

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Rate and Service Changes to
Implement Baseline Negotiated
Service Agreement with Bookspan

Docket No. MC2005-3

PRESIDING OFFICER'S RULING ON OFFICE OF CONSUMER
ADVOCATE MOTION TO COMPEL RESPONSE TO
INTERROGATORIES OCA/USPS-T2-11(c)-(e)

(Issued September 13, 2005)

On September 1, 2005, the Office of the Consumer Advocate filed a motion to compel the Postal Service to respond to interrogatories OCA/USPS-T2-11(c)-(e), directed to witness Yorgey.¹ These interrogatories seek information on witness Yorgey's experience and success in negotiating and implementing ICM agreements. The Postal Service objected to providing responses to these interrogatories on the ground of relevance.²

OCA's motion argues that the interrogatories are relevant for two reasons. First, OCA asserts that information concerning the financial performance and success of previously implemented agreements negotiated by witness Yorgey could impeach the credibility and reliability of her projections under the Bookspan NSA. Second, OCA asserts that witness Yorgey relied on her prior experience with these agreements as a

¹ Office of Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-T2-11(c)-(e), September 1, 2005 (Motion to Compel).

² Objection of the United States Postal Service to Interrogatories OCA/USPS-T2-11(c)-(d), August 15, 2005 (Objection); Response of the United States Postal Service to Motion of the Office of the Consumer Advocate to Compel Responses to Interrogatories OCA/USPS-T2-11(c)-(e), September 9, 2005 (Response). The same day it filed its Response, the Postal Service filed a Motion for Late Acceptance of the Response. There does not appear to be any prejudice to the participants from granting this request since it was due to administrative error and only one day late. Accordingly, the late filing will be accepted.

basis for her status as an expert witness in this case, and, accordingly, opened the door to questions of this nature.

The Postal Service argues that International Customized Mail (ICM) agreements are not Negotiated Service Agreements (NSAs), are outside of the Commission's jurisdiction and, that participants should not be allowed to use interrogatories to seek information on areas outside of the Commission's jurisdiction just because the witness had duties in non-jurisdictional areas. For the reasons discussed below, the Motion to Compel is granted.

Under Commission rule 25 on discoverability, information is discoverable when it is "reasonably calculated" to lead to relevant evidence. 39 CFR § 3001.25. This rule does not limit discoverable items only to information under the Commission's jurisdiction; it can extend to information much broader than that. A witness's testimony should not be taken in a vacuum, and information relating to his or her credibility can influence the weight that the Commission will ultimately give to testimony of that witness. Past experience and education can influence a witness's credibility, although how much depends on the specifics of such information. One of the reasons that expert witnesses discuss their prior experience and education is to add weight to their testimony. It would be anomalous, and not afford appropriate due process, if witnesses were allowed to use such information to their advantage while other participants were not allowed to question and explore the reliability, accuracy and meaning of that information.

The Postal Service's arguments that witness Yorgey's experience in the ICM agreement context are different from the NSAs that the Commission considers under Subpart L of its rules of practice and procedure goes to the weight of this evidence, not

its discoverability.³ The Postal Service will be free to argue again at the appropriate juncture of this case that the information on the witness' experience negotiating ICM agreements "shed[s] no light on whether the proposal in this docket meets the applicable statutory and regulatory standards," just as OCA will be free to argue that such information bears on the projections in this case.⁴ The Commission will consider everything admitted into evidence and weigh the persuasiveness of such evidence when it renders its opinion and recommended decision.

Even if credibility was not an issue, Negotiated Service Agreements are similar enough to ICM agreements to potentially shed light on the accuracy of the financial projections of the Bookspan NSA. In the Capital One NSA case, the Postal Service argued that "[i]n negotiating with Capital One to establish rates appropriate to its unique service needs, the Postal Service is doing nothing more in the domestic sphere than pursuing the same types of opportunity for innovation endorsed by the court in the [*UPS Worldwide Forwarding, Inc., v. United States Postal Service*, 66 F.3d 621 (3d Cir. 1995)] case in the international sphere [with ICM agreements]." Docket No. MC2002-2, Reply Brief of the United States Postal Service, April 14, 2003, at 11, n.6. Given this similarity, OCA correctly points out that if the evidence shows that a significant number of ICM agreements failed to generate profits despite financial projections to the contrary, the accuracy of similar financial projections in other contexts could be questioned. It would be unfair and inequitable for only the Postal Service to decide which past agreement

³ Negotiated Service Agreement, as that term is defined in the Commission's rules of practice and procedure is not the entire universe of Negotiated Service Agreements that the Postal Service executes. See 39 CFR §§ 3001.5(r); 3001.190-3001.198. These rules only govern those Negotiated Service Agreements which require a recommended decision from the Commission. Other Postal Service Negotiated Service Agreements do exist and could include many different contractual relationships. For purposes of clarity, unless otherwise indicated in this Ruling, the term "Negotiated Service Agreement" is used to refer to the entire universe of Negotiated Service Agreements and "Negotiated Service Agreement as defined in the Commission's rules of practice and procedure" refers to the term more narrowly defined in 39 C.F.R. § 3001(r).

⁴ Response at 2.

results the Commission will consider in determining whether to recommend the Bookspan NSA.⁵ The Commission should and will consider all relevant information.

Accordingly, OCA's questions are not beyond the realm of discoverability and the Motion to Compel is granted.

RULING

1. The Office of Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-T2-11(c)-(e), filed September 1, 2005, is granted.
2. The Motion of the United States Postal Service for Late Acceptance of Its Response to Motion of the Office of the Consumer Advocate to Compel Responses to Interrogatories OCA/USPS-T2-11(c)-(e), filed September 9, 2005, is granted.

George Omas
Presiding Officer

⁵ "Most importantly, the first year results of the first NSA with Capital One show the business impact of NSAs can be meaningful to both the customer and the Postal Service." USPS-T-1 at 1.