BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

POSTAL RATE AND FEE CHANGES, 2000	:	Docket No. R2000-1

EMERY'S INFORMAL EXPRESSION OF VIEWS ON
CONDITIONS FOR ACCESS TO PROTECTED MATERIAL
(February 25, 2000)

Emery Worldwide Airlines, Inc., 2850 Presidential Drive, Fairborn, OH 45324-6298 (Emery), pursuant to Commission rule 20b, submits the following informal expression of its views in response to the Answer of United Parcel Service to Motion of United States Postal Service for Waiver and for Protective Conditions for Analysis of Witness Yezer, dated February 14, 2000 (hereinafter "the UPS memorandum"). Emery was awarded the Postal Service's Priority Mail Network contract, and in the course of performing that contract has submitted a great deal of its own confidential and proprietary material to the Postal Service. Although Emery is not a participant in this proceeding, and does not seek to be a participant, Emery may be affected by the Commission's procedures for disclosure of confidential material submitted in this proceeding.

Background

The issue arises in this proceeding from the Postal Service's January 12, 2000 request that the Commission establish protective conditions for the econometric analysis of witness Yezer and the cost and box count data used by witness Kaneer. (See USPS motion.) Recognizing the need for protective conditions in certain cases, United Parcel Service ("UPS") has requested that the definition of "competitive decision-making" be limited in the protective

conditions implemented by the Commission. (See UPS memorandum.) Emery provides these comments because the Commission's resolution of these requests could affect future requests that involve disclosure of Emery's confidential and proprietary information. Emery requests the opportunity to submit further comments should there be such a request in the future.

USPS's proposed protective conditions

Under the Postal Service's proposed protective conditions, an individual may not view protected material if that individual is involved in "competitive decision-making" for any entity that might gain commercial benefit from the use of the information. The definition of competitive decision-making used by the Postal Service is identical to the definition used by the Commission in thc 1997 rate case:

> "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design or the competitive structuring and composition of bids, offers or proposals.

(USPS motion; see Presiding Officer's Ruling No. R97-1/52 (Oct. 23, 1997) & R97-1/62 (Nov. 17, 1997).) The term "competitive decision-making" was first articulated in U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468-69 (Fed. Cir. 1984), and has been used extensively by courts and administrative agencies in determining whether an individual may be granted access to another's confidential commercial information.

UPS's proposed revisions

United Parcel Service responded to the Postal Service's request on February 14, 2000. (See UPS memorandum.) UPS argues that the definition of competitive decision-making proposed by the Postal Service "is overly restrictive and would deny access to those who have legitimate need for access, including possibly legal counsel." (UPS memorandum, at 2.) For this reason, UPS requests that definition of "involved in competitive decision making" be modified to exclude the rendering of legal advice:

> It does not include rendering legal advice, or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.

Under this standard, a lawyer who would otherwise be denied access to protected material would be granted access if he or she is, was, or will be "rendering legal advice." Emery opposes this proposed weakening of the competitive decision-making standard.

The standard has been applied to lawyers for the past 16 years

Creating a special, lawyers-only limitation on the definition of "involved in competitive decision making" is inappropriate because the standard has uniformly been applied to lawyers for the past 16 years. The federal courts originated the "involved in competitive decision making" standard as a test to determine whether a party's counsel should be granted access, under a protective order, to confidential commercial information. See U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468-69 (Fed. Cir. 1984). Indeed, the competitive decision-making standard was adopted as an effort to balance the need for counsel to have access to relevant facts with the right to keep trade secrets and other confidential business information secret. In cases where lawyers are involved in competitive decision-making, they are denied access to protected materials. See, e.g., Matsushita Electric Indus. Co. v. United States, 929 F.2d 1577, 1580 (Fed. Cir. 1991); McDonnell Douglas Corp., B-259694 et al., 95-2 CPD ¶ 51 (denying admission to in house counsel); US Sprint Communications Co., B-243767, 91-2 CPD ¶ 201; Colonial Storage Co., B-253501 et al., 93-2 CPD ¶ 234 ("An attorney can be involved in the competitive decision making of a company by working with marketing, technical or contracting personnel on procurements, even if the attorney is not a competitive decisionmaker."); Federal Computer Corp. v. Department of Treasury, GSBCA No. 12754-P, 94-2 BCA ¶ 26,875 (in-house counsel denied access); Allied Signal Aerospace Co., B-250822, 93-1 CPD ¶ 201; Dataproducts New England, Inc., B-245149.3 et al., 92-1 CPD ¶ 231; Planning Research Corp., GSBCA No. 10697-P, 91-2 BCA ¶ 23,699 (outside counsel denied access); TRW, Inc., B-243450, 91-2 CPD ¶ 160

(granting access to one attorney and denying access to another). AT&T Paradyne Corp., GSBCA No. 10598-P, 90-3 BCA ¶ 22,976 (outside counsel denied access); MCI Telecommunications Corp., GSBCA No. 10450-P, 90-1 BCA ¶ 22,612 (same); Computer Data Systems, Inc., GSBCA No. 9217-P, 88-1 BCA ¶ 20,256 (denying access to in house counsel). There is no sense in creating a special lawyers-only limitation to a standard that has applied to lawyers for the past 16 years. Creating a new limitation would only create new uncertainty in how the standard would apply and would greatly weaken its intended protection.

The appropriate standard is "involved in competitive decision making"

In R97-1, when a similar issue was raised, the Commission adopted the definition of competitive decision making proposed by the Postal Service and allowed access to legal counsel so long as they were not involved in competitive decision-making. (See Presiding Officer's Ruling No. R97-1/52 (Oct. 23, 1997) & R97-1/62 (Nov. 17, 1997).) The use of the term "involved in competitive decision making" does not serve to exclude access to legal counsel per se. It excludes counsel only if their access to commercially-sensitive information would give their client an unfair competitive advantage. In such a case, excluding legal counsel from access to commercially-sensitive information is appropriate and intended. Any other rule would be unfair to those required to release their confidential business information because it would effectively allow their competitors to gain access to that information.

UPS's proposal vitiates the protection afforded by the standard

UPS's proposed weakening of the "involved in competitive decision making" standard to exclude all "rendering [of] legal advice" and all "services that are not directly in furtherance of activities in competition" essentially vitiates any protection afforded by the standard. To many attorneys, practically any task they are involved in can be characterized as rendering of legal advice. If the Commission adopts UPS's proposal, the "involved in competitive decision making" standard effectively becomes inapplicable to attorneys. There will be no confidentiality

afforded to any material viewed by counsel because counsel can almost always characterize their services as rendering legal advice.

The additional UPS proposed language -- excluding "services that are not *directly* in furtherance of activities in competition" from the "involved in competitive decision making" standard -- also unduly weakens the protection afforded by the standard. One could argue that there are very few services that are *directly* in furtherance of activities in competition with another party, thus greatly enlarging the scope of allowable competitive decision making activity an individual can perform and still be permitted access to protected material. But since activity that indirectly furthers activities in competition with another party can be just as competitively damaging as direct activities, see Colonial Storage Co., B-253501 et al., 93-2 CPD ¶ 23, there is no reason for the distinction between direct and indirect activity.

Emery thus opposes UPS's proposed language that would narrow the definition of "involved in competitive decision making" and weaken the protection afforded to protected material. Emery requests that the Commission make it clear that legal counsel may have access to commercially-sensitive information only if they can certify that they are not involved in competitive decision making for an entity that might gain commercial benefit from the use protected information. No exceptions should be granted for activity that can also be characterized as rendering legal advice or that indirectly furthers competitive activity.

Contents of the Commission's certification form

Emery also requests that the certification form signed by an individual seeking access to protected material specifically state the following:

> I certify that I am not involved in competitive business decision making as that term is used in U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468-69 (Fed. Cir. 1984).

The certification form used in R97-1 contains only a general statement that the individual is eligible to receive access to protected materials. There is no direct certification by the individual

as to whether he or she is involved in competitive business decision making. Given the large number of parties and attorneys involved in this proceeding, it would be prudent to make specific reference to the competitive decision making standard in the certification form itself. This is the practice in the federal courts and other administrative agencies that use this standard, and it presents no burden to either the parties or the Commission. It will also help alert and remind attorneys of the standard that applies before they gain access to protected material. And while it is our hope that no attorney ever violates a Commission order, in the event such conduct does arise, the transgressor cannot regretfully contend that he or she was unaware of, or forgot about, the applicable standard.

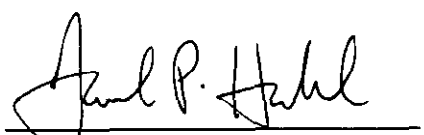
Notice procedures for gaining access to protected materials

Emery further requests that the Commission specifically require any person seeking access to protected information -- particularly a third party's protected information -- to file an application with the Commission and to notify interested parties five working days before gaining access. This short notice period would help reduce the possibility that a person would obtain access to protected material based on an incorrect or unfounded interpretation of the "competitive decision-making" requirement. Certainly, there can be good faith disputes over whether certain conduct constitutes involvement in competitive business decision making. By relying simply on self-certification, however, there is no procedure for resolving such disputes. In essence, then, the standard for access would be whatever the certifying party could tenuously argue does not come within the definition of "involved in competitive decision making." As we have already seen, at least one party in this proceeding has argued that the rendering of legal advice should not come within the "involved in competitive decision making standard," opening the door to no standard at all for attorneys.

This short notice period would allow the person whose protected information is at issue the opportunity to object to an application *before* protected information is inappropriately released. Without such notice, the harm that the protective conditions are intended to avoid

could already have occurred because the self-certifier would already have been granted access to proprietary material that he or she should not have seen. Such a brief notice period would not prejudice any party or unduly delay the proceedings. This is the procedure used by the General Accounting Office in resolving bid protest disputes. See 4 CFR § 21.4 Although the GAO provides for a narrower two-day objection period, GAO is required to issue a decision within 100 days after a protest is filed. 4 CFR § 21.9. Since the Commission procedure, though accelerated, lasts three times as long as the GAO procedure, allowing a few extra days for the objection period is warranted.

Respectfully submitted,



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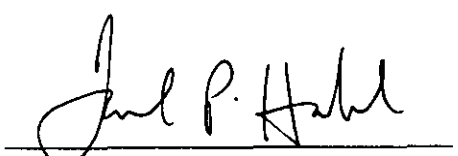
CERTIFICATE OF SERVICE

I hereby certify that I have this 25 day of February 2000 served the foregoing document by first-class mail, postage prepaid, in accordance with section 12 of the rules of practice.



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