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February 8, 2002



VIA FEDERAL EXPRESS

Office of the Secretary
Surface Transportation Board
1925 K Street, NW
Suite 780
Washington, DC 20423

ENTERED
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Public Record

RE: Capitol Materials Incorporated-Petition for Declaratory Order
Docket No.: NOR 42068
Request for the enlargement of time
Response to Norfolk Southern's Opposition to Extension/Discovery

Dear Secretary:

The purpose of this letter is to respond to the opposition advanced by Norfolk Southern to the request of Capitol Materials, Inc. for enlargement of the procedural schedule to permit discovery.

Initially, the requested enlargement of time for 90 days will neither "unduly" nor "unnecessarily" delay this proceeding or the efforts by NS "...to collect unpaid demurrage". Indeed, the matter has been pending in State Court, in Georgia, since July, 2000; since then, to the date when Petitioner requested referral, the parties have entered into various stipulations and agreements extending the discovery period, and Plaintiff itself requested a further extension as recently as May 25, 2001. Capitol has made no objection to this or any other requested delay despite the existence by Capitol of a very substantial counterclaim in this case which still remains in Georgia.

Newly retained D.C. counsel is correct, however, that the document requests here involved "...largely replicate document requests propounded in October 2000 in the court case" (footnote 2, page 3), and counsel is further correct that it has responded to these requests in late 2000 and early 2001. The difficulty, however, is that it never produced the requested documents. On the contrary, the responses of NS indicated that no such documents were available, when in fact these very type documents (engineer's daily reports of cars spotted and pulled) were later brought to a deposition by NS in another demurrage case in Atlanta. Counsel for Capitol for the first time became aware of the existence of such documents at that deposition and requested NS to produce them. Significantly, NS has never produced such documents and a motion to compel has been filed with the court in the other case.

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Rather than file such a motion in this proceeding before the Court, and further delay referral, the decision was made to immediately bring the entire matter to the Surface Transportation Board where such discovery could be propounded.

Discovery was not propounded by Capitol prior to the entry of the STB January 16th decision because the STB had not yet even accepted the case. Upon acceptance and upon receipt of such decision (which was significantly delayed in the mail) Capitol filed its requested enlargement of the modified procedure schedule and discovery.

The gratuitous suggestion of a modified procedure schedule by NS in its lengthy responses which did nothing more than agree with Petitioner to place the identified issues before the STB, warranted absolutely no response.

Please approve the requested enlargement of time.

Very cordially yours,



Bruce E. Mitchell, Esq.

BEM/crg

cc: Richard A. Allen, Esq.
Ira L. Rachelson, Esq.