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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO.: 42068

ORIGINAL

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

SUPPLEMENTAL OPENING STATEMENT OF
CAPITOL MATERIALS, INCORPORATED



ENTERED
Office of the Secretary
MAY 09 2002
Part of
Public Record

COMES NOW, Capitol Materials, Incorporated ("Capitol"), Petitioner herein and files this its Supplemental Opening Statement pursuant to Order of the Surface Transportation Board entered April 18, 2002, and respectfully states as follows:

I.

BACKGROUND

This proceeding was initiated by the petition of Capitol, filed on October 12, 2001, for a Declaratory Order to resolve a dispute over demurrage charges assessed by Norfolk Southern Railway Company ("Norfolk Southern") on shipments of drywall materials and supplies consigned to Capitol's facilities in Atlanta and Duluth, Georgia.

This matter is on referral from the Superior Court of Fulton County, Atlanta Judicial Circuit, in Norfolk Southern Railway Company v. Capitol Materials, Inc., Civil Action file no.: 2000-CV-25039. The State Court proceeding was initiated by Norfolk Southern for collection of \$216,930.00 in demurrage charges accruing during the period of June, 1997 through February, 2001. Capitol filed a motion to stay the Superior Court proceedings and refer the following issues to the Surface Transportation Board (the "Board") for determination:

- (1) Whether Norfolk Southern's demurrage rate as contained in its applicable tariff is unreasonable;
- (2) Whether the method by which Norfolk Southern calculates the demurrage charges is unreasonable; and
- (3) Whether Norfolk Southern's practice of assessing demurrage charges in the circumstances here present represents an unreasonable practice.

Capitol is a supplier of drywall and related materials to the construction industry in the Atlanta area. Capitol relies upon rail service to supply most of the gypsum drywall and materials that it sells to its customers. Norfolk Southern is the only rail carrier available to Capitol at its facilities located in downtown Atlanta and Duluth. (See Supplemental Verified Statements of Jeff Traicoff and Tom Mueller).

The sole basis for Norfolk Southern's Complaint in the State Court was to collect demurrage charges from Capitol which allegedly accrued between June of 1997 and February of 2001. Capitol has requested that the Surface Transportation Board make a determination regarding the reasonableness of Norfolk Southern's demurrage charges, specifically: (a) whether Norfolk Southern's demurrage rate as contained in its applicable tariff is unreasonable; (b) whether the method by which Norfolk Southern calculates the demurrage charge is unreasonable; and (c) whether the practice of Norfolk Southern in assessing the demurrage rate in the circumstances that are presented by Capitol represent an unreasonable rate practice.

Capitol has maintained and continues to maintain that the assessment of demurrage is unreasonable based on the factual circumstances of this case, including but not limited, to the following:

- (1) Norfolk Southern's failure to follow placement instructions it received from Capitol;
- (2) holding of rail cars in constructive placement rather than spotting the rail cars promptly at Capitol's place of business; and
- (3) failure to timely remove released rail cars from Capitol yards. (See, generally, the details set forth in the Supplemental Verified Statements of Jeff Traicoff and Tom Mueller submitted herewith and the Verified Statements of Jeff Traicoff and Tom Mueller regarding Norfolk Southern's service and rate practices which were previously submitted).

The assessment of any charge for demurrage in these circumstances represents an unreasonable rate practice. The tariff in which such a rate is contained should in these circumstances be found void, inapplicable or unreasonable as it has been applied by Norfolk Southern against Capitol.

II.

DOCUMENTS REQUESTED BY CAPITOL

On February 1, 2002, Capitol requested certain documents from Norfolk Southern. Thereafter, Capitol filed its Motion to Compel production of the documents it had requested. Norfolk Southern opposed Capitol's Motion to Compel and filed a Motion for Protective Order asserting that it had identified additional documents that were responsive to Capitol's requests but that they would only be disclosed pursuant to a Board-issued protective order.

On April 18, 2002, this Board granted Norfolk Southern's Motion for Protective Order and issued the protective order submitted by Norfolk Southern.

On April 23, 2002, counsel for Capitol transmitted the undertakings required by the terms of the protective order to counsel for Norfolk Southern.

On April 24, 2002, documents designated "Highly Confidential" were delivered to the offices of counsel for Capitol.

The Highly Confidential documents provided by Norfolk Southern were numbered NS-HC-0001-2797. These 2,797 pages:

- Are not separated as to which of Capitol Discovery Requests they are responsive;
- Are not in chronological order;
- Are not in any discernible order;
- Do not appear to reference the Bishop Street Facility;
- Do not contain any documents from 1997; and
- Are not complete (for example, Document NS-HC-0007 dated March 9, 2000 provides that it is page 3 of 7; pages 1, 2, 6 and 7 have not been produced).

As further example of the documents produced by Norfolk Southern, Document NS-HC-0010 is a car handling report dated March 10, 2000. Page six of the report (NS-HC-0014) contains a notice for the single car pulled and a report of the three cars "set out" by Norfolk Southern (NS-HC-0010-0011). However, Documents NS-HC-0005 and NS-HC-0006 consists of two pages of a four page document showing the cars pulled but the cars "set out" or spotted are not shown. Similarly, Documents NS-HC-0007 through

NS-HC-0009 are only three pages of a seven page document and show only the two cars pulled and the cars spotted are not provided.

Also, October, 1998 documents were found as NS-HC-0161-0168 as well as at NS-HC-0620 and at NS-HC-0342.

It is apparent that, despite the entry of a protective order issued by the Board, Norfolk Southern has not produced all of the documents requested by Capitol. In addition, the documents that have been produced do not relate to activity at Capitol's Bishop Street Facility. The documents produced by Norfolk Southern were intentionally disorganized in order to make it difficult for Capitol to prepare its Supplemental Opening Statement.

Given the date of production of these documents, the condition in which they were produced and the date when the Supplements to the Petition and the Verified Statements of Tom Mueller and Jeff Traicoff are due, it was impossible for Capitol to conduct a complete and detailed analysis of these documents. Consequently, Capitol reserves the right to supplement this Petition when it completes its analysis of the documents produced by Norfolk Southern pursuant to the protective order issued by the Board.

III.

CARS WERE CONSTRUCTIVELY PLACED WHEN SPACE WAS AVAILABLE AT CAPITOL'S SIDING

Norfolk Southern failed to follow the placement instructions it received from Capitol; held cars in constructive placement rather than spotting cars promptly at Capitol's Bishop Street and Duluth Facilities; and failed to timely remove released rail

cars from Capitol's yards. (See, Supplemental Verified Statements of Jeff Traicoff and Tom Mueller). Norfolk Southern has attempted to charged significant demurrage under the theory that cars were required to be constructively placed, where the records of Norfolk Southern show that space was available on Capitol's siding for the delivery of cars. There is no support in fact or law for such unreasonable practices. Some of these cars for which Norfolk Southern has attempted to charge demurrage were held by Norfolk Southern in constructive placement for no discernible reason. During some periods where Norfolk Southern is attempting to charge demurrage for cars held in constructive placement, other cars were being both constructively and actually placed and released by Capitol and picked up by Norfolk Southern. It appears that, at best, the constructive placement of rail cars was arbitrary and the resulting demurrage charges were the result of inefficiencies on the part of Norfolk Southern and are not the result of problems associated with the actions of Capitol. The resulting demurrage charges also are not related to the space available at Capitol's Bishop Street and Duluth Facilities. This seems especially apparent when considered along with the statement of Tom Mueller that Norfolk Southern provides a Constructive Placement Notice for each and every car that arrives for Capitol at Norfolk Southern's Chamblee, Georgia yard. The following examples are taken from the Supplemental Verified Statements of Tom Mueller and Jeff Traicoff, Capitol respectfully refers the Board to those Statements for additional examples randomly drawn from documents provided by Norfolk Southern.

A. DULUTH FACILITY

For example, and as set forth in the Supplemental Verified Statement of Tom Mueller, on February 13, 1998, one car was constructively placed (Car No. 4074) at

Capitol's Duluth Facility. This car was not actually placed until March 3, 1998. During the intervening time period (February 13 through March 3, 1998), nineteen cars were picked up by Norfolk Southern and twenty-three cars were released by Capitol as ready for pick-up.

Between March 4 and 6, 1998, five cars were constructively placed (Car Nos. 81398, 4088, 4115, 4204 and 624563) at Capitol's Duluth Facility; only one car was actually placed (Car No. 81381); and four cars were picked up (Car Nos. 4116, 3824, 4230 and 3482) by Norfolk Southern.

The four cars that were constructively placed at Capitol's Duluth Facility between March 4 and 6, 1998 were not actually placed until between March 11, 12, 16 and 20, 1998 despite the fact that during that period fifteen cars were picked up by Norfolk Southern. Capitol was unreasonably charged significant demurrage for the four cars that were constructively placed between March 4 and March 6, 1998.

B. BISHOP STREET FACILITY

The Supplemental Verified Statement of Jeff Traicoff contains further example of what occurred on July 20, 1998, when seven cars were constructively placed (Car Nos. 830, 84321, 85104, 621801, 4190, 118033 and 862170) at Capitol's Bishop Street Facility; one car was actually placed (Car No. 84321, which was also constructively placed on July 20, 1998). No record exists for the actual placement of one car (Car No. 4190). The remaining five cars were actually placed between July 22 and July 28, 1998. On this date, Norfolk Southern, without explanation, failed to pick-up any cars although two were released by Capitol for pick-up (Car Nos. 118044 and 118063).

In the period between the constructive placement and the actual placement of the five cars referred to above (that is, between July 20 and July 28, 1998), ten cars were picked up by Norfolk Southern and eight cars were released by Capitol for pick-up. As a result of the inefficiencies of Norfolk Southern and contrary to its responsibilities under the tariff, Capitol was charged significant demurrage for the five cars that were not actually placed until July 22 and July 28, 1998.

On August 5, 1998, one car was constructively placed (Car No. 118032); two cars were actually placed (Car Nos. 753 and 863489); and two cars were picked up (Car Nos. 4195 and 118067).

The one car that was constructively placed on August 5, 1998 at Capitol's Bishop Street Facility was not actually placed until August 10, 1998 despite the fact that in the intervening period, eleven cars were picked up by Norfolk Southern and ten cars were released by Capitol for pick-up. Again as a result of its own inefficiencies and contrary to its responsibilities to Capitol and the public, Capitol was charged significant demurrage for the one car constructively placed on August 5, 1998.

IV.

ASSESSMENT OF DEMURRAGE IS UNREASONABLE

The assessment of demurrage based upon the tariff of Norfolk Southern and the facts and circumstances in this case is patently unreasonable.

First, and as previously demonstrated, the tariff does not provide for circumstances where demurrage will not be assessed if a delay results from events and conduct attributable to Norfolk Southern. Norfolk Southern seeks payment of demurrage charges arising from delays created by its own conduct.

Second, as shown through the examples provided by the Supplemental Verified Statements of Tom Mueller and Jeff Traicoff, Norfolk Southern arbitrarily assessed demurrage charges for cars that it constructively placed when space was available at Capitol's Bishop Street and Duluth Facilities. It is apparent that Norfolk Southern failed to follow the instructions it received from Capitol to place each car as it arrived. Instead, Norfolk Southern held cars in constructive placement rather than spotting cars promptly at Capitol's Bishop Street and Duluth Facilities. Norfolk Southern also failed to remove released rail cars from Capitol's yards promptly after orders for their release were given by Capitol. The result of its inefficiencies and its failure to comply with the request of Capitol were "domino-like" delays to Capitol ordered cars on a regular basis. Despite its duties to the public, Norfolk Southern allowed its inefficiencies in delivery and removal of cars to impede traffic of needed commerce. If permitted to ignore its responsibilities to the public, Norfolk Southern will simply continue to be unreasonable and inefficient and burden commerce with unnecessary and unwarranted demurrage charges. In effect, if it prevails, Norfolk Southern will be paid to be inefficient under its interpretation of its tariff and applicable law.

Further, Capitol's analysis of the imposition of unreasonable demurrage has been impeded and blocked by Norfolk Southern's failure to produce responsive documents despite the issuance and entry of a protective order by the Board and Capitol's compliance with the terms and conditions of that protective order. In addition, the documents that have been provided by Norfolk Southern pursuant to the protective order are not referenced to the document requests posited by Capitol, are not either in

chronological or any discernible order and are not complete. Also, the documents produced seem to only refer to activity at Capitol's Duluth Facility.

Also, within the last approximately eighteen months, Norfolk Southern has arbitrarily and unreasonably increased the amount of demurrage it charges Capitol's Bishop Street Facility from \$20.00 per day to \$60.00 per day. (See, Supplemental Verified Statement of Jeff Traicoff). In addition, in February, 2002, Norfolk Southern ceased transmitting Constructive Placement Notices to Capitol's Bishop Street Facility. When Capitol inquired as to the reason for this change, it was told that Capitol had a standing order with Norfolk Southern to deliver all cars as they arrived and when such a standing order was in place, no Constructive Placement Notices were provided. (See, Supplemental Verified Statement of Jeff Traicoff).

As argued previously, the claim of Norfolk Southern is patently unfair and offends the traditional standards of American jurisprudence for the establishment of damages for breach of contract.

Norfolk Southern owed a duty to Capitol to provide efficient and timely service in accordance with not only industry standards and protocols but also in accordance with Capitol's own verbal standing orders to it. Norfolk Southern's breach of duty should not be allowed to support its claim for demurrage. A tariff cannot alter customary standards for interpreting agreements between parties. What is clear is that Capitol is a significant user of rail cars to service the needs of the public in the metropolitan area of Atlanta, Georgia. Norfolk Southern is the only provider of this rail car service. Norfolk Southern has ignored the requests of Capitol regarding the service to its siding. Capitol has the capacity to service its requests for rail cars to be delivered as they arrive. Capitol has

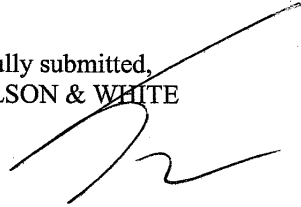
more than adequate ability to unload and store the materials delivered. Why would Capitol retain the delivered, emptied rail cars? Norfolk Southern has failed under its tariff to provide for instances where it is clearly at fault. Examples of this fault include, but are not limited to:

- when cars are constructively placed when efficient service and response to the orders of Capitol would have required that cars be actually placed;
- when cars that are constructively placed were re-located or misplaced and were not able to be delivered through no fault of Capitol;
- when Norfolk Southern fails to pick-up cars after they are released for pick-up by Capitol;
- when Norfolk Southern failed to deliver and pick-up cars more than once a day.

Capitol requests that the tariff of Norfolk Southern be recognized as unreasonable and void as it is applied to Capitol, that Norfolk Southern not be permitted to legislate or unilaterally make new agreements through the publication of new tariffs and the demurrage charges not be assessed against Capitol.

This 8th day of May, 2002.

Respectfully submitted,
RACHELSON & WHITE



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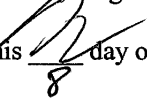
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CERTIFICATE OF SERVICE

This is to certify that I have on this day served copies of the foregoing 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  day of May, 2002.



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