motor Freight Traffic Association's website a list of not less than ten (10) neutral arbitrators selected by an independent arbitration association. If a person does not have Internet capability, upon notice by that party that it wishes to seek arbitration, the Secretary, within two (2) business days after that notice, will provide the list of not less than ten (10) neutral arbitrators by express mail, e-mail or facsimile. The claimant(s) and the Secretary of the Committee shall confer by telephone, e-mail or facsimile within three (3) business days after the list of neutral arbitrators has been received by the claimant(s) or was available to the claimant(s) on the National Motor Freight Traffic Association's website to mutually agree to a neutral arbitrator. If the claimant(s) and the Secretary select different neutral arbitrators, and cannot agree on a single neutral arbitrator, they will so notify the arbitration association, and the two selected arbitrators will choose the arbitrator to handle the matter from the remaining arbitrators on the list who were not selected. The arbitration association shall be notified by telephone, e-mail or facsimile of the selection of the neutral arbitrator, and the arbitration association shall determine whether the selected neutral arbitrator has a conflict of interest. The claimant(s) and the Secretary of the Committee shall be notified promptly of the results of that inquiry. If the neutral arbitrator selected has a conflict of interest, the two originally selected arbitrators will choose another neutral arbitrator until no conflict of interest exists.

NCC alleges that its approach is the best it can do to comply with the *March 2003 Decision*.

NCC's approach will be approved as a good faith effort to implement the *March 2003 Decision*. An advance list of a minimum of 10 potential arbitrators provided by an independent arbitration association should provide sufficient impartiality, and NCC's approach allows additions to the number of arbitrators on the list if a list of 10 becomes too small in light of the number of actual

pending cases and the frequency of disagreement over selection.⁴ The use of IDR as an administrator is unopposed and will be approved.

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 subject to NCC's adoption of the changes specified in this decision.

2. NCC is directed to submit to the Board a revised agreement incorporating the changes specified in this and prior decisions, with service on all parties to this proceeding, by November 17, 2003.

3. This decision is effective on October 16, 2003.

By the Board, Chairman Nober.

⁴ The Board's decision in the *March 2003 Decision* does not prevent NCC from increasing the size of the list by adding candidates supplied by more than one arbitration association, if this would be contractually permissible.