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205017

March 21, 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 Reply To Capitol Materials' Response To NS' Motion For Protective Order. 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 dark ink, appearing to read "Scott M. Zimmerman".

Scott M. Zimmerman

Enclosures

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Office of the Secretary
MAR 21 2002
Part of
Public Record

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 REPLY TO CAPITOL MATERIALS' RESPONSE TO NS'
MOTION FOR PROTECTIVE ORDER**

In response to Norfolk Southern's motion for protective order – a motion proposed by NS to *facilitate* production of documents *to Capitol* -- Capitol asks that the motion be denied and, without basis, attacks NS' good faith by accusing NS of a "pattern and practice" of "concealment of crucial documents" and asserts that the motion for protective order is "interposed for delay." Capitol's assertions are completely unsupported in fact or in logic, and Capitol's opposition is nothing more than a transparent effort to obtain a further extension of the procedural schedule. That request is completely unwarranted and NS asks that it be denied.¹

¹ Although the Board's rules generally prohibit replies to replies, see 49 C.F.R. § 1104.13(c), Capitol's unwarranted allegations of delay apparently are interposed for the purpose of supporting a new request for additional relief – namely, a still further extension of "discovery." See Opp. at 9. Because Capitol's filing seeks new relief, NS submits that it is a pleading to which NS is entitled to respond under 49 C.F.R. § 1104.13(a).

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A. As NS' Motion Stated, Entry Of The Requested Protective Order Is Necessary To Facilitate The Prompt Production Of Documents To Capitol.

Capitol asserts that good cause has not been shown for entry of the proposed protective order. NS respectfully disagrees.

As the Board has found, "[t]he unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury." *Arizona Elec. Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. Co. And Union Pacific R.R. Co.*, STB Docket No. 42058 (decision served February 16, 2001). Protective orders of the type requested here are routinely entered by the parties' consent in cases such as this for the purpose of *aiding* the discovery of commercially sensitive information. See NS Motion at 3 and cases cited.

Here, as NS previously has explained, in responding to Capitol's discovery requests served by mail on February 1, 2002, NS collected and transmitted to its counsel, among numerous other documents, several hundred pages of documents that appear responsive to certain of Capitol's requests but that identify shippers other than Capitol and include data regarding the handling of individual cars for such shippers and, in some cases, information pertaining to the commodity shipped.² However, 49 U.S.C.

² Moreover, apart from the documents that would be subject to the protective order, NS *already* has produced to Capitol more than 3,800 pages of other documents responsive to Capitol's requests (in contrast to Capitol's ongoing refusal to produce any documents at all in response to NS' requests).

§ 11904³ bars the unauthorized disclosure by a rail carrier of certain shipper information, including information regarding the “nature, kind, quantity, destination, consignee, or routing of property tendered” to the carrier that “may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions” of the shipper. Because NS has identified documents that may fall within the prohibition of § 11904, NS proposed a protective order that would permit the production of those documents and good cause exists to grant it.

Capitol’s assertion that NS’ motion “is interposed for delay” and is “dilatory in nature” is patently absurd. First, as a matter of logic, NS plainly has no reason to want to delay the proceedings. This proceeding originated from an underlying Georgia state court case in which NS is seeking to recover from Capitol several years’ worth of unpaid demurrage charges. Every day of delay is another day that NS does not have the money it believes Capitol owes. If delay is in any party’s interest, it would be Capitol’s.

Moreover, the facts don’t support Capitol’s allegation. As noted, the purpose of the motion NS has filed is to *facilitate* the production of documents that contain sensitive information that otherwise could not be disclosed. Upon identifying the need for such an order after receiving and reviewing the subject documents in late February, counsel for NS drafted a motion and proposed protective order and transmitted them to Capitol’s counsel nearly three weeks ago, on February 28. NS heard nothing from Capitol for a week, whereupon NS again took the initiative by contacting Capitol’s counsel on March

³ Due to a typographical error, this section was inadvertently referred to in the motion for protective order as section 10904. Capitol, however, was on notice of the correct section of the Code, as it was cited in the draft protective order attached to the motion. NS trusts, of course, that Capitol’s counsel read the proposed protective order before opposing it.

7 to discuss the motion and seek Capitol's consent before filing. Failing to reach agreement, however, NS was forced to file its motion the next day without Capitol's consent. Another full week went by before Capitol's opposition reached the Board on March 15.⁴

In sum, the facts show that, upon determining the need for a protective order, NS acted promptly and in good faith to make it happen. Had Capitol promptly responded to NS' draft motion and given the consent that is routine in such cases, an agreed-to order could have been entered and Capitol likely could have had the subject documents weeks ago. Instead, it has inexplicably opposed the very process that would permit that to happen.

B. Capitol's Request For An Unspecified Further Extension Of "Discovery" Is Unwarranted. Any Delay In The Proceedings To Date Is Of Capitol's Own Making.

The foregoing facts also make clear that Capitol's new request for still a further extension of discovery (for an unspecified period) is not warranted. Indeed, apart from the recent history of the last few weeks, the longer-term course of past events further demonstrates that Capitol's request should not be granted.

The facts, in sum, are these:

- NS filed its state court complaint on July 3, 2000.
- In its Answer, Affirmative Defenses and Counterclaim, filed two months later on September 5, 2000, Capitol first asserted that certain issues were within the primary and exclusive jurisdiction of the STB. Nevertheless, Capitol waited an

⁴ Despite the short time remaining before the April 1, 2002 due date for its initial submission, Capitol served its opposition by regular mail, so that did not reach the undersigned until March 18.

additional eight full months, until May 2, 2001 (the last possible day permitted by the court) to file its motion to stay the judicial proceedings and refer various issues to the Board.

- At the same time it filed its referral motion, Capitol sought to *suspend discovery* in the state proceeding, and indeed, filed a motion with the court on May 4, 2001 seeking to prevent NS from pursuing further discovery while the referral motion was pending. See Defendant's Brief In Support Of Its Motion For Protective Order, filed in the state court action.⁵

- The state court granted Capitol's motion to refer certain issues to the STB in an order dated August 27, 2001. Nevertheless, Capitol waited more than six weeks, until October 10, 2001, to submit its Petition For Declaratory Order to the Board.

- Capitol then waited until February 1, 2002—*sixteen weeks* after filing its petition, two weeks after the Board established its procedural schedule and only two weeks before Capitol's initial submission originally was due—to serve its document

⁵ Prior to the filing of Capitol's motion for referral on May 2, 2001, the parties engaged in substantial discovery. See Opp. at 4-5 (admitting that NS on multiple occasions produced documents in response to Capitol's requests). Capitol's assertion, see Opp. at 5, that NS did not respond to Capitol's Third Request For Production of Documents (served March 21, 2001), is false. NS served a written response on April 23, 2001; Capitol's referral motion and request to suspend discovery followed shortly thereafter.

requests on NS in this proceeding. Despite the short time before the due date for its submission, Capitol served its requests by regular mail.

- Upon receiving Capitol's requests the following week, NS promptly undertook to identify and assemble responsive documents—a task, given the breadth of Capitol's document production requests, that has required a very substantial amount of time, effort and expense. NS submitted its first batch of responsive documents, totaling some 2,100 pages, on February 19, 2002. Counsel for NS specifically noted in his transmittal letter that NS was continuing to investigate whether additional responsive existed and could be produced. (Inexplicably, Capitol filed a frivolous motion to compel on February 26, to which NS promptly responded.) NS produced a second batch of responsive documents on March 4, 2002, totaling an additional 1,400 pages. NS produced a third batch of documents on March 19, 2002, totaling approximately 350 pages.

- Meanwhile, on or about February 24, NS' counsel received the documents that are the subject of the motion for protective order. As described above, NS promptly drafted a motion for protective order to permit the production of those documents and transmitted it to Capitol's counsel on February 28. Capitol failed to respond, and when contacted by NS on March 7, refused to permit NS to represent that Capitol consented to the motion. A week after NS filed the motion on March 8, Capitol filed its opposition (again, serving it by regular mail, so that it reached the undersigned on March 18).

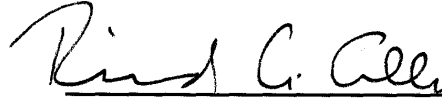
As the foregoing makes clear, there is no basis whatsoever for Capitol's claims of deliberate delay and concealment on NS' part. Indeed, the timeline clearly

demonstrates that, at numerous stages of the process since the state court case began, Capitol has delayed by weeks and even months various actions that it could have taken more promptly in order expeditiously to advance this matter. Under the circumstances, Capitol should not now be heard at the 11th hour, after the Board already has extended the schedule once at Capitol's request, to complain that it needs still more time.

CONCLUSION

NS respectfully asks that Capitol's request for a further extension of the discovery period be denied.

Respectfully submitted,



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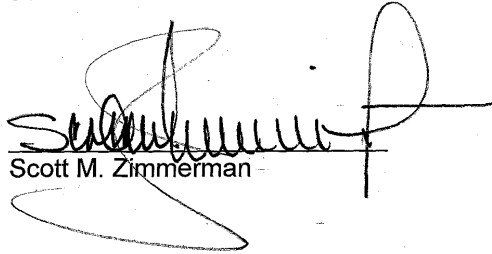
March 21, 2002

CERTIFICATE OF SERVICE

I certify that on March 21, 2002, a true copy of Norfolk Southern's Reply To
Capitol Materials' Response To NS' Motion For Protective Order was served by first
class U.S. mail (postage pre-paid) and by facsimile, upon:

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