

BEFORE THE
ANTITRUST MODERNIZATION COMMISSION

COMMENTS OF
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
AND THE NATIONAL CLASSIFICATION COMMITTEE

SECTION 13703(a) OF 49 U.S.C.
MOTOR CARRIER EXEMPTION

JOHN R. BAGILEO
LAW OFFICE OF JOHN R. BAGILEO
1101 30TH STREET, NW.
SUITE 300
WASHINGTON, DC 20007
PHONE: (202) 944-3736
FAX: (202) 944-8611

The National Classification Committee (NCC), an autonomous, standing committee of the National Motor Freight Traffic Association, Inc., is the body which, through its member motor carriers, collectively establishes the National Motor Freight Classification. That activity is conducted under the procedures approved initially by the former Interstate Commerce Commission (ICC), and currently by the Surface Transportation Board (STB), in the NCC's Section 13703(a) Agreement.

The National Motor Freight Classification (NMFC) is the publication in which some 1,100 participating motor carriers authorized by the Department of Transportation to transport freight in interstate commerce establish the classification of the commodities they handle. Freight classification is the process by which articles having comparable transportation characteristics are grouped together and assigned classes ranging from class 50 to class 500. The assignments of articles into the 18 classes which comprise that range are determined by an evaluation of the relevant transportation characteristics exhibited by the commodities. Those include the commodity's density, stowability, ease or difficulty in handling, and liability characteristics, and certain other factors related to those transportation elements. The former Interstate Commerce Commission prescribed those transportation elements in *Investigation Into Motor Carrier Classification*, 367 I.C.C. 243 and 367 I.C.C. 715-17 (1983). The NCC's application of those factors in the classification of commodities, and the reclassification of articles necessitated by changes in their transportation characteristics, have been approved by the ICC and the STB in proceedings in which those actions were contested.

In order for a Section 13703(a) Agreement to be approved the agency must conclude that the Agreement is in the public interest. (See 49 U.S.C. Section

13703(a)(2)). In order to demonstrate that the public interest is served it must be concluded that the Agreement furthers the objectives of the National Transportation Policy set forth in Section 13101 of 49 U.S.C. (See *Florida Specialized Carriers Interstate Rate Conf.*, 355 I.C.C. 623 (1977). Among the stated goals of the National Transportation Policy as applies to motor carriers are the encouragement of fair competition, and reasonable rates for transportation by motor carriers of property; and the implementation of a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public. (See Sections 13101(2)(B) and (D) of 49 U.S.C.)

Congress has acknowledged the value of the freight classification to the entire transportation community. In the legislative history of the Motor Carrier Act of 1980, it was stated that:

. . . [T]he Committee is of the view that the commodity classification system currently in place is a useful tool for shippers, receivers and transporters of regulated freight so all “know what they are talking about” thereby contributing to an efficient and economical transportation system. (H.R. Rept. No. 96-1069, 96th Cong., 2nd Sess., p. 28 (1980)).

Moreover, since the NCC Agreement was first approved in 1956, and with each review and/or renewal, the ICC and the STB found that the Agreement continues to serve the public interest. During the course of those reviews the NCC was found to have complied with all changes required by the agency in the administration of the classification process. Most recently, in Section 5a Application No. 61 (Sub-No. 6), *National Classification Committee-Agreement*, Decision served December 10, 2003 (not published), the STB, noting that all the modifications required had been made, approved the Agreement. Notwithstanding that most recent review, pursuant to a requirement in

the Motor Carrier Safety Improvement Act of 1999, which provides that there be a periodic review of all Section 13703(a) Agreements during each five-year period, the NCC, in 2005, submitted extensive evidence to the agency establishing its full compliance with the agency-prescribed requirements and demonstrated that its activities continue to serve the public interest. Once again, the NCC will comply with any modification which may be suggested or required by the agency with respect to its classification procedures in that pending proceeding.

The procedures under which the classification process is conducted are entirely transparent and open to the public. Whether a review matter or a classification proposal is involved a strict notification and disclosure schedule must be followed to ensure that interested persons are aware of those matters. Notification must be published in the NCC's docket bulletin at least 60 days in advance of the open, public meeting at which the review matter or proposal will be considered. That docket bulletin is mailed to proponents of the involved classification proposals, all subscribers to the docket bulletin, and all members of the NCC. Additionally, the docket bulletin is posted on the NMFTA/NCC website for online access free of charge. Notification of the review matters and the docketed proposals is mailed contemporaneously to all shippers that participated in an NCC research project, and to all identified trade or professional associations possibly representing shippers who might have an interest in the classification matters under consideration.

The NCC, to facilitate participation, includes a copy of the relevant staff report with the individual review matter to anyone who participated in the research survey. Concomitantly, shippers and other interested persons have access to the NCC's public

files and the data and information on which classification proposals or changes are based. That information includes all reports, analyses, studies, work papers, supporting raw data and any other information relating to the docketed classification proposal. The public docket files concurrently are made available with the 60-day notice provided in the NCC's docket bulletin and contain the proponent's supporting facts and data. Interested persons, other than the proponent who must submit its information 60 days prior to the open meeting at which the matter will be considered to permit proper consideration by the NCC members, can submit additional information up to 30 days before the meeting. Also, up to 15 days before the open meeting any person can submit a statement or analysis of the information and data that is on the record.

At the open public meeting a panel of carrier members of the NCC considers the information and determines the action, if any, to be taken with respect to a review matter or a classification proposal. The proponent, as well as any other party, may appear and present their views orally or in writing, stating their position on the merits of the classification matter under consideration. The results of the Classification Panel's decision, or that of the full NCC if a determination was made that the matter should be referred to that body in the first instance, is posted during the public meeting. A Disposition Bulletin is also issued which provides notice as to the classification actions taken at the public meeting. Thereafter, various recourses are available to a party who may be dissatisfied with the disposition of a docketed proposal.

The NCC, before a final determination can be made, must provide parties an opportunity to submit the matter to arbitration. With the approval of the STB, the NCC enlisted a neutral arbitration body and established simplified procedures which assure

easy access to that process to any party seeking to invoke the arbitration process. Alternatively, a request can be made for reconsideration of a Classification Panel decision by the full NCC.

Because the collectively-made classifications are subject to the reasonableness standard in Section 13701(a) of 49 U.S.C., and the jurisdiction of the STB, parties not wishing to seek arbitration or reconsideration by the NCC have several avenues for review by the STB. Before the classification proposal becomes effective any party opposing the classification action can file a protest at the agency. If the STB finds merit in the protest the classification proposal's effective date can be suspended until after an investigation proceeding is completed by the agency, and the merits of the matter are determined by the STB. Aside from, or in addition to, the protest route, the opposing party can file a formal complaint with the STB challenging the reasonableness of the effective classification item. Should the STB find a classification item to be unreasonable, pursuant to Section 13701(b) it can prescribe what the reasonable classification of the involved commodity should be.

It is doubtful that any other antitrust exemption or immunity has undergone, and continues to undergo, the Congressional review that has occurred in the various legislative measures enacted over the past 26 years regarding the trucking industry, or the regulatory scrutiny the former ICC and STB have exercised in their determinations that the collective classification process serves the public interest. As indicated, in the Motor Carrier Act of 1980, Congress described the commodity classification as a "useful tool . . . contributing to an efficient and economical transportation system." Moreover, the independent Motor Carrier Ratemaking Study Commission, which was established by the

Motor Carrier Act of 1980 to study collective ratemaking, and the continued need for antitrust immunity for that joint carrier activity, reached very similar conclusions as did Congress regarding the classification. After conducting extensive hearings and investigations, the Study Commission, which consisted of ten members, including three Senators, three Congressmen and four members of the public appointed by the President, concluded that:

Classification can foster competition by helping carriers establish cost-related rates and by easing the task of rate comparison by shippers. Classification can also reduce transaction costs involved in the pricing of motor carrier services. (See Report, *Collective Ratemaking In The Trucking Industry*, p. 455, June 1, 1983.)

In considering what would be an appropriate classification system, the Study Commission concluded that it would be a system “with basically the same organizational structure and procedures as the current one.” (See Report, pp. 455-57.)

Another extensive review of the classification system was conducted by the ICC in *Investigation Into Motor Carrier Classification, supra*, in which, in preliminarily assessing the merits of the classification system and its role for the future, it was concluded that:

Carriers will always need a way of listing their prices. Classifying articles according to their relative transportation characteristics is one way of starting to assemble a rational pricing system. (364 I.C.C. at 911.)

Again, in the agency’s subsequent review of its interim decision in that proceeding, the ICC reiterated that “the usefulness of the current commodity classification is not disputed.” (367 I.C.C. at 245.)

In its final review in that proceeding then Commissioner Gradison, in a separate opinion stated that:

. . . [T]he Classification is the useful product of many decades of careful work. It helps both carriers and shippers to do their work more efficiently. The Congress has recognized this and has found that the Classification will be as useful under the system in which carriers make individual rates, as it was under the system in which carriers made collective rate decisions. It assists new entrants into the motor carrier industry to make rational rate decisions, and it promotes the cost based rate system mandated by the Motor Carrier Act of 1980. (367 I.C.C. at 259-60.)

Significantly, in enacting the Trucking Industry Regulatory Reform Act of 1994, Congress, in expanding the ICC's authority in then Section 10505 of 49 U.S.C. to exempt various motor carrier activities from regulation, nonetheless excluded the authority "to relieve a motor carrier of property or other person from the application or enforcement of the provisions of sections 10706" [The former section governing collective classification making and rate agreements.] Specifically, Congress excluded from that exemption authority "any law, rule, regulation, standard, or order pertaining to antitrust immunity for . . . [the] classification of commodities (including uniform packaging rules), [and] uniform bills of lading"

In the Interstate Commerce Commission Termination Act of 1995 (ICCTA), Congress once more recognized the public interest value of the collectively-made motor carrier freight classification. In 49 U.S.C. Section 13703(a) it preserved the continued establishment of agreements among carriers to collectively make classifications. Section 13703(a)(5) provided that such activities, as they had in the past, would be conducted with immunity from the antitrust laws; and Section 13703(e) grandfathered existing

approved agreements, such as that held by the NCC, as if they took effect on the effective date of the legislation.

Indeed, in his comments filed on January 7, 1998 in Section 5a Agreement No. 61, *National Classification Committee-Agreement*, a then pending proceeding involving renewal of the NCC's collective classification making agreement, Congressman Nick J. Rahall, II, then Ranking Democratic Member of the Committee on Transportation and Infrastructure, discussed the deliberations in the House which ultimately created ICCTA. Congressman Rahall related that:

In fact, in the House of Representatives, there was never a question that we would not maintain immunity for commodity classifications with provision for this practice included in every draft of H.R. 2539 considered, from its introduction, through the Committee process, and as passed by the House. (Rep. Rahall's Comments, p.2).

Further, in explaining the basis for his support for continuing antitrust immunity for the NMFC, Congressman Rahall stated that:

I believed then, as I do today, that the efficient operation of the motor carrier industry, and its ability to serve both shippers and consumers alike, depended on the continuation of commodity classifications. In this regard, the hearing record developed during consideration of the 1995 Act (as well as records developed in preceding legislative actions going back to 1980) clearly showed that motor carriers could not, and would not, meet collectively without immunity. It is a fact that tremendous volumes of traffic move in LTL service, rather than under contract of FAK, but subject to their proper classification. No system other than the National Classification Committee Agreement provides for the grouping of products with comparable characteristics, or the separation of products that are dissimilar, for transportation purposes. (Rep. Rahall Comments, p. 3.)

In the Motor Carrier Safety Improvement Act of 1999, Congress eliminated the provision in former Section 13703(d) requiring the automatic expiration of rate bureau agreements after three years unless renewed by the STB. In its stead, in Section

13703(c)(2) of 49 U.S.C., Congress provided for a review of collective classification and ratemaking agreements in five-year periods beginning on the December 6, 1999 effective date of that Act. Under Section 13703(c)(1) the agency's review remains subject to Congress' requirement that in order to change the conditions of approval or termination of the agreement, it must be determined that any such action is "necessary to protect the public interest."

In summary, the purpose of the collectively-established freight classification is to promote the equitable distribution of the carriers' transportation burdens in handling the shipments among the shippers in a fair and reasonable manner. To achieve that goal, classification groups each of the myriad commodities moving in commerce into a limited number of classes that are reflective of their relative transportability or the service demands that the transportation of each commodity imposes on the motor carrier. Some 85 years ago the Supreme Court in *Director General v. Viscose Company*, 254 U.S. 503 (1921) accurately described the classification of freight as follows:

Classification in carrier ratemaking practice is grouping – the association in a designated list, commodities, which because of their inherent qualities of value, or the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded and the like, may justly and conveniently be given similar rates.

As noted above, the classes assigned to each commodity are determined through an analysis of four composite transportation characteristics; namely, the commodity's density, stowability, handling, and liability factors. Those classification standards were established by the ICC, the regulatory agency originally charged with the duty of ensuring that classification actions are reasonable. The STB is now charged with that responsibility.

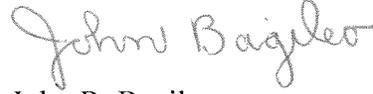
The Agreement under which the NCC conducts its collective classification activities was originally approved by the ICC in 1956, and was found to be the public interest. Since that time the Agreement and the classification process have been thoroughly reviewed in a number of regulatory proceedings by the ICC and the STB and, with certain modifications, in each have been found to be in the public interest, *i.e.*, consistent with the goals of the National Transportation Policy.

The modifications to the NCC's classification procedures prescribed by the ICC and the STB have been designed to encourage shipper participation in the process, and to create an entirely open forum for handling classification matters with interested persons having the same information available to them as do the carrier representatives in classifying or reclassifying commodities. All those modifications have been incorporated into and implemented by the NCC, and both the ICC and the STB have acknowledged that the NCC has complied with those conditions. If dissatisfied, a person can seek reconsideration by the full NCC, a decision by a neutral arbitrator, and/or file a protest or a formal complaint with the STB which will determine the reasonableness of the classification action.

The value of the collectively-established classification system to the entire transportation community has long and repeatedly been recognized by Congress, and has consistently been found to be in the public interest by the former ICC and the STB. It is well recognized by Congress, and the motor carriers participating in the NCC Agreement, that carriers will not engage in that collective activity without the antitrust safeguard provided by Section 13703(a)(6) of 49 U.S.C. in making and carrying out approved

agreements. Accordingly, it is requested that the Antitrust Modernization Commission not recommend that the provisions in Section 13703 be changed.

Respectfully submitted,

A handwritten signature in cursive script that reads "John R. Bagileo".

John R. Bagileo
Law Office of John R. Bagileo
1101 30th Street, NW
Suite 300
Washington, DC 20007

Counsel for National Motor Freight
Traffic Association, Inc. and the
National Classification Committee

Dated: August 28, 2006