

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

RECEIVED

Mar 13 4 07 PM '00

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Docket No. R2000-1

Postal Rate and Fee Changes, 2000

**MOTION OF ALLIANCE OF NONPROFIT MAILERS AND AMERICAN
LIBRARY ASSOCIATION TO COMPEL ANSWERS TO ANM/USPS-T35-5 & 6;
AND T38-5 & 6; AND ALA/USPS-T37-5 & 6.**

(March 13, 2000)

Pursuant to sections 26 and 27 of the Commission's Rules of Practice, the Alliance of Nonprofit Mailers ("ANM") and the American Library Association ("ALA") respectfully move to compel the Postal Service to respond fully to discovery requests ANM/USPS-T35-5 and 6, ANM/USPS-T38-5 and 6, and ALA/USPS-T37-5 and 6.

These questions (reproduced in Appendix A, *infra*) seek information that could explain why the Postal Service is attributing disproportionately large cost increases in this case to nonprofit ECR Standard (A) mail, nonprofit Periodicals mail, and Library Rate mail. Specifically:

- ANM/USPS-T35-5, ANM/USPS-T38-5 and ALA/USPS-T37-5 ("Request 5") ask the Postal Service to identify each mail characteristic that the Service has studied, investigated or analyzed since Docket No. R97-1 as a possible cause of the relatively rapid cost increases attributed by the Service to the three subclasses, and to produce all documents relating to each such study, investigation or analysis.
- ANM/USPS-T35-6, ANM/USPS-T38-6 and ALA/USPS-T37-6 ("Request 6") seek all memoranda, correspondence or other communications

created by in-house or outside economists, cost analysts or consultants for Postal Service headquarters since July 1, 1998, concerning possible causes of the relatively rapid cost increases attributed to the three subclasses.

The Postal Service does not—and cannot—dispute the relevancy of the information sought by these requests. Instead, the Service has embarked on a two-part strategy to evade them.

First, the Service's answers recast the questions to cover only a subset of the information requested. With respect to Request 5, the Service states that it "has not performed *definitive* analyses of the subjects described in this interrogatory; however, information regarding trends in costs is provided in USPS LR-I-217" and "LR-I-193."¹ As the Postal Service knows perfectly well, the questions were not limited to "definitive" analyses, and the Commission's discovery rules impose no such restriction. Likewise, the Service has responded to Request 6 merely by directing ANM and ALA to USPS LR-I-217 and LR-I-193. The Postal Service makes no pretense, however, that these two library references exhaust the universe of responsive information in the Service's possession, custody or control.

Second, in an apparent effort to block any follow-up questions, the Service "partially objects" to the same discovery requests as (1) overbroad and unduly burdensome and (2) potentially violative of the attorney-client privilege or the attorney work product privilege doctrine. USPS Objection To Interrogatories

¹ Response of USPS to Interrogatories of ANM Redirected From Witness Moeller (ANM/USPS-T35-4-6) (filed March 2, 2000); Response of USPS to Interrogatories of ALA Redirected From Witness Kiefer (ALA/USPS-T37-4-6) (filed March 2, 2000); Response of USPS to Interrogatories of ANM Redirected From Witness Tafique (ANM/USPS-T38-5-6) (filed March 2, 2000) (emphasis added).

of ANM Directed To Witness Moeller (ANM/USPS-T35-1, 3, 5 and 6) (filed Feb. 28, 2000); USPS Objection To interrogatories of ANM To Witness Taufique (ANM/USPS-T38-1, 3, 5, and 6) (filed Feb. 28, 2000); and Objection of USPS To Interrogatories of ALA (ALA/USPS-T37-1, 3, 5 and 6) (filed Feb. 28, 2000). As we now explain, these objections are wholly without merit.

I. THE POSTAL SERVICE HAS FAILED TO DEMONSTRATE THAT THE INTERROGATORIES ARE OVERBROAD OR UNDULY BURDENSOME.

To place the Postal Service's claims of undue burden in context, it is useful to begin with a few facts. The Postal Service, with over \$60 billion in annual revenue – one percent of the gross domestic product of the United States – is perhaps the largest and most complex monopoly subject to cost-of-service rate regulation in America. The Postal is also unique among regulated industries in its monopoly of the relevant data. Unlike railroads, telephone companies, electric utilities, or energy pipelines, the Postal Service is, in many respects, the only entity of its kind in the United States. Literally no other firm exists that could offer a benchmark for most of the data submitted by the Postal Service. To an extent unparalleled among other major regulated industries, the Commission and the Postal Service's ratepayers are dependent on the Postal Service for accurate information about its costs.

The rate increases proposed by the Postal Service for nonprofit ECR Standard (A) mail, nonprofit Periodicals mail, and Library Rate mail underscore this fact. To justify the disproportionate increase proposed for these subclasses, the Postal Service asserts that they have incurred disproportionate cost increases since the last rate case. Why the costs of these subclasses should outstrip the costs of similar commercial subclasses is hardly self evident; and the Postal Service professes ignorance of why the anomaly has occurred.

Under the circumstances, one would expect the Postal Service to make a vigorous effort to determine the cause of the anomaly, particularly in light of the financial burdens that the rate increases would impose on captive ratepayers. Indeed, one would expect the Postal Service to undertake such an inquiry *before* finalizing its rate proposals and filing its rate request.

In this context, the Postal Service's objection that the requests are overbroad or unduly burdensome borders on the frivolous. The Service objects that the requests seek "all" documents, memoranda, correspondence or other communication regarding the particular information sought. But the first page of each set of interrogatories at issue specifically "incorporates by reference the instructions in OCA interrogatories OCA/USPS-1-14 (Jan. 24 2000)." The OCA instructions in turn limit the scope of any requests for "all documents" to those documents "that can be located, discovered or obtained by reasonably diligent efforts." *Id.*

Moreover, the requested documents are limited to memoranda, correspondence or other communications between experts, and documents relating to particular studies, investigations or analyses. If documents of this kind exist, the individuals aware of their existence should be within one or two degrees of separation from the individuals responsible for the Postal Service's cost testimony. Unsurprisingly, the Service does not even attempt to quantify the cost or time required to unearth the requested material. This omission is fatal. The Commission's rules specifically provide that a "participant claiming undue burden shall state *with particularity* the effort that would be required to answer the request, *providing estimates of cost and work hours required*, to the extent possible." Sections 26 & 27 (emphasis added).

II. THE POSTAL SERVICE INAPPROPRIATELY RAISES THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES.

The Postal Service also objects to Requests 5 and 6 on the ground that the information sought *might* be privileged. This objection is also baseless.

First, a party asserting a claim of privilege must “identify the specific evidentiary privilege asserted and *state the reasons for its applicability.*” Sections 26(c) and 27(c) (emphasis provided). The Postal Service’s amorphous and unsubstantiated claim that “*some* documents . . . *may* consist of materials protected by either the attorney client-privilege or the attorney work product privilege doctrine, or both” (emphasis added) does not begin to meet this standard.

In all events, the Postal Service’s privilege objections are facially invalid. The attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981) (emphasis added); *see also American Standard Inc. v. Bendix Corp.*, 80 F.R.D. 706, 709 (D.C.Mo. 1978) (privilege does not apply to factual information discovered by attorney); Wright & Graham, *Federal Practice and Procedure: Evidence* § 5484 (1986) (“The most important point to be conveyed by the definition of “communication” is that the privilege only applies to communications, not to their informational content.”).²

² Even if the requested information were communicated to a Postal Service attorney, the information requested would still not be privileged. This outcome is well accepted legal doctrine. Just as a criminal cannot claim attorney-client privilege with respect to a weapon that he turns over to his attorney, the Postal Service cannot claim attorney-client privilege with respect to existing information that is somehow communicated to the Postal Service’s attorneys. *See* Wright & Graham, *Federal Practice & Procedure: Evidence* § 5484 (1986).

Similarly, the Postal Service's assertion that the information sought by Requests 5 and 6 might also be protected from disclosure by the attorney work product doctrine is without merit. The attorney work product doctrine does not protect data or other information used by testifying experts to form their opinions. See Fed. R. Civ. P. 26(a)(2)(B) (stating that experts who testify are required to submit, inter alia, "the data or other information considered by the[m] . . . in forming the[ir] opinions."). Consequently, the Postal Service cannot assert the attorney work product protection for the data sought by Requests 5 and 6 because those data were used and relied upon by the Postal Service's testifying experts.

In addition, even if the materials sought by Requests 5 and 6 were not prepared by or considered by testifying witnesses, the information is still discoverable "upon a showing that the party seeking discovery has substantial need of the material in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed R. Civ. P. 26(b)(3) & 26(b)(4)(B). As explained above, the Postal Service has unique access to the data sought by ANM and ALA – there are no other means by which ANM and ALA can obtain this data. Moreover, the information sought by Requests 5 and 6 is necessary for ANM and ALA to protect their common interest in ensuring that the costs attributable to certain classes of mail are properly estimated by the Postal Service. Thus, Requests 5 and 6 are not protected by the attorney work product privilege doctrine because ANM and ALA have a substantial need for the information sought by Requests 5 and 6 and there are no alternative means for obtaining it.

CONCLUSION

For the foregoing reasons, ANM and ALA respectfully request that the Postal Service be directed to answer fully ANM/USPS-T35-5 & 6; and ANM/USPS-T38-5 & 6; and ALA/USPS-T37-5 & 6.

Respectfully Submitted,



David M. Levy
Christopher T. Shenk
Sidley & Austin
1722 Eye St., N.W.
Washington, DC 20006-3704
(202)736-8214

*Counsel for Alliance of Nonprofit
Mailers and American Library
Association*

March 13, 2000

APPENDIX A

(ANM/USPS-T35-5 & 6; ALA/USPS-T37-5 & 6; ANM-T38-5 & 6)

ANM/USPS-T35-5. Please identify each characteristic of nonprofit ECR Standard (A) mail that the Postal Service has studied, investigated or analyzed since Docket No. R97-1 as a possible cause of the relatively rapid cost increases attributed to the subclass by the Postal Service in this docket. Produce all documents relating to each such study, investigation or analysis.

ANM/USPS-T35-6. Please produce all memoranda, correspondence or other communications created by in-house or outside economists or cost analysts for Postal Service headquarters since July 1, 1998, concerning possible causes of the relatively rapid cost increases attributed to nonprofit ECR Standard (A) mail by the Postal Service's costing systems.

ALA/USPS-T37-5. Please identify each characteristic of Library Rate mail that the Postal Service has studied, investigated or analyzed since Docket No. R97-1 as a possible cause of the relatively high unit costs attributed to the subclass by the Postal Service. Produce all documents relating to each such study, investigation or analysis.

ALA/USPS-T37-6. Please produce all memoranda, correspondence or other communications created by in-house or outside economists, cost analysts or consultants for Postal Service headquarters since July 1, 1998, concerning possible causes of the relatively rapid cost increases attributed to Library rate mail by the Postal Service's costing systems.


ANM/USPS-T38-5. Please identify each characteristic of nonprofit Periodicals mail that the Postal Service has studied, investigated or analyzed since Docket No. R97-1 as a possible cause of the relatively rapid cost increases

attributed to the subclass. Produce all documents relating to each such study, investigation or analysis.

ANM/USPS-T38-6. Please produce all memoranda, correspondence or other communications created by in-house or outside economists, cost analysts or consultants for Postal Service headquarters since July 1, 1998, concerning possible causes of the relatively rapid cost increases attributed to nonprofit Periodicals mail by the Postal Service's costing systems.

CERTIFICATE OF SERVICE

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



March 13, 2000