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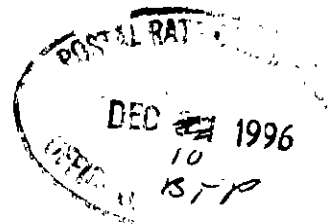
SPECIAL SERVICES REFORM, 1996

Docket No. MC96-3

OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO
DOUGLAS F. CARLSON MOTION TO COMPEL RESPONSE TO INTERROGATORY
TO UNITED STATES POSTAL SERVICE WITNESS LYONS (DFC/USPS-T1-1)
(December 10, 1996)

The United States Postal Service hereby opposes Douglas F. Carlson's December 3, 1996 motion to compel a response to interrogatory DFC/USPS-T1-1 to witness Lyons (hereinafter "Motion"). The interrogatory at issue is not proper follow-up, and the Motion was filed over two weeks late.

Interrogatory DFC/USPS-T1-1, filed on October 25, 1996, purports to follow up on witness Lyons' response to Presiding Officer's Information Request ("POIR") No. 4, question 8. That question, filed on October 2, 1996, asked the Postal Service to discuss the possibility that the acceptance by non-resident boxholders of the proposed non-resident fee might have been reduced if these boxholders had been told that the increase included a non-resident fee. In response, witness Lyons acknowledged that some non-resident boxholders might shift the location of their box rather than pay the higher fee; but he suggested that other non-resident boxholders who rejected the higher fee might accept it if, told that the increase was designed to reflect the added value of box service for non-residents, they were reminded of the extra value they receive by choosing a box away from their residence. Tr. 8/3012.



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In interrogatory DFC-T1-1, Mr. Carlson asks whether some non-resident boxholders who rejected the fee increase would continue to do so when told of various reasons for the non-resident fee. This is the type of question that could have been asked during the discovery period, or at the hearings, on the Postal Service's direct case.¹ In fact, the Office of the Consumer Advocate asked witness Ellard interrogatories on acceptance rates by non-resident boxholders,² and, specifically asked witness Ellard whether non-resident boxholders would have reacted differently to increased box fees if they had been informed that part of the increase was from the non-resident fee. Tr. 2/394. Witness Ellard answered "yes". Mr. Carlson was at that hearing, but declined to follow-up on witness Ellard's response. *Id.* Thus, Mr. Carlson has been provided full due process on this issue, and should not be allowed to extend discovery on a Postal Service witness so late into this proceeding.

In any case, the rule which allows follow-up interrogatories does not apply to responses to POIRs.³ Its terms are limited to follow-up to responses to

¹ Just because Mr. Carlson did not come up with this question until witness Lyons' POIR response does not mean that he did not have the information and opportunity to ask the question earlier. Information on the responses of boxholders, including non-residents, to a range of post office box increases was presented by witnesses Ellard (USPS-T-6) and Lyons (USPS-T-1, Appendix) as part of the Postal Service's direct case, filed on June 7, 1996. Discovery on the direct case was open until August 12, 1996, and witness Carlson filed interrogatories on several Postal Service witnesses during that period. Douglas F. Carlson Interrogatories to United States Postal Service Witness Paul M. Lion, filed August 9, 1996; Douglas F. Carlson Interrogatories to United States Postal Service Witness John F. Landwehr, filed August 9, 1996; Douglas F. Carlson Interrogatories to United States Postal Service Witness Susan W. Needham, filed August 9, 1996.

² Tr. 2/349, 371.

³ See Objection of the United States Postal Service to Douglas F. Carlson Follow-up Interrogatory to Witness Lyons (DFC/USPS-T1-1), filed November 4, 1996.

interrogatories, and that is how it has been interpreted in past Presiding Officer's Rulings.⁴

The Postal Service believes that its due process rights are violated if it not only is subject to all of the deadlines established by the Commission and must respond to POIRs throughout proceedings, but also is subject to follow-up discovery from intervenors throughout the entire proceeding. Mr. Carlson argues that allowing follow-up interrogatories to responses to POIRs is no different than regular follow-up, since both can extend beyond the usual deadlines for discovery. Motion at 3, n. 1. However, in most cases, follow-ups to interrogatories end by the completion of hearings on the Postal Service's direct case, or soon thereafter. Since POIRs are filed throughout proceedings, and have been issued even after rebuttal testimony is filed, it is much more likely that follow-ups to POIRs will impose a burden on the Postal Service that is inconsistent with its due process rights.⁵

⁴ See Presiding Officer's Ruling No. R87-1/3, at 2 (May 21, 1987), which stated that "[f]ollow-up interrogatories which are legitimate efforts to clarify responses to timely discovery are permissible." (emphasis added). Likewise, Presiding Officer's Ruling No. R87-1/138, at 4 (October 29, 1987) held that "[t]he special consideration underlying Rule 2D is that the opportunity to ask follow-up should not be arbitrarily cutoff when the initial discovery period expires, if the answers to timely initial discovery comes too late to otherwise permit it."

⁵ In fact, the Commission has recognized that follow-up interrogatories might interfere with the procedural schedule, and the deadline for them was established accordingly. Presiding Officer's Ruling No. R87-1/138, at 4, asserted:

This [Rule 2D] involves a risk that the record will slip out of phase, that one round of testimony will not be completed before discovery on the next begins. For this reason, there is a short seven-day deadline attached to Rule 2D.

Moreover, Presiding Officer's Ruling No. R90-1/56, at 2 (August 20, 1990), in denying David Popkin's motion to compel answers to follow-up interrogatories,
(continued...)

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Mr. Carlson argues that, since he passed up an opportunity to file a motion to cross-examine witness Lyons orally on his response to POIR NO. 4, Question 8, then the Postal Service should be required to file a written response to his follow-up interrogatory. However, the fact that Mr. Carlson was given an opportunity to move to cross-examine witness Lyons on his response diminishes his due process claim to receive an alternative form of due process. Moreover, because Mr. Carlson was given the opportunity to file a motion to cross-examine witness Lyons does not mean his motion would have been granted. Certainly the Postal Service would have opposed such a motion, especially since the cross-examination concerned topics that could have been, and to some extent were, raised by the OCA, during the discovery period and hearings on the Postal Service's direct case.

Finally, this Motion was filed over two weeks late. While Mr. Carlson explains in his Motion why he did not file it on time, the reasons that motivated his actions do not excuse his failure to protect his rights on time, or to otherwise comply with

⁵ (...continued)
stated that:

Our rate proceedings are subject to a statutory 10-month deadline. Therefore, we must hold parties to a higher standard of diligence -- in discovery as well as other matters -- than could be permitted in the absence of the deadline.

That Ruling, moreover, recognized the burden on the Postal Service of responding to discovery once the case has moved into later phases:

In this situation [when the questions are not a reasonable next step in consideration of an issue], the information requested must be of considerable importance if an answer is to be required during the time when the Postal Service's efforts are focused on evaluating the participants' cases and preparing for the next set of hearings.

Id. at 2-3.

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the rules applicable to this case. He has not, moreover, moved for late acceptance of his motion. The Postal Service opposes late acceptance of this motion.


For all these reasons, the Postal Service opposes Mr. Carlson's Motion.

Respectfully submitted,

UNITED STATES POSTAL SERVICE


By its attorneys:

Daniel J. Foucheaux, Jr.
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David H. Rubin

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.


David H. Rubin

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