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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY
Docket No. R97-1

POSTAL RATE AND FEE CHANGES, 1997

OPPOSITION OF UNITED STATES POSTAL SERVICE TO
DOUGLAS F. CARLSON MOTION TO COMPEL
UNITED STATES POSTAL SERVICE TO ANSWER INTERROGATORIES
DFC/USPS-19(A)-(C) AND (E)-(R), 24-27, AND 30-32
(January 16, 1998)

The United States Postal Service hereby opposes the Douglas F. Carlson Motion to Compel United States Postal Service to Answer Interrogatories DFC/USPS-19(a)-(c) and (e)-(r), 24-27, and 30-32 (hereinafter Motion). The Postal Service will first respond to Mr. Carlson's general arguments about discovery under Special Rule 2E, and then address his arguments about the specific interrogatories.

Special Rule 2E

Mr. Carlson admits that his interrogatories are designed for preparation of his direct testimony.^{1/} Mr. Carlson's interrogatories thus fail to qualify under Special Rule 2E because they do not seek information needed to rebut the testimony of participants other than the Postal Service.^{2/} Mr. Carlson claims that precedent from Docket No. R87-1 "clearly establishes that Special Rule 2E is available to participants who need information to prepare their *direct* case."^{3/} However, the

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^{1/} Motion at 1.

^{2/} Presiding Officer's Rulings No. MC96-3/36 at 3, R97-1/85 at 3-4, R97-1/88 at 3-6.

^{3/} Motion at 3.

Presiding Officer in that docket, in introducing proposed Special Rule 2E for the first time, stated that:

questions eliciting information on Postal Service operating methods or data which may be necessary **to enable a participant to prepare rebuttal evidence** will be allowed, but participants are cautioned not to abuse this procedural device.

Presiding Officer's Ruling No. R87-1/3, at 2 (emphasis added) (May 21, 1987).

Moreover, in Docket No. R87-1, Special Rule 2E was limited to discovery concerning areas not addressed in the Postal Service's direct case.^{4/} Implicit in this limitation is that Special Rule 2E is not designed for preparation of testimony in rebuttal to the Postal Service's direct case, since in general discovery needed to rebut the Postal Service's direct case would necessarily be directed to areas addressed in that case.

Recent rulings have established that Special Rule 2E is limited to discovery needed to develop testimony in rebuttal to the testimony of participants other than the Postal Service. In Docket No. MC96-3, the Presiding Officer concluded that:

Special Rule 2.E. applies for the limited purpose of allowing parties to develop evidence for submission as rebuttal to the direct cases of participants other than the Postal Service.

...

Special Rule 2.E.... is limited to when a participant needs data available only from the Postal Service in order to prepare testimony to rebut participants other than the Postal Service.

Presiding Officer's Ruling No. MC96-3/36 at 2, 3. While Mr. Carlson argues that this ruling "certainly was not intended to overrule precedent that the Commission has followed for nine years and deny use of Special Rule 2(E) to participants who need

^{4/} Presiding Officer's Rulings No. R87-1/108 at 3; R87-1/138 at 2.

information that is available only from the Postal Service to prepare their direct case”, Motion at 3, the ruling specifically addressed discovery for purposes of rebutting the Postal Service’s direct case, asserting that:

Discovery for the purpose of developing evidence for submission as rebuttal to the direct case of the Postal Service is generally to be completed before oral cross-examination of Postal Service witnesses.

Id. at 2. Moreover, rather than ignoring or contradicting past precedent, as Mr. Carlson implies, the Presiding Officer noted that the Postal Service “supports its argument with reference to past Commission practice, and particularly to Presiding’s Officer’s Rulings in Docket No. R87–1.”^{5/}

Most significantly, the Presiding Officer has recently affirmed Presiding Officer’s Ruling No. MC96–3/36. Thus, in the current docket the Presiding Officer concluded that Special Rule 2E:

is generally not available for the purpose of developing testimony to rebut the direct case of the Postal Service. See Presiding Officer’s Ruling MC96–3/36 at 2. If Rule 2E were available for this purpose, the discovery cutoff date would have little meaning.

Presiding Officer’s Ruling No. R97–1/85 at 4.^{6/}

^{5/} *Id.* Given that the Docket No. R87–1 rulings provide some support for the Docket No. MC96–3 ruling, as discussed above, there was no need specifically to overrule these rulings.

^{6/} Two days later, the Presiding Officer distinguished Ruling No. MC96–3/36, but nonetheless found that ANM’s interrogatories are “arguably supported, rather than precluded, by Special Rule 2E” because:

While Special Rule 2.E is designed to enable acquisition of information for the purpose of rebuttal, there is no requirement that

(continued...)

Mr. Carlson's liberal interpretation of Special Rule 2E shows that the Presiding Officer's concern about Rule 2E making the discovery deadline meaningless is well founded. Mr. Carlson would make Special Rule 2E available for discovery of any Postal Service information needed to develop the discovering party's evidence, *unless that information was specifically explained in the Postal Service's initial filing.*

In reaching this interpretation, Mr. Carlson mischaracterizes the precedent that limited Rule 2E discovery to areas not explained in the Postal Service's direct case. Mr. Carlson incorrectly reads Presiding Officer's Ruling No. R87–1/118 as “strongly suggest[ing] that information is ‘explained in the Postal Service's direct case’ only if a Postal Service witness addressed the issue ‘in the Postal Service's initial filing.’” Motion at 2. That ruling stated that, upon Postal Service objection, parties seeking to conduct Special Rule 2E discovery have a burden to demonstrate how the requested information is to be used in the party's testimony.^{7/} The ruling then stated that this conclusion was “especially true where on its face, the information sought pursuant to Rule 2.E was addressed by one of the Service's witnesses in the Postal Service's initial filing.”^{8/} That statement does not exclude from “areas addressed by the Postal

^{6/} (...continued)

the provision of this supplemental information be delayed until ANM, as an intervenor, is able to assess its necessity upon direct review of other intervenors' cases.

Presiding Officer's Ruling No. R97–1/86 at 6, 7. The focus on Special Rule 2E being used to prepare evidence in rebuttal to intervenor cases was maintained.

^{7/} Presiding Officer's Ruling No. R87–1/118 at 2.

^{8/} *Id.*

Service in its direct case” other issues which are addressed by a witness in responding to discovery, and entered into the record during hearings on the Postal Service’s direct case.

Moreover, the facts underlying Ruling No. R87–1/118 do not support Mr. Carlson’s reading of it. In Docket No. R87–1, the Postal Service’s initial filing contained only general testimony on the new retirement system (FERS)^{9/}, including an assumption that 40 percent of employees would have switched to it from the old retirement system (CSRS). The UPS interrogatory at issue in the ruling asked for the fraction of city delivery carriers covered by FERS each accounting period from FY 1983 to date. The Postal Service testimony in its initial filing did not present any numbers of how many employees actually were covered by FERS, but nonetheless the UPS inquiry was considered by the Presiding Officer as “addressed by one of the Service’s witnesses in the Postal Service’s initial filing.”^{10/} Moreover, in an earlier Docket No. R87–1 ruling, the Presiding Officer asserted that:

a question on the rate differences between 10 and 11 ounce first-class pieces, a subject not specifically discussed by witness Lyons, is so clearly encompassed in his testimony as to be not appropriate for a Rule 2.E request.

Presiding Officer’s Ruling No. R87–1/108 at 3, n. 1. Similarly, as an example from the current proceeding, Mr. Carlson’s questions about the procedures for delivering return receipt mail to large recipients are encompassed in witness Plunkett’s general

^{9/} Docket No. R87–1, USPS-T-14 at 17–18, and USPS-T-15 at 4–6.

^{10/} Presiding Officer’s Ruling No. R87–1/118 at 2.

testimony in the Postal Service's initial filing on the characteristics and value of return receipt service.^{11/}

Mr. Carlson incorrectly claims that undersigned counsel represented to him "that Special Rule 2E is available to participants who need information that is available only from the Postal Service for preparation of their direct case."^{12/} My representation concerned Mr. Carlson's request, at witness Needham's hearing, to file an institutional interrogatory asking for studies or other information indicating the average post office box delivery cutoff time posted in box lobbies nationwide. Tr. 3/657–58. When asked by the Presiding Officer whether the Postal Service would have a problem with such an interrogatory, my conditional response did not state that *this interrogatory would be timely under Rule 2E, but rather that such an interrogatory, in contrast to Mr. Carlson's interrogatories at issue now, did appear to ask for "data" within the limits of Rule 2E.*^{13/}

^{11/} For example, witness Plunkett testifies that:

Return receipts provide customers with proof of delivery of a mail piece. The return receipt provides the sender with the signature of the addressee or the addressee's agent, the date the piece was delivered, and the address where the piece was delivered if that address is different from the address on the mail piece.

USPS-T-40 at 12.

^{12/} Motion at 4.

^{13/} Implicitly the response indicated that the Postal Service would not object to such an interrogatory, which I considered to be in the nature of homework resulting from a hearing, rather than Special Rule 2E discovery.

Interrogatories DFC/USPS-19(a)-(c) and (e)-(r)

Interrogatory DFC/USPS-19 seeks comprehensive information about a system being rolled out by the Postal Service, that among other matters, collects information regarding whether postal facilities meet their post office box cut off times.^{14/} The Postal Service objected on grounds of relevance, materiality, commercial sensitivity, lateness, and burden; the arguments presented in the objection retain their salience, but do not bear repetition here. Mr. Carlson does not seek to compel a response to one of the eighteen originally propounded subparts, which has the salutary effect of removing the objection founded on commercial sensitivity. However, each of the remaining grounds stands.^{15/}

Mr. Carlson identifies his purpose in propounding interrogatory 19 as relating to *the discussion in his testimony of delivery to post office boxes, citing to DFC-T-1 at 14–15. Motion at 4.* Since that portion of his testimony consists **solely** of problems he sees in obtaining box service at a single post office, and it is unclear even whether the system he asks about is installed in that office, the scope and breadth of

^{14/} Notwithstanding having been informed that cut off times do not apply to all mail, Tr. 19-A/8653 (DFC/USPS-8), Mr. Carlson apparently continues to believe that it applies to all of his box mail. See DFC-T-1 at 14, lines 19–30.

^{15/} Mr. Carlson surmises that omitting part (d) of the interrogatory also eliminates any *ground for objecting on burden grounds.* Motion at 7. While the burden objection extended to the entire interrogatory, with part (d) serving as the best example, it still applies most clearly to remaining part (b), which seeks “all documents and other information relating to reasons why this system was developed.” Of course, were the vagueness and overbreadth of this phrasing eliminated by, for example, simply asking why it was developed—something Mr. Carlson makes no effort to do in his Motion, the burden objection might not still lie.

the interrogatory are vastly broader than the intended use. Indeed, Mr. Carlson's purpose exemplifies why the interrogatory seeks information that is both immaterial and irrelevant.

Mr. Carlson argues in the alternative that if the interrogatory is not proper under Rule 2E, then it should be permitted as follow up to the response to interrogatory DFC/USPS-9, which was filed on November 6, 1997. Mr. Carlson asserts that he received the objection on November 12, Motion at 6, which under Special Rule 2D means that he must file any follow up interrogatory by November 19. Since it was not filed until November 26, it does not qualify as proper follow up.^{16/}

In conjunction with his argument that interrogatory DFC/USPS-19 qualifies under Rule 2E, Mr. Carlson also argues that the information he requests are operational procedures. Motion at 5. His context, as noted above, is the time by which his personal box mail is put into his post office box. In this context, operational procedures would include details of when box mail is put up. However, his interrogatory inquires instead into the means by which the Postal Service **manages** its business. If the term "operational procedures" is read so broadly as to include management procedures, it effectively becomes meaningless as a limitation on the scope of discovery.

^{16/} The Postal Service asserts that, under Commission practice, "service" cannot occur before "filing" for purposes of meeting deadlines.^{16/}

Accordingly, the Motion should be denied with respect to DFC/USPS-19 on grounds of relevance, materiality, lateness, and burden—especially in light of its apparent limited utility to Mr. Carlson.

Interrogatories DFC/USPS-24–27

Interrogatories DFC/USPS-24 to 27 are essentially the same as interrogatories filed by David Popkin two days earlier.^{17/} The Presiding Officer denied Mr. Popkin's motion to compel responses to his interrogatories, because they "are not for the purpose of rebutting the presentation of another participant", and instead "are aimed at challenging the Postal Service's direct case by showing that the level of service is lower than the Postal Service claims."^{18/} Moreover, the Presiding Officer concluded that "there is no reason these discovery requests could not have been filed earlier. Mr. Popkin cross-examined witness Plunkett concerning the same return receipt issues on October 7, 1997."^{19/} Similarly, Mr. Carlson's interrogatories are not for the purpose of rebutting the presentation of another participant, but rather are aimed

^{17/} Interrogatory DFC/USPS-24 addresses the delivery of return receipt mail to the Franchise Tax Board in Sacramento, while interrogatories DBP/USPS-122–171 address the delivery of return receipt mail to each of the 50 state tax bureaus, including California. Both interrogatory DFC/USPS-25 and interrogatory DBP/USPS-113 address the delivery of return receipt mail to the IRS in Austin, Texas. Both interrogatory DFC/USPS-26 and interrogatory DBP/USPS-109 address the delivery of return receipt mail to the IRS in Memphis, Tennessee. Both interrogatory DFC/USPS-27 and interrogatory DBP/USPS-108 address the delivery of return receipt mail to the IRS in Philadelphia.

^{18/} Presiding Officer's Ruling No. R97–1/85 (January 7, 1998), at 4.

^{19/} *Id.*

at challenging the Postal Service's direct case. Moreover, Mr. Carlson's interrogatories could have been filed earlier. In fact, Mr. Carlson cross-examined witness Plunkett on these issues, as well as conducting written discovery on them. The reasoning in Presiding Officer's Ruling No. R97-1/85 thus should be applied to deny Mr. Carlson's motion to compel.

Mr. Carlson admits that he is using Special Rule 2E because he chose not to conduct follow-up discovery on Mr. Plunkett's responses to interrogatories posed during the regular discovery period.^{20/} Special Rule 2E should not be available to allow a party to change its litigation strategy after deciding to forego an opportunity for timely follow-up discovery.

Mr. Carlson charges that:

If the Commission does not grant my motion to compel the Postal Service to answer these interrogatories, the Commission will be supporting the Postal Service's effort to exclude damaging evidence and require participants and the Commission to rely on an inaccurate record.

Motion at 10. Mr. Carlson's interrogatories do not simply try to move existing evidence into the record, but instead ask the Postal Service to obtain new evidence from the Field.^{21/} Moreover, as the Postal Service explained in its opposition to Mr.

^{20/} Motion at 9.

^{21/} In this regard, the Postal Service maintains its argument that Special Rule 2E does not apply to requests for the Postal Service to obtain information from the Field concerning practices that may be inconsistent with authorized procedures. See Objection of United States Postal Service to Interrogatories of Douglas F. Carlson Directed to the Postal Service (DFC/USPS-24-28 and 35) (December 12, 1997), and Motion at 11.

Popkin's most recent motion to compel, the record is already clear with respect to possible divergent practices for the delivery of return receipts to the IRS.^{22/}

Mr. Carlson mischaracterizes the Postal Service's approach to determining if an issue is addressed in the Postal Service's direct case.^{23/} The key is not whether discovery has been conducted on that issue. Rather, when a Postal Service witness responds to discovery on a particular issue, that at a minimum demonstrates that the witness' testimony encompasses that issue as part of the Postal Service's direct case (and initial filing). The witness' testimony would encompass that issue even if no discovery had been filed, if the issue pertains to the general subjects addressed in that testimony, or to the rates, fees, or classifications implicated by the testimony. While Mr. Carlson represents that the Postal Service's approach would benefit intervenors who hold discovery until after the deadline for discovery, the Postal Service objects to such discovery when it concerns issues that could have been answered by witnesses from its direct case. *E.g.*, Objection of United States Postal Service to Request for Admissions of Douglas F. Carlson (DFC/USPS-RA-4-5) (November 12, 1997).

^{22/} Opposition of United States Postal Service to David B. Popkin's Motion to Compel Responses to DBP/USPS Interrogatories (DBP/USPS-19(a), 69-71, 96(a), 98, and 103-343) (December 29, 1997), at 2. The Presiding Officer indicated his similar understanding of the record in Presiding Officer's Ruling No. R97-1/85, at 3.

^{23/} Motion at 10.

Interrogatories DFC/USPS-30–32

On November 26, 1997, the Postal Service filed its response to DFC/USPS-17, which asked for “all information that is available in summary form about the specific types of problems that customers have experienced with return receipts.” Mr. Carlson then asked, in DFC/USPS-29, for the number of complaints reported on Consumer Service Cards for all of the categories for which the Postal Service collects such information. This information was provided to him. In DFC/USPS-30–32, Mr. Carlson, who was evidently unhappy with some of the figures provided to him, “follow[s] up on the accuracy of the information that the Postal Service provided,” Motion at 11. He claims this pursuit is relevant because of the information’s bearing on the value of service of post office boxes and return receipt service, and because he wishes to counter the fact that the complaints reported represent only a small proportion of return receipts volume.

The Postal Service maintains its objection that the procedures by which it verifies the accuracy of its national figures on Consumer Service Card complaints are not relevant to the issues before the Commission in this proceeding. The information provided in the Postal Service’s response to DFC/USPS-29 are, at most, only marginally used for setting the rates and fees proposed by the Postal Service. They are but one of many elements in assessing the value of service of each of the Postal Service’s products, which is but one of nine criteria considered by the Postal Service in proposing its rates and fees. For Mr. Carlson to charge that, unless the Postal Service is compelled to satisfy his personal inquiries into the precision of the numbers

that are reported from Consumer Service Cards, it is thus being permitted to “respond to discovery selectively,” Motion at 12, would place a burden on the Postal Service and the Commission to second-guess every number cited by the Postal Service in the course of a rate or classification proceeding, regardless of its importance to the Postal Service’s proposal.

Mr. Carlson claims that the Postal Service “seriously misreads” his interrogatories in making a claim of burden in its objection. Interrogatories DFC/USPS-30–32 each ask for the Postal Service to determine the degree to which Consumer Service Cards accurately reflect the number of complaints that are actually received, either orally or in writing. His Motion appears to give the Postal Service two choices in its response: either to state that it simply does not know the response (the “interpretation” that he offered to Postal Service counsel), or to perform an investigation that Mr. Carlson agrees is “extensive.” Motion at 12. As the Postal Service indicated in its objection to these interrogatories, a response to them would be virtually impossible to obtain without an “extensive” review of its field offices.

The Postal Service also maintains that these interrogatories were filed too late to qualify under Special Rule 2D. Not only were they served one day late, they were not filed until 13 days after receipt.^{24/} Moreover, no motion for late acceptance was filed.

^{24/} As mentioned above, the Postal Service asserts that, under Commission practice, “service” cannot occur before “filing” for purposes of meeting deadlines.

Conclusion

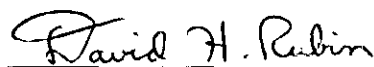
For the reasons discussed above, and in the Postal Service's objections to the referenced interrogatories, Mr. Carlson's Motion should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:


Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



David H. Rubin

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.



David H. Rubin

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