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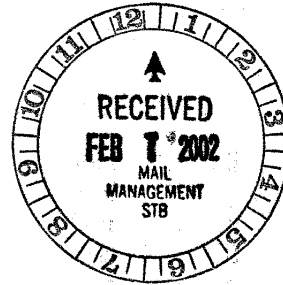
RICHARD A. ALLEN

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February 7, 2002

BY HAND

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



**Re: STB Docket No. 42068, Capitol Materials, Inc. – Petition For
Declaratory Order**

Dear Secretary Williams:

I enclose for filing in the above-referenced matter an original and 10 copies of the Norfolk Southern's Opposition to Capitol Material's Request For Extension of Procedural Schedule.

ENTERED
Office of the Secretary
FEB 07 2002
Part of
Public Record

Sincerely,

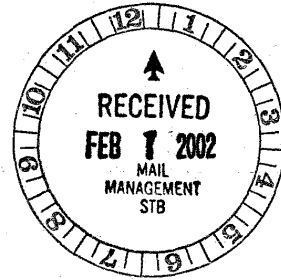
Richard A. Allen
Richard A. Allen

Enclosure

cc : Ira L. Rachelson, Esq.
Bruce E. Mitchell, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. 42068



CAPITOL MATERIALS INCORPORATED —
PETITION FOR DECLARATORY ORDER — CERTAIN RATES AND
PRACTICES OF NORFOLK SOUTHERN RAILWAY COMPANY

**NORFOLK SOUTHERN'S OPPOSITION
TO CAPITOL MATERIALS' REQUEST
FOR EXTENSION OF PROCEDURAL SCHEDULE**

By decision served January 16, 2002, the Board established a procedural schedule in this case; under that schedule, petitioner's opening statement and evidence is to be filed on February 15, 2002. By letter dated January 30, 2002, counsel for petitioner Capitol Materials Incorporated ("Capitol") now asks the Board for an extension of that schedule to permit Capitol to file its opening statement and evidence sometime after a requested "ninety (90) day period for limited discovery in this proceeding."

Respondent Norfolk Southern Railway Company ("NS") strongly objects to any extension of the schedule. Granting such an extension would serve only to unduly and unnecessarily delay NS' efforts to collect unpaid demurrage. Capitol filed its petition on October 11, 2001. Before the Board issued its January 16, 2002 decision, Capitol never proposed a procedural schedule, never sought discovery and never expressed any objection to the schedule proposed by NS, which called for Capitol's opening statement to be filed on

November 30, 2001. Capitol has had more than enough time since filing its petition to prepare its case and engage in discovery under the Board's rules. Capitol gives no reason why it could not do so, and it provides no justification whatever for extending the schedule and thus for further delaying NS' effort to collect straightforward demurrage charges that Capitol has refused to pay.

BACKGROUND

Capitol's petition relates to a court action filed by NS in July 2000 in the Superior Court of Fulton County, Georgia against Capitol. NS' complaint, as amended, seeks the recovery of demurrage charges incurred by Capitol between June 1997 and February 2001, which Capitol has not paid. On August 28, 2001, the Superior Court granted Capitol's motion to refer the following issues to the Board for resolution: "(1) whether Plaintiff's demurrage rate as contained in its applicable tariff is unreasonable, (2) whether the method by which Plaintiff calculates the demurrage charge is unreasonable, and (3) whether the Plaintiff's practice of assessing the demurrage rate in the circumstances at bar represents an unreasonable rate practice." Petition, Exhibit A at 1-2. The court did not refer issues relating to Capitol's counterclaim against NS or stay discovery pertaining to those issues.

On October 11, 2001 -- more than six weeks after the court's decision ordering referral -- Capitol finally filed its petition. NS responded on October 31, 2001. NS' response concurred with the petition's request that the proceeding be conducted under 49 C.F.R. Part 1112 -- Modified Procedures, and it suggested that the Board establish a procedural schedule similar to the schedule established in a similar case -- *South-Tec Development Warehouse, Inc. and R.R. Donnelley & Sons Company -- Petition for Declaratory Order -- Illinois Central*

Railroad Company, Docket No. 42050. Specifically, NS suggested a schedule that would require petitioner to submit its opening statement and supporting evidence by November 30, 2001, require NS to submit a reply statement by January 18, 2002, and require Capitol to submit a rebuttal statement by February 17, 2002.¹

Capitol did not object to the schedule proposed by NS, did not propose any alternative schedule and did not file anything further with the Board. The Board issued its scheduling order on January 16, 2002. Again, Capitol did nothing until two weeks later, when it filed its letter request to extend the schedule. The only reason given for the request is the statement: "Due to the complex issues involved in this matter, we are requesting a ninety (90) day period for limited discovery." On February 4, 2002, NS was served with a request for production of documents from Capitol – the first, and so far only, discovery request propounded by Capitol in this proceeding.²

¹ NS' proposed schedule was similar to the schedule established in the *South-Tec* case. There, the petitioner filed its petition for declaratory order on December 10, 1999. By decision served February 18, 2000, the Board established a procedural schedule requiring the petitioner and a supporting party to file opening statements by March 20, 2000, requiring the respondent to reply by April 19, 2000 and requiring rebuttal statements by May 4, 2000. Statements were filed in accordance with this schedule, and the Board served its final decision on November 15, 2000.

² Although this is the first Capitol discovery request in this STB proceeding, Capitol has sought and received substantial discovery in the underlying court case. Indeed, the four numbered document requests received by NS on February 4, 2002 largely replicate document requests propounded in October 2000 in the court case, to which NS responded in late 2000 and early 2001. For example, the Request 1 seeks "all documents establishing each switching date and time of every rail car tendered to Capitol Materials at its Atlanta facility and its Duluth facility during the subject period" On October 12, 2000, Capitol demanded from NS all documents reflecting "each switching date and time of every Railcar tendered to Defendant during the Period" Similarly, Request 2 seeks "all bills of lading or other documents which identify the origin date of every car spotted at facilities of Capitol Materials, Inc. at Atlanta and Duluth during the period," which replicates the demand on October 12, 2000 for "any document, whether bill of lading or otherwise, reflecting the date (continued...)

ARGUMENT

THERE IS NO BASIS FOR EXTENDING THE SCHEDULE

Capitol has given the Board no sound reason for extending the schedule. Contrary to Capitol's bald assertion, the issues in the case are not complex, and there is no reason to believe that Board's discovery rules and time frames are inadequate under the schedule established to deal with those issues – at least if Capitol had utilized them in a diligent and timely fashion. The parties in similar cases, such as the *South-Tec* case, managed to prepare their claims and defenses under the Board's rules within similar time frames, and there is no reason petitioner could do the same in this case. Moreover, as noted, Capitol has already had substantial discovery against NS in the underlying court case, and has had since at least October 11, 2001 (if not August 28, 2001, when the court granted its motion) to prepare its opening submission to the Board.³

Considerations of both sound administrative policy and fundamental fairness support the denial of any extension of time for discovery at this late date. Nothing Capitol has done

(...continued)

of origin of each Railcar delivered to Defendant at the Atlanta Facility and Duluth Facility during the Period.” NS provided waybills containing the requested information in late 2000 and early 2001, as well as summaries of the same, which summaries are responsive to Request No. 4's demand for “all documents evidencing or showing a complete listing or logs of all cars delivered to Capitol Materials at its Atlanta facility and its Duluth facility during the subject period.”

³ Indeed, in the court case, after obtaining substantial discovery from NS, Capitol in May 2001 asked the court to suspend any further discovery by NS against Capitol in that case pending resolution of Capitol's motion to refer various issues to the STB. In its decision referring those issues to the Board, the court granted Capitol's request in part by staying all further discovery in that proceeding related to the issues referred to the Board. Capitol can hardly be heard to assert the need for more time to conduct discovery after obtaining substantial discovery from NS in the court case and then moving the court to cut off any further discovery.

supports its request. Indeed, Capitol's own inaction to date demonstrates that a further extension is not warranted. Capitol asked the court to refer certain issues to the Board. Although the court granted Capitol's request in an order dated August 28, 2001, Capitol did not file its petition with this Board until October 11, more than six weeks after the court's decision. Capitol made no objections to the schedule proposed in a timely fashion by NS, made no request for discovery until the 11th hour and made no contact with counsel for NS.⁴ Furthermore, Capitol's claim that the alleged "complexity" of the issues necessitates a protracted discovery period is refuted by the fact that the discovery Capitol has now served on NS largely duplicates discovery Capitol conducted more than a year ago in the state civil proceeding.

In sum, Capitol has given no reason why it should be heard now to complain of the schedule the Board has established when it (1) never proposed a schedule itself, (2) never before suggested the need for unusually protracted discovery, (2) never objected to the schedule proposed by NS, and (4) waited until February 4, 2002 -- nearly four months after filing its petition and less than two weeks before the deadline for its initial submission -- to seek discovery.

It is apparent that Capitol is attempting to use the Board's processes to delay as long as possible NS' efforts to collect straightforward demurrage charges under standard demurrage tariffs. The Board has instituted a proceeding to consider Capitol's claims, but there is no

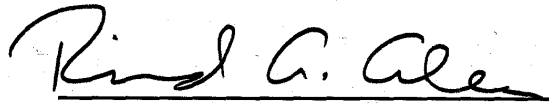
⁴ This discovery request, as well as Capitol's request for an extension of the procedural schedule, was served on NS by mail; there was no courtesy phone call or fax copy to counsel.

reason on the facts presented that it should give Capitol more time than other parties have had in similar circumstances to prepare and present its case.

CONCLUSION

Capitol's motion to extend the procedural schedule established by the Board should be denied.

Respectfully submitted,



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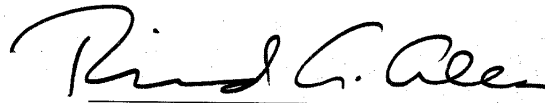
February 7, 2002

CERTIFICATE OF SERVICE

I certify that on February 7, 2001, a true copy of the foregoing "Norfolk Southern's Opposition to Capitol Material's Request For Extension of Procedural Schedule" was served by first class U.S. mail, with courtesy copies by fax, upon:

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