

**BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001**

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

**Complaint on First-Class Mail  
Service Standards**

**Docket No. C2001-3**

**DOUGLAS F. CARLSON  
RESPONSE TO REPLY OF THE  
UNITED STATES POSTAL SERVICE TO THE ANSWERS  
OF THE OFFICE OF THE CONSUMER ADVOCATE AND THE  
COMPLAINANT IN OPPOSITION TO THE MOTION TO DISMISS**

**August 22, 2001**

On August 14, 2001, I filed an answer in opposition to the Postal Service's motion to dismiss my complaint without a hearing.<sup>1</sup> On August 21, 2001, the Postal Service filed a response to my Answer and to the OCA's answer to the Postal Service's motion to dismiss.<sup>2</sup> The Postal Service also filed a motion for leave to file its reply.<sup>3</sup>

In this reply, the Postal Service takes issue with my suggestion that the Postal Service may have invented the defense that the changes in service standards that are the subject of this complaint merely implement a realignment plan reviewed in Docket No. N89-1. Postal Service Reply at 3-5.

As I explained in my Answer, I filed a FOIA request on January 27, 2001. Answer at 18. This FOIA request asked for a copy of every document and other

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<sup>1</sup> Douglas F. Carlson Answer in Opposition to Postal Service Motion to Dismiss, filed August 14, 2001 ("Answer").

<sup>2</sup> Reply of the United States Postal Service to the Answers of the Office of the Consumer Advocate and the Complainant in Opposition to the Motion to Dismiss, filed August 21, 2001 ("Postal Service Reply").

<sup>3</sup> Motion of the United States Postal Service for Leave to Reply to Answers in Opposition to Postal Service Motion to Dismiss, filed August 21, 2001.

record that, *inter alia*, explains reasons or justifications for any change in service standards implemented in 1998, 1999, 2000, or 2001 for mail destined to the San Francisco Bay Area. See DFC-LR-1. In my Answer, I contended that documents relating to Docket No. N89-1 were responsive to my FOIA request if these changes constituted an implementation of Docket No. N89-1. Answer at 18. If the Postal Service complied with FOIA, the Postal Service's failure to produce these documents suggests that documents relating to Docket No. N89-1 were not responsive to my FOIA request. That is, these documents did *not* explain or justify changes in service standards implemented in 1998, 1999, 2000, or 2001. Therefore, Docket No. N89-1 does not explain or justify these changes. I properly pointed out this inconsistency in my Answer. However, I also pointed out the alternative — namely, if the Postal Service's defense to my complaint existed all along, the Postal Service should have produced the documents. *Id.* at 19. The full relevant passage — consisting of two paragraphs — is completely within the bounds of permissible legal argument.

As a central strategy to defend against my allegation that the Postal Service implemented changes in service standards without first obtaining an advisory opinion from the Commission, the Postal Service offered a declaration from Charles M. Gannon.<sup>4</sup> This declaration asserts that the Postal Service was merely implementing the realignment plan reviewed in Docket No. N89-1. The Postal Service controls *all* the relevant information concerning the Postal Service's belief that it was merely implementing the realignment plan reviewed in Docket No. N89-1. Despite the Postal Service's argument that my allegation is baseless, Postal Service Reply at 5, I am fully entitled to cast doubt on Mr. Gannon's assertion by presenting evidence of a prior inconsistent act.

The Postal Service appears to be using Mr. Gannon's second declaration to take issue with my legal conclusion concerning the Postal Service's response to my FOIA request.<sup>5</sup> While attempting to argue that the Postal Service complied with FOIA, Mr. Gannon notes that my FOIA request contained a limiting clause: it "covers

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<sup>4</sup> Declaration of Charles M. Gannon, filed July 30, 2001.

<sup>5</sup> The Second Declaration of Charles M. Gannon appears in the Postal Service Reply at 6–9.

only documents relating to changes in service standards implemented in 1998, 1999, 2000, or 2001.” Second Declaration at ¶¶ 5. A plain reading indicates that responsive documents must be provided if they relate to changes implemented in one of these four years. If responsive documents relate to changes implemented in other years *as well*, they still must be provided as long as they relate to changes implemented in one of these four years. Only if otherwise-responsive documents do not relate to changes implemented in any of these four years may the documents not be provided.

In struggling to explain why the Postal Service did not interpret my FOIA request to cover documents from Docket No. N89-1, Mr. Gannon seems to be saying that the Postal Service interpreted my FOIA request as limited to documents *generated* during those four years. This reading of the sentence is not reasonable, as the sentence is not the least bit ambiguous. The time period applies to the years of implementation, not the years during which documents were generated.

Mr. Gannon also appears to be suggesting that the response to my FOIA request adequately ties the changes in service standards to Docket No. N89-1. See Second Declaration at ¶¶ 4 and 5. To Mr. Gannon, PowerPoint slide number 2’s terse bullet-point reference “History of Current Service Standards (Hotel Room-San Diego & 91-92 Realignment)” apparently constitutes a linkage to Docket No. N89-1 that is adequate to satisfy my FOIA request seeking to understand why my First-Class Mail service standards were being drastically constricted. See DFC-LR-1 and Second Declaration at ¶ 5. If anything, this bullet-point reference supports my arguments in my Answer — that Docket No. N89-1 is *history*, and the recent changes in service standards are not an implementation of Docket No. N89-1.

Finally, the Postal Service cannot assert that my FOIA request could reasonably have been interpreted to cover only internally generated or non-public documents. In *U.S. Department of Justice v. Tax Analysts*, the U.S. Supreme Court heard a case involving a FOIA request for Tax Court opinions in the possession of the Department of Justice. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 109 S.Ct. 2841 (1989). As a routine office practice, the department circulated

Tax Court opinions to department attorneys for their review. These opinions were publicly available from court clerks as well. Since these publicly available documents were under the control of the Department of Justice, the Supreme Court ruled that the Tax Court opinions were agency records subject to FOIA. If the Postal Service was relying on any Docket No. N89-1 documents to implement the recent changes in service standards affecting the San Francisco Bay Area, the Supreme Court decision confirms beyond a shadow of a doubt that the Postal Service was required to provide them to me under FOIA. The purpose of Mr. Gannon's second declaration seems to be to suggest that the tiny, indirect reference to "History of Current Service Standards (Hotel Room-San Diego & 91-92 Realignment)" in PowerPoint slide number 2 somehow satisfied the Postal Service's requirement to supply documents related to Docket No. N89-1. This position has no merit.

The Postal Service refers to informal consultations with "the source of the offending sentence" in which the Postal Service "explained how it could be demonstrated that the accusation is false." Postal Service Reply at 4. The Postal Service's explanation depended on self-serving interpretations concerning FOIA. I found these explanations entirely unconvincing and did not agree to postal counsel's request. Simply stated, the conclusion that the Postal Service complied with FOIA in responding to my FOIA request and the conclusion that the Postal Service did not invent this defense after I filed my complaint are inconsistent. That is, both simply cannot be true at the same time. I stand by this logical legal conclusion.

I must note as well that a fair reading of the OCA's answer<sup>6</sup> suggests that the OCA did not find the Postal Service's defense, which includes Mr. Gannon's declaration, any more persuasive than I did. The OCA wrote, "Although Mr. Gannon notes these are the same goals as under the Docket No. N89-1 proposal, it is apparent that Mr. Henderson's task [to Mr. Gannon's group] was a new assignment for the program." I find it peculiar that the Postal Service chose to attack an

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<sup>6</sup> Answer of the Office of the Consumer Advocate to United States Postal Service Motion to Dismiss Complaint at 5, filed August 14, 2001.

individual participant but not to question the OCA's legal argument, even though both arguments seem to question the Postal Service's core defense.

The *Federal Rules of Civil Procedure* do not apply to Commission proceedings. Nonetheless, if Mr. Gannon's declarations lead the Commission to conclude that the Postal Service believed that it was merely implementing the realignment plan in Docket No. N89-1, the Commission should apply the equitable principle contained in Rule 37(c) of the *Federal Rules of Civil Procedure*. Since the Postal Service failed to provide documents supporting this Docket No. N89-1 explanation under FOIA, the Postal Service should be barred from asserting this defense. Indeed, in the months since I submitted my FOIA request on January 27, 2001, and in the two months since my complaint first raised the issue of this FOIA request and this defense, not one document relating to Docket No. N89-1 has come forward as a supplemental response.

Ultimately, to resolve the section 3661 issue, the Commission probably will not need to reach a decision on the question of what the Postal Service believed and when. My Answer provides 21 other pages explaining why the changes in service standards otherwise do not comply with section 3661. The present response has been necessary to repeat my legal conclusions underlying the allegation at issue. If, however, the Commission finds a need to resolve this question, it should require the Postal Service to produce the many documents generated since Docket No. N89-1 that must exist that would prove that the Postal Service believed that it was merely implementing Docket No. N89-1. Documents are conspicuously absent from the Postal Service's latest reply.

As a final matter, the Postal Service complains about my "baseless charges" in another proceeding.<sup>7</sup> The Postal Service conveniently forgets to read its response to

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<sup>7</sup> The Postal Service needs to understand that the responses of many field officials over a three-year period to my service complaints concerning posted collection times create considerable skepticism about Postal Service assertions in disputes relating to collection issues. In addition, during this three-year period, the Postal Service, apparently statutorily immune from libel and defamation claims, has distributed at least two memos or e-mail messages nationwide spreading unquestionably

the document in question, in which the Postal Service levels multiple allegations against my representations of my intent and motivation for seeking production of the Collection Box Management System database.<sup>8</sup> In that document, the Postal Service finds my assessment of the “chilling effect” of the protective conditions to be “fanciful.” CBMS Response at 2. In addition, in a mini-tirade, the Postal Service argues:

[T]he true danger revealed by Mr. Carlson’s cross-motion is not that of the Postal Service using protective conditions as a legal club to improperly discourage legitimate service complaints, but of potential abuses, not just of the discovery process, but of the entire complaint process. Stated most simply, the service complaint provision in section 3662 is not intended to operate as a vehicle by which *interested parties can conceal their true intent of extracting information from the Postal Service under the guise of an alleged need for hearings* to review potential service deficiencies. Parties with broad-ranging interest in local, regional, and national postal matters, no matter how benign their motivation, cannot be allowed to make sweeping demands for massive amounts of information *under the pretext* that such material is necessary to address what is initiated as a relatively narrow service complaint proceeding, *if their true intent is to use that information for other purposes.*

CBMS Response at 4. The only apparent difference between these statements and the sentence in my Answer is that my careful legal analysis led to the statement at issue in this proceeding whereas the Postal Service’s assertions about my motivations are pure unsubstantiated speculation.

In conclusion, this response explains the basis for the statement in my Answer with which the Postal Service takes issue. The Postal Service should recognize that the stakes are high in this complaint proceeding. The Postal Service substantially curtailed First-Class Mail service for millions of customers without affording them a public hearing. My Answer describes some of the media coverage that these changes and this complaint have received. On August 14, 2001, a *San Diego Union-Tribune* editorial joined the chorus calling for the Postal Service to reverse these

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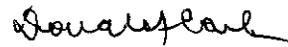
false information about my activities. To say the least, Postal Service complaints about my allegedly baseless allegations in Commission proceedings ring hollow with this writer.

<sup>8</sup> Docket No. C2001-1, Response of the United States Postal Service to Carlson Cross-Motion for Reconsideration and Response Regarding DFC/USPS-19 and Presiding Officer’s Ruling No. C2001-1/6, filed August 9, 2001 (“CBMS Response”).

changes.<sup>9</sup> The Postal Service should not be surprised that I submitted a vigorous defense to the agency's attempt to dismiss my complaint without a hearing.

Given the imbalance in information resources concerning the subject matter of this complaint, the Postal Service and Mr. Gannon should fully expect that I will identify and challenge any instances where prior acts appear inconsistent with statements asserted in conjunction with this proceeding.

Respectfully submitted,



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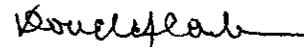
DOUGLAS F. CARLSON

Dated: August 22, 2001

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### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the Postal Service in accordance with section 12 of the *Rules of Practice*.



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DOUGLAS F. CARLSON

August 22, 2001  
Chicago, Illinois

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<sup>9</sup> This editorial is no longer posted on the newspaper's Web site.