

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

Postal Rate and Fee Changes

Docket No. R2005-1

PRESIDING OFFICER'S RULING
ON DAVID B. POPKIN MOTION TO COMPEL
SUPPLEMENTAL RESPONSES TO INTERROGATORIES

(Issued September 22, 2005)

On September 6, 2005, David B. Popkin filed a motion to compel supplemental responses to two of his interrogatories previously answered by the Postal Service.¹ The Postal Service opposed this motion in a pleading filed on September 13, 2005.²

Mr. Popkin invokes the requirements of section 26(f) of the Commission's rules of practice [39 CFR § 3001.26(f)], which provides:

(f) *Supplemental answers.* The individual or participant who has answered interrogatories is under the duty to seasonably amend a prior answer if he/she obtains information upon the basis of which he/she knows that the answer was incorrect when made or is no longer true. Participants shall serve supplemental answers to update or to correct responses whenever necessary, up until the date the answer could have been accepted into evidence as written cross-examination. Participants filing supplemental answers shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer.

In his Motion, Mr. Popkins asserts that this section should be enforced upon the Postal Service with respect to his Interrogatories DBP/USPS-5 and 83. The two interrogatories will be considered in turn.

¹ David B. Popkin Motion to Compel Supplemental Responses to Interrogatories DBP/USPS-5 and 83 as Mandated by Section 26[f] of the Commission's Rules of Practice, September 6, 2005 (Motion).

² United States Postal Service Reply in Opposition to David Popkin Motion to Compel Supplemental Responses to Interrogatories DBP/USPS-5 and 83, September 13, 2005 (Reply).

DBP/USPS-5. The first interrogatory requests a listing of EXFC results “for the past four quarters,” displayed by 18 specified categories. The Postal Service initially objected to answering this interrogatory, but was compelled to do so in Ruling No. 10.³ The Service filed its compelled response on June 9, 2005, and a revised response containing errata on June 22, 2005.⁴ These responses, Mr. Popkin notes, provided EXFC data for the latest four quarters as of the response date of June 22, 2005. Now that the Postal Service has released data for the third quarter of Fiscal Year 2005, he argues, the Service should be required to update its response to the past four quarters as of August 2, 2005.⁵

In its Reply, the Postal Service asserts that section 26(f) is inapplicable here, and thus it has no duty to update its response to DBP/USPS-5. The Service notes that Mr. Popkin phrased the interrogatory as a strictly retrospective request for the four quarters of data preceding the filing date of his interrogatory, not “data from all FY 2005 quarters” or data from future 2005 quarters that became available during the pendency of this proceeding. According to the Service, it is aware of no need to correct any errors or supplement incomplete data in the answer it has already provided, and thus argues that section 26(f) is inapplicable on those potential grounds.⁶

Even assuming, *arguendo*, that section 26(f) imposes some duty to supplement its answer with new information, the Postal Service further argues that any such obligation ended with the July 8, 2005, deadline for designation of institutional interrogatory responses into the evidentiary record established in Ruling No. 27. To the extent that Mr. Popkin’s request for FY 2005 Quarter 3 EXFC data is directed to exploring First-Class Mail’s value of service, the Service claims that he had a full opportunity to direct a more expansive question to its witness Robinson no later than

³ Presiding Officer’s Ruling No. R2005-1/10, May 16, 2005, at 4-5.

⁴ Revised Response of the United States Postal Service to Interrogatory of David Popkin [DBP/USPS-5][Errata], June 22, 2005.

⁵ Motion at 1.

⁶ Reply at 1.

the discovery deadline of June 10, 2005, established in Ruling No. 11. Additionally, because such value of service considerations are not within the scope of the testimony filed by Valpak's witnesses, the Service states it would have challenged any new interrogatory seeking more recent EXFC data prior to the ultimate deadline of August 23, 2005, for discovery on the Postal Service. Thus, the Service submits, having missed all applicable deadlines for new discovery against the Postal Service, Mr. Popkin should not now be allowed to escape the consequences by virtue of section 26(f).⁷

I agree with the Postal Service that section 26(f) of the rules does not impose a duty to provide more recent quarterly data in response to DBP/USPS-5. As the Postal Service has recognized, that provision imposes upon it the duty to amend a discovery response that is factually incorrect, incomplete, or has been rendered untrue by intervening events.⁸ By its own terms, Mr. Popkin's interrogatory requests EXFC results "for the *past* four quarters." (Emphasis added.) The Postal Service ultimately provided the requested information, and vouches for its completeness and continuing validity. That response did not become factually inaccurate, incomplete, or no longer valid simply because time passed and data for a subsequent period were generated. This being the case, section 26(f) does not oblige the Postal Service to provide the new information sought by the movant, and the Motion shall be denied as to DBP/USPS-5.

DBP/USPS-83. The second subject of the Motion is an interrogatory that asks the Postal Service about instances in which it used its authority under section 182.51(g) of the Domestic Mail Classification Schedule. This provision allows the Service to deny refunds for late-delivered Express Mail where delay was caused by "breakdowns of a substantial portion of the USPS transportation network resulting from events or factors

⁷ *Id.* at 2-3.

⁸ Reply at 2; see also Docket No. C2001-3, Reply of the United States Postal Service to Motion of Douglas Carlson for Reconsideration of Presiding Officer's Ruling No. C2001-3/4 and Other Relief, November 27, 2001, at 2.

outside the control of the Postal Service[.]”⁹ The Postal Service responded that it “has never used its discretionary authority under DMCS 182.51(g).”¹⁰

The Motion asserts that the Service’s initial response should be updated to reflect that the Postal Service has invoked the rule in connection with the recent Hurricane Katrina, as is purportedly indicated on the Postal Service website www.usps.com. Furthermore, the Motion states that informal conversations with Postal Service counsel suggest the possibility that the rule was also invoked in the Midwest during the holiday season in 2004, but was subsequently overruled.¹¹

In its Reply, the Postal Service challenges the grounds on which Mr. Popkin argues for an updated response to DBP/USPS-83. Regarding Hurricane Katrina, the Service states that, while it did make refunds unavailable for late-delivered Express Mail to certain ZIP Codes affected by the storm, it did so pursuant to its authority under DMCS section 182.51(h), which applies to “acts of God[.]”¹² and not pursuant to section 182.51(g). The Service also denies that it exercised authority under the latter provision during the holiday season in 2004, because Postal Service headquarters did not authorize the use of this or any other exemption pursuant to section 114.3.1(b) of the Domestic Mail Manual, which the Service asserts is a necessary prerequisite. Even if section 26(f) could be read as imposing a duty to supplement its response to DBP/USPS-83, the Service argues, the movant has not identified any basis for questioning its continued accuracy, or requiring any sort of update.¹³

I find insufficient grounds for compelling the Postal Service to update its original response to DBP/USPS-83. That interrogatory explicitly limits its focus to instances in which refunds were denied as a consequence of breakdowns in a substantial portion of

⁹ 39 CFR Pt. 3001, Subpt. C, App. A § 182.51(g). This provision was adopted in Docket No. R2001-1. See PRC Op. R2001-1, paras. 3009-3019; Appendix Two at 6.

¹⁰ Response of the United States Postal Service to Interrogatory of David B. Popkin (DBP/USPS-83), June 3, 2005, at 2.

¹¹ Motion at 2-3.

¹² 39 CFR Pt. 3001, Subpt. C, App. A § 182.51(h).

¹³ Reply at 4-5.

the Service's transportation network, one of the new conditions adopted in Docket No. R2001-1. The Service's response to the interrogatory denies any use of this provision as of the time of its filing, and counsel represents on the Postal Service's behalf that it has not approved any subsequent use of this particular source of authority. Independent observations or hearsay accounts of suspensions of the refund guarantee because of some weather-related or seasonal operational difficulties do not justify an inference that the Postal Service has failed to discharge its duty to update this interrogatory. Accordingly, the motion shall be denied as to DBP/USPS-83 as well.

RULING

The David B. Popkin Motion to Compel Supplemental Responses to Interrogatories DBP/USPS-5 and 83 as Mandated by Section 26[f] of the Commission's Rules of Practice, filed September 6, 2005, is denied.

George Omas
Presiding Officer