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July 23, 2002



VIA FEDERAL EXPRESS

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

205929

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

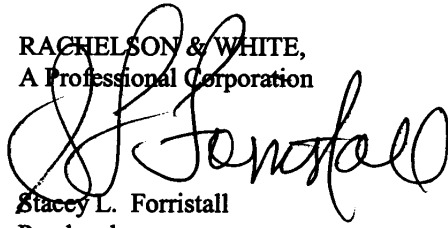
Ladies and Gentlemen:

Enclosed herewith is an original and 11 copies of Capitol Materials' Incorporated's Rebuttal to Reply Statement of Norfolk Southern Railway Company and the Verified Statements of Jeff Traicoff and Tom Mueller. Please file this document in accordance with the procedures of your office.

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

Sincerely,

RACHELSON & WHITE,
A Professional Corporation


Stacey L. Forristall
Paralegal

/s/f

cc: Capitol Materials Incorporated
Richard A. Allen, Esq.
George A. Aspatore, Esq.
Bruce E. Mitchell, Esq.

Enclosures

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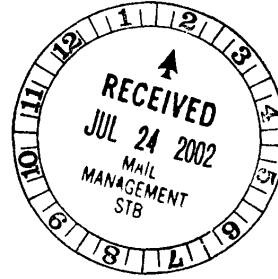
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO.: 42068



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

**CAPITOL MATERIALS, INCORPORATED'S REBUTTAL
TO REPLY STATEMENT OF NORFOLK SOUTHERN RAILWAY COMPANY**

COMES NOW, Capitol Materials, Incorporated ("Capitol"), Petitioner herein and files this its Rebuttal to the Reply Statement of Norfolk Southern Railway Company ("Norfolk Southern") pursuant to Order of the Surface Transportation Board entered January 16, 2002, as supplemented, and as and for such Response, respectfully states as follows:

I.

In its Reply Statement, Norfolk Southern does not dispute or deny any of Capitol's statements that Norfolk Southern's omissions in service that resulted in:

- bunching;
- missed switches;
- missed spotting of loaded cars;
- failure to issue Constructive Placement Notices;
- stacking; and
- run-arounds.

The examples provided by Capitol in its Opening and Supplemental Statements evidenced circumstances where the assessment of demurrage was unreasonable or inappropriate. Norfolk Southern has made no effort to account for or explain the omissions

in service that wrongfully resulted in the imposition of demurrage charges. Instead, Norfolk Southern glosses over the issue, stating that it is not "necessary" for it to do so. (Reply Statement of Norfolk Southern Railway Company, hereinafter "Reply Statement," p. 16). Norfolk Southern also fails to proffer to the Board any of the invoices and statements it has submitted to Capitol, each of which is disputed and denied by Capitol.

Norfolk Southern does, however, take great pains to define demurrage and interpret its Demurrage Tariffs. However, the interpretation of the Demurrage Tariffs of Norfolk Southern and the definition of demurrage is not at issue. What is at issue is Norfolk Southern's assessment of demurrage charges on Capitol and the reasonableness of their imposition.

Norfolk Southern chooses instead to argue that protests and notices provided by Capitol are not entitled to any consideration. The reason given is that Capitol did not adhere to what Norfolk Southern perceives to be an unalterable provision of the averaging agreement that Norfolk Southern alleges to exist between the parties. The argument offered by Norfolk Southern in its Reply Statement is that because Capitol did not reduce its admittedly continuous oral complaints to writing, neither Norfolk Southern nor the Board is permitted to consider the admitted discrepancies in its services and is thus free from blame.

What is absolutely overlooked by Norfolk Southern is the extensive course of dealing between Norfolk Southern and Capitol and the undisputed evidence of continuous protests and notice of claims for relief. More importantly, Norfolk Southern acknowledged the protests and notice of claims for relief of Capitol by advising Capitol to ignore the demurrage bills. Specifically,

- During all the years, Capitol has been served by rail, initially by Southern Railway and then by Norfolk Southern and through the 1980s and '90s, demurrage was assessed and paid based on actual placement in those instances where, for whatever reason, Capitol held a rail car longer than the allotted free time. At no time during this period did Capitol ever receive a "constructive placement" notice.
 - In 1997, Capitol began to receive "constructive placement" notices and demurrage began to be assessed based on constructive placement. Capitol was unaware what "constructive placement" referred to because when Capitol received these notices it had space available at its siding for spotting and could have accommodated rail cars at its facilities.
 - Since 1997, Capitol has been in repeated contact with Norfolk Southern personnel concerning the demurrage charges assessed against Capitol. Capitol was repeatedly advised by Norfolk Southern to "ignore" these bills because the records of Norfolk Southern were not reliable. Many of the bills that Capitol had received from Norfolk Southern for demurrage charges simply "went away" and were not re-billed.
 - Two years later, in 1999, Capitol was approached for the first time regarding the collection of the old demurrage bills, after the initial contact there were numerous meetings during which the parties attempted to review these old records.
- During the meetings with representatives of Norfolk Southern, however, Mr. Traicoff, on behalf of Capitol, was told:

1. Norfolk Southern, citing a tariff rule, would not consider the rail problem of "bunching" regardless of the impact this had upon assessment of demurrage.
2. Norfolk Southern would not consider the issue of "run-arounds" and the assessment of demurrage on those rail cars, again citing a tariff rule.
3. Norfolk Southern would not consider the actual impact of switches that were either completely missed or during which Norfolk Southern either only spotted or only picked up rail cars (half-switches) and the domino effect this had not only on rail cars in constructive placement but on all rail cars in the stream of commerce.
4. Norfolk Southern would not consider the actual effect of missed or half-switches unless all of the slots available at Capitol's yards were empty.

Simply stated, Norfolk Southern perceives that its obligation to provide rail service to the public is what it unilaterally conceives to be a "take-it-or-leave-it" basis. Because Capitol has no other alternative than to use Norfolk Southern for rail service, Norfolk Southern has even suggested that Capitol use truck service if Capitol did not like Norfolk Southern's terms of service. Additionally, Norfolk Southern advised Capitol that any form of claim for relief that involved bunching, run-arounds or missed or half-switches would not be considered - even if these claims were presented in writing. Capitol was told that each and every one of the problems that were continuously confronted by Capitol, and which were inherent in Norfolk Southern's service, would not be considered. As far as Norfolk Southern

was concerned, these issues were "off-the-table." Capitol objected to the imposition of these arbitrary, unilaterally conceived rules and this lawsuit followed within the space of few months from the last meeting between the parties.

The authority that is being offered by Norfolk Southern to support its position is found in Compass I Distribution Corporation - Petition for Declaratory Order, Docket No. 39517, 1984 ICC LEXIS 203, wherein the Court found that since the party had obtained the benefits under the averaging agreement, it could not complain of its duties under that agreement.

The argument of Norfolk Southern is without merit. Even assuming that the averaging agreement binds Capitol, Capitol has not obtained any of the benefits under that agreement. Those benefits would be in the form of credits "earned" on cars released before the expiration of the first twenty-four (24) hours of free time. There is not one instance, over the "number of years" that Norfolk Southern has provided rail service to Capitol, where Capitol has received such credits.

Concerning the protests and notices of claim, it is not necessary that Capitol rely on its own evidence concerning its complaints respecting the demurrage charges. Norfolk Southern admits and acknowledges, both in its Reply Statement and in three of the four Verified Statements submitted by it, that Capitol disputed Norfolk Southern's demurrage bills and complained about the assessment of the charges. See, Reply Statement, pps. 11, 12; Verified Statement of Stephen B. Marshall, pps. 2, 3; Verified Statement of Larry T. Rasche, pps. 2, 3; Verified Statement of Carolyn Woods, p. 8).

The course of dealing between the parties has resulted in a departure from the strict terms of the tariff and a waiver of requirement that Capitol submit "written claims for

demurrage relief" (Reply Statement, p. 15). See, Conrail v. Foster Wheeler Environmental Corp., 2000 U.S. Dist. LEXIS 13477 (E.D.Pa. 2000) (Appellant manifested through its actions an intent not to require Appellee to strictly comply with the Contract provision requiring shipments in 50 car trains, 5 days a week). See, also, Indiana Harbor Belt R. Co. v. Jacob Stern & Sons, 37 F.Supp. 690, 692 (N.D. Ill. 1941) (A railroad's right to draft its tariffs is limited. A railroad may not avoid statutory and common law rules that govern the rights of the parties thereby in effect "legislating" by means of drafting a tariff) and Boston & M.R.R. v. Piper, 246 U.S. 439, 38 S.Ct. 354, 62 L.Ed. 820, Ann.Cas.1918E, 469; Franklin v. Southern Pac. Co., 203 Cal. 680, 265 P. 936, 59 A.L.R. 118 (A carrier cannot avoid obligations imposed by statutory or common law, by publishing and filing a tariff to that effect).

Further, Capitol does not agree that the averaging agreement on which Norfolk Southern relies even applies. In this proceeding, Norfolk Southern has referenced two separate tariffs: one, the governing publication named in the averaging agreements and the other an independent publication by Norfolk Southern. Specifically, the averaging agreements identify as the governing publication Tariff PHJ-6004-O, H.J. Positano, Agent, ". . . supplements thereto or successive issues thereof." The contracting entity in the averaging agreement and the participating carrier to this agency Tariff is Southern Railway. There is no indication that the averaging agreement that is referred to was assigned to Norfolk Southern.

Further, the Tariffs placed in evidence by Norfolk Southern (Verified Statement of Carolyn Woods, Exhibits 1-3), are neither a supplement to nor a successive issue of the

governing agency Tariff cited above but instead represent a tariff independently published by Norfolk Southern in its own series.

Since Norfolk Southern is not a party to the averaging agreement between Capitol and Southern Railway or because the Tariff on which Norfolk Southern relies is not applicable here, there is no basis for Norfolk Southern's contention that it is not obligated to consider Capitol's complaints.

II.

In its Reply Statement, Norfolk Southern provides a tutorial on demurrage, defined for the edification of the Board as a "charge that both compensates rail carriers for expenses incurred when rail cars are detained by shippers and serves as a penalty for undue detention" (Reply Statement, p. 5, citations omitted).

Norfolk Southern then states that its demurrage charges begin to "accrue on a car a certain period after the car is 'placed,' either actually or constructively, by Norfolk Southern at the shipper's facility for loading or unloading" (Reply Statement, p. 7) and that this demurrage continues to accrue "until the car is 'released'" (Reply Statement, p. 8). Norfolk Southern also handily provides textbook examples of how this assessment should work.

However, Capitol has found that Norfolk Southern's theory of how demurrage charges should be assessed does not readily translate to reality. Norfolk Southern's own bills indicate Norfolk Southern, for the years 1997, 1998, 2000 and 2001, repeatedly charged demurrage on rail cars for which there is no indication of a constructive placement, actual placement or release date. See, Verified Statements of Jeff Traicoff and Tom Mueller in Support of Capitol's Rebuttal Statement and the Exhibits attached thereto.

As an example, on May 22, 1997, Car No. 9054 arrived at Norfolk Southern's yard. It was constructively placed in Capitol's Bishop Street, Atlanta facility on May 23, 1997. There is no indication, on Norfolk Southern's bills, of when Car No. 9054 was actually placed although Capitol was charged eighteen (18) days of demurrage for this rail car.

As another example, on July 27, 1998, Car No. 839 arrived at Norfolk Southern's yard. It was constructively placed at Capitol's Bishop Street, Atlanta facility on July 28, 1998. Again, there is no indication, on Norfolk Southern's bills, of when Car No. 839 was actually placed although Capitol was charged eleven (11) days of demurrage for this rail car.

As stated above and as set forth in the Verified Statements of Jeff Traicoff and Tom Mueller submitted herewith, Capitol was repeatedly charged demurrage (sometimes double-digit days) for cars for which there is no actual placement date noted on the bill. There is no indication on the bills submitted by Norfolk Southern of when this rail car was actually placed. (In fact, Norfolk Southern has failed to submit any bills in support of its position). Capitol consistently complained about Norfolk Southern's demurrage bills because these bills were consistently inaccurate and did not reflect the reality of what occurred at Capitol's yards. Norfolk Southern has admitted it was aware of these complaints but failed to do anything about them.

III.

As part of its interpretation of the Tariff Agreements that it drafted, Norfolk Southern states that on March 1, 2000, it "simplified the terminology and structure of the demurrage tariff" (Verified Statement of Carolyn Woods, p. 6) by:

- arbitrarily tripling the charges for each day for which demurrage is assessed after the expiration of free time; and

- arbitrarily and completely revising the method by which it calculates the chargeable days.

Under the former method, if a rail car was constructively placed on Tuesday with actual placement on Wednesday at or about noon, chargeable time would begin on Thursday at 12:01 a.m. If this rail car was released on Monday, the assessment would be for two days which would be all free time with no demurrage.

Under the new, "simplified" method, Capitol would be assessed for Thursday, Friday, Saturday and Sunday. Upon release of the rail car, Capitol would receive two credit days but it would still have two chargeable days. The end result is that Capitol is not only being charged the increased rate of \$60.00 per day, but it is also being charged for additional days because Saturdays and Sundays are factored in as part of the new method.

Norfolk Southern never provided any direct notice to Capitol that it would be changing to this new "simplified" method of calculating demurrage. (See, Verified Rebuttal Statement of Jeff Traicoff, pps. 11-12). Only a monopoly would be able to impose what amounts to a take-it-or-leave-it pricing schedule on its customers.

The new per day cost imposed by Norfolk Southern is an unreasonable demurrage rate. Further, the new method of calculating this new demurrage rate represents an unreasonable rate practice because it includes days when services are not even provided by Norfolk Southern, such as Saturdays, Sundays and holidays.

In its Reply Statement, Norfolk Southern does not offer any reason why it "simplified" the terminology and structure of its Demurrage Tariff nor does it allege that it provided any notice of this change to Capitol. It simply states that it was done.

The imposition of this new cost and method of calculation is unreasonable and was unreasonably imposed.

IV.

Despite the fact that they were created by its own personnel, Norfolk Southern's bills are riddled with errors and inconsistencies which, in addition to the problems inherent in Norfolk Southern's service, form the basis for Capitol's refusal to pay. For example, and as stated above, Norfolk Southern's bills omit actual placement dates, release dates and pick-up dates.

In addition, Norfolk Southern's bills demonstrate that Norfolk Southern arbitrarily and frequently failed to provide service to Capitol and that the frequency of this failure to provide service has increased since 1997.

In 1997, for Capitol's Atlanta yard only, Norfolk Southern missed switches(that is, Norfolk Southern failed to either pull empty rail cars or spot loaded rail cars), approximately once a month (ten missed switches). That number of missed switches at Capitol's Atlanta yard increased to slightly more than once a month in 1998 (thirteen missed switches). In the year 2000, the number of missed switches further increased to an average of 1.5 times monthly (eighteen missed switches). See, Verified Rebuttal Statements of Jeff Traicoff and Tom Mueller and the Exhibits thereto. The number of missed switches are exclusive of weekends and holidays.

In Capitol's Duluth yard, Norfolk Southern missed eleven switches in 1997, twenty-two switches in 1998, twenty-three switches in 2000 and eight switches in 2001.

Norfolk Southern has failed to calculate or take into consideration the effect these repeated missed switches has on the assessment of demurrage charges.

VI.

Railroads operating in interstate commerce are subject to regulation by the federal government through the Board. 49 U.S.C. §§ 10101, et seq. Among the enumerated policies of the federal government in regulating the railroad industry is to ensure the development of an "efficient rail transportation system" that meets "the needs of the public and the national defense," and "to maintain reasonable rates where there is an absence of effective competition." 49 U.S.C. § 10101, emphasis added.

In this case, Norfolk Southern has no competition to its rail service to Capitol and this lack of competition has manifested itself in Norfolk Southern's take-it-or-leave-it rules, rates, service and assessment of demurrage charges.

The concept of charging demurrage is intended as a deterrent to prevent the detention of a rail car for an unwarranted period of time. Demurrage is not another means for a railroad to collect revenue. See, e.g., Atchison, Topeka and Santa Fe Ry. Co. v. I.C.C., 687 F.2d 912, 918 (7th Cir. 1982). In this case, it has been demonstrated that Norfolk Southern has attempted to charge demurrage even when its own billing documents do not establish constructive placement dates, actual placement dates or release dates. Also, Norfolk Southern has failed to establish that it has been the conduct of Capitol which has resulted in detention of rail cars for an unwarranted period of time. Thus, the facts presented do not justify the imposition of demurrage.

Capitol has also shown how Norfolk Southern's changed its method of calculating demurrage. This arbitrary change resulted in an increase in the number of days Capitol can be charged demurrage and increased the amount of the demurrage charge per day. These arbitrary changes constitute unreasonable practices.

Further, Capitol has demonstrated, using Norfolk Southern's own bills, that the core problems with Norfolk Southern's service resulted in the assessment of demurrage charges and delay in the placement and release of rail cars. See, St. Louis, Southwestern Ry. Co. v. Mays, 177 F.Supp. 182, at 184 (E.D.Ark. 1959) (Holding that in order for liability for demurrage to exist, the failure to load or unload the cars within the free time must be the fault of the shipper or consignee, and, conversely, that demurrage cannot be charged where such failure was due to the fault of the carrier); Southern Ry. Co. v. Aluminum Co. of America, 119 F.Supp. 389 at 396 (E.D. Tenn. 1951) (Holding that no demurrage can be exacted by a carrier unless the delay in loading is clearly attributable to the fault of shipper or consignee).

It is black letter law that when the facts establish that the actual cause of undue delay or detention of the railroad car is attributable to the practices of the railroad and not the carrier or the consignee, demurrage is denied. See, e.g., Illinois Cent. Gulf R. Co. v. Southern Rock, Inc., 644 F.2d 1138 (5th Cir. 1981); St. Louis, Southwestern Ry. Co. v. Mays, 177 F.Supp. 182 (E.D. Ark. 1959); Southern Ry. Co. v. Aluminum Co. of America, 119 F.Supp. 389 (E.D. TN 1951), aff'd 210 F.2d 139 (6th Cir. 1954); United States Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., 226 Ala. 606, 147 So. 891 (1933); Seaboard Air Line Ry. Co. v. Daugherty-McKey & Co., 40 Ga.App. 190, 149 S.E. 92 (1929); Garrison Coal Co. v. Hines, 118 Okla. 251, 247 P. 62 (1925).

CONCLUSION

Capitol has demonstrated that Norfolk Southern's service has created the problems that resulted in delay in the spotting and release of rail cars. Capitol has documented examples of the deficiencies in the services provided by Norfolk Southern. Norfolk

Southern has neither denied or disputed any of these examples. Norfolk Southern has not shown that it was the Capitol's actions or inaction which resulted in the delay of spotting or release of rail cars. Norfolk Southern's entire argument is that because Capitol did not submit written claims for demurrage relief as required by the alleged agreement between the parties, Capitol may not complain of Norfolk Southern's service problems. This argument fails because there is no average agreement between the parties. Capitol never received any benefit under the alleged agreement. Norfolk Southern and Capitol established a long course of dealing regarding the assessment of demurrage charges and claims for relief from those charges. Norfolk Southern and Capitol mutually departed from or waived the requirement that written claims be submitted, assuming one existed. Capitol, in fact, received relief from demurrage charges in response to its claims for relief. Norfolk Southern also repeatedly advised Capitol that the issues that Capitol wanted to have addressed (bunching, run-arounds, missed and half-switches) would not be considered and written claims for relief on these issues would be useless.

Capitol respectfully requests that the tariff of Norfolk Southern be found to be unreasonable as applied to Capitol and that demurrage charges not be assessed against Capitol.

This 23rd day of July, 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 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 23rd day of July, 2002.



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