

# DOCKET SECTION

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268B0001

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

## RESPONSE TO NDMS MOTION TO COMPEL RESPONSE TO INTERROGATORIES NDMS/USPS-T28-27-41 (November 21, 1997)

In accordance with Presiding Officer's Ruling No. R97-1/64, the United States Postal Service hereby responds to NDMS's motion to compel responses to interrogatories NDMS/USPS-T28-27-41.

The Postal Service agrees to the further schedule for disposition of this matter set forth in NDMS's Motion at p. 1. The Postal Service also agrees that two of the technical points made in the Motion to Compel are correct. The statement in our objection regarding the lack of a specific objection to the admission of witness Crum's testimony did not take account of NDMS's standing objection, later embodied in their October 16 motion to strike. The Postal Service also agrees that Library Reference H-108 was included in its listing in response to Presiding Officer's Ruling No. R97-1/42, which was later referred to in Ruling No. R97-1/54 concerning further discovery.

As pointed out in the Postal Service's November 12 Notice Regarding Library References Already in Evidence, however, the inclusion of Library Reference H-108 in the list filed by the Postal Service needs to be examined in the context of the circumstances at that time. It is not an automatic indication that the situation with regard to witness Crum's testimony is analogous to other library references at issue. There are important distinctions between the situation surrounding witness Crum's testimony and the other library references which are being incorporated into the

record through the supplemental testimony of additional postal witnesses. NDMS's motion fails completely to take account of these unique circumstances. The Postal Service believes that these facts are crucial to a proper evaluation of NDMS's motion. The Presiding Officer has already noted that witness Crum's circumstances differ. *See Presiding Officer's Ruling No. R97-1/20, at 9 (September 17, 1997).*

In seeking to justify their motion, NDMS complain about "sponsorship by witnesses [being] explicitly denied, then witnesses reverse their sworn answers to sponsor testimony, and evidence is not identified until just before it is offered...." Either NDMS are confused about the facts applicable to witness Crum or they are seeking to deliberately muddy the waters. Since these facts, as reviewed below, are not applicable to witness Crum, they do not support NDMS's argument.

NDMS first asked substantive questions about the material at issue, then contained in Library Reference H-108, in its very first set of interrogatories to witness Crum filed on August 8. These questions were answered by witness Crum, in his own name, and with a signed declaration on August 22. Although the Postal Service had initially objected (on August 18) to NDMS/USPS-T28-1, which included non-substantive questions regarding sponsorship of the material, the Postal Service indicated that witness Crum would answer questions about this material, which he did. On September 9, witness Crum answered the subparts of NDMS/USPS-T28-1 to which the Postal Service had previously objected, indicating his close involvement with the production of the material and his continued availability both to answer and to sponsor the answers to questions regarding this material. When witness Crum incorporated the substantive material in Library Reference H-108 into his testimony, as Exhibit K, all parties were given notice, once again, that witness Crum would stand

cross-examination on these materials at hearings, just as he had responded to discovery on them from the beginning.

Contrary to NDMS's allegations, there was no denial of responsibility and no reversal of position. Although witness Crum indicated that "as a library reference, it is my understanding that LR-H-108 is not sponsored by any witness," this was simply his reading as a legal layman of the legal controversy swirling around him,<sup>1</sup> and his use of the present tense concerning sponsorship reflected his understanding of the then-current status of the library reference. Although NDMS seem not to have understood this, the Presiding Officer did: "Witness Crum...has declared himself the main author of the study supporting the surcharge proposed in this testimony, but stops short of acknowledging sponsorship *at this stage of the proceeding.*" Presiding Officer's Ruling No. R97-1/20, at 9 (September 17, 1997) (emphasis added).

NDMS attempt to defend their asking questions now that clearly could have been asked months ago as a legitimate litigation strategy. According to NDMS, "[t]he questions that NDMS are now asking were not asked witness Crum prior to his testimony on October 9 because, until October 1, Library Reference H-108 was simply an unsponsored library reference. Delving into these subjects prior to the Postal Service's commitment to vouch for Library Reference H-108 could have had the effect of assisting the Postal Service's 'bootstrapping' effort, which was at the heart of the NDMS objections to such testimony of witness Crum in the first place." Motion at 6.

The Postal Service is frankly baffled by NDMS's argument that it tread lightly into discovery concerning Library Reference H-108 in order not to give weight to the

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<sup>1</sup> His understanding was consistent with the Postal Service's position at that time on the procedural matter regarding the status of library references.

material it contained. While other parties desisted almost entirely from discovery on LR-H-108, presumably on this theory, of the 46 separate questions NDMS filed during the regular discovery period, fully 20 specifically referred to LR-H-108, and several more concerned that material, without mentioning the library reference explicitly. Those 20 questions asked about what was then an "unsponsored" library reference. In addition to written discovery, much of NDMS's oral cross-examination of witness Crum concerned this material as well.

It was Witness Crum's answers to NDMS's own question (NDMS/USPS-T28-1) that lay a foundation, as strong as that underlying admission into evidence of testimony, for the possible admission of the library reference material into evidence, as contemplated by Special Rule 5. NDMS would have readers of their Motion believe that the possibility of the material's being entered into the record was not something they needed to take account of in formulating their litigation strategy. NDMS seem to have failed to realize that, regardless of whether the Postal Service initially designated the material as testimony, once the appropriate foundation was laid in response to NDMS's question, a motion to enter the material into evidence could have been made by any party. Presumably, there are parties whose interests in this matter diverge from NDMS's and who could have made such a motion.

The Postal Service is baffled how NDMS can characterize this matter as "a seemingly endless effort [by the Postal Service] to deny the parties discovery." Motion at 7. The facts regarding witness Crum's testimony simply do not bear out such an allegation. Witness Crum has responded to every interrogatory posed on this matter. Several of the interrogatories at issue now are questions that were already asked by NDMS and answered by witness Crum. NDMS cannot therefore contend that they withheld discovery or cross-examination on these matters as part of

a legitimate litigation strategy. The interrogatories at issue, and the potential for a request for further oral cross-examination of Mr. Crum to follow up on any further written answers, are nothing but an attempt by NDMS to get another bite at an apple on which they have gnawed quite consistently throughout the original discovery period and at hearings.

AMMA, which also recently filed discovery to which the Postal Service objected, has offered a settlement, which the Postal Service accepted. Witness Crum will provide answers to AMMA's questions, to the extent they seek further factual information about the material, such as confirmation of further calculations, explanation of sources, and explanation of calculations relied on by the witness. AMMA has indicated that its interest in this information is to be able to formulate its direct case on this subject, and that it will not request cross-examination of witness Crum in the absence of his appearing otherwise.

The Postal Service offered the same settlement to NDMS, but NDMS refused to accept it. The Postal Service remains willing to have witness Crum answer NDMS's questions that are of the type indicated above. Responses to those questions would permit NDMS as well to have information they may need to prepare their case. These questions are: NDMS/USPS-T28-27, 28(a), (d), (h), 29(a)-(c), 31(a), 32(a), 33(a), 34(a), 36(a) and 37, 38(a)-(c). There should be no need for further oral cross-examination on these questions.

The questions remaining at issue are: NDMS/USPS-T28-28(b), (c), (e)-(g), (i), (j) & (k) (the latter is unclear and could use clarification); 29; 30, 31(b)-(g); 32(b)-(e); 33(b) 34(b)-(f); 35; 36(b)-(d). Of these, several questions were already asked and answered and should not have to be replied to again. These are NDMS/USPS-T28-28(g), 31(b), 31(d)(iv), 31(f)(iv), 33(b)(iv) and 34(f). In addition, two interrogatories

inquire about subject areas within the testimony of other witnesses. NDMS/USPS-T28-30 (a) & (c) are within the subject matter of the testimony of witness Moeller, UPSP-T-36. There is no authority for further discovery on this testimony. NDMS/USPS-T28- 38(d) and 41 concern material covered in the supplemental testimony of witness Smith, USPS-ST-46, who will respond to these questions.

Of the questions at issue, various questions are of the type that ask witness Crum whether he "believe[s]" the information he has provided. *E.g.*, NDMS/USPS-T28-28(b).<sup>2</sup> Other questions seek witness Crum's opinion about an analysis that NDMS apparently are considering offering in their direct testimony. *E.g.*, NDMS/USPS-T28-39 and 40. One question asks about a sentence in witness Crum's direct testimony that was filed on July 10, has not been changed since,<sup>3</sup> and does not depend on material in Exhibit K. NDMS/USPS-T28-30(b).

As indicated above, the Postal Service is willing to have witness Crum confirm (or not confirm and explain, as appropriate) the information set forth in NDMS's objective questions. This will provide NDMS with sufficient information on which their experts can base their own opinions about the cost information at issue. Responses by witness Crum to other types of questions serves no useful or legitimate purpose at this stage of the case.

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<sup>2</sup> With respect to questions challenging witness Crum's "belief" in the numbers he presents, it should be remembered that witness Crum has already sworn to the accuracy of the information he has presented as part of his testimony, and has been cross-examined on this material.

<sup>3</sup> Although the page indicates it was revised on October 1, 1997, the only revision was to change the reference to Library Reference H-108 to refer to Exhibit K.

The Postal Service agrees to file responses to the interrogatories indicated by November 28. The Postal Service requests that NDMS's motion be otherwise denied and that no oral cross-examination of witness Crum be scheduled.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.  
Chief Counsel, Ratemaking

  
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Scott L. Reiter

**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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Scott L. Reiter

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