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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

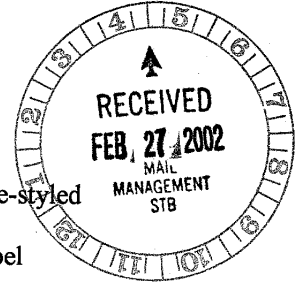
ENTERED
Office of the Secretary

FEB 28 2002

Part of
Public Record

Docket No. 42068

**MEMORANDUM IN SUPPORT OF PETITIONER'S
MOTION TO COMPEL DISCOVERY**



COMES NOW, Capitol Materials Incorporated, Petitioner in the above-styled action, and files this Memorandum in Support of Petitioner's Motion to Compel Discovery. For the reasons set forth below, Petitioner respectfully requests that the Board enter an Order GRANTING Petitioner's Motion and awarding reasonable attorney's fees incurred as a result of the filing of this Motion.

A. FACTUAL BACKGROUND

Norfolk Southern Railway Company (hereinafter referred to as "Norfolk Southern") filed its Complaint in this case on or about July 3, 2000, seeking to collect demurrage charges in the amount of \$58,840.00, which allegedly accrued between June, 1997 and September of 1998. Capitol Materials Incorporated (hereinafter referred to as "Capitol") filed its Answer with the Court on September 5, 2000 denying liability for any demurrage charges. Capitol included a Counterclaim for damage to its business. Norfolk Southern filed an Amended Complaint in May of 2001 including additional proposed charges for the period of September, 1998 through February of 2001, bringing the total amount sought by Norfolk Southern to \$216,930.00.

In May of 2001 Capitol filed a Motion for Stay and Referral to the Surface Transportation Board regarding certain demurrage issues. On August 28, 2001, the

Superior Court of Fulton County, Georgia entered an Order granting Capitol's Motion for Referral. On October 12, 2001, Capitol filed a Petition for Declaratory Order with the Surface Transportation Board.

On January 16, 2002, the Surface Transportation Board issued a Decision directing Modified Procedure and fixing dates for the filing of statements by the parties. On or about January 31, 2002, Capitol filed a request for a 90-day discovery period in this matter. Norfolk Southern submitted an opposition document regarding the discovery request and on February 8, 2002 the Surface Transportation Board issued a Decision allowing for a discovery period through and including February 28, 2002.

On February 1, 2002, Capitol served a Request for Production of Documents to Norfolk Southern (a true and correct copy of which is attached hereto as Exhibit "A"). Capitol requested four categories of documents which had not been produced by Norfolk Southern in the underlying action in Fulton County Superior Court, Georgia. The first category of documents had only recently been discovered to exist.¹

On or about February 19, 2002, Norfolk Southern served via facsimile a letter to counsel for Capitol stating that additional documents were being forwarded via Federal Express (a true and correct copy of the letter is attached hereto as Exhibit "B"). A box containing un-indexed documents was received by counsel for Capitol in Atlanta, Georgia on Wednesday, February 20, 2002.

As of this date, Norfolk Southern has failed to file any pleading in response to Capitol's Request for Production of Documents, regarding the four categories of

¹ These documents are untitled, but are the forms used by the train engineer to enter times and dates of switching. Petitioner has termed these documents "Engineer Reports." Respondent uses the term "Release & Special Instructions." Whatever the term used, these documents are the source document for the subsequent computer entries.

documents requested. The documents produced by Norfolk Southern do not appear to have any relation to the items specifically requested. Indeed, the documents appear to be copies of documents previously produced by Norfolk Southern in the underlying Superior Court action.

B. ARGUMENT AND CITATION OF AUTHORITY

The Surface Transportation Board Decision dated January 16, 2002, stated that “All parties must comply with the Rules of Practice at 49 CFR subchapter B, including 49 CFR part 1114” (See, STB Decision, Footnote 1). 49 CFR section 1114.21 states that “Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding...”

On February 1, 2002, Capitol served a Request for Production of Documents pursuant to 49 CFR section 1114.30 requesting the following four categories of documents:

1. Produce all documents establishing each switching date and time of every rail car tendered to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period, including but not limited to the daily train engineer’s report on which specific times and dates are entered for all cars spotted and pulled, and all documents in the possession of Norfolk Southern Railway Company on which such information is reflected.

NO SUCH DOCUMENTS HAVE BEEN PRODUCED.

2. Produce all bills of lading or other documents which identify the origin date of every car spotted at the facilities of Capitol Materials, Inc. at Atlanta and Duluth during the period.

NO SUCH DOCUMENTS HAVE BEEN PRODUCED.

3. Produce all documents which support, reflect or refer to your decision to provide only one switch per day to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period.

NO SUCH DOCUMENTS HAVE BEEN PRODUCED.

4. Produce all documents evidencing or showing a complete listing or log of all cars delivered to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period.

THESE DOCUMENTS HAVE NOT BEEN PRODUCED.

As noted above, Norfolk Southern has failed to serve any responsive pleading regarding Capitol's Request for Production of Documents. Norfolk Southern did not put forth any objection to the document request and has not asserted any type of privilege over the requested items. Norfolk Southern simply produced a box of documents which were apparently previously produced in the underlying action.

Capitol's Request Number One specifically requested the daily train engineer's reports for the subject period. Norfolk Southern's in-house records refer to this by the title "Release & Special Instructions". In a similar demurrage case also pending in Georgia, Norfolk Southern failed and refused to turn over these type documents and a Motion to Compel is currently pending in that action, as well. (See, Norfolk Southern Railway Company v. Integrated Distribution, Inc., State Court of Clayton County,

Georgia, Civil Action Number 2000-CV-03332-D). As stated, these documents are the source documents for all placement and pull times and dates. An example of the "Release & Special Instructions" document from the Integrated Distribution case is attached hereto as Exhibit "C".

As of the date of filing this Motion, Norfolk Southern has failed and refused to provide the requested discovery information. Norfolk Southern should be ordered to produce the discovery information immediately. In addition, Capitol is entitled to reasonable attorney's fees incurred in presenting this Motion to the Board pursuant to 49 CFR section 1114.31. Finally, the discovery period should be extended beyond February 28, 2002, since these documents are necessary to Petitioner's case-in-chief and since Norfolk Southern has failed to provide discovery responses within the applicable period set by the Board.

C. CONCLUSION

For all these reasons, Capitol Materials Incorporated respectfully requests that the Board enter an Order GRANTING Capitol's Motion to Compel and awarding reasonable attorney's fees to Petitioner Capitol. Petitioner would also request that the discovery period be extended beyond February 28, 2002, in order to provide for a suitable resolution of this matter and to provide for a reasonable inspection time of the discoverable documents.

This 26th day of February, 2002.

Rachelson & White
Suite 425
Glenridge Highlands One
5555 Glenridge Connector
Atlanta, GA 30342
Phone 770-698-0700
Fax 770-698-0071

Respectfully submitted,

RACHELSON & WHITE

Ira L. Rachelson (by T.S. w/
appears petitioner)
Ira L. Rachelson, Esq.
GA Bar No.: 591700
Counsel for Petitioner

Mitchell & Associates
3390 Peachtree Road
Suite 520
Atlanta, GA 30326
Phone 404-262-9488
Fax 404-231-3774

MITCHELL & ASSOCIATES

Bruce E. Mitchell (by T.S. w/
appears petitioner)
Bruce E. Mitchell, Esq.
GA Bar No.: 512350
Counsel for Petitioner

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. 42068

**CAPITOL MATERIALS INCORPORATED'S
REQUEST FOR PRODUCTION OF DOCUMENTS
TO NORFOLK SOUTHERN RAILWAY COMPANY**

COMES NOW Petitioner, Capitol Materials Incorporated, and hereby requests, pursuant to 49 CFR § 1114.30, that Norfolk Southern Railway Company produce for inspection and copying at the offices of the undersigned within fifteen (15) days from the date of service hereof, the documents described below that are in the possession, custody or control of Norfolk Southern Railway Company (hereinafter referred to as "Norfolk Southern") or its agents or attorneys.

If privilege is claimed as to any document otherwise covered by this request for production, Petitioner requests that each document as to which privilege is claimed be identified in a manner such that the STB may determine whether or not such document is entitled to be accorded privileged status. Specifically, state: (a) the document's sender or author, recipient, date, type of document (*e.g.*, letter, memorandum, record, etc.) and general subject matter; and (b) the basis upon which you claim the privilege. This request for production seeks inspection and copying of documents in the possession of Norfolk Southern and its agents and attorneys, including both copies and originals, unless otherwise specifically stated.



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INSTRUCTIONS AND DEFINITIONS

(a) "Document" means every writing or record of every type and description that is or has been in your possession, custody or control or of which you have knowledge, including but not limited to, correspondence, memoranda, tapes, stenographic or handwritten notes, studies, publications, books, pamphlets, pictures, drawings and photographs, films, microfilms, voice recordings, maps, reports, surveys, minutes or statistical compilations, or any other reported or graphic material in whatever form, including copies, drafts, and reproductions. "Document" also refers to any other data compilations from which information can be obtained, and translated, if necessary, by you through computers or detection devices into reasonably usable form.

(b) "Person" means any natural person, corporation, partnership, proprietorship, association, governmental entity, agency, group, organization, or group of persons.

(c) "Respondent", "you", or "yours" refers to, without limitation, the named party, Norfolk Southern, and all business entities with which Norfolk Southern is or has been affiliated, together with any predecessor, successor, parent, or subsidiary entity as well as any officer, director, employee, attorney, agent, or representative of Respondent or any such other business entity previously described herein.

(d) Petitioner refers to, without limitation, Capital Materials Incorporated, and all entities with which it is or has been affiliated, together with any predecessor, successor, parent, or subsidiary entity as well as any officer, director, employee, attorney, agent, or representative of Petitioner or any such other business entity previously described herein.

(e) The "Period" unless otherwise specifically identified, shall mean from June 1, 1997 to and including February 1, 2001.

(f) The "Atlanta Facility" unless otherwise specifically identified, shall mean the business location of Petitioner at 464 Bishop Street, NW, Atlanta, Georgia 30318.

(g) The "Duluth Facility" unless otherwise specifically identified, shall mean the business location of Petitioner at 3300 Star Boulevard, Duluth, Georgia 30096.

(h) "Rail Yard" shall mean the business location of the Respondent (whether owned, leased, operated or managed) from which freight is assembled into railcars and then the railcars are transported for delivery to Capitol.

(i) "Railcar" shall mean those certain railcars which are the property of Norfolk Southern and which were transported by Norfolk Southern to the Atlanta Facility and Duluth Facility.

(j) Terms in the singular shall be deemed to include the plural and terms in the plural shall be deemed to include the singular.

REQUESTS

1.

Produce all documents establishing each switching date and time of every rail car tendered to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period, including but not limited to the daily train engineer's report on which specific times and dates are entered for all cars spotted and pulled, and all documents in the possession of Norfolk Southern Railway Company on which such information is reflected.

2.

Produce all bills of lading or other documents which identify the origin date of every car spotted at the facilities of Capitol Materials, Inc. at Atlanta and Duluth during the period.

3.

Produce all documents which support, reflect or refer to your decision to provide only one switch per day to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period.

4.

Produce all documents evidencing or showing a complete listing or log of all cars delivered to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period.

This 1st day of February, 2002.

RACHELSON & WHITE

By: Ira L. Rachelson (by T.D. w/
Ira L. Rachelson, Esq. *express permission*)
GA Bar No.: 591700
Counsel for Petitioner

Rachelson & White
Suite 425
Glenridge Highlands One
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Atlanta, GA 30342
Phone 770-698-0700
Fax 770-698-0071

MITCHELL & ASSOCIATES

By: Bruce E. Mitchell (by *ES w/*
Bruce E. Mitchell, Esq. *express permission*)
GA Bar No. 512350
Counsel for Petitioner

Mitchell & Associates
3390 Peachtree Road
Suite 520
Atlanta, GA 30326
404-262-9488
Fax 404-231-3774

CERTIFICATE OF SERVICE

This is to certify that I have on this day served copies of the foregoing **CAPITAL MATERIALS INCORPORATED'S REQUEST FOR PRODUCTION OF DOCUMENTS TO NORFOLK SOUTHERN RAILWAY COMPANY** upon the following individuals by mailing copies of same via first class U.S. Mail in properly addressed envelopes with sufficient postage addressed to:

Richard A. Allen, Esq.
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, D.C. 20006

George A. Aspatore Esq.
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191

This 1st day of February, 2002.

Ira L. Rachelson (by *Ira L. Rachelson* w/ *affirmation*)
Ira L. Rachelson, Esq.
GA Bar No.: 591700
Counsel for Petitioner

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Glenridge Highlands One
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Fax 770-698-0071

FEB. -19' 02 (TUE) 12:19

ZUCKERT, SCOUTT

TEL: 202 298 8181

P. 002

ZUCKERT SCOUTT & RASENBERGER, L.L.P.
ATTORNEYS AT LAW

888 Seventeenth Street, N.W., Washington, DC 20006-5309
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www.zsrlaw.com

SCOTT M. ZIMMERMAN

DIRECT DIAL (202) 973-7529
sczimmerman@zsrlaw.com

February 19, 2002

BY FEDERAL EXPRESS

Ira L. Rachelson, Esq.
Rachelson & White
Glenridge Highlands One
5555 Glenridge Connector
Atlanta, Georgia 30342

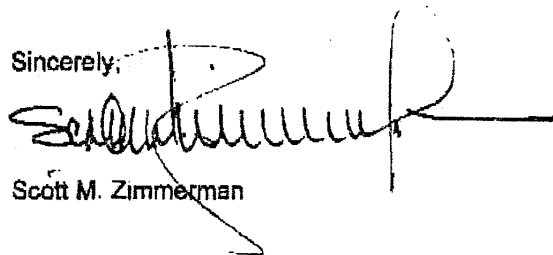
Re: *Capitol Materials Incorporated -- Petition For Declaratory Order -- Certain Rates
And Practices Of Norfolk Southern Railway Company, STB Docket No. 42068.*

Dear Mr. Rachelson:

Enclosed on behalf of Norfolk Southern Railway Company are various documents produced in response to Capitol Materials' request for production of documents. NS is continuing to investigate whether it has any other documents that are responsive and can be produced without undue burden, and we will keep you apprised in that regard.

Please feel free to contact me if you have any questions.

Sincerely,



Scott M. Zimmerman

Enclosures

cc (by fax, w/o encls): Bruce E. Mitchell, Esq.



Page 1 of 1

Griffin CYO Page # 2
60468 Sewell

STATION 1251 GRIFFIN, GA
 RELEASE & SPECIAL INSTRUCTIONS

FOR ROUTE 60468

PAGE : 0003
 09:54PM EST 08-14-00

8/14/00: PULL EMPTY TANK CARS

A

B

C

D

E

F UTLX 72256

G GATX 22012

H

SPOT TANK CARS

A DUPX 80118

B

C

D

E

F UTLX 79849

G UTLX 74037

H

DUPX 80118 SHOWS ON SY04, UTLX 79849 SHOWS ON NY01, UTLX 74037 SHOWS ON 668.

REJ S/S

CAR	L/E	FROM	TO	HAND DATE	TIME	ACTUAL	STN	R/W	RSN	RSN	EMPL
PULL GATX 022012	E	668	MACONP	08/15	05:05A						
PULL UTLX 072256	E	668	MACONP								

624 US Call

SCJX 891940 L 08/15/00 03:20A from 624 to 624 spot

FPAK 945253 L | | | to 644 spot

244 R Boy 20431 L 08/15/00 02:00A from 644 to 644 spot

R Boy 33804

R Boy 37403

CSXT 123834

R Boy 35030

R Boy 30601



CERTIFICATE OF SERVICE

This is to certify that I have on this day served copies of the foregoing

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO COMPEL

DISCOVERY upon the following individuals by mailing copies of same via first class U.S.

Mail in properly addressed envelopes with sufficient postage addressed to:

Richard A. Allen, Esq.
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, D.C. 20006

George A. Aspatore Esq.
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191

This 26th day of February, 2002.

Bruce E. Mitchell
Bruce E. Mitchell, Esq.
GA Bar No.: 512350
Counsel for Petitioner

*(by JLS w/
express permission)*

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