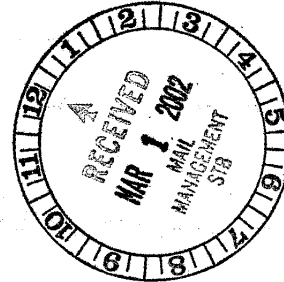


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March 1, 2002



BY HAND DELIVERY

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423

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

Dear Secretary Williams:

Enclosed for filing in this case are the original and 10 copies of Norfolk Southern's Opposition To Capitol Materials' Motion To Compel Discovery. Also enclosed is a 3.5" computer disk containing the text of this pleading in WordPerfect 5.0 format.

Please date-stamp the enclosed two extra copies of the pleading and return them to our messenger. Many thanks for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott M. Zimmerman".

Scott M. Zimmerman

Enclosures

ENTERED
Office of the Secretary

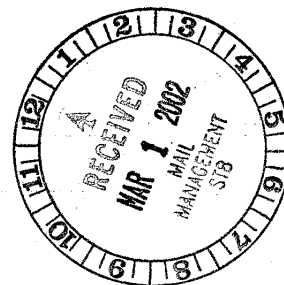
MAR 04 2002

**Part of
Public Record**

BEFORE THE
SURFACE TRANSPORTATION BOARDENTERED
Office of the Secretary

STB Docket No. 42068

MAR 04 2002

Part of
Public RecordCAPITOL MATERIALS INCORPORATED —
PETITION FOR DECLARATORY ORDER – CERTAIN RATES AND
PRACTICES OF NORFOLK SOUTHERN RAILWAY COMPANY

**NORFOLK SOUTHERN'S OPPOSITION
TO CAPITOL MATERIALS' MOTION TO COMPEL DISCOVERY**

The motion filed by Capitol Materials on February 26, 2002, asking the Board to order NS to produce documents in response to Capitol's requests, is based entirely on a series of mischaracterizations and should be denied. The motion is a transparent and baseless attempt to further lengthen the procedural schedule beyond the extension already granted by the Board.

First. The crux of Capitol's assertions is that NS allegedly "has failed and refused to provide the requested discovery information." Capitol Materials Memorandum at 5. That claim is false. The fact of the matter is that since being served with Capitol's document requests, NS has diligently worked at the time-consuming and labor-intensive task of identifying responsive documents, has produced thousands of pages of responsive documents, and has made clear that it is working to identify and produce still more.

On February 19, 2002, in response to Capitol's request, NS sent to Capitol's counsel more than 2,100 pages of documents. In the accompanying cover letter,

counsel for NS made clear that, in addition to the documents being produced that day, NS was continuing to search for additional documents. See Exhibit 1. Accordingly, Capitol's claim that "Norfolk Southern has failed and refused to provide the requested discovery information" (Motion at 5) is simply false.¹

Second, Capitol's assertion that the documents already produced by NS "do not appear to have any relation to the items specifically requested" (Mem. at 3) is also completely false. For example, Capitol's Document Request No. 1 demands "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" Among the documents produced on February 19 are numerous constructive placement notices showing the arrival dates and times of cars consigned to or ordered by Capitol Materials during the relevant period. NS also has produced demurrage bills and supporting documentation, which show information for individual cars such as the dates of constructive placement, actual placement, release, and pulling. NS also has produced listings (and supporting documentation) that identify individual cars delivered to Capitol Materials and include information, as applicable, such as constructive placement date and time, actual placement date and time, release date and time, and pull date and time.²

¹ On February 28, 2002, Capitol filed its response to NS' interrogatories and document requests to Capitol. In contrast to the thousands of pages of documents NS has furnished to Capitol, Capitol's response refused to provide any documents at all to NS.

² Because these documents include possibly sensitive shipper-specific information pertaining to Capitol, NS is reluctant to include copies of samples of these documents in this public filing, but would be pleased to provide copies to the Board for *in camera* inspection.

Third, Capitol Materials implies that NS has produced nothing more than documents already produced in the underlying Georgia state court action. That is also false. Many of the documents do replicate those previously produced in the state action. That is because, as the Board already has recognized, the requests served by Capitol in this proceeding largely overlap with requests served in the Georgia state case. See *Capitol Materials Incorporated — Petition For Declaratory Order — Certain Rates And Practices Of Norfolk Southern Railway Company*, Docket No. 42068, Decision served February 8, 2002 at n.2. However, the documents produced to Capitol on February 19, 2002 also include material, such as certain demurrage bills and supporting documentation, that had not been produced in the state proceeding because the relevant discovery had, on Capitol's motion, been suspended there.

As noted above, since producing thousands of documents to Capitol on February 19, NS has continued the extremely labor-intensive task of seeking to identify and collect additional documents responsive to Capitol's requests. Indeed, prior to the filing of Capitol's motion, NS had assembled various additional documents that even now are in the process of being reviewed in preparation for production.³ If Capitol's counsel had contacted NS' counsel before filing the motion to compel, as Board policy strongly encourages parties to do before bringing discovery disputes to the agency, much time and energy likely could have been saved.

³ In this regard, it appears that certain of the documentation requested by Capitol includes information about shippers other than Capitol, the disclosure of which arguably could fall within the proscription of 49 U.S.C. § 11904. For that reason, NS will be filing shortly a motion for protective order that would permit the designation of highly confidential materials that would be viewable only by outside counsel and consultants.

CONCLUSION

Capitol's motion to compel discovery is baseless and should be denied.

Respectfully submitted,



George A. Aspatore
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*Attorneys for
Norfolk Southern Railway Company*

March 1, 2002

CERTIFICATE OF SERVICE

I certify that on March 1, 2002, a true copy of "Norfolk Southern's Opposition To Capitol Materials' Motion To Compel Discovery" was served by first class U.S. mail (postage pre-paid) and by facsimile, upon:

Ira L. Rachelson
Rachelson & White, P.C.
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Bruce E. Mitchell
Mitchell & Associates
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February 19, 2002

BY FEDERAL EXPRESS

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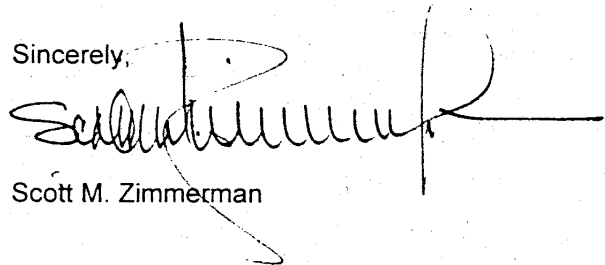
Re: *Capitol Materials Incorporated -- Petition For Declaratory Order -- Certain Rates
And Practices Of Norfolk Southern Railway Company, STB Docket No. 42068.*

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.