

SERVICE DATE - APRIL 19, 2002

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: April 18, 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.<sup>1</sup> In a decision served on January 16, 2002, the Board instituted a proceeding to resolve the controversy and adopted a procedural schedule pursuant to the modified procedure rules at 49 CFR part 1112. In a decision served on February 8, 2002, the procedural schedule was revised to allow the parties until February 28, 2002, to complete discovery matters and, correspondingly, the due dates for filing statements were extended.<sup>2</sup> Motions to compel discovery were filed by Capitol on February 27, 2002,<sup>3</sup> and by NS on March 8, 2002. NS also filed a motion for a protective order on March 8, 2002. This decision denies both motions to compel, grants the motion for a protective order, and grants an extension of the procedural schedule.

Capitol's Motion to Compel. Capitol asserts that NS has failed to file any responsive pleading regarding document production requests that Capitol served on February 1, 2002,<sup>4</sup> has

---

<sup>1</sup> 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.

<sup>2</sup> Under the revised schedule, Capitol's opening statement was due April 1, 2002, NS's reply statement is due May 16, 2002, and Capitol's rebuttal statement is due June 17, 2002.

<sup>3</sup> In a related filing, Capitol seeks revision of the procedural schedule to extend the discovery period for "a reasonable time beyond February 28, 2002."

<sup>4</sup> The discovery requests involve the following categories: (1) all documents establishing each switching date and time of every rail car tendered to Capitol at its Atlanta and Duluth facilities during the subject period, including but not limited to the daily train engineer's report on which specific times and dates are entered for all cars spotted and pulled, and all documents in  
(continued...)

not objected to the requests, and has not asserted any type of privilege over the items. Capitol states that, although it received a box of documents from NS on February 20, 2002, the documents were not indexed and do not appear to relate to the items specifically requested. Rather, according to Capitol, they appear to be copies of documents previously produced by NS in the underlying court case. Thus, Capitol submits that the Board should order NS to immediately produce the sought information. Capitol also asserts that it is entitled to reasonable attorney's fees incurred in presenting its motion to compel pursuant to 49 CFR 1114.31. In its related filing, Capitol argues that an extension of the procedural schedule is needed to provide time for a suitable resolution of the matters involved in the motion to compel and to provide for a reasonable inspection time of the discoverable documents.

In replies filed on March 1, and 4, 2002, respectively, NS objects to both the motion to compel and the extension request. In its reply to the motion to compel, NS asserts that Capitol's statements that NS "has failed and refused to provide the requested discovery information" and that the produced documents "do not appear to have any relation to the items specifically requested" are completely false. On the contrary, NS argues that it has diligently worked at the time-consuming and labor-intensive task of identifying documents and has produced thousands of pages of responsive documents. Moreover, NS submits that the cover letter accompanying the more than 2,100 pages forwarded on February 19, 2002, made it clear that NS was continuing to search for additional documents. In fact, NS asserts that, prior to the filing of the motion to compel, it had assembled various additional documents that were being reviewed in preparation for production.<sup>5</sup> NS submits that many documents replicate those previously produced in the underlying court action because Capitol's requests in this proceeding largely overlap with requests served in that case. In any event, NS submits that the documents produced on February 19 also include material, such as certain demurrage bills and supporting documentation, that had not been produced in the court proceeding. NS asserts that, in view of its extensive efforts to respond to the discovery requests, the motion to compel is baseless and should be denied.

---

<sup>4</sup>(...continued)

the possession of NS on which such information is reflected; (2) all bills of lading or other documents which identify the origin date of every car spotted at the Atlanta and Duluth facilities during the period; (3) all documents which support, reflect or refer to NS's decision to provide only one switch per day to the Atlanta and Duluth facilities during the subject period; and (4) all documents evidencing or showing a complete listing or log of all cars delivered to the Atlanta and Duluth facilities during the subject period.

<sup>5</sup> In its March 4 reply to the extension request, NS indicates that it expected to forward additional documents to Capitol on that date. However, NS also states that it has identified a number of other documents containing possibly sensitive information about other shippers that it will not produce without a protective order.

Capitol's motion to compel and request for an award of attorney's fees will be denied. Although Capitol complains that NS has produced numerous documents that were previously produced in the court case, the requests here, which demand all documents, bills of lading, listings, and logs that reflect origin, switching, and delivery dates for every car delivered to Capitol's facilities, necessarily would require that NS produce virtually every document related to the demurrage charges at issue here.

Notwithstanding the broad scope of its requests, it appears that Capitol is primarily interested in obtaining documents that it referred to as "daily train engineer's reports" in its production requests. The motion to compel, however, clarifies that NS apparently uses the title "release and special instructions" to refer to these documents.<sup>6</sup> While NS does not specifically indicate that it has provided a document by either name, NS states that it produced demurrage bills and other listings (with supporting documentation) showing the following information for individual cars: constructive placement date and time; actual placement date and time; release date and time; and pull date and time. Thus, in light of the extensive documentation that NS has produced relating to switching dates and times, Capitol should have sufficient information to prepare its opening statement. Moreover, Capitol has failed to show how the information in this recently discovered source document is relevant and might affect the result in this proceeding.<sup>7</sup>

NS's motion to compel. NS seeks an order requiring Capitol to provide the information and answers sought in two interrogatories and three document requests.<sup>8</sup> NS states that

---

<sup>6</sup> A sample attached to the motion to compel reflects that the "release and special instructions" form is a source document that only records the date and time when cars are switched.

<sup>7</sup> On March 19, 2002, Capitol filed a pleading entitled "Reply to Norfolk Southern Railway Company's Response to Capitol Materials Incorporated's Motion to Compel Discovery." Under the Board's rules, 49 CFR 1104.13(c), a reply to a reply is not permitted. The pleading generally consists of a rehash of Capitol's arguments in the motion to compel, expanded to include the additional materials forwarded by NS on March 4, 2002, and a renewed request to extend the discovery period. Moreover, Capitol has not presented any argument or shown good cause why rule 1104.13(c) should be waived. Therefore, the reply will be rejected. Consequently, NS's motion to strike Capitol's March 19, 2002 pleading is moot.

<sup>8</sup> The requests involve the following information: (1) Interrogatory No. 1 asks Capitol to provide specified information identifying every rail car delivered to its Atlanta and Duluth facilities during the relevant period that Capitol contends involved unreasonable demurrage charges; (2) Interrogatory No. 2 asks Capitol to describe for each of the cars identified in response to Interrogatory No. 1 the basis or bases for its claim that the demurrage charges assessed with respect to such car are unreasonable; (3) Document Request No. 1 seeks all  
(continued...)

Interrogatories Nos. 1 and 2 and its document requests represent its efforts to focus the scope of the proceeding and perhaps narrow the issues. For example, NS asserts that the purpose of Document Request No. 4 is to allow the parties to confirm or Capitol to rebut NS's understanding that Capitol has not filed any type of written demurrage claim with NS since 1997.<sup>9</sup>

In reply, Capitol states that it has fully responded to the discovery requests served by NS, and reiterates its contention that unreasonable demurrage charges were assessed on every car delivered during the subject period. Capitol submits that NS has failed to make any showing as to why Capitol should be forced to produce documents that are reasonably available to NS or are in the possession, custody, and control of NS. Moreover, Capitol asserts that, while it is required to respond to discovery requests, it is not required to provide responses that accord and conform with NS's litigation position.

NS's motion to compel will be denied. The discovery requests are all designed to identify and limit the scope of Capitol's case-in-chief in advance of its opening statement.<sup>10</sup> Narrowing the scope of the issues, however, is not sufficient grounds for granting a motion to compel. This proceeding involves Capitol's allegation that NS's practice in assessing demurrage charges is unreasonable.<sup>11</sup> NS has submitted its bills and related support documents. Thus, NS need only respond to the arguments that Capitol raises in its opening statement. Moreover, if NS believes that Capitol has failed to address in its opening statement critical elements regarding NS's demurrage practices, then NS can raise that in its reply.

---

<sup>8</sup>(...continued)

documents that discuss, refer to, or relate to, the demurrage charges assessed by NS with respect to the Atlanta and Duluth facilities that accrued during the relevant period; (4) Document Request No. 2 seeks all documents that Capitol contends support the conclusion that the demurrage rate or rates are unreasonable; and (5) Document Request No. 4 seeks the production of each written claim and relevant demurrage bill that Capitol presented to NS seeking relief from any demurrage charge with respect to any rail car delivered to either the Atlanta or Duluth facility during the relevant period.

<sup>9</sup> NS submits that it needs this information because the applicable tariff contains a requirement that a customer must file a written claim within 45 days of the demurrage bill date to claim relief or allowance from an assessed demurrage charge.

<sup>10</sup> Capitol filed its opening statement on April 1, 2002.

<sup>11</sup> The court referred three issues for the Board's consideration: (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.

NS's Motion for Protective Order. By a motion filed March 8, 2002, NS seeks a protective order to aid in discovery. NS submits that it has identified a number of documents that are responsive to recent discovery requests that contain information relating to shippers other than Capitol. Because disclosure of these documents may be restricted, NS seeks a protective order governing their use and disclosure by the recipients. The proposed protective order submitted by NS, set out in the appendix, includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

In reply, Capitol submits that the motion for a protective order is nothing more than a delaying tactic to excuse NS's failure to respond to document requests. Thus, Capitol asserts that the motion should be denied because NS has failed to show that good cause exists to issue a protective order.<sup>12</sup>

Given the broad nature of Capitol's requests here, it is conceivable that NS may have identified additional documents that contain restricted information about other shippers. Under the circumstances, good cause exists to grant the motion for protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury. A protective order will expedite the exchange of discovery materials in this proceeding and will ensure that additional material produced, either in response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

Procedural Schedule. Even though all discovery matters have not been completed, NS argues that no extension of the discovery period is necessary because the parties are not precluded from continuing efforts after February 28, 2002, to respond to previous discovery

---

<sup>12</sup> On March 21, 2002, NS filed a pleading entitled "Norfolk Southern's Reply to Capitol Materials' Response to NS' Motion for Protective Order." NS argues that the Board's rules at 49 CFR 1104.13(c), prohibiting a reply to a reply, should be waived and its pleading accepted. NS's request for waiver is based on the argument that Capitol's opposition to issuance of a protective order is nothing more than a transparent effort to obtain a further extension of the procedural schedule. Under the circumstances, NS asserts that it is entitled to reply to this new request for an extension of the discovery period. However, the main focus of the pleading is to place the blame for the procedural delays and discovery disputes on Capitol. NS has already responded to Capitol's request to extend the procedural schedule and has not presented good cause why rule 1104.13(c) should be waived to allow additional argument on this issue. Therefore, the pleading will be rejected.

requests or from asking the Board to compel discovery after that date if a party has failed to comply with a previous request.<sup>13</sup>

Because the motions to compel are being denied, there is no need to further extend the discovery period. However, a short extension of the procedural schedule appears necessary in light of NS's argument that it cannot produce sensitive documents involving other shippers without a protective order. Because a protective order is being issued with this decision, a short extension of the statement filing due dates should allow sufficient time for Capitol to receive and review the remaining documents and submit any revisions to its opening statement. A revised procedural schedule is set forth below. The Board expects the parties to cooperate with each other in promptly completing the remaining discovery in this proceeding.

It is ordered:

1. Capitol's motion to compel and its request for an award of attorney's fees are denied.
2. NS's motion to compel is denied.
3. NS's motion for protective order is granted.
4. The parties are directed to comply with the protective order in the appendix to this decision.
5. Capitol's reply filed March 19, 2002, is rejected.
6. NS's reply filed March 21, 2002, is rejected.
7. The procedural schedule for this proceeding is revised as follows:

May 9, 2002	Opening statement due.
June 24, 2002	Reply statement due.
July 24, 2002	Rebuttal statement due.

---

<sup>13</sup> In a related matter, NS states that because of Capitol's refusal to respond to its discovery requests, NS does not know what evidence, if any, Capitol will rely on in its opening submission. Consequently, NS states that it may be required to seek the Board's permission to conduct discovery related to that filing. NS's assumption that such a request would be permissible is erroneous. Indeed, the Board's rules specifically state that no written interrogatories shall be served within 20 days prior to the date assigned for the filing of opening statements under the modified procedure. 49 CFR 1114.26(c).

8. This decision is effective on the date served.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

**APPENDIX**

**PROTECTIVE ORDER**

1. Subject to paragraph 3 below, any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL” and such material must be treated as confidential. Such material, any copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the party receiving such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
2. Subject to paragraph 3 below, any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, may in good faith designate and stamp particular material, such as material containing shipper-specific rate, cost or traffic data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to another party’s outside counsel of record in this proceeding, and to those individuals working with or assisting such counsel who are not employed by the party and have a need to know, review, or handle the Highly Confidential material for purposes of the proceeding, including testifying and consulting experts, provided each such person has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Highly Confidential Material prior to receiving access to such materials.
3. Argument and witness testimony is not, in itself, Confidential or Highly Confidential, except to the extent that such argument or testimony reveals any party’s Confidential or Highly Confidential data, information, or documentation.
4. Confidential and Highly Confidential material shall be used by a receiving party solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
5. Confidential and Highly Confidential material that is not the receiving party’s own data, information, or documents must be destroyed by the receiving party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom, except that: (1) outside counsel (but not outside consultants) for each party are permitted to retain file copies of all pleadings and evidence

filed with the Board and file copies of all work product; and (2) in-house counsel for each party are permitted to retain file copies of all pleadings and evidence which he or she received during the course of this proceeding.

6. Confidential and Highly Confidential material, if contained in any pleading or evidence filed with the Board, shall, in order to be kept confidential, be filed only in pleadings or evidence submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order” or “Highly Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.
7. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to stamp the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation. The parties who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving parties with properly designated material.
8. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other parties return the inadvertently produced privileged document. The parties who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
9. If any party intends to use Confidential and/or Highly Confidential material in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential and/or Highly Confidential material to any Administrative Law Judge, the Board, or the court, with a written request that the Administrative Law Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

10. If any party intends to use Confidential and/or Highly Confidential material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such Confidential and/or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential and/or Highly Confidential material shall be kept under seal and treated as Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.
11. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.
12. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release Confidential or Highly Confidential material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the Confidential material, Highly Confidential material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.
13. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, or by an Administrative Law Judge in a decision from which no appeal is taken, warrants suspension of any of the provisions herein.
14. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
15. A “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation may be removed by consent of a party who asserts the confidential, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate Order of the Board, or of an Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.

**UNDERTAKING  
CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on April 19, 2002, governing the production of confidential documents in STB Docket No. 42068, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to this Undertaking for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42068 or any judicial review proceeding arising therefrom. I further agree not to disclose any confidential data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
Dated: \_\_\_\_\_

**UNDERTAKING  
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for \_\_\_\_\_, for which I am acting in this proceeding, I have read the Protective Order served on April 19, 2002, governing the production of confidential documents in STB Docket No. 42068, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to the preparation and presentation of evidence and argument in STB Docket No. 42068 and any judicial review proceeding arising therefrom, that I will take all necessary steps to ensure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the highly confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
OUTSIDE [COUNSEL][CONSULTANT]

Dated: \_\_\_\_\_