

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

COMPLAINT OF TIME WARNER INC. ET AL.
CONCERNING PERIODICALS RATES

Docket No. C2004-1

ANSWER OF AMERICAN BUSINESS MEDIA TO
MOTION OF TIME WARNER INC., ET AL. TO COMPEL
PRODUCTION AND RESPONSES TO TW ET AL./ABM-T3-2 & 3
(October 12, 2004)

On October 6th, Time Warner et al. (hereafter "Time Warner") filed a motion to compel responses to Time Warner et al./ABM-T3-2 and 3, directed to witness McGarvy, but that motion relies entirely on a motion to compel a response to interrogatory Time Warner et al./ABM-T1-3, directed at American Business Media witness Cavnar. The specific motion here seeks mail.dat files for each publication produced by Crain Communications, witness McGarvy's employer, and an analysis performed by witness McGarvy of the impact on Crain's publications if it changed its mailing practices (as well as supporting documents, specifically, once again, mail.dat files).

By choosing to rely entirely upon a separate motion that in essence combines three, Time Warner has mixed together contentions related to three witnesses with no clear line of demarcation showing which of its assertions support which of its motions to compel. In other words, it is not clear whether, for example, the combined motion's discussion of witness Bradfield's testimony is presented in partial support of the specific motion to compel a response from witness McGarvy—the subject of the instant motion—or whether it is offered only to support the merged motion to compel a

response from witness Bradfield. What makes this tactic especially troubling here is that interrogatory TW et al./ABM-T3-2 to witness McGarvy, dealing with the “what if” analysis, is totally unlike any of the other interrogatories that are the subject of Time Warner’s motions to compel, yet it is addressed only in a motion that, in accordance with its title (but not its content), deals only with an interrogatory directed at witness Cavnar.

Facing a choice of whether to file a single substantive response with two incorporations by reference or three separate responses, as the Commission’s procedures appear to contemplate, American Business Media has selected the latter option, in part because it is inappropriate to lump together the testimony of the three witnesses for purposes of this discovery dispute. Our choice will lead to repetition that we submit is preferable to confusion.

Although American Business Media and Time Warner appear to disagree to some extent on the meaning of the precedent from Docket No. MC95-1, addressed at pages 9-10 of the motion, we do agree that, apart from any other considerations such as confidentiality, discovery of a witness is limited by the scope of that witness’s testimony. Time Warner concludes from *Presiding Officer’s Ruling No. MC95-1/11* (June 1, 1995) that “requesting facts or documents underlying that witness’s testimony is entirely proper” (motion at 10). In fact, in that order (at 2) the Presiding Officer gave as an example of improper discovery questions to a university professor giving economic testimony for the Postal Service concerning his employer’s mailing practices. More generally, the ruling (*id.*) was that, where the Postal Service uses a witness that is employed by another entity (as is analogous to the situation here), the scope of

discovery does not extend to the business practices of the witness's employer when that information is not known to the Postal Service and is outside the scope of the witness's testimony.

Time Warner (motion at 9-10) ascribes great weight to the arguments presented Docket No. MC95-1 by American Business Media's predecessor seeking to obtain information on Meredith Corporation's alternate delivery experiences from its employee who was testifying for the Postal Service in a case in which the availability of alternate delivery was a significant issue (*Presiding Officer's Ruling No. MC95-1/11* at 8) and the witness had access to the information. Although Time Warner contends (motion at 10) that the Presiding Officer "saw merit" in those arguments, he in fact did not. Rather, all that the witness was required to produce was "a brief description of the business of Publishers Express" (*Presiding Officer's Ruling No. MC95-1/11* at 9), on whose board he served, information that was otherwise publicly and readily available. Similarly, the Presiding Officer (*id.* at 8) denied the attempt by American Business Press (as it was then known) to obtain alternate delivery information from witness Baer because "alternate delivery is not *central* to witness Baer's testimony" (emphasis supplied).

TW et al./ABM-T3-3

As discussion above shows, quite apart from consideration of confidentiality or other grounds for withholding the mail.dat files, Time Warner must demonstrate not in general terms that impact is an issue in this case (despite its failure to offer any impact evidence) but, with respect to TW et al./ABM-T3-3, that the commercially sensitive data in Crain's mail.dat files are "central" to witness McGarvy's testimony. It has not even shown that the requested mail.dat files are in any way related to that testimony.

Not that Time Warner does not try, in vain, to make some connection. Time Warner apparently believes that if it can show that Ms McGarvy testifies to a significant extent about the impact of the proposed rates, it will have created the necessary nexus and will have access to Crain's mail.dat files. So it blithely ignores the actual content of her testimony but three times states that it is essentially for the purpose of presenting extensive impact testimony. Thus, at page 6, Time Warner states that Ms McGarvy "testifies extensively about the impact of the proposed rates," at 14 repeats that she "testifies extensively about the impact of the proposed rates" and at 16 claims that "she appears in this case chiefly to give expert testimony about the probable impact of the proposed rates."

If that were so, one would expect to find ample citations to this extensive testimony. Yet for all of this extensive testimony, Time Warner (motion at 6) cites only a single sentence *in the introduction to her testimony* that, if the proposed rates were implemented, they would sacrifice many small publications to assure guaranteed rate reductions to the complainants. It goes on (motion at 7) to cite Ms. McGarvy's testimony at page 8, lines 3-12, about the inability of small publishers to handle severe rate complexities and to obtain services from major printers, but that testimony is not about the impact of the proposed rates (except, perhaps, very indirectly and certainly unrelated to mail.dat files). Later (motion at 14), and finally, Time Warner cites ABM-T3-2 (no line numbers) for the proposition that Ms. McGarvy bases her testimony on the impact of the rates on her experience at Crain. In fact, but for fifteen words (not dealing with impact) carried over from the introductory sentence, that page deals

exclusively with Ms. McGarvy's education and her experience at Crain and in the industry. There is no mention of impact.

For all of its efforts, therefore, Time Warner was able to cite a single, introductory and non-specific sentence in thirteen pages of testimony to support its assertion that the primary purpose of witness McGarvy's testimony is to address impact and that it does so extensively.

The reason that Time Warner falls so far short of its mark is that the purpose of the testimony is not to address impact. We submit that anyone skimming through the testimony seeking a section—or even a paragraph—on the impact of the proposed rates on Periodicals mailers will fail in that endeavor. Rather, after the introduction (page 1) and the biographical sketch (page 2), the subjects covered are: an “overview” that presents the rationales advanced by the complainants and summarizes her testimony (pages 3-4); a discussion of how the industry is changing as more smaller publishers have begun to co-mail and co-palletize (pages 4-6); why weeklies and dailies, especially, can probably not co-mail or co-palletize and how service problems could result if sack sizes were increased (pages 6-8); why small publishers could have logistical problems with a complex schedule (page 8); why small publishers may have trouble getting into a co-mail or co-pallet program (pages 9-10); why changes should be made at a “measured pace” (page 10); the existing rate differentials among publications (pages 11-12); and a conclusion that points out the potential savings to the complainants if no changes are made and encourages the Commission to require more study and an analysis of existing trends before ordering major changes (pages 12-13).

For this reason alone, the motion with respect to the mail.dat files (Time Warner et al./ABM-T3-3) should be denied. The Commission need not reach the issue of confidentiality, but should it choose to do so, American Business Media submits that there is no compelling need for the confidential mail.dat files and that Time Warner has available to it ample data—including its own data, mail.dat files for 155 American Business Media-member publications and data it is in the process of obtaining from the Postal Service—with which to make its rebuttal case.¹ Clearly, with all of these sources available, Time Warner cannot meet the Commission’s standard that absent “exceptional circumstances” an intervenor (as opposed to the Postal Service) will not be ordered to produce confidential data. See *Presiding Officer’s Ruling No. R2000-1/02* (July 31, 2000), addressed in American Business Media’s Objections, in which the Presiding Officer stated:

The Commission’s policy regarding the discovery of intervenors commercially sensitive information has been reiterated in a series of rulings—absent exceptional circumstances, such data need not be produced.

See also *Presiding Officer’s Ruling No. R2000-1/97* (July 25, 2000), at 8, where the Presiding Officer ruled that the proponent of a new rate or classification sometimes has a higher burden for disclosure and *Presiding Officer’s Ruling No. R97-1/104* (February 27, 1998) at 1-2, confirming that “a strong interest in protecting” commercially sensitive information prevails, “regardless of the availability of protective conditions.” The Time

¹ The substitutability of alternate data is addressed more fully in American Business Media’s Answer of American Business Media to Motion of Time Warner Inc., et al. to Compel Production Responsive to Time Warner et al./ABM-5(c) and Time Warner et al. /ABM-68(k) (October 12, 2004)

Warner citations at page 11, note 13, offered in support of its assertion that once relevance is established, disclosure with protective conditions is mandatory all deal with discovery from the Postal Service, and, as shown here, the Commission has sharply distinguished between the Postal Service and intervenors.

TW et al./ABM-T3-2

In this portion of its motion—that is, the motion to which reference is made by Time Warner—it seeks all analyses prepared by Ms. McGarvy of changes in mailing practices that might be made to reduce the impact of the proposed rates along with all data on which such analyses were based. Time Warner addresses American Business Media’s objections at pages 13-16 of its Motion to Compel captioned as related to ABM-T1 (Cavnar).

American Business Media interpreted the question broadly to include any studies of rate impact without putting too fine a gloss on the term “could be made,” although, technically, the analysis performed by Ms. McGarvy was simply to see the effect of changes in sack minimums without regard to whether such changes “could be made” consistent with Crain’s delivery requirements. ABM thus explained in its Objection filed September 23rd that the answer would be that such analysis was undertaken but that an objection is raised to production of the analysis and the underlying data on two grounds (not three as stated by Time Warner at 13). See Objection at 2. The first ground was that “the documents sought, which include mail.dat files . . . are confidential and need not be disclosed, especially by Crain Communications, a non-party” The second was that the analysis performed is attorney work product.

American Business Media has addressed above the Commission's extreme reluctance to order the production of highly confidential documents, such as Crain's mail.dat files, so that even if witness McGarvy is directed to produce the results of her analysis, she should not be directed to produce the mail.dat or other data that were used.²

In accusatory terms Time Warner asserts (motion at 14) that American Business Media "neglects entirely" the distinction between the analysis and the underlying data, concluding that the work product privilege has no applicability to the latter. American Business Media never claimed a work product privilege with respect to the underlying data, such as the mail.dat files, so there is no dispute as to this point. Our claim was confidentiality and (as explained above and in the Objection) the availability of other mail.dat files and data.

As for the actual work product claim covering the analysis, Time Warner again (motion at 14-15) invokes the demonstrably false claim that Ms. McGarvy's testimony "consists chiefly of opinions about impact" (motion at 15). It is not clear why it walks this fragile limb, because besides being false, the assertion does nothing to advance its position. In fact, Time Warner agrees (motion at 15) that, at least "as a matter

² This conclusion is especially valid where, as here, the eventual work product would be produced only in response to a discovery order and not as part of the party's direct case.

principle,” the work product claim applies to the analysis performed at the request of counsel.³

Perhaps Time Warner persists with this gross mischaracterization of witness McGarvy’s testimony in order to bolster its next argument (motion at 15-16), which appears to be that because her analysis concerns publications with which she is most familiar (correct), and because her testimony is chiefly about impact (incorrect), “the relevance, indeed the centrality, of the materials to the issues raised in her testimony is virtually self-evident” (motion at 16). American Business Media of course denies what Time Warner declares to be self-evident, but even if it were true that the study performed at the request of counsel were relevant to the testimony, that fact would not overcome the attorney work product privilege. Indeed, it would be rare, we submit, to find attorney work product that is irrelevant to the issues in a case.

Finally, in an attempt to demonstrate, as it must, substantial need and the unavailability of equivalent documents elsewhere, Time Warner contends (motion at 16):

Finally, since the requested documents bear not merely on the state of witness McGarvy’s knowledge but on the level of her expertise and the quality of her judgments in assessing probable impacts of the proposed rates, there do not exist any “substantial equivalent[s]” of the requested items.

This *non sequitur* is difficult to follow and impossible to answer. ABM submits that Ms. McGarvy’s manipulation of data to see the result of changing sack minimums has

³ Although it is not clear, Time Warner may be arguing that even if it is not entitled to the analysis, it is entitled to the underlying data, a truly preposterous position.

nothing to do with the level of her expertise or the quality of her judgments, especially since neither ‘expertise’ nor ‘judgments’ were involved. The analysis is purely mathematical and does not consider whether, in fact, Crain could reasonably change its sack minimums. But even if we are missing something in Time Warner’s assertion, by its terms it deals only with the availability of equivalent data and not with the “need” test Time Warner invokes but ignores and thus fails.

As to both tests—equivalent data and need—Time Warner has not shown and cannot show any circumstances justifying the setting aside of the attorney work product privilege. As American Business Media has explained several times in its various answers to Time Warner’s unfounded motions to compel, if the complainants want to show what would happen at its proposed rates if sack sizes were changed, it can use (1) data from its own publications, (2) the 155 mail.dat files already provided to it by American Business Media and (3) data it is going to obtain from the Postal Service. Because those data are far more extensive than data concerning Crain’s sacked publications, they are not equivalent—they are better. The issue, after all, is not what would happen to Crain Communications under the proposed rates but what would happen to Periodicals.⁴

⁴ American Business Media has responded to (or is in the process of responding to) interrogatories, such as TW et al./ABM-69 and 70 and TW et al./ABM-T2-10 seeking additional information related to exhibit LB-1.

For these reasons, the motion to compel a response to Time Warner/ABM-T3-2
and 3 should be denied.

Respectfully submitted,

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