

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

EXPERIMENTAL PRIORITY MAIL FLAT-RATE
BOX, 2004

Docket No. MC2004-2

REPLY OF UNITED STATES POSTAL SERVICE
TO POPKIN MOTION TO COMPEL RESPONSES
TO INTERROGATORIES DBP/USPS-7-9
(August 17, 2004)

On August 12, 2004, Mr. Popkin filed a motion to compel responses¹ to his institutional interrogatories DBP/USPS-7-9², themselves filed on July 27, 2004³, to which the Postal Service filed comprehensive and explanatory objections on August 6, 2004⁴. Mr. Popkin's repetition of slightly different but essentially the same questions constitutes an abuse of process that the Presiding Officer and

¹ David D. Popkin Motion to Compel Response to Interrogatories DBP/USPS-7-9 (August 12, 2004). The Motion consists of four short paragraphs.

² The interrogatories state:

DBP/USPS-7. Does the United States Postal Service believe that mailers, both sophisticated and unsophisticated, should be able to make educated decisions about their use of the various services provided by the Postal Service, including weight-zone and flat-rate Priority Mail, that will be in their own best interests? If not, please explain the reasons for this belief.

DBP/USPS-8. Does the United States Postal Service believe that mailers, both sophisticated and unsophisticated, will require sufficient information about the various rates and mailing criteria in order to be able to make educated decisions about their use of the various services provided by the Postal Service, including weight-zone and flat-rate Priority Mail, that will be in their own best interests? If not, please explain the reasons for this belief.

DBP/USPS-9. [a] Does the United States Postal Service believe that it has an obligation to provide sufficient information about the various rates and mailing criteria to mailers, both sophisticated and unsophisticated, in order to allow them to be able to make educated decisions about their use of the various services provided by the Postal Service, including weight-zone and flat-rate Priority Mail, that will be in their own best interests? [b] If not, please explain the reasons for this belief. If so, please provide the details of the methods that are utilized by the Postal Service to fulfill this obligation. Please specify which of the methods will be utilized with respect to the flat-rate Priority Mail rate and service.

³ David B. Popkin Institutional Interrogatories to the United States Postal Service [DBP/USPS-7-9 *sic*] (July 27, 2004).

⁴ Objections of the United States Postal Service to Interrogatories of David B. Popkin (August 6, 2004).

Commission should make clear it does not tolerate. Mr. Popkin even agrees that he is asking redundant question in the hope of obtaining “a satisfactory” response. Motion, at ¶ 3. The mere fact that Mr. Popkin does not like the answers he has already gotten cannot justify his posing them to multiple witnesses and insisting, as he now does, that he is entitled to a different response from the Postal Service itself.

The general issue is one that has received considerable attention in this docket: Since the proposed postage rate for flat-rate boxes is greater than the lowest available Priority Mail rate, some flat-rate box pieces may contain matter that, if appropriately repackaged, could be sent at a lower Priority Mail rate. This potentiality was addressed in direct testimony. See, e.g., USPS-T-1, at 9-10. This issue also remains open in the form of compelled responses regarding a draft communication plan and examples or mock-ups of the proposed boxes themselves.

Mr. Popkin, however, remains obsessed with his own particular take on the issue, apparently figuring that answers from two witnesses are insufficient such that he is entitled to compelled responses from the Postal Service as an institution. The Postal Service objection noted that Mr. Popkin’s questions have already been asked and answered, and that if he deemed those answers insufficient he had then been free to seek further compelled responses or follow-up responses.⁵ Posing his questions yet again, and seeking compelled institutional responses to them, accordingly constitutes an abuse of process.

Mr. Popkin attempts to justify the repetition by dismissing witness responses as “personal” opinions. *Id.* Mr. Popkin’s many years of law school have evidently led him astray. Postal Service witnesses appear before the Commission as experts and, as often reflected on testimony cover pages, “on behalf of” the Postal Service. As such, they are appearing in their professional

⁵ See Objections of the United States Postal Service to Interrogatories of David B. Popkin, at 2-3 (August 6, 2004). That pleading explains in detail the bases for Postal Service objections – including the terms whose vagueness is problematic – so for the sake of brevity that material is largely not repeated herein.

capacities and their testimony, absent an overt label as “personal”, is understood and treated by the Commission as statements made by the Postal Service.

Mr. Popkin’s procedural approach of insisting on institutional responses to interrogatories previously answered by witnesses is troubling for additional reasons. The Postal Service endeavors to provide evidence in Commission proceedings by means of the best available expert witnesses. Witnesses are often required to consult with various postal officials when responding to discovery and information requests; considerable effort is often undertaken to provide complete and correct responses that reflect the position of the Postal Service, thus conforming to the legal reality that its experts testify on behalf of the Postal Service. Mr. Popkin’s characterization of these responses as merely “personal”, accordingly lacks any legal or factual foundation. Issues raised in many dockets, however, can exceed the scope of respective witnesses’ testimonies. Often, such inquiries can be handled by having a witness consult with other resources and thereafter report her best understanding. On other occasions, such as when the witness is completely unfamiliar with the area of inquiry, institutional responses may be provided. Participants in Commission proceedings are generally cooperative in permitting these techniques to fill out the evidentiary record available for the Commission’s consideration. Use of institutional responses, however, carries with it the possibility that the Commission will thereafter require a witness to appear for cross-examination on institutional responses. In this docket, were institutional responses to DBP/USPS-7-9 compelled, and a witness thereafter required, both witnesses Barrett and Scherer could be designated since both of them have essentially answered Mr. Popkin’s questions. Accordingly, the relief sought by Mr. Popkin could not provide a constructive addition to the evidentiary record of this docket.

In his responses to interrogatory DBP/USPS-T1-5(b-d), redirected from witness Scherer (July 7, 2004), witness Barrett indicated his inability to distinguish Mr. Popkin’s “sophisticated” from “unsophisticated” customers, but did state that all customers would have access to flat-rate boxes. The latter part of this response indicates that the communication plan, now being prepared for a

compelled response, was then unavailable. Clearly, this response indicates the Postal Service awareness of the need, which exists for all new classifications, to inform customers of their options. Also clear, however, is that different methods of communication are not prepared, respectively, for “sophisticated” versus “unsophisticated” customers.⁶

Witness Scherer’s response to DBP/USPS-T1-12 (filed on July 27, 2004 – the same day Mr. Popkin re-filed his questions in the guise of institutional interrogatories DBP/USPS-7-9) covered some of the same ground. While this question dealt with “non-sophisticated” (rather than “unsophisticated”) and “sophisticated” customers, its import is essentially the same as the institutional interrogatories and the interrogatory parts answered by witness Barrett. Witness Scherer is also unwilling to distinguish customers based on their sophistication, but he explains why he thinks customer decisions will generally be informed ones while acknowledging that customers will require some information to make informed decisions. In this respect, implementation of a flat-rate box Priority Mail experiment is no different from implementation of any other classification or rate category.

Mr. Popkin’s Motion sheds no additional light on his supposed need for institutional rather than witness responses. He claims (in the first paragraph) to be “attempt[ing] to obtain information with respect to whether mailers should be able to make educated decisions in using the Postal Service, whether they require information to make these decision[.]” Both of these questions were already answered by witness Scherer. Mr. Popkin also claims to be interested in “whether the Postal Service feels it has an obligation to provide this information”, which simply constitutes a restatement of “whether [customers] require information”. The word “obligation”, however, can have various meanings, also as witness Scherer indicated. In conformity with his response, the Postal Service included as a basis for its objection that this question could call for a legal conclusion, which would be inappropriate discovery.

⁶ Witness Barrett’s use of the singular “communications *plan*” implies that only one plan is needed, rather than different plans for respective customer groups.

Mr. Popkin's questions rely, unfortunately, upon a host of terms that are clear to him but too vague to the witnesses. His remedy, if any, is not repetition, as has been pointed out in those previous responses and pleadings. In any event, the Postal Service does not have additional answers to his questions. At most, any compelled responses would restate the answers previously provided. Answering these questions accordingly will lead to duplicative responses rather than the discovery of new admissible evidence.

Mr. Popkin's response to Postal Service objections on the grounds of vagueness and insufficiently defined terms, found in the fourth paragraph of his motion, asserts that since they are part of the "English Language" [capitals in original] does nothing to remedy his questions' vagueness and imprecision. The Postal Service has, through its witnesses, provided responses to Mr. Popkin's questions. The general thrust of his questions is now being addressed through compelled responses that will be filed shortly. However, his attempts to obtain institutional responses using terms that apparently have specific meanings to him that are not shared by others accordingly cannot lead to the discovery of admissible evidence; Mr. Popkin's motion to compel responses to interrogatories DBP/USPS-7-9 should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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