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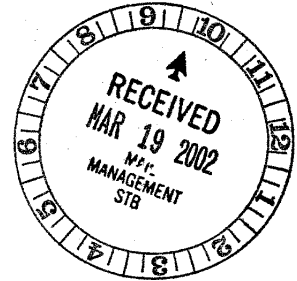
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March 18, 2002

VIA FEDERAL EXPRESS

Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-00001



RE: *Capitol Materials Incorporated\Petition for Declaratory Order\Certain Rates and Practices of Norfolk Southern Railway Company*
STB Docket No. 42068

Ladies and Gentlemen:

Enclosed herewith is an original and 11 copies of Capitol Materials Reply to Norfolk Southern Railway Company's Response to the Motion to Compel in connection with the above-referenced matter. Please file this document in accordance with the procedures of your office and return a copy marked "filed of record" in the enclosed envelope provided for your convenience.

If you have any questions or need further information, please give our office a call.

Yours very sincerely,

RACHELSON & WHITE,
a Professional Corporation

A handwritten signature in cursive script that reads 'Carole A. Arellano'.

Carole A. Arellano,
Assistant to Ira L. Rachelson

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Office of the Secretary

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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

**REPLY TO NORFOLK SOUTHERN RAILWAY COMPANY'S RESPONSE TO
CAPITOL MATERIALS INCORPORATED'S MOTION TO COMPEL DISCOVERY**

COMES NOW, Petitioner Capitol Materials Incorporated ("Capitol") and files its Reply to Respondent Norfolk Southern Railway Company's ("Norfolk Southern's") Response to Motion to Compel Discovery, showing the Surface Transportation Board as follows:

INTRODUCTION AND SUMMARY OF ARGUMENT

Norfolk Southern has failed to respond to the Requests for Production of Documents served upon them by Capitol on February 1, 2002. Norfolk Southern has failed to comply with the requirements of a Decision of this Board dated January 16, 2002 that stated that "All parties must comply with the Rules of Practice at 49 CFR subchapter B, including 49 CFR 1114." Consequently, Capitol's Motion to Compel Discovery should be granted.

Norfolk Southern's "response" to Capitol's attempt to resolve the issues to be presented to the Board has been to place what has been represented to be 3,500 pages of documents in boxes and send them to counsel for Capitol with a cover letter. Norfolk Southern has failed and refused to make any attempt to index or reference the documents to explain the relationship, if any, of the documents to Capitol's Requests. The documents were not organized in any fashion. None of the documents produced were accompanied by a pleading containing responses to Capitol's Requests. In response to Capitol's request for an explanation concerning the documents that were produced,

counsel for Norfolk Southern responded that Norfolk Southern had adequately complied.

Since the only effort made by Norfolk Southern to organize the documents produced to Capitol was to count them, the response of Norfolk Southern should be considered as a deliberate effort to frustrate the discovery procedures of this Board. Norfolk Southern has used the number of documents produced in support of its Response to the Motion to Compel of Capitol as well as in support of its own Motion to Compel. However, the number of documents produced simply is not relevant to either pleading. Possibly the plan of Norfolk Southern is to burden Capitol and the Board with a senseless, but time-consuming discovery fight. This tactic would serve to divert Capitol and the Board from the essential issue to be resolved, which is the failure of Norfolk Southern to adequately manage the delivery of freight essential to Capitol's business.

Norfolk Southern's further "response" to Capitol's Requests has been to file a baseless Motion for Protective Order. The purpose of the Motion for Protective Order is to further delay production of documents and thereby prevent Capitol from obtaining documentation that will establish Norfolk Southern's failure to properly manage the delivery of the rail cars that are the subject matter of this Petition.

Significantly, while the documents produced by Norfolk Southern are voluminous, the documents delivered by Norfolk Southern do not relate to Capitol's Requests. The documents that are produced appear to be copies of documents previously produced in the underlying State Court case.

Norfolk Southern's obstructionist tactics should not be condoned. It has been apparent throughout the pendency of this proceeding that the position of Norfolk Southern with regard to full and fair discovery has been to stonewall, delay and obfuscate.

STATEMENT OF FACTS

On February 1, 2002, Capitol served a Request for Production of Documents to Norfolk Southern. Capitol requested four categories of documents which had not been previously produced by Norfolk Southern in the underlying Superior Court case.

On or about February 19, 2002, Norfolk Southern served, by facsimile, a letter to counsel for Capitol stating that documents were being forwarded via Federal Express. A box containing un-indexed, un-referenced documents were received by counsel for Capitol on February 20, 2002. The box did not contain any pleadings of any kind or any response of any kind to the Requests served by Capitol.

On March 4, 2002, Norfolk Southern transmitted by cover letter approximately 1,400 additional pages of un-indexed, un-referenced documents to counsel for Capitol. Again, despite providing these additional documents, Norfolk Southern still has not provided documents that are responsive to Capitol's Requests. Norfolk Southern has also failed to provide any pleadings or response to any kind to the Requests served by Capitol.

On March 8, 2002, Norfolk Southern filed its Motion for Protective Order seeking to further restrict and delay its production of responsive documents.

As of the date of this Reply, Norfolk Southern has failed and refused to file any pleading in response to Capitol's Requests for Production of Documents. The documents which have been produced by Norfolk Southern, while voluminous, do not appear to have any relation to Capitol's Requests and appear to be copies of documents previously produced in the underlying Superior Court case.

ARGUMENT AND CITATION OF AUTHORITY

The concept of full and fair discovery lies at the heart of our legal system. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickmann v. Taylor*, 329 U.S. 495, 507 (1947).

Further, "discovery cannot be a game of hide-and-seek." *Hogue v. Freuhauf*, 151 F.R.D. 635, 639 (C.D.Ill. 1993).

Despite these well-accepted rules of law that govern discovery, Norfolk Southern has engaged in tactics of delay and obstruction calculated to prevent the production of documents that likely support Capitol's position that Norfolk Southern engages in unfair and unreasonable rate practices.

Further, Norfolk Southern has chosen not to comply with a Decision of this Board in that it has failed and refused to produce documents regarding matters which are clearly relevant to the subject matter of this proceeding. See, 49 CFR 1114.21.

Capitol served its Requests for Production requesting four categories of documents which had not been produced by Norfolk Southern in the underlying State Court case. The documents produced by Norfolk Southern were, for the most part, largely duplicative of documents produced by Norfolk Southern in the underlying State Court case.

Norfolk Southern, in its Response to Capitol's Motion to Compel Discovery, admits that the 3,500 pages of documents were largely duplicative of those produced by it in response to discovery served in the underlying State Court case. Norfolk Southern also admits that it has produced documents that were responsive to the discovery served but stayed by referral to the Surface

Transportation Board in the underlying Superior Court case.

In this proceeding, Capitol has not requested production of those documents. To the contrary, Capitol has requested production of four categories of documents which had not been produced by or requested of Norfolk Southern in the underlying State Court case. Norfolk Southern has failed to respond to Capitol's Requests. When finally confronted with the likelihood that it will be required to produce the requested documents, Norfolk Southern's sole response has been to file a Motion for Protective Order to delay the production of responsive documents.

Norfolk Southern's abuse of discovery and violation of the Board's Decision should not be permitted. Capitol's Motion to Compel Discovery should be granted.

CONCLUSION

Because it is clear that Norfolk Southern has been in possession of the documents responsive to Capitol's Requests since the inception of this proceeding and the inception of the State Court action, Capitol respectfully requests that its Motion to Compel Discovery be granted by the Board.

Further, because Norfolk Southern has concealed the documents from Capitol, the time allowed for discovery should be extended in order to allow Capitol adequate time to review the documents and complete preparation of its case. Capitol requests that the Board allow Capitol a period of forty-five (45) days following production of the documents within which to complete discovery.

The abusive discovery tactics of Norfolk Southern should not be sanctioned. The documents that are the subject matter of Capitol's Requests are essential in order to establish the transit times for the subject railcars. Norfolk Southern has failed to produce the subject documents because they may be detrimental to its position. Regardless, these documents have been properly and timely

requested by Capitol and, under the applicable rules, must be produced. The failure to produce the documents has not been explained and no support for the apparent concealment has been offered. Capitol respectfully requests that the Board grant its Motion to Compel Discovery and order Norfolk Southern to produce all responsive documents within ten days of the date of entry of its Order and further requests the extension of the discovery period for a period of forty-five (45) days following production of the documents with which to complete discovery, and such other relief that is just and proper in the premises.

This 18th day of March, 2002.

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Respectfully submitted,

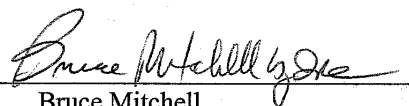
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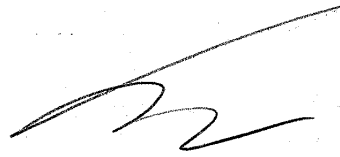
CERTIFICATE OF SERVICE

This is to certify that I have on this day served copies of the foregoing Reply to Response to Motion to Compel Discovery upon the following individuals by mailing copies of the same via first class mail U.S. Mail in properly addressed envelopes with sufficient postage addressed to:

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George A. Aspatore, Esq.
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This 18th day of March, 2002.



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