

205075

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. 42068



ENTERED
Office of the Secretary

MAR 28 2002

Part of
Public Record

CAPITOL MATERIALS INCORPORATED
PETITION FOR DECLARATORY ORDER - CERTAIN RATES AND
PRACTICES OF NORFOLK SOUTHERN RAILWAY COMPANY

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

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Capitol fully responded to the Interrogatories and Requests for Production served upon it by Norfolk Southern. Norfolk Southern's Motion to Compel Discovery is not based on Capitol's failure to respond. Instead Norfolk Southern does not approve or agree with the substance of Capitol's Responses. Capitol is only required to respond to the Interrogatories posed and to the Requests for Production served. Capitol is not required to provide discovery responses that accord and conform with Norfolk Southern's litigation position.

Norfolk Southern's Motion to Compel Discovery should be denied. Capitol fully responded to the discovery served upon it.

STATEMENT OF FACTS

On February 13, 2002, Norfolk Southern served five Interrogatories and four Requests for Production on Capitol.

On February 28, 2002, Capitol served its written Responses to both the Interrogatories and the Requests for Production.

On March 8, 2002, Norfolk Southern filed its Motion to Compel Discovery seeking additional response to Interrogatory Nos. 1 and 2 and the production of documents responsive to Requests for Production Nos. 1, 2 and 4.

ARGUMENT AND CITATION OF AUTHORITY

Capitol Fully and Completely Responded to Norfolk Southern's Discovery Requests.

As will be more fully shown below, Capitol fully and completely responded to the Interrogatories and Requests for Production served on it by Norfolk Southern. In fact, in its Motion to Compel Discovery, Norfolk Southern admits that Capitol fully responded to, at the very least, Interrogatory No. 1. Given this fact, it is apparent that Norfolk Southern's Motion is interposed for purpose of harassment and abuse. Norfolk Southern may not like or agree with Capitol's Responses but that does not equate with a failure of Capitol to respond.

Norfolk Southern's Interrogatory No. 1 asks:

Please identify every rail car delivered either to the Atlanta Facility or the Duluth Facility during the relevant period as to which you contend the demurrage charges assessed by Norfolk Southern 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) [sic] actual placement date and time, (e) release date and time, and (f) pull date and time.

Capitol responded to Interrogatory No. 1 as follows:

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 C Ps and the A Ps, the release dates and times and the pull dates and times, represent information already available to Respondent through its own records. (Emphasis added).

Capitol answered the question posed to it by Capitol. Norfolk Southern asked that Capitol identify each and every rail car on which Capitol contends that unreasonable demurrage charges were assessed. Capitol did so: Capitol stated that, conditionally, that is, absent the production of certain documents by Norfolk Southern, its position was that demurrage charges were unreasonably assessed on every car identified in each PRO of Norfolk Southern. Norfolk Southern later admits that Capitol's Response to Interrogatory No. 1 is complete: "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 Interrogatory No. 1 appears to confirm that position." (Norfolk Southern's Motion to Compel Discovery, p. 7).

If Norfolk Southern acknowledges and understands this to be the position of Capitol, how can Capitol respond any more fully to Interrogatory No. 1? Capitol has stated that it cannot answer Interrogatory No.1 any more fully absent the production of certain documents by Norfolk Southern. When Norfolk Southern produces those documents, Capitol will supplement its Response to Interrogatory No. 1.

Norfolk Southern argues that Capitol has “refused” to identify the cars on which it contends demurrage charges were unreasonably assessed. This is clearly not the case. Capitol has identified the cars: every car identified in each PRO of Norfolk Southern. The additional information sought by Norfolk Southern is in the possession of Norfolk Southern.

Norfolk Southern’s Interrogatory No. 2 asks:

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 [sic] 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 damage unreasonable.

Capitol responded to Interrogatory No. 2 as follows:

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

Again, Capitol has answered Interrogatory No. 2. Norfolk Southern may not like the Response but there can be no doubt that Interrogatories Nos. 1 and 2 were fully answered. Norfolk

Southern's argument that it has produced over 3,500 pages of documents has absolutely no relevance to Capitol's Responses Interrogatories Nos. 1 and 2. Norfolk Southern's incessant mention of its production of voluminous amounts of non-responsive documents only strengthens the impression that Norfolk Southern's responses to discovery are not concerned with the free exchange of relevant information but are merely a form of self-aggrandizement.

Norfolk Southern's Request For Production No. 1 asks that Capitol:

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 responded to this Request as follows:

Petitioner objects to this request as it is unreasonably broad.

Norfolk Southern now argues that Capitol should be forced to send back to Norfolk Southern its own documents, the most significant of which Norfolk Southern has not provided to Capitol.

Norfolk Southern's Request For Production No. 2 asks that Capitol:

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

Capitol responded to this Request as follows:

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

In its Motion to Compel, Norfolk Southern argues that Capitol's objection is baseless and then sets forth the standard for discovery before the Board. Capitol does not dispute this standard

nor the authority cited by Norfolk Southern in support of it. Capitol does, however, dispute that it is required to produce documents which may be protected by the attorney-client or work product privileges. The objection posited by Capitol suggests as much- if the request calls for a legal conclusion that the likelihood is that the documents responsive to that request will be protected by the attorney-client or work product privileges. Norfolk Southern has failed to make any showing as to why those privileges should be waived.

Norfolk Southern's Request For Production No. 4 asks that Capitol:

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

Capitol responded to this Request as follows:

These documents are in the possession of Respondent.

Norfolk Southern argues that Capitol's response prevents it from confirming whether it received any written claims from Capitol seeking relief from any demurrage charge. This argument is specious. Norfolk Southern can confirm from the documents within its possession whether or not it ever received any written claims from Capitol seeking relief from demurrage charges. Again, Norfolk Southern has failed to make any showing as to why Capitol should be forced to produce documents that are reasonably available to Norfolk Southern or are in the possession, custody and control of Norfolk Southern. Discovery is not a game whereby each party simply regurgitates documents which are available to both and already in the other's possession.

CONCLUSION

Norfolk Southern's Motion to Compel Discovery should be denied. Capitol has fully, separately and completely responded to each and every one of the discovery requests served upon it. In fact, Norfolk Southern admits, in its own Motion, that Capitol has fully responded to, at the very least, Interrogatory No. 1. It follows from this admission, and from the reasons set forth above, that Capitol has fully responded to Norfolk Southern's admission. It further follows from this admission that this Motion has been brought solely for purposes of harassment and abuse. Norfolk Southern's Motion should be denied.

This 27 day of March, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served copies of the foregoing Response to Norfolk Southern Railway Company's 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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This 27 day of March, 2002.

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