

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42068

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

Decided: January 16, 2002

By petition filed on October 12, 2001, Capitol Materials Incorporated (Capitol) seeks a declaratory order to resolve a dispute over demurrage charges assessed by Norfolk Southern Railway Company (NS) for shipments of wallboard received at Capitol's facilities in Atlanta, and Duluth, GA. NS replied. Both parties request that the proceeding be handled under the modified procedure provisions at 49 CFR part 1112.

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. 2000CV25039. The court proceeding was initiated by NS in order to collect from Capitol \$216,930 in demurrage charges, which allegedly accrued from June 1997 through February 2001.<sup>1</sup> Capitol filed a counterclaim seeking damages for loss of business. Capitol also filed a motion to stay the court proceedings and refer the following issues to the Board for determination: (1) whether NS's demurrage rate as contained in its applicable tariff is unreasonable; (2) whether the method by which NS calculates the demurrage charge is unreasonable; and (3) whether NS's practice of assessing the demurrage rate in the circumstances at bar represents an unreasonable practice. In an order dated August 27, 2001, the court granted the motion and referred the above matters to the Board for review and decision.<sup>2</sup>

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission (ICC), have exercised broad authority in handling such requests, considering a number of factors, including the significance to the industry and the ripeness of the controversy. See Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). There, the ICC noted that petitions for issuance of a declaratory order premised on

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<sup>1</sup> In its initial complaint, NS sought demurrage charges of \$58,840 for the period between June 1997 and September 1998. NS subsequently amended the complaint to include additional charges of \$158,090 for the period between September 1998 and February 2001.

<sup>2</sup> The court retained jurisdiction over Capitol's counterclaim regarding damages for loss of business.

referral from a court are routinely accepted and treated procedurally in the same manner as a complaint.<sup>3</sup>

Under the Board's authority in 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding is instituted to resolve the controversy here. The matter has been referred by a court of competent jurisdiction and otherwise appears to be within the Board's primary jurisdiction. The Board will resolve this matter pursuant to the modified procedure rules at 49 CFR part 1112. A procedural schedule is set forth below.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure, on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice at 49 CFR subchapter B, including 49 CFR parts 1112 and 1114.
2. Capitol's opening statement is due by February 15, 2002.
3. NS's reply statement is due by April 1, 2002.
4. Capitol's rebuttal statement is due by May 1, 2002.
5. This decision is effective on its service date.

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<sup>3</sup> It then delegated the responsibility for taking initial action in disposing of such matters to the Director of the Office of Proceedings. See 49 CFR 1011.8(c)(6).

6. A copy of this decision will be mailed to:

The Honorable Stephanie B. Manis  
Superior Court of Fulton County  
Atlanta Judicial Circuit  
185 Central Avenue S.W.  
Atlanta, GA 30303

RE: No. 2000CV25039

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary