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SCOTT M. ZIMMERMAN

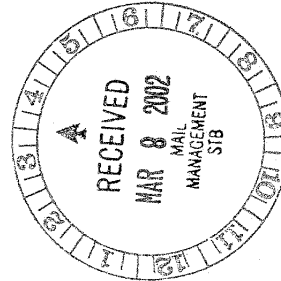
DIRECT DIAL (202) 973-7929
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204936

March 8, 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 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

ENTERED
Office of the Secretary

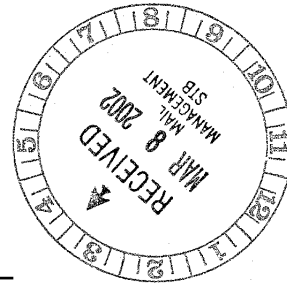
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Public Record

Enclosures

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 MOTION TO COMPEL DISCOVERY

Respondent Norfolk Southern Railway Company (NS) hereby respectfully moves the Board to order petitioner Capitol Materials Incorporated (Capitol) to comply, within 10 days of the Board's order, with the discovery requests served by NS upon Capitol on February 13, 2002 by answering separately and fully Interrogatory Nos. 1 and 2 and producing all documents responsive to Document Request Nos. 1, 2 and 4.¹

On February 13, 2002, NS served upon Capitol a set of discovery requests, consisting of 5 interrogatories and 4 requests for production of documents. NS' requests are attached as Exhibit 1.

On February 28, 2002, Capitol served a written response to NS' requests. Capitol's "response," which is attached as Exhibit 2, is, in fact, entirely *unresponsive* to

ENTERED
Office of the Secretary

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Public Record

¹ On March 7, 2002 counsel for NS conferred with counsel for Capitol with respect to the matters raised in this motion, but the parties were unable to reach resolution.

several interrogatories and document requests. Indeed, in responding to NS' document requests, Capitol has refused to produce even a single piece of paper.²

Before discussing the shortcomings of Capitol's specific responses to various individual interrogatories and document requests, a preliminary observation is warranted. Capitol's response begins by reciting ten "general objections" that Capitol "incorporates by reference" in its response to every single interrogatory and document request. These objections should be ignored, as they clearly are nothing but a pro forma effort to assert boilerplate objections to every request without any attempt to actually determine, on a request-by-request basis, whether any objection actually applies.

For example, General Objection No. 2 (which, again, is sought to be invoked indiscriminately against *all* of NS' requests) complains that the requests are "unduly burdensome and oppressive." See Exh. 2 at 1. But Capitol fails to present any actual evidence as to the alleged undue burden posed by any of NS' requests.

Similarly, General Objection No. 10 summarily objects to the definitions preceding NS' requests as "vague and ambiguous" and as "making many of the requests burdensome and compound." Nowhere, however, does Capitol even attempt to identify which specific definitions, if any, are vague or ambiguous, or explain the reasons for such claim; nor does Capitol identify which, if any, requests Capitol believes are "burdensome and compound" or provide evidence as to the specific degree of burden or explain why the particular request is unanswerable.

² This, in contrast to the more than 3,500 pages of documents that NS has produced to date, at considerable effort and without objection, in response to Capitol's requests.

Moreover, each of the remaining eight “general objections” (*i.e.*, Nos. 1, 3, 4, 5, 6, 7, 8, and 9) recites a certain objection that Capitol invokes “to the extent” that it applies. But again, Capitol never even attempts to argue, much less demonstrate, “the extent” to which any of those objections actually applies to any of the specific requests NS propounded.

It is clear, in short, that each of Capitol’s so-called “general objections” is nothing but rote boilerplate that Capitol has failed to show legitimately applies to any of NS’ requests. Those “general objections,” therefore, do not provide a valid basis for Capitol’s refusal to respond fully to NS’ requests.

We turn now to a discussion of the specific discovery requests at issue.

Interrogatory Nos. 1 and 2. Interrogatory Nos. 1 and 2 together represent an effort by NS to focus the scope of the proceeding and perhaps narrow the issues between the parties by asking Capitol to identify the specific demurrage charges it is challenging and the reasons why Capitol believes the challenged charge in each case is unreasonable. Interrogatory No. 1 asks Capitol to “identify [by providing certain specified types of information] every rail car delivered to either the Atlanta Facility or the Duluth Facility during the relevant period as to which you contend the demurrage charges assessed by NS are unreasonable.” Interrogatory No. 2 follows by asking Capitol to describe, for each individual car identified in response to Interrogatory No. 1, “the basis or bases for your claim that the demurrage charges assessed with respect to such car are unreasonable, including, but not limited to, the specific actions taken or not taken by NS with respect to such car that render the assessed demurrage unreasonable.”

In response to Interrogatory No. 1, Capitol said that its litigation “position” is that “absent documents of [NS] identifying all cars delivered during the subject period, and further absent the underlying document [sic] supporting its computer entries of the time and date of cars placed and pulled, every car identified in each PRO number of Respondent involves demurrage charges improperly and unreasonably assessed.” Exh. 2 at 3 (emphasis supplied). Similarly, in response to Interrogatory No. 2, Capitol asserted that “[a]bsent the documents requested by Petitioner of Norfolk Southern, Petitioner is able to provide examples only of repetitive instances of unreasonable demurrage charges being assessed by [NS].” In short, Capitol claims that without various documents to be supplied by NS, it either cannot, or will not, provide the issue-narrowing and issue-clarifying information sought in Interrogatory Nos. 1 and 2.

Capitol’s refusal to identify the specific cars as to which it claims the demurrage charges assessed by NS are unreasonable and the grounds for its claims is completely unjustified. Capitol appears to forget that it is the complainant before the Board with regard to NS’ demurrage charges. Its petition to the Board alleges that NS’ “charges are unreasonable based on the factual circumstances of this case” (Petition at 4), and as to those allegations, Capitol has the burden of proof. Capitol cannot refuse to respond to a discovery request asking it to identify the charges it claims to be unreasonable and the circumstances it claims makes those charges unreasonable. If it persists in such a refusal, the Board is entitled – indeed required – to conclude that Capitol cannot prove its case.

Nor is there any basis for Capitol’s “litigating position,” which seems to be that without receiving what Capitol deems a sufficient quantity of documents from NS,

Capitol is entitled to presume that every demurrage charge assessed by NS against Capitol is unreasonable. That position is nothing more than a bogus attempt to reverse the burden of proof and impose it on NS. Furthermore, as NS has explained elsewhere in responding to Capitol's baseless motion to compel, NS to date has produced (and began producing well *before* Capitol's motion was filed and *before* Capitol served its non-response to NS' discovery requests), at considerable effort, some 3,500 pages of documentation in response to Capitol's discovery requests. These include, among other things, summaries of cars delivered to Capitol during the relevant period and supporting documentation such as waybills and constructive placement notices.³ Capitol's "response" to Interrogatory Nos. 1 and 2 utterly disregards the thousands of pages of responsive documents produced by NS (not to mention any documents that may be in Capitol's own files that contain information pertaining to cars delivered during the relevant period) and fails to demonstrate that Capitol cannot properly respond to NS' interrogatories.

Document Request No. 1. Document Request No. 1 asks Capitol to produce "all documents that discuss, refer to, or relate to, the demurrage charges assessed by NS with respect to the Atlanta Facility and the Duluth Facility that accrued during the relevant period." Capitol refused, on the ground that the request is "unreasonably broad."

³ Furthermore, as explained in NS' letter to STB Secretary Vernon Williams on March 4, (responding to a letter to Secretary Williams from Capitol attorney Bruce Mitchell on February 27), 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 on February 28 proposed to Capitol a protective order, and today is filing a separate motion asking the Board to adopt it.

Capitol's objection is groundless. There is nothing "unreasonably broad" about Document Request No. 1 at all. Capitol's petition for declaratory order appears to challenge the reasonableness of *all* NS demurrage charges that accrued during the relevant period, and its response to NS' Interrogatory No. 1 appears to confirm that position. Even if it is now Capitol's position that something less than all the demurrage charges assessed by NS during the relevant period were unreasonable, documents related to all charges assessed during that period would still be discoverable.

Document Request No. 2. Document Request No. 2 asks Capitol to "produce all documents that you contend support the conclusion that the demurrage rate or rates identified in response to Interrogatory No. 3 are unreasonable."⁴ Capitol again refused to produce any documents, summarily asserting, without any support, that the request "calls for a legal conclusion and is therefore objectionable."

Capitol's objection is baseless. There is nothing objectionable about asking a party to produce documents that support a particular contention of that party. Even assuming for the sake of argument, without conceding, that such a request calls for a "legal conclusion," it still is not objectionable. Although the Board, in discovery matters, is "neither governed nor limited by the Federal Rules [of Civil Procedure]," *FMC Wyoming Corp. et al. v. Union Pac. R.R. Co.*, STB Docket No. 42022, 1998 STB Lexis 28 (served Feb. 5, 1998), the Board's discovery rules do "follow generally" the Federal Rules. *Potomac Elec. Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989, 2 S.T.B. 290, 291 n.5 (served May 14, 1997). Nothing in the Board's evidentiary rules or the

⁴ Interrogatory No. 3 asked Capitol to "[i]dentify, with reference to the applicable NS tariff(s), the specific demurrage rate or rates that you contend are unreasonable."

Federal Rules support Capitol's objection. Indeed, in the analogous context of interrogatories, the Federal Rules provide that a request is not necessarily objectionable merely because the answer "involves an opinion or contention that relates to fact or the application of law to fact." Fed. R. Civ. P. 33(c). See also *Wehr v. The Burroughs Corp.*, 1977 U.S. Dist. Lexis 14203 at *2-*3 (E.D. Pa. 1977) (compelling a response to an interrogatory asking defendant to identify all documents supporting a contention that plaintiff's discharge was not attributable to age discrimination); *Wilson Jones Co. v. Elbe File & Binder Co.*, 33 F.R.D. 356 (D. Mass. 1963) (directing production in response to a request for "[a]ll documents and other materials that in any way support the allegations" of certain paragraphs of the complaint.).

Document Request No. 4. Document Request No. 4 asks for "each written claim presented by [Capitol] to NS seeking relief from any demurrage charge with respect to any rail car delivered to either the Atlanta Facility or Duluth Facility during the relevant period, along with the demurrage bill to which each such written claim pertains."

In response, Capitol again refused to produce any documents, asserting that "[t]hese documents are in the possession of Respondent."

Capitol's response is insufficient. In a letter to the Board's Office of Compliance and Enforcement dated January 22, 2001 (attached as Exhibit 3), NS explained that, under the applicable tariff, to challenge an assessed demurrage charge a customer "must file a written claim within 45 days of the demurrage bill date to claim relief or allowance," and that NS "cannot find any evidence that [Capitol] has ever filed any type of written demurrage claim with NS since 1997." In short, NS said that it was unaware that Capitol had filed any written demurrage claims during the relevant period. The

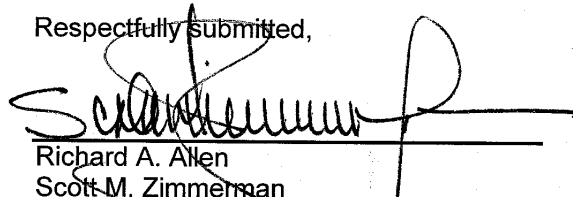
purpose of Document Request No. 4 is to allow NS to confirm that understanding, or, conversely, allow Capitol to rebut it, by ascertaining whether *Capitol* can identify and produce any documents that it believes constitute such written claims, along with the associated demurrage bill. That purpose cannot be served unless *Capitol* is required to identify and produce any documents in its possession that are responsive to the request, whether or not Capitol believes NS has copies of them. If Capitol cannot or will not produce copies of written claims in its possession, the Board can only conclude that no such claims were ever submitted.

CONCLUSION

In light of the foregoing, NS respectfully requests that the Board order Capitol Materials to answer NS' Interrogatory Nos. 1 and 2 "separately and fully" as required under 49 C.F.R. §1114.26 (and with the signature and verification required under that section), and to produce all documents responsive to NS' Document Request Nos. 1, 2 and 4, within 10 days of the Board's order.

George A. Aspatore
William H. Johnson
**NORFOLK SOUTHERN
CORPORATION**
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2657

Respectfully Submitted,



Richard A. Allen
Scott M. Zimmerman
Adam F. Hulbig
**ZUCKERT, SCOUTT &
RASENBERGER, LLP**
888 Seventeenth Street, NW
Suite 600
Washington, D.C. 20006
(202) 298-8660

*Attorneys for
Norfolk Southern Railway Company*

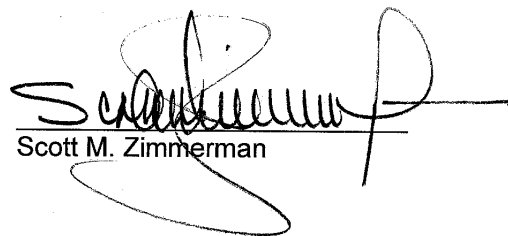
March 8, 2002

CERTIFICATE OF SERVICE

I certify that on March 8, 2002, a true copy of "Norfolk Southern's 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.
Suite 425, Glenridge Highlands One
5555 Glenridge Connector
Atlanta, Georgia 30342

Bruce E. Mitchell
Mitchell & Associates
3390 Peachtree Road
Suite 520
Atlanta, Georgia 30326



Scott M. Zimmerman

EXHIBIT 1

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 FIRST SET OF INTERROGATORIES AND
FIRST SET OF DOCUMENT REQUESTS TO CAPITOL MATERIALS**

Norfolk Southern Railway Company ("NS") hereby serves its first set of interrogatories and first set of requests for production of documents upon petitioner Capitol Materials Incorporated.

Pursuant to 49 C.F.R. § 1114.26, Capitol Materials is requested to answer separately and fully in writing each of the following interrogatories and serve its answers upon the undersigned no later than February 28, 2002. Additionally, pursuant to 49 C.F.R. § 1114.30, Capitol Materials is requested to produce for inspection and copying at the office of the undersigned no later than February 28, 2002 all documents described in the following document production requests that are in the possession, custody or control of the petitioner or its agents or attorneys. Please produce all such documents either as they are kept in the normal course of business or organized and labeled to correspond with the requests.

If privilege is claimed as to any document responsive to any of the following requests for production, NS requests that the petitioner describe each such document in sufficient detail to show whether the document is entitled to privileged status, including, without limitation, the sender or author, recipient, date, type of document (e.g., letter, report, etc.) general subject matter, and basis for the claimed privilege.

DEFINITIONS

"Document" means every writing or record of every type and description, including, but not limited to: correspondence, memoranda, tapes, stenographic or handwritten notes, studies, publications, books, pamphlets, pictures, diagrams, drawings, photographs, films, microfilms, voice recordings, maps, reports, surveys, spreadsheets, minutes or statistical compilations, or any other written or graphic material in any form, including copies, drafts and reproductions. "Document" also refers to any other data compilation from which information can be obtained, and translated, if necessary, by you through computers or detection devices into reasonably usable form.

"Capitol Materials," "Petitioner," "you" and "yours" refer to petitioner Capitol Materials Incorporated and all business entities with which Capitol Materials Incorporated is or has been affiliated (including, without limitation, all parents, subsidiaries, predecessors, successors, or affiliates) as well as any officer, director, employee, attorney, agent or other representative of Capitol Materials Incorporated or of any of the other foregoing entities.

"NS" refers to Norfolk Southern Railway Company and all business entities with which Norfolk Southern Railway Company is or has been affiliated (including, without limitation, all parents, subsidiaries, predecessors, successors, or affiliates) as well as

any officer, director, employee, attorney, agent or other representative of Norfolk Southern Railway Company or of any of the other foregoing entities.

"The relevant period" means June 1, 1997 through March 31, 2001, unless otherwise indicated.

The "Atlanta Facility" means Capitol Materials' business location at 464 Bishop Street, NW, Atlanta, Georgia 30318.

The "Duluth Facility" means Capitol Materials' business location at 3300 Star Boulevard, Duluth, Georgia 30096.

INTERROGATORIES

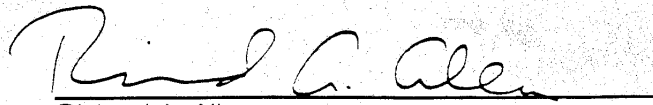
1. Please identify every rail car delivered to either the Atlanta Facility or the Duluth Facility during the relevant period as to which you contend the demurrage charges assessed by NS are unreasonable. For purposes of this interrogatory, "identify" means to provide for each car its (a) initials, (b) number, (c) arrival date and time, (d) constructive placement date and time (if applicable), (d) actual placement date and time, (e) release date and time, and (f) pull date and time.
2. For each of the individual cars identified in response to Interrogatory No. 1, describe, with specificity, the basis or bases for your claim that the demurrage charges assessed with respect to such car are unreasonable, including, but not limited to, the specific actions taken or not taken by NS with respect to such car that render the assessed demurrage unreasonable.
3. Identify, with reference to the applicable NS tariff(s), the specific demurrage rate or rates that you contend are unreasonable.

4. For each rate identified in response to Interrogatory no. 3, set forth with specificity all the facts that you contend demonstrate the unreasonableness of such rate.
5. Identify, with reference to the applicable NS tariff(s), the specific method or methods by which NS calculates its demurrage charges that you contend are unreasonable and describe with specificity the basis or bases for such contention.

DOCUMENT REQUESTS

1. Produce all documents that discuss, refer to, or relate to, the demurrage charges assessed by NS with respect to the Atlanta Facility and the Duluth Facility that accrued during the relevant period.
2. Produce all documents that you contend support the conclusion that the demurrage rate or rates identified in response to Interrogatory No. 3 are unreasonable.
3. Produce all documents that you contend support the conclusion that the specific method or methods by which NS calculates its demurrage charges that you identify in response to Interrogatory No. 5 are unreasonable.
4. Produce each written claim presented by you to NS seeking relief from any demurrage charge with respect to any rail car delivered to either the Atlanta Facility or Duluth Facility during the relevant period, along with the demurrage bill to which each such written claim pertains.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard A. Allen", is written over a horizontal line.

Richard A. Allen
Scott M. Zimmerman
Adam F. Hulbig
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, D.C. 20006
(202) 298-8660

Attorneys for
Norfolk Southern Railway Company

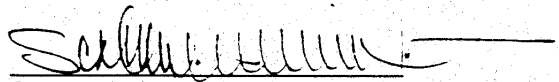
February 13, 2002

CERTIFICATE OF SERVICE

I certify that on February 13, 2001, a true copy of "Norfolk Southern's First Set Of Interrogatories And First Set Of Document Requests To Capitol Materials " was served by first class U.S. mail, postage pre-paid, and by facsimile, upon:

Ira L. Rachelson
Rachelson & White, P.C.
Suite 425, Glenridge Highlands One
5555 Glenridge Connector
Atlanta, Georgia 30342

Bruce E. Mitchell
Mitchell & Associates
3390 Peachtree Road
Suite 520
Atlanta, Georgia 30326


Scott M. Zimmerman

COPY

EXHIBIT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. 42068

**CAPITOL MATERIALS INCORPORATED'S
RESPONSE TO NORFOLK SOUTHERN RAILWAY COMPANY'S
FIRST INTERROGATORIES AND FIRST
SET OF DOCUMENT REQUESTS**

COMES NOW, Petitioner Capitol Materials Incorporated (hereinafter referred to as "Capitol") and serves this its Response to Norfolk Southern Railway Company's First Interrogatories and First Set of Document Requests, as follows:

GENERAL OBJECTIONS

Capitol objects to each and every discovery request on the following grounds. Each General Objection is incorporated by reference in the response to each specific item set forth below.

1. Capitol objects to each of Norfolk Southern's discovery requests to the extent that they seek information regarding communications between Capitol and its legal counsel on the grounds that such communications are privileged and are not subject to discovery. Capitol further objects to each of Norfolk Southern's discovery requests to the extent that they seek information regarding materials prepared by or for Capitol or its representatives in anticipation of litigation or for trial on the grounds that Norfolk Southern has not made the required showing for the discovery of such work product material.

2. Capitol objects to these discovery requests on the ground that they are unduly burdensome and oppressive.

3. Capitol objects to these discovery requests to the extent they seek information that is reasonably available upon a reasonable inquiry of the information in the possession, custody or control of Norfolk Southern.

4. Capitol objects to these discovery requests to the extent they seek information or documents outside the time period relevant to the subject matter of this lawsuit.

5. Capitol objects to these discovery requests to the extent they seek information that is protected from discovery by any privilege, including but not limited to, the attorney-client privilege and/or the work product doctrine.

6. Capitol objects to these discovery requests to the extent they seek information of a private, non-public, confidential, or proprietary nature, including trade secrets and/or commercial, financial, or other information which has not yet been disseminated publicly, or any other matter protected by any commercial information or similar privilege or any right of privacy. Capitol hereby asserts the confidentiality of such information and the privilege protecting it, and objects to the discovery requests on that basis. Capitol will not produce such information until such time as a suitable protective order has been entered, if at all.

7. Capitol objects to these discovery requests to the extent that they seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this action.

8. Capitol objects to these discovery requests to the extent they seek information that is already in the possession of Norfolk Southern or that is equally available to Norfolk Southern.

9. Capitol objects to these discovery requests to the extent they are burdensome, oppressive, vague, ambiguous, overly broad, and/or redundant.

10. Capitol objects to the definitions preceding the discovery as vague and ambiguous, and as making many of the requests burdensome and compound.

Without waiving any of the foregoing objections, Capitol responds as follows:

SPECIFIC RESPONSES

1.

Please identify every rail car delivered to either the Atlanta Facility or the Duluth Facility during the relevant period as to which you contend the demurrage charges assessed by NS are unreasonable. For purposes of this interrogatory, "identify" means to provide for each car its (a) initials, (b) number, (c) arrival date and time, (d) constructive placement date and time (if applicable), (d) actual placement date and time, (e) release date and time, and (f) pull date and time.

RESPONSE:

Capitol has taken the position throughout the course of the Georgia Court proceeding and now continues in this position that absent documents of Respondent identifying all cars delivered during the subject period, and further absent the underlying document supporting its computer entries of the time and date of cars placed and pulled, every car identified in each PRO number of Respondent involves demurrage charges improperly and unreasonably assessed. The initials of each car, each car number, the arrival dates and times, the CP's, and the AP's, the release dates and times and the pull dates and times, represent information already available to Respondent through its own records.

2.

For each of the individual cars identified in response to Interrogatory No. 1, describe with specificity, the basis or bases for your claim that the demurrage charges assessed with respect to such car are unreasonable, including, but not limited to, the specific actions taken or not taken by NS with respect to such car that render the assessed demurrage unreasonable.

RESPONSE:

Absent the documents requested by Petitioner of Norfolk Southern, Petitioner is able to provide examples only of repetitive instances of unreasonable demurrage charges being assessed by Respondent.

3.

Identify, with reference to the applicable NS tariff(s), the specific demurrage rate or rates that you contend are unreasonable.

RESPONSE:

The specific demurrage daily rate has increased during the course of the shipments which are the subject of this proceeding from \$20 to \$60 absent justification or cost relationship.

Further, the refusals to carry over credits represents a unilateral and arbitrary decision of Respondent, again reflective of a captive traffic context, as here.

4.

For each rate identified in response to Interrogatory no. 3, set forth with specificity all the facts that you contend demonstrate the unreasonableness of such rate.

RESPONSE:

See response to Number 3 above.

5.

Identify, with reference to the applicable NS tariff(s), the specific method or methods by which NS calculates its demurrage charges that you contend are unreasonable and describe with specificity the basis or bases for such contention.

RESPONSE:

See response to Number 3 above.

RESPONSE TO DOCUMENT REQUESTS

1.

Produce all documents that discuss, refer to , or relate to, the demurrage charges assessed by NS with respect to the Atlanta Facility and the Duluth Facility that accrued during the relevant period.

RESPONSE:

Petitioner objects to this request as it is unreasonably broad.

2.

Produce all documents that you contend support the conclusion that the demurrage rate or rates identified in response to Interrogatory No. 3 are unreasonable.

RESPONSE:

This request calls for a legal conclusion and is therefore objectionable.

3.

Produce all documents that you contend support the conclusion that the specific method or methods by which NS calculates its demurrage charges that you identify in response to Interrogatory No. 5 are unreasonable.

RESPONSE:

The pertinent tariffs of Norfolk Southern used as a basis for calculation, together with each of the freight bills rendered; these documents are in the possession of Respondent.

4.

Produce each written claim presented by you to NS seeking relief from any demurrage charge with respect to any rail car delivered to either the Atlanta Facility or Duluth Facility during the relevant period, along with the demurrage bill to which each such written claim pertains.

RESPONSE:

These documents are in the possession of Respondent.

This 28th day of February, 2002.

RACHELSON & WHITE

Ira L. Rachelson (by T.S.W.)
Ira L. Rachelson, Esq. *appears pro se*
GA Bar No.: 591700
Counsel for Petitioner

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

MITCHELL & ASSOCIATES

Bruce E. Mitchell (by T.S.W.)
Bruce E. Mitchell, Esq. *appears pro se*
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 **CAPITOL MATERIALS INCORPORATED'S RESPONSE TO NORFOLK SOUTHERN RAILWAY COMPANY'S FIRST INTERROGATORIES AND FIRST SET OF DOCUMENT REQUESTS** 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, DC 20006

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

This 28th day of February, 2002.

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

(by J.A.S. w/ express permission)

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



EXHIBIT 3

Norfolk Southern Corporation
National Customer Service Center
125 Sprint Street, S.W. - Box 153
Atlanta, Georgia 30303

Deborah H. Butler
AVP Transportation Customer Service
404/658-2062

January 22, 2001

Mr. Melvin Clemens
Director, Office of Clients & Enforcement
Surface Transportation Board
Suite 780
Washington, DC 20423-0001

Dear Mr. Clemens:

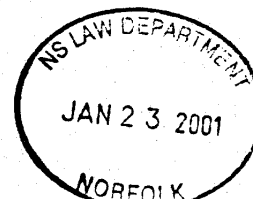
This is in reference to your 12/21 inquiry regarding a demurrage complaint letter from Mr. David Whitcomb of Capitol Materials (CM). The principal complaints in Mr. Whitcomb's letter include: the lack of multiple switches per day; invalid constructive placement notices; bunching at the plant; remarks attributed to an unnamed NS employee to the effect that CM should "ignore the charges"; and Mr. Whitcomb's observation that the charges "will often simply disappear and never were re-billed."

Here's what we know about each of these issues.

- CM has two Atlanta locations, both of which receive constructive placement notices. We believe these notices were correctly issued. CM has never filed a written dispute or provided any written evidence that NS constructive placement notices were incorrect. CM has verbally referred to an "old contract" that excludes them from demurrage unless the railcar is located on their siding. We can find no such contract and CM has been unable to furnish one. We suspect CM incorrectly believes section 6 of its track agreement with Norfolk Southern limits their demurrage in this fashion. This track agreement is unrelated to demurrage; a copy is attached for your reference.
- The issue of an extra switch per day came up during an April 14, 1999 meeting between NS and CM. This meeting was held to resolve various demurrage issues, including the outstanding balance owed NS. During this meeting, NS Group Sales Manager Larry Rasche encouraged CM to request an extra switch if and when they needed one. Larry advised that such a switch was possible, but would likely be chargeable. According to Mr. Darnell Wood, NS Terminal Superintendent for the Atlanta Terminal during the time period in question, CM never requested an extra switch.

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Operating Subsidiary: Norfolk Southern Railway Company

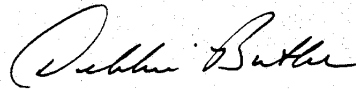


- Bunching relief does not apply under demurrage tariff NS 6004, which became effective March 1, 2000. The tariff and monthly average agreement used prior to March 1, 2000, (copy attached) likewise did not allow for bunching relief. We can find no evidence that CM has ever filed for bunching relief. If such a claim had been made, it would have been declined.
- NS does not have a policy or process that automatically waives or reduces demurrage charges once they have been billed. Each patron must file a written claim within 45 days of the demurrage bill date to claim relief or allowance. Any employee that would counsel CM or any customer to simply ignore a legitimate demurrage bill would be subject to dismissal.

In summary, we cannot find any evidence that CM has ever filed any type of written demurrage claim with NS since 1997. CM has been unable or unwilling to provide any creditable dispute or evidence that will allow us to adjust their bills. This is despite multiple visits, meetings, letters, and face to face attempts to explain our bills and to explain how CM can file a claim.

Please do not hesitate to call me or Wes Alexander (404-589-6205) if you need additional information or would like to discuss Capitol Material's claim in greater detail.

Very truly yours,



Deborah H. Butler