

DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

RECEIVED

SEP 23 2 55 PM '97

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Postal Rate and Fee Changes, 1997)

Docket No. R97-1

OFFICE OF THE CONSUMER ADVOCATE
MOTION TO COMPEL RESPONSES TO
INTERROGATORIES TO UNITED STATES POSTAL SERVICE
WITNESS MICHAEL K. PLUNKETT
OCA/USPS-T40-14 (IN PART), 15 (IN PART) AND 19-20¹
September 23, 1997

The Office of the Consumer Advocate files this motion to compel responses to the interrogatories to Postal Service witness Plunkett set forth below. The Postal Service filed an objection to the above-entitled interrogatories on September 19, 1997 ("Objection"). The interrogatories are as follows:

OCA/USPS-T40-14. Is the insurance business of the Postal Service regulated by state insurance commissions? Please explain, including any legal citations necessary to support the Postal Service explanation. Also include any contrary legal citations if they exist.

OCA/USPS-T40-15. Is the advertising or marketing of insurance by the Postal Service regulated by any federal agency, such as the Federal Trade Commission (under its unfair or deceptive acts or practices authority). Please explain.

OCA/USPS-T40-19. As to insured and uninsured mailers, does the Postal Service have the status of a common carrier? For example, at common law, a common carrier was regarded as an insurer against the loss of, or damage to, property received by it for transportation (subject to certain exceptions). See, generally,

¹ It is apparent from the first page of the text of the Objection that the title for the Postal Service Objection should have referred to OCA/USPS-T40-19-20, not 20-21.

14 Am Jur 2d §508. Please explain. If there are contrary views about this (e.g., from reported court decisions, or from allegations in lawsuits) please provide the contrary views.

OCA/USPS-T40-20. As to insured and uninsured mailers, does the Postal Service have the status of a bailee (a person who receives the possession or custody of property)? Please explain. If there are contrary views about this (e.g., from reported court decisions, or from allegations in lawsuits) please provide the contrary views.

The Postal Service argues that these interrogatories are not relevant to the proposals in this proceeding and that all ask for legal conclusions rather than discoverable facts.² The Postal Service cites Special Rule of Practice 5: "Argument will not be received in evidence. It is the province of the lawyer, not the witness. It should be presented in brief or memoranda."³ It also cites rules 25 and 26 for the proposition that interrogatories must appear to be "reasonably calculated to lead to the discovery of admissible evidence."⁴ The Postal Service notes that witness Plunkett will respond to interrogatories OCA/USPS-T40-14 and 15 to the extent they request his knowledge of actual regulation of the Postal Service's business by state insurance commissions or federal agencies.

However, another portion of the discovery rules also is relevant. Rule 25(c) states, in relevant part: "An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact, but the Commission or presiding officer may order

² Objection at 1.

³ Id. at 2.

⁴ Id.

that such an interrogatory need not be answered until a prehearing conference or other later time.” And, in practice, the Postal Service routinely responds to legal questions that relate to fact or the application of law to fact. For example, in this proceeding witness O’Hara freely responded to a question regarding Ramsey pricing and its compatibility with the criteria of 39 U.S.C. §3622(b).⁵

THE INSURANCE ISSUES IN THIS PROCEEDING

Responses to the above interrogatories are necessary if OCA is to conduct meaningful and economical cross-examination of witness Plunkett. The Postal Service has by its insurance proposals generated a number of issues, many of which have legal ramifications. Resolution of these issues requires that the Postal Service spell out its position on some of these issues prior to the hearings.

Witness Plunkett presents the Postal Service’s case with regard to an overall 17.3 percent average increase in insurance fees.⁶ He states that the purpose of Postal Service insurance is “to provide indemnity for the value (up to \$5,000) of articles lost or damaged in transit.” He notes that “[i]nsurance is used primarily in conjunction with package services generally, and Parcel Post in particular.”⁷ Of particular relevance, in Table 1 he gives costs associated with insurance, segregating those costs associated with loss and with damage.⁸ He states that the Postal Service insurance proposal is to

⁵ Response of witness O’Hara to OCA/USPS-T30-5, filed August 20, 1997.

⁶ Direct Testimony at 3.

⁷ Id. at 4.

⁸ Id. at 6.

be placed into “perspective”: the “primary surface alternative” provides a limited amount of insurance as part of the basic price, and postal alternatives include registered mail and Express Mail, which include some insurance as part of the basic charge.

Witness Plunkett also introduces a bulk insurance proposal. The costs behind these proposed rates are admittedly sketchy, for this is a brand new kind of insurance.⁹ Witness Plunkett also asserts that “indemnity costs for bulk insurance are expected to be lower than for basic insurance.”¹⁰ Interestingly, bulk insurance apparently will provide “replacement value” recovery, whereas general insurance provided by the Postal Service provides only “actual value,” i.e., depreciated value.¹¹

Thus, the bulk insurance proposal should be examined relative to the type of insurance that the Postal Service offers the general public (i.e., those that cannot qualify for bulk insurance and its favorable “replacement value”). Further, the prices of the two types of insurance should be examined in relation to the value that one gets when purchasing such insurance. Briefly stated, what does the public get for its insurance dollar? This is the central question of the entire set of interrogatories (OCA/USPS-T40-1-31) sent to witness Plunkett. We next explain the context of the particular interrogatories at issue by examining the purpose of the accompanying ones.

⁹ Id. at 8, generally.

¹⁰ Id. at 8.

¹¹ Many of OCA’s outstanding interrogatories seek to probe the differences between the two types of offerings. See OCA/USPS-T40-1-31 generally.

A number of interrogatories to witness Plunkett seek to confirm the Postal Service's regulatory scheme as it pertains to insurance. Thus, OCA/USPS-T40-1 through 6, 8 through 10, and 17 seek confirmation of the many exclusions that are contained in Postal Service regulations, and ask how the Postal Service interprets these exclusions when awarding payments to insureds.

A serious issue in this regard is: "What does the general public now think they are buying when they purchase Postal Service insurance?" Consequently, OCA/USPS-T40-12 asks what type of notice is given to consumers purchasing general insurance. After all, it seems highly relevant that an insurance purchaser should know the terms of the deal. OCA/USPS-T40-12 and 13 seek to obtain data on consumer complaints. OCA also wants to know what type of notice is given to consumers as to the type of insurance they purchase.¹²

OCA/USPS-T40-14 and 15, targets of two of the objections, follow naturally from these inquiries. If there are important consumer issues here, we think the Commission needs to know how else the insurance business of the Postal Service is regulated. This will enable the Commission to make proper determinations under 39 U.S.C. §§3622 and 3623 (e.g., whether the proposed insurance classifications are "fair and equitable" given the nature of Postal Service insurance). If the Postal Service's insurance business is not well-regulated by others, the Commission may have to consider or recommend stringent consumer protection provisions. Otherwise, the consumer may be paying a lot (and a lot more under the proposed rate increase) for illusory protection.

¹² OCA/USPS-T40-16.

OCA/USPS-T40-17 and 18 shift perspective from notice issues to an issue that has arisen in a related proceeding, Docket No. MC97-5, Provisional Packaging Service, i.e., the so-called “pack-and-send” proceeding. Briefly stated, the Postal Service has represented that it will not indemnify an insured if the article is not properly wrapped for protection.¹³ In the pack-and-send context, the issue is one of the propriety of the Postal Service collecting insurance premiums for an article it has deemed mailable, it has professionally packed, and then has itself damaged, lost, or not safeguarded against internal thievery. But some of the same issues are relevant in the instant proceeding also.

In stark terms, when examining the latest insurance proposals, OCA wondered why one should pay to insure an item against, e.g., being lost, when the entity receiving the premium is the one (a) entrusted with its safe keeping and carriage, and (b) the one responsible for losing it. Analogously, do we pay the dry cleaner an explicit premium for insurance in the event that it damages or loses our clothes? Why should we then pay the Postal Service? Thus, we ask OCA/USPS-T40-18 concerning the status of uninsured mailers who nonetheless believe the Postal Service should compensate them for loss. The objected-to interrogatories, OCA/USPS-T40-19 and 20, seek to explore this issue further. Clearly, the Postal must have its own perspective on this issue.¹⁴

¹³ See response to OCA/USPS-T40-17, and the citation therein to DMM S010.2.14(l).

¹⁴ For the sake of brevity, we shall only state that the remaining interrogatories relate to numerous other consumer protection insurance issues. The necessity for Commission action on any of them will depend, in great part, on the Postal Service response to the objected-to interrogatories.

Thus, one must know the official position of the Postal Service on all four interrogatories in order to place examination of these issues into their proper context. In sum, do we need to worry about these issues at the hearing (and through the decisional process), or do other laws and regulations apply which at least mitigate any perceived problems? Thus, these are the type of mixed law and fact answers clearly envisioned by the Commission's discovery rules.

Supplying such answers after the hearings, i.e., on brief, will not be adequate. Without these answers, OCA would have to assume the worst – that the Postal Service operates its insurance business in a regulatory void. Then the Postal Service insurance witness would be subjected to vigorous cross-examination. This will cause OCA, the Postal Service, and the Commission to expend resources that could be conserved for other issues. These answers will thus help focus the issues at the hearing, precisely what the discovery process is supposed to be all about. As the Supreme Court has noted:¹⁵

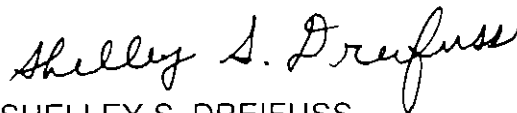
The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties *to obtain the fullest possible knowledge of the issues and facts before trial.* [emphasis added.]

Finally, compelling responses to these interrogatories should be favored because of the need to explore largely virgin territory. OCA is unaware that the

¹⁵ Hickman v. Taylor, 329 U.S. 495, 500 (1947).

Commission has considered many of these insurance issues previously, especially as they affect household mailers. However, and perhaps providentially, the insurance proposals in this case – a substantial insurance rate increase coupled with a new classification that provides replacement value insurance to large mailers while the general public may obtain only the inferior depreciation value insurance – may merit intensive analysis. We thus respectfully request that the Postal Service be compelled to answer the above-entitled interrogatories in full.

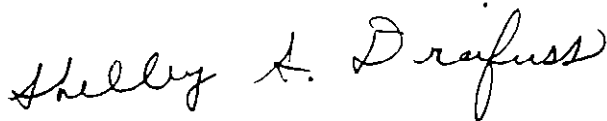
Respectfully submitted,



SHELLEY S. DREIFUSS
Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.



SHELLEY S. DREIFUSS
Attorney

Washington, D.C. 20268-0001
September 23, 1997