

ORIGINAL

006259

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

SPECIAL SERVICES REFORM, 1996

Docket No. MC96-3

DOUGLAS F. CARLSON
MOTION TO COMPEL RESPONSES TO INTERROGATORIES
TO UNITED STATES POSTAL SERVICE (DFC/USPS-1-6)

December 9, 1996

Pursuant to § 25 of the Rules of Practice, I, Douglas F. Carlson, hereby move to compel the Postal Service to respond to institutional interrogatories DFC/USPS-1-6.

PROCEDURAL BACKGROUND

On November 14, 1996, I filed six institutional interrogatories directed to the Postal Service (DFC/USPS-1-6). Interrogatories 1 through 4 generally explore issues related to the comparative cost of producing multi-color and single-color postal cards. Interrogatory 5 seeks to clarify confusion surrounding return-receipt service that was raised in Attachment 1 to Response to DBP/USPS-T1-3 and in Response to DBP/USPS-T8-14(k). Finally, interrogatory 6 follows up on witness Lyons' statements in Response to POIR No. 4 (Question 8), which was filed on October 15, 1996. I filed interrogatory 6 as an institutional interrogatory after the Postal Service objected on November 1, 1996, to my original follow-up interrogatory to witness Lyons on this subject (DFC/USPS-T1-1) on the grounds that follow-up interrogatories to responses to POIR's are not proper follow-up under § 2(D) of the Special Rules of Practice. See Objection of the United States Postal Service to Douglas F. Carlson Follow-up Interrogatory to Witness Lyons (DFC/USPS-T1-1) (filed November 1, 1996). On December 3, 1996, I filed a motion to compel a response to DFC/USPS-T1-1, since the Postal Service objected to my institutional interrogatory on this subject (DFC/USPS-1-6).

RECEIVED
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY
DEC 16 11:30 AM '96

POSTAL RATE COMMISSION
DOCKETED
DEC 16 1996
OFFICE OF THE SECRETARY

The Postal Service lodged a three-part general objection to my six institutional interrogatories: (1) They were filed "after the close of discovery on the Postal Service's direct case and are, accordingly, late"; (2) "they are not follow-up as that term is used" in § 2(D) because they could have been, but were not, "propounded during the regular discovery period and no interrogatory (or other) response shed new light which the interrogatory sought to explore"; and (3) "since the purpose of the interrogatories is not, as required by Rule 2(E), to develop rebuttal testimony from materials solely in the possession of the Postal Service, that rule does not permit the late filing of the interrogatories." Objection of United States Postal Service to Interrogatories of Douglas F. Carlson (DFC/USPS-1-6) at 2. The Postal Service also objected to the individual interrogatories on a variety of other grounds.

My motion to compel responds first to the general objections, then explains, interrogatory by interrogatory, why the Postal Service's objections are not valid and why the Commission should compel an answer to each interrogatory.

GENERAL OBJECTION

These institutional interrogatories were filed after the close of discovery on the Postal Service's direct case but prior to the November 15, 1996, deadline for discovery directed to the Postal Service. See POR No. MC96-3/3, Attachment A. On its face, § 2(E) of the Special Rules of Practice clearly would allow these institutional interrogatories until 20 days prior to the filing date for rebuttal testimony. Since rebuttal testimony was due on December 6, institutional interrogatories would have been permitted until November 16--or, in this case, November 15, since November 16 was a Saturday. I relied on this rule in scheduling my work and my filings in this case.

In claiming that my interrogatories are not permitted, the Postal Service relies on Presiding Officer's Ruling No. MC96-3/21, which limits the scope of § 2(E). The OCA interrogatories

that were at issue in POR No. 21 addressed the "general issue of how IOCS sampling is affected by changes in the composition of CAG strata over time." Ruling at 1. No participant submitted rebuttal evidence on this subject. In its objection, the Postal Service quoted the following sentence from POR No. 21: "Rule 2.E. was generally intended to extend the otherwise applicable discovery period for information that can be obtained only from the Postal Service that is needed to prepare rebuttal testimony." POR No. MC96-3/21 at 2; Objection at 1. The following sentence, however, appears to qualify the previous sentence: "Because no participant filed rebuttal testimony on the topic that these interrogatories address, rebuttal evidence on this topic will not be appropriate, and Special Rule 2.E. does not apply to these interrogatories." Ruling at 2. The limitation that the Postal Service quoted thus applies only when an institutional interrogatory that is filed after the deadline for discovery on the Postal Service's direct case seeks information that is not the subject of another participant's rebuttal testimony. In this case, the OCA has filed rebuttal testimony concerning manufacturing costs of postal cards, the subject of interrogatories 1-4 (see OCA-T-400 at 21-25); return-receipt service, the subject of interrogatory 5 (see OCA-T-400 at 12-20); and the nonresident post-office-box fee, the subject of interrogatory 6 (see OCA-T-300). In addition, I filed rebuttal testimony on the nonresident fee.

The Postal Service's interpretation of § 2(E) would render the rule virtually useless and superfluous. The Postal Service seems to be arguing that § 2(E) interrogatories are permitted only for preparation of rebuttal testimony. In this docket, the deadline for rebuttal testimony was September 30, 1996. POR No. 3, Attachment A. In contrast, the § 2(E) deadline was November 15, 1996. Id. Under the Postal Service's interpretation, the § 2(E) deadline might as well have been in early or mid-September, so that a participant could have received his responses by the September 30 deadline for filing rebuttal testimony. The Postal Service's interpretation would seem not to allow any discovery between September 30 and November 15.

The more reasonable interpretation of § 2(E), as the rule was limited by POR. No. 21, would permit institutional interrogatories until November 15, 1996, to clarify issues on subjects related to participants' rebuttal testimony. As indicated above, my interrogatories concern real issues in this case that are related to the OCA's rebuttal testimony.

Admittedly, the scope of § 2(E) is a murky area. However, this uncertainty potentially raises due-process concerns if my interrogatories are disallowed under § 2(E) and the further grounds I explain below. The plain language of § 2(E) clearly permitted me to file interrogatories on November 14, 1996, and the ruling raising questions about the scope of § 2(E) was issued on October 18, 1996, a few weeks after the deadline for filing rebuttal testimony.

The Postal Service's final general objection is that these interrogatories are not proper follow-up. This objection is puzzling because all these interrogatories follow up on questions raised by previous interrogatories, requests for admissions, responses to POIR's, and Postal Service witness testimony. In the next section of this motion, which examines each interrogatory individually and counters the multiple, specific objections raised thereto, I will explain why each interrogatory is, in fact, follow-up.

To summarize thus far, I believe that my interrogatories are timely under § 2(E) of the Special Rules of Practice. However, if the interrogatories are not permitted by § 2(E), the interrogatories nevertheless are, as explained below, proper follow-up. Moreover, the interrogatories should be allowed as follow-up despite their apparent tardiness as follow-up (see § 2(D)) because I relied on § 2(E), which, on its face, allowed me to file interrogatories until November 15, 1996.

INTERROGATORIES 1, 2, AND 3

The Postal Service objected to interrogatories 1, 2, and 3 on the grounds that they are not relevant to the issues in this

case. Objection at 2. Interrogatory 1 seeks confirmation that the Postal Service stopped producing single-color postal cards after a former postmaster general complained that the single-color cards were unattractive. Interrogatory 2 seeks to confirm that the cost of producing single-color postal cards would be less than the cost of producing multi-color postal cards. After I failed to obtain confirmation of this information in my Request for Admission DFC/USPS-1¹, I asked that cost information be provided for the last year in which both single-color and multi-color postal cards were produced. Interrogatory 3 asks whether, in the two months since Presiding Officer Quick raised the issue of single-color postal cards during his questioning of witness Lyons on September 9, 1996, the Postal Service has considered producing potentially less expensive single-color postal cards. See Tr. 2/184-85.

These interrogatories clearly are relevant to the Postal Service's request to charge a two-cent fee to recover the manufacturing cost of producing postal cards. For as long as the Postal Service has sold postal cards, the cards have been sold for the fee corresponding to the rate for mailing a post card. Customers are accustomed to this long tradition. While designs of postal stationery perhaps generally may be within the discretion of the Postal Service, as the Postal Service argues in its objection,² the proposal to charge an additional fee for the manufacturing cost of postal cards must, by law, be in the public interest³ and fair⁴. The Commission also must consider the effect of a rate increase on the general public.⁵ If single-color postal cards cost less to produce than multi-color postal cards, and if, as I recall, the Postal Service stopped producing single-color postal cards for aesthetic reasons, this information

¹Request was filed on October 16, 1996; Postal Service response was filed on October 25, 1996.

²Objection at 2-3.

³39 U.S.C. § 3622(a).

⁴39 U.S.C. § 3622(b)(1).

⁵39 U.S.C. § 3622(b)(4).

certainly would be relevant to the Commission's determination as to whether the proposed fee for postal cards is in the public interest. Moreover, the Commission quite properly could consider whether it would be fair to assign to customers the obligation to pay a higher fee for multi-color postal cards when the decision to eliminate single-color postal cards was made at a time when consumers were not going to be charged a separate fee for the manufacturing cost of the cards.

Interrogatories 1, 2, and 3 clearly are relevant. Indeed, the fact that the Postal Service considers them to be "plainly not material to the issues before the Commission and beyond the scope of this proceeding"⁶ raises serious concern about the validity of the Postal Service's determination under 39 U.S.C. § 3622(a) that its request is in the public interest.

The Postal Service also complains that these interrogatories request historical information that would not be useful in evaluating the current proposal. Again, however, the Postal Service's position is incorrect. In my request for admission DFC/USPS-1, I requested that the Postal Service admit that the cost of producing a single-color postal card would be less than 1.175 cents, the manufacturing cost that the Postal Service used in its direct case. See USPS-T-7 at 106 and OCA/USPS-T8-35(h). The Postal Service denied my request on the grounds that the Postal Service has insufficient information "to permit it to admit the truth of the matters asserted in this statement." Response to Request for Admission DFC/USPS-1. Notwithstanding the Postal Service's claim, I believe one could draw a reasonable conclusion about manufacturing costs if single-color postal cards were less expensive to produce than multi-color postal cards in the last year in which both types of cards were produced. If, indeed, single-color postal cards were less expensive to produce than multi-color cards, as would be consistent with witness Lyons' intuition,⁷ the Commission could properly direct the Postal

⁶Objection at 2.

⁷Tr. 2/185.

Service to explore less-expensive alternatives to the current postal cards and then return with a revised request in a future case. The cost issue is particularly important because the Postal Service wishes to charge 2 cents for a product that costs 1.175 cents to produce. It is quite possible that single-color postal cards would cost less than 1 cent to produce, in which case the Commission might not approve a 2-cent fee for postal cards.

While the information I requested in interrogatory 2 is historical, it may still be quite useful in the current case. The Postal Service claims that the burden to search for the data would be "manifestly undue, particularly given the complete lack of relevance the requested information has on the subject matter of this proceeding." Objection at 3. Since, however, this information is relevant, perhaps the burden is not undue. In any event, if the Postal Service truly wishes to object on the grounds that this interrogatory would impose an undue burden on it, the Postal Service should provide detailed information explaining the time that would be involved in collecting and reporting this information so that the Commission could determine whether, in fact, my interrogatory would impose an undue burden.

The Postal Service also objected to interrogatory 3 on the grounds that it "calls for information protected from disclosure by the deliberative process privilege." Id. The Postal Service cites no authority for this supposed privilege, so I am unable to respond to its claim on the merits. However, even if the privilege exists, the Postal Service has waived it. At the hearing on September 9, 1996, the following exchange took place between Presiding Officer Quick and Postal Service witness Lyons:

Q: And if somebody wants the plain old pedestrian kind, should they be able to get them for less than these ones with nice color on them?

A: I think that's something very reasonable to investigate. In terms of we're talking about in the context here of being more demand value oriented, I fully agree that's a reasonable thing to look at.

Tr. 2/185. Witness Lyons has led participants and the Commission to believe that the Postal Service considers as "reasonable" the possibility of offering at a lower fee postal cards that are less expensive to produce. Since actions speak louder than words, interrogatory 3 merely inquires whether the Postal Service has taken any action since witness Lyons made this statement--and if it has not, why it has not. Even if this interrogatory might have been barred by a privilege, the Postal Service cannot make a statement such as witness Lyons' and then hide behind a privilege when a participant seeks to follow up on the statement. The Postal Service's claim of a privilege must fail.

Proper Follow-up

In its general objection, the Postal Service claimed that none of my interrogatories is proper follow-up. In reality, interrogatories 1, 2, and 3 are proper follow-up. Interrogatories 1 and 2 directly follow up on my requests for admissions DFC/USPS-1 and 2. In fact, the Postal Service's answer to request for admission DFC/USPS-2 was nonresponsive. The Postal Service denied the request for admission for a logically irrelevant reason, stating that "Multi-color design postal cards were introduced long before single-color design postal cards were discontinued." Response to Request for Admission DFC/USPS-2. In reality, the request for admission still could have been admitted even though multi-color postal cards existed prior to the discontinuance of single-color postal cards. The request for admission simply asked whether single-color postal cards were eliminated at the request of a former postmaster general who wanted to see more attractive postal cards. In any event, interrogatories 1 and 2 clearly are proper follow-up

Finally, interrogatory 3 follows up on witness Lyons' testimony on September 9, 1996. Tr. 2/184-85.

INTERROGATORY 4

Interrogatory 4 explores whether the Postal Service has considered reasonable alternatives for production of postal cards

that might lower the cost that it claims must now be passed on to consumers. Similar to my argument on why interrogatories 1, 2, and 3 are relevant, if the Postal Service has failed to examine its own procurement operations relating to postal cards and take steps to lower the cost of producing postal cards, perhaps the current request is premature, unfair, and not in the public interest. These interrogatories seek information that is relevant to the proceeding.

The Postal Service also complains that section (c) of the interrogatory seeks commercially sensitive information and that "[r]elease of such information would compromise the Postal Service procurement of stamp stock by giving prospective bidders substantial bargaining power." Objection at 4. This claim is puzzling at best, even if the objection is referring to section (b), not section (c). Nowhere in this interrogatory did I request specific cost numbers; I simply asked whether the Postal Service sometimes uses outside contractors instead of the Government Printing Office to produce postage stamps because the outside contractors produce the stamps at a cost lower than the cost the GPO would charge. If the answer is yes, the Postal Service can write the word "confirmed" and hardly be giving prospective bidders substantial bargaining power.

Proper Follow-up

Interrogatory 4 is proper follow up. The interrogatory, which further explores cost issues, would not have been necessary had the Postal Service admitted request for admission DFC/USPS-1. Since the Postal Service denied the request for admission, interrogatory 4 is proper follow-up.

INTERROGATORY 5

Interrogatory 5 was designed to clarify confusion surrounding return-receipt service that was raised in Attachment 1 to Response to DBP/USPS-T1-3 and in Response to DBP/USPS-T8-14(k). The Postal Service seems unwilling to acknowledge that certain agreements exist with some large recipients of mail that

allow these recipients themselves to sign, date, and return the return receipts on accountable mail. While Attachment 1 to Response to DBP/USPS-T1-3 seems to acknowledge that these agreements exist, Response to DBP/USPS-T8-14(k) casts some doubt on what appeared to be clear language in Attachment 1.

Contrary to the Postal Service's assertion,⁸ this issue is relevant to this case. The practice described above seems fundamentally inconsistent with the service the Postal Service is supposed to be providing to the customer--namely, an independent confirmation of the date of delivery. In this case, the Postal Service is justifying a 40-cent increase in the return-receipt fee by claiming that customers will be receiving a service enhancement--an enhancement that 90 percent of customers previously elected not to purchase. USPS-T-8 at 86; USPS-T8-26. Whether customers will, in fact, receive this service is relevant if the Commission is considering approving the fee hike based on the service justification. The Commission at least implied that the level of service provided for return receipts is relevant when it recommended that a study be conducted on return-receipt service. R90-1 Recommended Decision ¶ 6576, fn. 10.

Even if the issue that interrogatory 5 pursues is not relevant, the Postal Service long ago waived this objection. This issue first arose in DBP/USPS-T1-1, the response to which was filed on August 23, 1996. The subject also was pursued extensively at the hearing on September 11, 1996, and in follow-up interrogatories, although the record still is not particularly clear. The Postal Service cannot elect to answer some questions on this topic, then later decide not to answer questions that seek clarification and claim that the questions are irrelevant--especially when the Postal Service has not been particularly forthcoming with information on this issue.

The remainder of the Postal Service's objection to interrogatory 5 crumbles under the objection's own fatal,

⁸Objection at 5.

internal inconsistency. The Postal Service makes two simultaneous arguments. First, the Postal Service asserts that it has supplied an answer to my requests for admissions (DFC/USPS-3 and 4) "on the very same subject." Objection at 4. Therefore, the Postal Service claims that the interrogatory is cumulative. Id. Second, the Postal Service asserts that preparing a response to the interrogatory could be unduly burdensome. Id. at 5. Of course, if the Postal Service has, indeed, already provided an answer to this question, answering this interrogatory could not possibly be unduly burdensome! In reality, the Postal Service provided a nonresponsive answer to the request for admission, so it has not already answered this interrogatory.⁹

The Postal Service's claim that preparing a response to this interrogatory could be unduly burdensome is speculative and generally not credible. Objection at 5. The Postal Service suggests that delivery units across the country might need to be polled until one identified an incident as described in the interrogatory. In reality, the information probably is at the Postal Service's fingertips. The Postal Service simply needs to consult with Sandra D. Curran, Acting Manager, Delivery, who authored the August 1, 1996, letter that is Attachment 1 to DBP/USPS-T1-3. Ms. Curran probably can confirm the incident described in the interrogatory; and if she cannot, she surely can contact the people who provided the information that prompted her to write the letter. If these approaches fail, the Postal

⁹Request for admission DFC/USPS-3 asked for confirmation of a current practice of the Postal Service, but the Postal Service denied the request for admission by explaining, using the language "are to be performed," how official acts of the Postal Service should be performed. The difference between the request for admission, which asked for information about practices that actually occur, and the response, which explained how practices should be performed, is the essence of the issue that I seek to clarify.

The Postal Service also claims that the information sought in interrogatory 5 would hardly help the Commission evaluate the return-receipt proposal. The Postal Service then should provide a straightforward answer to request for admission DFC/USPS-3, which, perhaps, was more to the point.

Service then could explain the burden to the Commission and seek relief from answering the question.

Proper Follow-up

On the issue of proper follow-up, interrogatory 5 follows up on requests for admissions DFC/USPS-3 and 4. The Postal Service virtually admitted this fact in its claim that interrogatory 5 is cumulative. Objection at 4. Footnote 9, supra, also provides further explanation of why interrogatory 5 is proper follow-up.

INTERROGATORY 6

I filed interrogatory 6 after the Postal Service objected to my attempt to follow up to witness Lyons' statement in POIR No. 4 (Question 8) by filing DFC/USPS-T1-1. My argument as to why DFC/USPS-T1-1 should be allowed is explained fully in my Motion to Compel Response to Interrogatory to United States Postal Service Witness Lyons (DFC/USPS-T1-1), which I filed on December 3, 1996. Those arguments apply to this motion as well. In essence, contrary to the Postal Service's claim in its objection, I could not have asked this question during the normal discovery period because witness Lyons made the statement in a filing on October 15, 1996, well after the regular discovery period ended. Objection at 6. Secondly, I could have asked this question orally in November had I been present at the hearing on November 18, 1996, and simply filed a motion by November 20, 1996. Tr. 5/1341. Since I was not aware of this opportunity until several days later, and since I had no reason to anticipate that this opportunity would be offered at the hearing, I believe that a written answer to my question would protect my due-process right and not prejudice the Postal Service. Thus, the Postal Service should be directed to respond to DFC/USPS-6 (or to DFC/USPS-T1-1).¹⁰

¹⁰Section (a) of my interrogatory seeks confirmation that the Postal Service agrees with witness Lyons' statement. The Postal Service objects to this question on the grounds that it is cumulative and redundant. The question merely is designed to prevent the Postal Service from distancing itself from witness Lyons' statement. If the Postal Service believes the question is redundant, it could answer the question with a simple "yes."

CONCLUSION

The Postal Service provided a long list of objections to DFC/USPS-1-6. Some objections are procedural in nature, while other objections are substantive. All objections, however, are without merit. Each interrogatory is relevant to this proceeding and seeks to clarify previous testimony or responses to discovery requests.

Therefore, for the reasons explained in detail in this motion, I request that the Commission compel the Postal Service to respond to institutional interrogatories DFC/USPS-1-6.

Respectfully submitted,

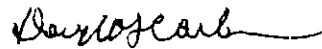
Dated: December 9, 1996



DOUGLAS F. CARLSON

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the required participants of record in accordance with section 12 of the Rules of Practice and sections 3(B)(3) and 3(C) of the Special Rules of Practice.



DOUGLAS F. CARLSON

December 9, 1996
Emeryville, California