

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

888 Seventeenth Street, NW, Washington, DC 20006-3309
Telephone [202] 298-8660 Fax [202] 342-0683
www.zsrlaw.com

204882

RICHARD A. ALLEN

DIRECT DIAL (202) 973-7902
raallen@zsrlaw.com

March 4, 2002

BY HAND DELIVERY

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

ENTERED
Office of the Secretary
MAR 05 2002
Part of
Public Record



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

Dear Secretary Williams:

I write on behalf of respondent Norfolk Southern Railway, Inc. (NS) in response to the letter to you dated February 27, 2002 from Bruce E. Mitchell, counsel for the petitioner, Capitol Materials, Inc. (Capitol). In that letter, Mr. Mitchell asks that the discovery period in this case "be extended for a reasonable period of time beyond February 28, 2002," based on a pending motion to compel that Capitol filed last week.

Capitol's request should be denied. The Board's decision served February 8, 2002, which substantially extended the procedural schedule at Capitol's request, established February 28, 2002 as the end of discovery and requires Capitol's opening statement to be filed on April 1, 2001. There is no reason, at least at present, to extend the discovery period or otherwise modify the procedural schedule. Capitol served document requests upon NS early last month; in response, NS transmitted to Capitol more than 2100 pages of documents on February 19.

Although Capitol filed a motion to compel discovery on February 26, 2002, NS' response to that motion, filed March 1, 2002, shows that the motion is frivolous. As noted, NS produced a substantial volume of responsive documents nearly two weeks ago (long *before* the motion to compel was filed) and is continuing to respond fully to the petitioner's requests, most recently with additional documents that we expect to produce

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

Hon. Vernon Williams
March 4, 2002
Page 2

today.¹ Capitol, which was given much of the relevant documentation more than a year ago in the underlying Georgia state court action, and which filed its petition with the Board on October 11, 2002, will have ample time to prepare and file its initial statement by April 1, 2002.

NS understands the Board's February 8, 2002 decision to preclude either party from propounding additional discovery requests to the other party after February 28, 2002 but not to preclude either party from continuing its efforts after that date to respond to discovery previously propounded – as NS has been, and is, doing – or from asking the Board to compel discovery after that date if the other party has failed to comply with previously propounded requests. In that regard, Norfolk Southern notes that Capitol's response to Norfolk Southern's discovery requests, which Capitol served on February 28, 2002, refused to provide a single document to NS. While NS may need to ask the Board's assistance in obtaining Capitol's compliance with discovery, NS does not presently anticipate that the resolution of that matter will require it to request an extension of the date now established for NS' responsive filing, May 16, 2002.²

In any event, neither Capitol's motion to compel nor any other circumstance to date warrants an extension of the discovery period or any modification of the procedural schedule established by the Board's decision served February 8, 2002.

Sincerely,



Richard A. Allen
Counsel for Norfolk Southern
Railway Company

cc (by mail and fax): Ira L. Rachelson, Esq.
Bruce E. Mitchell, Esq.

¹ In addition, NS has identified a number of other documents that contain possibly sensitive information about shippers other than Capitol. To facilitate production of those documents, NS has proposed to Capitol a protective order, and is awaiting Capitol's response.

² Although NS served interrogatories and document requests on Capitol on February 13, 2002 (after receiving the Board's February 8 decision), NS does not know what evidence (if any) Capitol will rely on in its initial submission. When Capitol files that submission, NS may be required to seek the Board's permission to conduct discovery related to that filing.