BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268

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

EMERY'S OPPOSITION TO MOTION OF
UNITED PARCEL SERVICE TO COMPEL PRODUCTION
OF INFORMATION AND DOCUMENTS REQUESTED IN
INTERROGATORIES UPS/USPS-T34-1(a) to 1(c) and
UPS/USPS-T34-3(e) TO WITNESS ROBINSON
(March 10, 2000)

Emery Worldwide Airlines, Inc., One Lagoon Drive, Suite 400, Redwood City, California 94065 ("Emery"), opposes the relief requested by United Parcel Service ("UPS") in its motion to compel production of information and documents requested in interrogatories UPS/USPS-T34-1(a)-(c) and 3(e). Emery supports the Postal Service's objections to the interrogatories and requests that the Rate Commission enter a protective order denying UPS access to the documents requested in the interrogatories. In the alternative, Emery requests that the documents be produced only under protective conditions that would prevent access by individuals who are involved in competitive decision-making for any company that could gain a competitive advantage from the information.

BACKGROUND

UPS's interrogatories request that the Postal Service produce a copy of the contract and related documents defining the relationship between Emery and the Postal Service with respect to

transportation and processing of Priority Mail. (See UPS/USPS-T34-1(a) to 1(c).) The interrogatories also ask for documents identifying the rates charged to the Postal Service for Emery's services under the Priority Mail Contract. (See UPS/USPS-T34-3(e).) Both the Postal Service and Emery consider the requested information to contain confidential and proprietary information that could be used to gain an unfair competitive advantage in the mail and parcel transportation market. See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Revealing this information would be tantamount to revealing Emery's costs and pricing strategies to a direct competitor of both Emery and the Postal Service.

As UPS points out, the Commission addressed a similar dispute between UPS, the Postal Service, and Emery in the 1997 rate case. (See Presiding Officer's Ruling Nos. R97-1/52 (Oct. 23, 1997) & R-97-1/62 (Nov. 17, 1997).) The Commission concluded that the requested portions of the Priority Mail Contract should be produced under protective conditions. The reasons justifying the protective conditions ordered in R97-1 are present in R2000-1. Moreover, caselaw defining the scope of confidential and proprietary business information has developed substantially since 1997. The leading case on the issue makes clear that line item prices can, in certain circumstances, be considered confidential commercial or financial information. The public release of such information would cause substantial competitive harm to the provider, and is thus prohibited under the Trade Secrets Act. See McDonnell Douglas Corp. v. National Aeronautics & Space Admin., 180 F.3d 303 (D.C. Cir. 1999) (discussed infra, at pages 4-6).

ARGUMENT

The Freedom of Information Act and the Trade Secrets Act prohibit disclosure of trade secrets and privileged or confidential commercial or financial information. 5 U.S.C § 552(b)(4); 18 U.S.C. § 1905. Information is confidential if its release would cause substantial harm to the competitive position of the person releasing it. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Contractor costs, profit margins, and pricing strategies have been uniformly found to be exempt from disclosure under FOIA because releasing that information "would allow competitors to estimate, and undercut [the contractor's] bids." See Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979). And if releasing line item prices would allow a contractor's customers or competitors to undercut its prices, even line item prices may not be released. McDonnell Douglas Corp. v. National Aeronautics & Space Admin, 180 F.3d 303 (D.C. Cir. 1999); see also Sperry Univac Div. v. Baldridge, No. 82-0045-A, 1982 U.S. Dist. LEXIS 17764 (E.D. Va. June 16, 1982) (unit prices cannot be released if they would effectively reveal a contractor's pricing strategies). In the context of litigation, such confidential information can be released only pursuant to a protective order that protects against the potential competitive harm. E.g. United States Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984); Matsushita Electric Industrial Co. v. United States, 929 F.2d 1577, 1579-80 (Fed. Cir. 1991).

I. The Priority Mail Contract should not be publicly-released because it contains Emery's confidential commercial and financial information.

In this proceeding, the Priority Mail Contract should not be publicly disclosed because it contains confidential and proprietary information that would cause substantial competitive harm

to Emery if released to the public. As explained in the Declaration attached as Exhibit A, releasing the Priority Mail Contract would reveal Emery's costs and pricing strategies and would place Emery at a competitive disadvantage on future contracts. The Priority Mail Contract contains over 100 pages of detailed pricing schedules. The schedules contain separate line items for transporting flats, parcels, and outsides between each of ten Priority Mail processing centers ("PMPCs") and a multitude of Air Mail Centers ("AMCs") and Area Distribution Centers ("ADCs"). It also contains adjustment factors for variations in the volume of pieces transported. The price variations reflected in the pricing schedule reflects Emery's experience in the industry and its analysis of expected costs and profit on the various routes. Even the table of contents contains confidential information about Emery's pricing strategies and techniques.

This detailed pricing information would allow UPS, or any other competitor, to infer and predict Emery's costs for transporting different size pieces between the destinations chosen by Emery. Releasing the Priority Mail Contract would also allow competitors to see the prices that Emery has concluded are appropriate for transporting individual pieces between PMPCs, AMCs, and ADCs. It would allow them to avoid the extensive work involved in developing such a pricing strategy. At the very least, it would allow Emery's competitors to estimate and undercut Emery's bids on other commercial and government air freight contracts. UPS or other competitors would need only to apply their own knowledge of the air freight transportation business to determine which Emery routes are more profitable than others and which routes are discounted. They could use the results of their analysis to evaluate their own ability to compete on Emery routes. They could develop a plan to undercut Emery's prices on Emery's most profitable routes, leaving Emery with the less profitable ones — effectively "cherry-picking"

Emery's best routes. Such unfair competition would cause substantial harm to Emery's competitive position in the mail and parcel transportation markets.

The risk of such competitive harm caused by the release of unit price information was the basis for the recent decision in McDonnell Douglas Corp. v. National Aeronautics and Space Admin., 80 F.3d 303 (D.C. Cir. 1999). NASA sought to release line item pricing information in a McDonnell Douglas contract, arguing that release of the line item pricing was "'the price of doing business' with the government." Id. at 306 (quoting NASA argument). McDonnell Douglas sought to prevent the release, arguing that releasing the line item pricing information would cause substantial harm to its competitive position. In particular, McDonnell Douglas argued that release of the pricing information would allow commercial customers to "ratchet down" its prices and would allow competitors to "calculate its costs with a high degree of precision." Id. at 306. The court agreed with McDonnell Douglas:

> Both of the reasons McDonnell Douglas advanced for claiming its line item prices were confidential commercial or financial information are indisputable. McDonnell Douglas has shown — as much as anyone can show before the event — that it is likely to suffer substantial competitive harm. And under present law, whatever may be the desirable policy course, appellant has every right to insist that its line item prices be withheld as confidential.

Id. at 307. Because McDonnell Douglas showed that the release of its line item prices would cause competitive harm, the court held that disclosure by NASA would have violated the Trade Secrets Act. Id. at 306.

II. Release of other USPS contracts and information does not require public release of the Priority Mail Contract.

The McDonnell Douglas decision directly addresses UPS's contention that disclosure of Emery's line item prices is justified because the Postal Service has disclosed information concerning other contracts. (See UPS Memo., at 6.) In that case, the government sought to disclose contract unit prices based on its "long and consistent practice" of releasing such information. The court rejected this rationale, holding instead that the analysis of competitive harm must be conducted on a case by case basis. McDonnell Douglas, 180 F.3d at 306-07. The Court held that the fact that other contractors agreed to release line item prices was irrelevant: "That appellant's competitors have not attempted to stop the disclosure of their line item prices is of no significance in determining the issue before us." Id. at 306-07. Thus, the Postal Service's release of the WNET and other contracts is similarly irrelevant in determining the propriety of releasing line item prices and other Emery confidential material in the Priority Mail Contract.

The WNET and TNET contractors apparently did not object to the public release of their contract prices. But Emery does object to public release of the Priority Mail Contract. Moreover, the WNET and TNET contracts are much different contracts than the Priority Mail contract. Even UPS agrees that the WNET contract contains only about ten line items each for aircraft, crews, maintenance, supplies, and other items. (See UPS Memo., at 6 (citing Docket No. R97-1, LR-H-249, WNET 92-01, at 2).) With respect to the MBE and TIC Enterprises contracts, the only pertinent line item prices are commission rates. These contracts do not contain a detailed pricing structure involving 10,000 prices for separate city pairs. These contracts also do not disclose how to run and integrate a complex and separate network for the

processing, handling, and delivery of a product (Priority Mail) that faces fierce marketplace competition. (See UPS Memo., Ex. B.) And none of the contracts previously released by the Postal Service correlates per-piece unit prices to volumes and origin-destination information as in the Priority Mail Contract. Not only would release of the Priority Mail Contract give UPS access to the prices for each of the origin-destination pairs in the contract, but it would allow them to see Emery's adjustment factors for estimated volume. By allowing UPS to take advantage of Emery's corporate experience and analysis of transportation costs and economies, it would give UPS an unfair competitive advantage and substantially harm Emery's competitive position.

Moreover, Emery's release of general, non-confidential information concerning the Priority Mail Contract does not require it to release confidential information. Providing investors with a tour of a facility, for example, would not allow them to infer and predict Emery's pricing strategies. To the extent Emery publicly released information concerning its performance under the Priority Mail Contract, such information was much more general than the specific pricing schedules and other information that UPS is seeking.

III. Disclosure is not required by section 39 U.S.C. § 5005(b)(3).

UPS next contends that there is a statutory requirement that any contract "for the transportation of mail" be available for inspection. (See UPS Memo., at 5 (citing 39 U.S.C. § 5005(b)(3).) Sections 5000 to 5600 are provisions in the Postal Reorganization Act that reenact the Postal Service's authority to purchase surface, air, and vessel transportation from regulated carriers under a regulatory scheme that has since been abolished. The contracts contemplated by these sections are contracts strictly for mail transportation, such as "star route" highway contracts. See, e.g., Myers & Myers, Inc. v. United States, 527 F.2d 1252, 1257 (2d Cir.

1975) ("legislative history of § 5005(a)(4), (b)(2) indicates that the statute was enacted to give star route contractors a measure of security . . . ."). These statutory provisions are not applicable to purchases of mail transportation network contracts, which are purchased under the authority of 39 U.S.C. § 401(3). Moreover, the Priority Mail Contract is not a contract for the "transportation of mail" by surface, air, or vessel as contemplated by these sections. Emery does much more than transport mail under the contract. Emery developed and independently operates 10 brand new Priority Mail Processing Centers; Emery created and maintains complex mail sorting schemes; Emery employs thousands of employees to handle, sort, and process mail; and Emery collects, compiles, and transmits to the Postal Service vast amounts of data concerning the types and volume of mail processed under the Contract.

The Priority Mail Contract also does not contain the "public release" warning relied on by UPS. To the contrary, the Priority Mail Contract contemplates that the Contract will remain confidential. Offerors could not even obtain a copy of the solicitation without first agreeing to a strict non-disclosure agreement. The Contract itself prohibits Emery from providing copies to any third parties without express approval of the Postal Service. Once a subcontractor or prospective subcontractor is permitted access, the nondisclosure agreement limits the availability of information to those employees who (1) are actively involved in projects for the Priority Mail Contract and (2) have a legitimate reason to know the information. Emery strictly complies with this requirement and instructs its employees that the information is confidential and not to be disclosed. Emery also strictly limits access by subcontractors and prospective subcontractors to those who have executed a nondisclosure agreement. Even Emery's counsel was required to

execute and comply with a nondisclosure agreement before reviewing or discussing any aspect of the Priority Mail Contract with Emery.

IV. The Priority Mail Contract should be released, if at all, only under strict protective conditions.

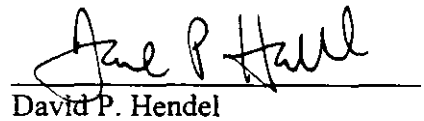
To the extent that portions of the Priority Mail Contract are relevant to the issues of this proceeding, they should be provided only under strict protective conditions. In doing so, the Commission would give UPS access to the information it needs to present its arguments in the rate case. At the same time, it would protect Emery from the competitive harm associated with the release of its confidential commercial and financial information. This was the approach adopted by the Commission in the 1997 rate case, and Emery urges the Commission to follow its 1997 decision. (See Presiding Officer's Ruling Nos. R97-1/52 (Oct. 23, 1997) & R97-1/62 (Nov. 17, 1997).) The protective conditions applicable to the release of the Priority Mail Contract should bar access by any individual who is involved in "competitive decision-making" for any entity that might gain commercial benefit from the use of the information. Emery suggests that the term "involved in competitive decision-making" should include consulting on marketing or advertising strategies, pricing, product research and development, product design or the competitive structuring and composition of bids, offers or proposals. (See Emery's Informal Expression of Views on Conditions for Access to Protected Material (Feb. 28, 2000).)

CONCLUSION

Emery supports the Postal Service's objections to interrogatories UPS/USPS-T34-1(a) to 1(c) and UPS/USPS-T34-3(e) to Witness Robinson. If the Commission requires the release of

the Priority Mail Contract, Emery requests the use of strict protective conditions to prevent the disclosure of Emery's confidential and proprietary information.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 10 day of March 2000 served the foregoing document by first-class mail, postage prepaid, in accordance with section 12 of the rules of practice.

Brian P. Waagner