

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D. C. 20268-0001

COMPLAINT OF TIME WARNER INC. ET AL.
CONCERNING PERIODICALS RATES

Docket No. C2004-1

ANSWER OF AMERICAN BUSINESS MEDIA TO
MOTION OF TIME WARNER INC., ET AL. TO COMPEL
PRODUCTION OF DOCUMENTS RESPONSIVE TO TW ET AL./ABM-T1-3
(October 12, 2004)

On October 6th, Time Warner et al. (hereafter "Time Warner") filed what purports to be a motion to compel related to its interrogatory TW et al./ABM-T1-3, directed at American Business Media witness Cavnar. On the same day, it filed motions related to requests directed at American Business Media witnesses Bradfield (T2) and McGarvy (T3). Yet even after its first filing on October 5th of a single motion covering all three witnesses was rejected, Time Warner has again filed a single motion covering all three witnesses, although with only one witness identified in the caption, accompanied by two motions related to other witnesses incorporating the instant motion by reference. The specific motion here seeks mail.dat files for each publication produced by Hanley Wood, witness Cavnar's employer.

In choosing to again combine its motions, Time Warner has mixed together contentions related to three witnesses with no clear line of demarcation showing which of its assertions support which of its motions to compel. In other words, it is not clear whether, for example, the combined motion's discussion of witness McGarvy's testimony is presented in support of the specific motion to compel a response from

witness Cavnar—the subject of the instant motion—or whether it is offered to support the merged motion to compel a response from witness McGarvy.

Facing a choice of whether to file a single substantive response with two incorporations by reference or three separate responses, as the Commission's procedures appear to contemplate, American Business Media has selected the latter option, in part because it is inappropriate to lump together the testimony of the three witnesses for purposes of this discovery dispute. Our choice will lead to repetition that we submit is preferable to confusion.

Although American Business Media and Time Warner appear to disagree to some extent on the meaning of the precedent from Docket No. MC95-1, addressed at pages 9-10 of the motion, we do agree that apart from other considerations such as confidentiality, discovery of a witness is limited by the scope of that witness's testimony. Time Warner concludes from *Presiding Officer's Ruling No. MC95-1/11* (June 1, 1995) that "requesting facts or documents underlying that witness's testimony is entirely proper" (motion at 10). In fact, in that order (at 2) the Presiding Officer gave as an example of improper discovery questions to a university professor giving economic testimony for the Postal Service concerning his employer's mailing practices. More generally, the ruling (*id.*) was that, where the Postal Service uses a witness that is employed by another entity (as is analogous to the situation here), the scope of discovery does not extend to the business practices of the witness's employer when that information is not known to the Postal Service and is outside the scope of the witness's testimony.

Time Warner (motion at 9-10) ascribes great weight to the arguments presented Docket No. MC95-1 by American Business Media's predecessor seeking to obtain information on Meredith Corporation's alternate delivery experiences from its employee who was testifying for the Postal Service in a case in which the availability of alternate delivery was a significant issue (*Presiding Officer's Ruling No. MC95-1/11* at 8) and the witness had access to the information. Although Time Warner contends (motion at 10) that the Presiding Officer "saw merit" in those arguments, he in fact did not. Rather, all that the witness was required to produce was "a brief description of the business of Publishers Express" (*Presiding Officer's Ruling No. MC95-1/11* at 9), on whose board he served, information that was otherwise publicly available. Similarly, the Presiding Officer (*id.* at 8) denied the attempt by American Business Press (as it was then known) to obtain alternate delivery information from witness Baer because "alternate delivery is not central to witness Baer's testimony."

As this discussion shows, quite apart from consideration of confidentiality or other grounds for withholding the mail.dat files, Time Warner must demonstrate not in general terms that impact is an issue in this case (despite its failure to offer any impact evidence) but that the commercially sensitive data in Hanley Wood's mail.dat files are "central" to witness Cavnar's testimony. It has not even shown that the requested mail.dat files are in any way related to that testimony.

Time Warner in fact devotes more space in a motion supposedly directed at witness Cavnar to the other American Business Media witnesses. As to witness Cavnar, Time Warner begins with the statement (motion at 4) that he testifies in an expert or professional capacity, which is true, but he does not purport to be an expert on

the impact of the Time Warner-proposed rates on Periodicals. Time Warner then (motion at 2-3) refers to a single sentence in witness Cavnar's testimony (T1 at lines 11-12) that the proposed rates would push costs for some Periodicals mailers above the costs of mailing at Standard rates, based upon his experience in dealing with the two rates. In his testimony, *id.* at lines 13-15, he relies on an interrogatory response by Time Warner witness Mitchell and McGraw-Hill witness Schaefer's testimony, not the mailing characteristics of Hanley Wood publications.

Without even trying to link this testimony and an interrogatory response to its request for mail.dat files, Time Warner launches (motion at 5) into a rebuttal more appropriate to testimony and asserts that if mailers made the changes necessary to comply with Standard requirements they would qualify for lower Periodicals rates at the proposed rates. While we expect to see that assertion in rebuttal testimony, its relevance to a motion seeking production of Hanley Wood's mail.dat files is not apparent. Finally, we note that Mr. Cavnar did not suggest, as Time Warner implies, that a mailer would in fact make the changes that would be required to qualify as Standard mail. Rather he simply said that for many Periodicals the proposed Periodicals rates would be higher than Standard rates.

The only other portion of witness Cavnar's testimony to which Time Warner refers (motion at 5) is his assertion that he did not study the impact of the proposed rates on Hanley Wood because, with all of its publications co-palletized, he did not believe it would be adverse. The Presiding Officer should take specific note of the fact that in Time Warner's motion that is otherwise well-documented with citations to specific testimony and other authority, there is no citation to support this discussion. In fact, Mr.

Cavnar's statement is not in the record and is contained in response to interrogatory TW et al./ABM-T1-1. There, Mr. Cavnar was responding to a request that he list the impact of the proposed rates on Hanley Wood publications, and he replied that the impact has not been calculated because "we currently co-palletize our periodical mailings, and do not expect to be adversely impacted. . . ." Time Warner cannot be permitted to bootstrap an argument that Mr. Cavnar testifies on impact by reference to a response to an interrogatory on impact (especially when the answer disavows having examined impact). Yet (motion at 5) it seeks to justify its request for mail.dat files on the ground that it is entitled to information on which it erroneously states the witness relied in responding to an interrogatory.¹

Although Time Warner established a "within the scope of the testimony" test for discovery, it falls far short of meeting its own test. The simple fact is that witness Cavnar does not testify about the impact of the proposed rates on Hanley Wood, or, in fact, about the impact on any mailers. In response to Time Warner/ABM-T1-2, Mr. Cavnar truthfully stated: "Please note that my testimony makes no statement regarding the impact of the proposed rates on Hanley Wood publications, either adverse or favorable."²

¹ Parties to Commission cases cannot be permitted to use the written cross-examination protocol to expand the scope of a witness's testimony, thus justifying otherwise improper pre-trial discovery. Apart from the fact the response in question does not open the witness to this discovery, it is beyond dispute that, if the witness were asked on the witness stand whether he had calculated the impact, and said he did not because he expected that co-palletization would protect against adverse impact, the inquiring party would not then be permitted to submit a request for production of mail.dat files.

² Because Hanley Wood never calculated the impact of the proposed rates, its publications do not appear on exhibit LB-1.

For this reason alone, the motion should be denied. The Commission need not reach the issue of confidentiality, but should it choose to do so, American Business Media submits that there is no compelling need for the confidential mail.dat files and that Time Warner has available to it ample data—including its own data, mail.dat files for 155 American Business Media-member publications and data it is in the process of obtaining from the Postal Service—with which to make its rebuttal case.³ Clearly, with all of these sources available, Time Warner cannot meet the Commission’s standard that absent “exceptional circumstances” an intervenor (as opposed to the Postal Service) will not be ordered to produce confidential data. See *Presiding Officer’s Ruling No. R2000-1/02* (July 31, 2000), addressed in American Business Media’s Objections, in which the Presiding Officer stated:

The Commission’s policy regarding the discovery of intervenors commercially sensitive information has been reiterated in a series of rulings—absent exceptional circumstances, such data need not be produced.

See also *Presiding Officer’s Ruling No. R2000-1/97* (July 25, 2000), at 8, where the Presiding Officer ruled that the proponent of a new rate or classification sometimes has a higher burden for disclosure and *Presiding Officer’s Ruling No. R97-1/104* (February 27, 1998) at 1-2, confirming that “a strong interest in protecting” commercially sensitive information prevails, “regardless of the availability of protective conditions.” The Time Warner citations at page 11, note 13, offered in support of its assertion that once

³ The substitutability of alternate data is addressed more fully in American Business Media’s Answer of American Business Media to Motion of Time Warner Inc., et al. to Compel Production Responsive to Time Warner et al./ABM-5(c) and Time Warner et al. /ABM-68(k) (October 12, 2004)

relevance is established, disclosure with protective conditions is mandatory all deal with discovery from the Postal Service, and, as shown here, the Commission has sharply distinguished between the Postal Service and intervenors.

It is also important to note that American Business Media has not objected to, but has complied with (and will comply with) requests for information not in its custody or control that is, in fact, related to the testimony of its witnesses. For example, Time Warner et al./ABM-T1-7(c) asked for the advertising rate cards for all Hanley Wood periodical publications. They were provided. In addition, in several requests, such as Time Warner et al./ABM-69 and 70, and in Time Warner et al./ABM-T2-10, Time Warner has sought additional backup to exhibit LB-1. It will be provided. The request here is much different, since it seeks confidential information totally unrelated to the testimony of the witness.

For the foregoing reasons, the motion seeking an order compelling the production of the commercially sensitive mail.dat files sought in TW et al./ABM-T1-3 should be denied.

Respectfully submitted,

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