

DOCKET SECTION

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

OPPOSITION OF UNITED STATES POSTAL SERVICE
TO UPS MOTION TO COMPEL RESPONSES TO INTERROGATORIES
UPS/USPS-T33-44bc, 45e-h, m-p, 46bc, 47e-h, m-p, 48-50, 57-58
TO WITNESS SHARKEY
(October 14, 1997)

As part of an attempt to informally resolve a dispute regarding provision, in this proceeding, of commercially sensitive, trade secret information sought by the United Parcel Service (UPS) relating to a contract between the Postal Service and Emery Worldwide Airlines (Emery) which establishes a PMPC network for handling and transportation of Priority Mail, UPS agreed to suspend its efforts to seek the unredacted PMPC contract in favor of filing additional, more specific interrogatories based upon a redacted PMPC contract filed by the Postal Service. See Motion of United Parcel Service For Extension Of Time To Seek Production Of PMPC Contract (September 8, 1997). On September 11, 1997, UPS filed interrogatories 43-58 to witness Sharkey.

The new interrogatories filed by UPS were more limited and more focussed in scope than the initial UPS interrogatories related to the PMPC contract. In recognition of this, and in an effort to further narrow the items in dispute, the Postal Service filed responses to interrogatories UPS/USPS-33-43, 44a, 45a-d, I-I, 46a, 47a-d, I-I, 51, 52ab, and 53-56 on September 25, 1997. Because the remaining interrogatories still posed significant threats of disclosure of commercially sensitive, trade secret information, and were otherwise objectionable, however, objections to these questions were filed on September 22, 1997.

In its continuing effort to resolve this dispute informally, the Postal Service noted in its objections that it would consider providing most of the information requested in the remaining interrogatories under appropriately strict protective conditions. The Postal Service stated that in addition to the terms occasionally used in Commission protective orders,^{1/} the Postal Service wished to add language aimed at limiting the risk that the information disclosed could be used, either intentionally or unintentionally, by counsel or consultants in the course of providing advice to competitors of the Postal Service or of its contractor.^{2/}

Despite concerted attempts to define protective conditions agreeable to the Postal Service, Emery and UPS, no agreement was reached prior to the deadline for filing of motions to compel. Thus, on October 6, 1997, UPS filed a motion to compel responses to interrogatories UPS/USPS-T33-44bc, 45e-h, m-p, 46bc, 47e-h, m-p, 48-50, and 57-58.^{3/}

In its motion to compel, UPS makes two arguments. First, UPS argues that the requested information is "directly relevant to this proceeding." Second, UPS asserts that

¹ See, e.g., Presiding Officer's Ruling No. R97-1/5 (August 7, 1997).

² It should be noted that on September 26, 1997, the Postal Service's contractor for implementation of the PMPC network, Emery Worldwide, filed comments supporting the Postal Service's objections, expressing Emery's concern that disclosure of the information sought would risk substantial harm to Emery's commercial interests, and suggesting that, if disclosed, the information should be provided only under protective conditions which are more detailed and comprehensive than those suggested in the Postal Service's pleadings. See Emery's Informal Expression On Release Of Proprietary And Confidential Information To UPS (September 26, 1997).

³ UPS states in its Motion that it has withdrawn interrogatory UPS/USPS-T33-52(c). Motion to Compel at 1, note 1.

none of the information sought is in any way commercially sensitive or proprietary. UPS is incorrect in both respects.

First, it is far from clear that all of the information sought has a bearing on the issues in this case. As noted in the Postal Service's objections, some of the information sought has no direct relevance to the costs of the Postal Service under the contract, and thus has little relevance to this proceeding. In particular, "air transport cost elements" sought in subparts (m) through (p) of questions 45 and 47 are artifacts of the contract negotiation process, but do not affect in any way the cost ultimately to be paid by the Postal Service under the contract as finally negotiated. They are simply irrelevant to the Postal Service's base-year, interim year, and test-year cost estimates, and if produced, would have no effect but to give UPS further insight into the private negotiating stances of a competitor. UPS does not address this matter at any point in its Motion.⁴

UPS's second argument is more flawed than its first, and of more concern. In essence, UPS is arguing that it, a competitor to both the Postal Service and Emery, is more capable than either when it comes to determining whether specific pieces of information are commercially sensitive to the Postal Service and Emery. The Postal Service is confident that the Commission will be conscious of the biased and self-serving nature of the UPS argument. For its part, the Postal Service can only state that its concerns regarding the sensitivity of the information now sought are serious, and that it would not have filed objections, spent numerous hours reviewing the PMPC contract, spent more time and resources attempting to fashion an informal settlement, and taken

⁴ The extent of UPS's analysis of this issue is the repeated general assertion that each of its interrogatories is carefully designed to elicit only information relating to the Postal Service's costs to be incurred under the contract. As demonstrated above, this is plainly not the case.

the time to suggest potentially agreeable protective conditions, if its concerns were not real and valid.

Moreover, the Postal Service takes seriously Emery's expressed concerns regarding the information sought. This is imperative not only because the Postal Service has embarked on an important and financially significant cooperative business venture with Emery and does not wish to overlook the interests of an important business partner, but also because, as federal agencies, the Postal Service and the Commission are compelled by law in certain circumstances to refrain from disclosing trade secrets. The Trade Secrets Act, 18 U.S.C. § 1905, imposes criminal penalties on officers or employees of the United States who publicly release certain proprietary information not authorized by law, including:

. . . trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association

18 U.S.C. § 1905. To the extent that trade secret information would remain exempt from disclosure through one or more of the exemptions enumerated by Congress under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), the Trade Secrets Act would bar any discretionary release of the information unless, after notice and comment, the agency promulgated a contrary rule having the force and effect of law. *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995)("[W]henver a party succeeds in demonstrating that its materials fall within [FOIA] Exemption 4, the government is precluded from releasing the information by virtue of the Trade Secrets Act"); *CNA Financial*, 830 F.2d at 1142 ("[I]f trade secrets and confidential financial information are excepted from mandatory disclosure by one or more of the exemptions that Congress has incorporated into FOIA, the Trade Secrets Act will bar a discretionary

release, unless, after notice and comment, an agency, possessing delegated power to do so, promulgates, a contrary rule having the force of law”).

FOIA Exemption 4 requires agencies to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 554(b)(4). Under FOIA, information is confidential if its disclosure will likely: (1) impair the government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974). To demonstrate a likelihood of substantial harm, one need only show the presence of actual competition and the likelihood of substantial competitive injury. *National Parks and Conservation Ass’n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

The application of these principles in the present context is straightforward. The existence of actual competition is undeniable, for it is well established that UPS competes with both the Postal Service and Emery. Indeed, if UPS were not seeking to advance its competitive interests in this proceeding, it is unlikely that it would have sought full disclosure of the PMPC contract in the first place. Moreover, both Emery and the Postal Service have raised the potential for competitive injury if the requested information were disclosed.

In its previous comments to the Commission, Emery indicated that its commercial interests would be harmed by disclosure of the requested information. In particular, the information requested would reveal details of Emery’s pricing strategies for the regions covered by the PMPC network, enabling competitors such as UPS to evaluate its own geographic pricing and adjust its competitive strategies vis-a-vis Emery and the Postal Service. In addition, the Postal Service is concerned that the integrity of the procurement process could be compromised in the future if confidential business

information submitted in response to a request for proposals were subjected to disclosure in discovery, and objects to disclosure for that reason. For example, Emery has expressed concern to Postal Service representatives that disclosing even the information redacted from the table of contents of the PMPC contract could reveal important strategic information relating to Emery's proprietary method of responding to government solicitations.

UPS's claim that the Postal Service has waived the confidentiality it claims with respect to the PMPC information because certain other contractual information alleged to be similar has been disclosed previously in this case does not adequately address the serious issues involved in the distinct dispute at hand. The information previously provided is not the information now sought. The Postal Service has never before entered into a contract like the PMPC network contract, which involves the establishment of a network of ten contractor-controlled mail processing centers. The Postal Service has from the beginning asserted the proprietary nature of the contractual materials involved, and has even required internal Postal Service personnel to sign non-disclosure agreements prior to obtaining access to the PMPC contract. Furthermore, the Postal Service's contractor, Emery, has steadfastly asserted the confidential, proprietary and trade secret nature of the information in question, and has even filed comments to that effect with the Commission. Second, even if the previously disclosed information been identical to the PMPC contract information, the fact that the Postal Service once may have not exercised its right to object with respect to that information does not mean that it is forever barred from seeking to protect from disclosure other contractual information of a commercially sensitive, trade secret nature.

Conclusion

Although the parties to this dispute have made diligent efforts to narrow the scope of the dispute, the UPS Motion to Compel would derail any further progress. The UPS position with respect to the remaining confidential information has devolved to a simple assertion that the information is not at all confidential, and that UPS will not agree to provision under protective conditions, especially the protective conditions suggested by its competitors, whose interests risk injury upon disclosure.

This all-or-nothing position does little to advance the orderly disposition of this matter. For its part, the Postal Service, based upon its own review and upon the comments filed by Emery, concludes that important and sensitive commercial interests are at risk, and that disclosure, if any, should be made only under protective conditions designed to eliminate that risk. *In its objections, the Postal Service has suggested a very limited addition to the protective conditions customarily used by the Commission which would be appropriate in this instance. Emery has suggested a more expansive set of protective conditions, which the Postal Service would not oppose.*

Based on the arguments set out above, the Postal Service believes that the UPS Motion to Compel should be denied. If, however, the Commission were to compel

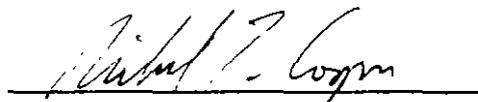
production of some of the requested information, it must do so only under appropriate protective conditions, as suggested by the Postal Service and Emery.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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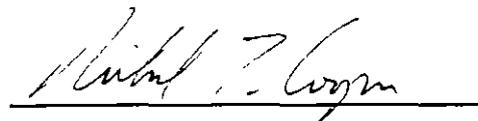


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CERTIFICATE OF SERVICE

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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