

204979

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

ENTERED
Office of the Secretary

MAR 15 2002

Part of
Public Record

**CAPITOL MATERIALS INCORPORATED'S RESPONSE TO
NORFOLK SOUTHERN RAILWAY COMPANY'S
MOTION FOR PROTECTIVE ORDER**

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Norfolk Southern's Motion for Protective Order should be denied. Good cause does not exist for the issuance of a Protective Order. Additionally, the Motion for Protective order is interposed simply to excuse the failure of Norfolk Southern to respond to Capitol's Requests for Production of Documents.

Throughout the pendency of this proceeding, as well as during the underlying Superior Court case, Norfolk Southern has not addressed any of the issues that are the subject matter of its Motion for Protective Order. Until the Motion for Protective Order was presented shortly before Capitol was scheduled to present its Opening Statement, Norfolk Southern never responded to any Request for Production of Documents served upon them by Capitol with an objection that the documents sought were confidential or proprietary in nature or might potentially be confidential or proprietary in nature.

Additionally, the Motion for Protective Order is presented to this Board under the “color” of Norfolk Southern’s alleged extensive compliance with Capitol’s effort to obtain 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. While it may be true that Norfolk Southern has produced over 3,500 pages of documents in this proceeding, Norfolk Southern’s version of good faith compliance was simply to place documents in a box and send them to counsel for Capitol. The documents produced by Norfolk Southern were not indexed. The documents were not organized in any way. The documents were not submitted together with any reference to the specific requests of Capitol. The documents were not accompanied by a pleading in response 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 adequately complied. The only effort made by Norfolk Southern to organize the documents that they produced to Capitol was apparently to count them in order to use the number of documents that were produced in its Response to the Motion to Compel of Capitol.

The documents that are the subject matter of the Motion for Protective Order are not identified in any way. No explanation concerning the documents is given to support Norfolk Southern’s Motion for Protective Order. It is absolutely unclear from Norfolk Southern’s Motion for Protective Order what kind and type of documents it now seeks to protect and to what Request(s) these documents are responsive. It is possible that Norfolk Southern simply wishes to use abusive discovery tactics to burden its customers that desire relief from its improper rate practices. It is possible that Norfolk Southern desires to limit the free use and exchange of the documents so that others that have been similarly oppressed will be subject to the same abuse that has been imposed

on Capitol. Despite these possibilities, this Board, however, has not been presented with anything upon which to grant the Motion for Protective Order of Norfolk Southern.

Finally, it appears that the documents which Norfolk Southern now seeks to produce subject to the Motion for Protective Order were withheld from discovery throughout this proceeding and the underlying Superior Court case. Without further explanation, it appears that Norfolk Southern's Motion for Protective Order was prompted by Capitol's Motion to Compel Production of Documents. In fact, and as noted in Capitol's Motion to Compel, concealment of crucial documents appears to be part of Norfolk Southern's pattern and practice in litigating demurrage claims.

Given these facts, it is clear that Norfolk Southern's Motion for Protective Order is simply dilatory in nature. Norfolk Southern has delayed until the eleventh hour the production of documents responsive to Capitol's Requests and it now seeks to delay further by filing an unwarranted Motion for Protective Order. Norfolk Southern's Motion for Protective Order should be denied.

STATEMENT OF FACTS

On July 3, 2000, Norfolk Southern filed an action in the Superior Court of Fulton County, Georgia seeking to collect demurrage charges in the amount of \$58,840.00 alleged to have accrued between June, 1997 and September, 1998.

Capitol filed its Answer denying any liability for demurrage charges on September 5, 2000; Capitol included a Counterclaim for damage to its business.

Norfolk Southern then filed an Amended Complaint in May, 2001 which included additional demurrage charges for the period September, 1998 through February, 2001. The total demurrage charges sought by Norfolk Southern as the result of the Amended Complaint have risen to \$216,930.00.

On October 12, 2000, Capitol served its First Request for Production of Documents on Norfolk Southern, requesting that Norfolk Southern produce:

1.
All documents referenced by you in response to the Interrogatories served concurrently herewith.

2.
Copies of all tariffs upon which you rely in support of your claim.

3.
Copies of all documents upon which you rely to support the allegations in Paragraph 9 of the Complaint.

4.
Copies of all documents upon which you rely to support the allegations in Paragraph 10 of the Complaint.

On December 8, 2000, Norfolk Southern responded by producing, without any objection, including any objection based on the confidential or proprietary nature of the documents requested, documents it determined were responsive to Capitol's requests.

On December 19, 2000, Norfolk Southern served its Supplemental Response to Capitol's First Request for Production of Documents. Again, Norfolk Southern produced documents it determined were responsive to Capitol's requests without objection, including objections based on the confidential or proprietary nature of the documents requested.

On March 14, 2001, Norfolk Southern served its Second Supplemental Response to Capitol's First Request for Production of Documents. Again, Norfolk Southern produced documents it determined were responsive to Capitol's requests without objection, including objections based on the confidential or proprietary nature of the documents requested.

On October 31, 2000, Capitol served its Second Requests for Production of Documents on Norfolk Southern, requesting that Norfolk Southern produce:

1.

All documents identified by you in your responses to the Second Set of Interrogatories served concurrently herewith.

On December 4, 2000, Norfolk Southern responded by stating that it had identified no documents in response to Defendant's Second Set of Interrogatories. Norfolk Southern did not object to the request on any ground, including objections based on the confidential or proprietary nature of the documents Capitol sought to have produced.

On March 14, 2001, Norfolk Southern served its Supplemental Response to Capitol's Second Request for Production of Documents. Norfolk Southern responded without objection of any kind to the documents requested by Capitol.

On March 21, 2001, Capitol served its Third Request for Production of Documents on Norfolk Southern, requesting that Norfolk Southern produce:

1.

All documents referencing, evidencing or relating to transit times for all Railcars delivered by you . . . during the Period.

2.

All documents referencing, evidencing or relating to every Railcar delivered by you to . . . [Capitol's] Atlanta Facility and Duluth Facility during the Period.

Norfolk Southern did not respond to these Requests.

In May, 2001, Capitol filed a Motion for Stay and Referral to the Surface Transportation Board regarding certain demurrage issues. On August 28, 2001, an Order was entered transferring

this matter to the Surface Transportation Board and staying all discovery related to the issues of the demurrage charges.

However, at no time during the thirteen months that this matter was before the Fulton County Superior Court did Norfolk Southern ever raise any objection to the documents requested by Capitol on the ground that these documents were confidential or proprietary in nature and thus should be subject to a protective order. At no time during the pendency of that case did Norfolk Southern raise objections of this kind to any of the discovery served upon them by Capitol.

On February 1, 2002, after the matter had been accepted by the Surface Transportation Board, Capitol served a Request for Production of Documents on Norfolk Southern, requesting that Norfolk Southern:

1.

Produce all documents establishing each switching date and time of every rail car tendered to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period, including but not limited to the daily engineer's report on which specific times and dates are entered for all cars spotted and pulled, and all documents in the possession of Norfolk Southern Railway Company on which such information is reflected.

2.

Produce all bills of lading or other documents which identify the origin date of every car spotted at the facilities of Capitol Materials, Inc. at Atlanta and Duluth during the period.

3.

Produce all documents which support, reflect or refer to your decision to provide only one switch per day to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period.

4.

Produce all documents evidencing or showing a complete listing or log of all cars delivered to Capitol Materials, Inc. at its Atlanta facility and its Duluth facility during the subject period.

Thereafter, on February 19, 2002, Norfolk Southern produced, by its own estimate, more than 2,100 pages of documents it had determined were responsive to Capitol's requests. Norfolk Southern transmitted these documents by way of cover letter. Norfolk Southern did not raise any objections of any kind to Capitol's requests.

On or about February 26, 2002, Capitol filed its Motion to Compel Production of Documents. The reason Capitol was requested to file its Motion to Compel was that despite providing over 2,100 pages of documents, Norfolk Southern failed to provide any documents that were responsive to Capitol's Requests.

On March 4, 2002, Norfolk Southern transmitted by cover letter approximately 1,400 additional pages of 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.

Despite its absolute failure to raise any objections of any kind to Capitol's Requests, Norfolk Southern now has filed a Motion for Protective Order seeking to protect additional documents it has determined to be responsive to Capitol's Requests.

The Motion for Protective Order is sought without explanation or support of any kind, including why it has consistently failed to produce the engineers reports or work orders that reflect the transit times for the subject railcars.

ARGUMENT AND CITATION OF AUTHORITY

No Good Cause Exists for Issuance of a Protective Order.

49 CFR 1114.21(c) provides that upon motion and for good cause shown a protective order may be issued. In this case, Norfolk Southern has failed to show that any good cause exists for the issuance of a protective order.

- Norfolk Southern has failed to describe what type and kind of documents it seeks to protect;
- Norfolk Southern has failed to identify the Requests to which the documents it seeks to protect are responsive;
- Norfolk Southern has failed to indicate what types of proprietary interests need to be protected except to state that many of the documents may contain shipper information;
- Norfolk Southern has failed to show why, given the length of time it has been in possession of the documents it now seeks to protect, redacting alleged confidential information would be unduly burdensome.

Simply put, Norfolk Southern has failed to show good cause as required. Norfolk Southern's Motion should be denied.

Norfolk Southern alleges that "many of the documents contain information relating to other shippers the disclosure of which may be restricted by 49 U.S.C. § 10904." As the Board is aware, 49 U.S.C. § 10904 deals with offers of financial assistance to avoid abandonment and discontinuance of rail service. This code section does not contain any provisions restricting disclosure of information sought through discovery in a proceeding to determine the reasonableness of demurrage

charges. This code section, in fact, does not contain any provisions restricting or limiting the production of documents in any respect.

This code section is not a basis for restricting the flow of discovery so as to allow for the just, speedy and inexpensive determination of this matter.

Norfolk Southern's Motion is interposed for delay and seeks to burden Capitol with additional expenses, and delay Capitol in the presentation of its case.

Capitol requests that the discovery period be extended beyond February 28, 2002 so as to provide Capitol with an adequate opportunity to review the documents Norfolk Southern has finally determined to produce because these documents are necessary and crucial to Capitol's case-in-chief and also because Norfolk Southern has failed to provide these relevant, responsive documents within the applicable period established by the Board and has failed to provide them in the underlying Superior Court case.

CONCLUSION

Norfolk Southern's Motion should be denied. Good cause for the issuance of a protective order has not been suggested, much less proven, by anything that has been submitted to the Board for consideration.

At no time during the pendency of this proceeding or the underlying Superior Court case, has Norfolk Southern responded to any Request for Production served upon them by Capitol with an objection that the documents sought were confidential or proprietary in nature or might potentially be so.

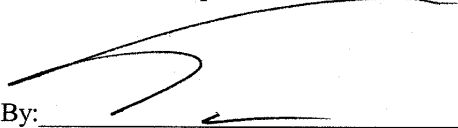
Norfolk Southern has delayed production of these documents until the eleventh hour in spite of timely requests in this proceeding and in the underlying State Court actions. Norfolk Southern

This 13th day of March, 2002.

Rachelson & White, P.C.
Glenridge Highlands One
5555 Glenridge Connector
Suite 425
Atlanta, Georgia 30342
(770) 698-0700
(770) 698-0071

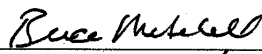
Respectfully submitted,

RACHELSON & WHITE
a Professional Corporation

By: 
Ira L. Rachelson
Georgia Bar No. 591700
Counsel for Petitioner

Mitchell & Associates
3390 Peachtree Road
Suite 520
Atlanta, Georgia 30326
(404) 262-9488
(404) 231-3774

MITCHELL & ASSOCIATES

By: 
Bruce Mitchell *n/express*
Georgia Bar No. 512350 *remm*
Counsel for Petitioner 

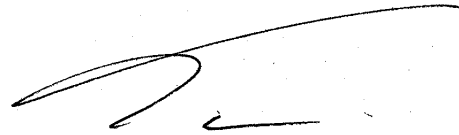
CERTIFICATE OF SERVICE

This is to certify that I have on this day served copies of the foregoing Response to Norfolk Southern Railway Company's Motion for Protective Order 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:

Richard A. Allen, Esq.
Zuckert, Scoutt & Rasenberger, LLP
888 Seventeenth Street, NW
Suite 600
Washington, D.C. 20006

George A. Aspatore, Esq.
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

This 13th day of March, 2002.



Ira L. Rachelson
Georgia Bar No. 019780

Attorney for Petitioner

Rachelson & White
Glenridge Highlands One
5555 Glenridge Connector
Suite 425
Atlanta, Georgia 30342
(770) 698-0700