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POSTAL RATE COMMISSION
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PRESIDING OFFICER'S
RULING NO. R2000-1/37

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes

Docket No. R2000-1

RULING ON ANM/ALA MOTION
TO COMPEL FULL RESPONSES
TO CERTAIN INTERROGATORIES
DIRECTED TO WITNESSES
MOELLER, TAUFIQUE AND KIEFER

(Issued April 12, 2000)

This ruling addresses a joint motion of the Alliance of Nonprofit Mailers (ANM) and the American Library Association (ALA) for more complete responses from the Postal Service to certain interrogatories originally directed to witnesses Moeller, Taufique and Kiefer. The interrogatories pursue possible reasons for (and any related documentation concerning) the attribution of disproportionately large cost increases in this case to three preferred rate subclasses. The subclasses in question are Nonprofit Enhanced Carrier Route (ECR) Standard, Nonprofit Periodicals, and Library. See Motion of ANM and ALA to Compel Answers to ANM/USPS-T35-5 and 6 [Moeller], ANM/USPS-T38-5 and 6 [Taufique] and ALA/USPS-T37-5 and 6 [Kiefer], March 13, 2000. (ANM/ALA Joint Motion.)

The underlying interrogatories. Interrogatory No. 5 asks the witnesses to identify each mail characteristic the Postal Service has studied, investigated or analyzed since Docket No. R97-1 as a possible cause of the relatively rapid cost increases. It also asks for all documents relating to each such study, investigation or analysis. *Id.* at 1. Interrogatory No. 6 asks each witness for all memoranda, correspondence or other communications created by in-house or outside economists, costs analysts or

consultants for Postal Service headquarters since July 1, 1998 concerning the same matter.

Objection and institutional response. The Postal Service filed partial objections to the underlying interrogatories. In support of its position, it cites overbreadth in the questions as phrased as well as potential privileges, such as attorney-client and attorney-work product. However, the Service said it nevertheless would conduct a good-faith search for responsive information and provide documents, to the extent not privileged. See United States Postal Service Objection to Interrogatories of Alliance of Nonprofit Mailers Directed to Witness Moeller (ANM/USPS-T35-1,3,5 and 6) at 2-3; United States Postal Service Objection to Interrogatories of ANM directed to Witness Taufique (ANM/USPS-T38-1,3, 5 and 6 at 2-3); and USPS Objection to Interrogatories of ALA directed to Witness Kiefer (ALA/USPS-T37-5 and 6) (all filed Feb. 29, 2000). The Service subsequently placed documents it considered responsive to the interrogatories in USPS-LR-217 and USPS-LR-193.

In related responses, the Service stated that it has not performed definitive analyses of the subjects described in the interrogatories, but noted that USPS-LR-I-217 contained information regarding cost trends. See Response of U.S. Postal Service to Interrogatory of ANM Redirected from Witness Moeller (ANM/USPS-T35-5 and 6), Feb. 28, 2000; Response of the United States Postal Service to Interrogatories of the ALA Redirected from Witness Kiefer (ALA/USPS-T37-4-6), March 2, 2000; and Response of the United States Postal Service to Interrogatories of the ANM Redirected from Witness Taufique (ANM/USPS-T38-5-6), March 2, 2000.

Joint Motion to Compel. ANM and ALA allege that the Service's apparent restriction of the search to "definitive analyses" and its filing of partial objections is a strategic move to evade answering the questions and to preclude follow-up interrogatories. ANM/ALA Joint Motion at 2 (referring to Postal Service Objections cited above). And, while they acknowledge that the Service has pointed out two library references (USPS LR-I-217 and LR-I-193) containing information, the joint movants claim the Service makes no pretense that these two library references exhaust the

universe of responsive information in the Service's possession, custody and control. *Id.* They claim that the Service's objections are without merit. *Id.* at 3.

The Postal Service's response to the motion to compel. The Service states that although it has objected to the interrogatories on grounds of burden, it nevertheless has conducted a good faith search for "responsive information" and has provided the results of that search. It explains that employees who were likely to have responsive documents were contacted, their files were searched, and with one exception, all documents were provided in USPS-LR-I-217. United States Postal Service Response to Motion of Alliance of Nonprofit Mailers and American Library Association to Compel Answers to ANM/USPS-T350-5 and 6; and T38-5 and 6; and ALA/USPS-T37-5 and 6, March 20, 2000. The Service further states that the document that constitutes the exception analyzes statistical variance in the costs of two subclasses and considers the benefits and drawbacks of an alternative dealing with this variance. It claims this document is "clearly pre-decisional," as the proposal it considers was not adopted. The Service further contends that the document was prepared in anticipation of litigation by employees in Finance in collaboration with attorneys and is therefore protected by the work product doctrine. *Id.* at 3.

The Service also notes that the controversy over burden has been mooted, given the search it has conducted.¹ *Id.* at 2.

Discussion. Given that the Service appears to have conducted an extensive search in response to the interrogatories, I agree that the issue of burden, in this instance, is moot. Two other considerations remain. One is whether the Service has inappropriately narrowed the search by stating that it would look for "definitive" analyses. The other is whether the document claimed to be privileged must nevertheless be produced.

A detailed explanation is not presented in the Service's responses, but based on a reading of the pleadings as a whole, it appears that the Service did not proceed

¹ However, the Service notes that it does not waive its right to object to such exhaustive, broad-based searches that are not confined to narrow topics or organizational units. Postal Service Response at 2.

inappropriately by interpreting the inquiry at hand as calling for a search of "definitive" and "responsive" analyses and studies. In the face of questions as broad as those posed here, judgment had to be applied before undertaking a search. I will assume that this judgment was exercised in good faith. Moreover, the Service's response indicates that a rather extensive search was performed, and the two library references contain the responsive, non-privileged material. Therefore, I do not find the Service's response lacking in this regard.

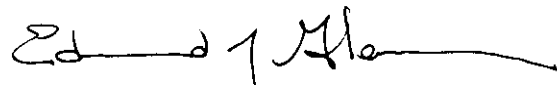
The ostensibly privileged document is a closer question. In general, the information sought in the interrogatories is clearly relevant and material, and the Service stands in a unique position in terms of its production. At the same time, as rulings in previous cases have stated, production of clearly pre-decisional material that contains mental impressions, legal theory or opinions generally warrants protection. P.O. Ruling Nos. R97-1/60 and 121. That protection, however, does not extend to purely factual data. Given this limitation, I believe it would be appropriate for the Service to review the document and determine whether purely factual material can be isolated. If so, this material should be made available, and any additional steps needed for protection should be taken. If the material is inextricably linked to legal theory or opinion, a clearer description of why this is the case should be provided.

In making this determination, I emphasize that quick resolution of the outstanding issue is clearly called for, so that orderly progression of the hearings is not impaired. To this end, I encourage the parties in interest to work out informal arrangements to the extent possible.

RULING

1. The Motion of Alliance of Nonprofit Mailers and American Library Association to Compel Answers to ANM/USPS-T350-5 and 6; and T38-5 and 6; and ALA/USPS-T37-5 and 6, March 20, 2000, is granted in part in accordance with the body of this ruling.

2. If a satisfactory result is not worked out by April 19, 2000, counsel for ANM and ALA should promptly file for further relief.



Edward J. Gleiman,
Presiding Officer