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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. MC96-3

SPECIAL SERVICES FEES)
AND CLASSIFICATIONS)
_____)

**MAJOR MAILERS ASSOCIATION'S OPPOSITION
TO UNITED STATES POSTAL SERVICE'S MOTION
TO STRIKE TESTIMONY OF MMA WITNESS BENTLEY**

Major Mailers Association asks the Commission to deny the Postal Service's Motion, dated November 14, 1996, insofar as it pertains to the testimony of MMA witness Bentley.

INTRODUCTION

The Postal Service wants to have the testimonies of MMA witness Bentley and others stricken insofar as they "make reference to and rely upon" Commission Library References PRC-LR-1 and LR-2 (Motion, p. 5). The Service's complaint is that Library Reference PRC-LR-1 and LR-2 is not sponsored by any witness and therefore not admissible in evidence. This Service motion is substantively identical to the motion to strike that the Service filed in Docket No. R94-1--a motion that the Commission denied (POR No. R94-1/63).

Like its motion in Docket No. R94-1, the Service's current motion is unsupportable in law. Rule 703 of the Federal Rules of Evidence authorizes expert witnesses to base their opinions on data which "need not be admissible in evidence." "[T]he rule's purpose is to permit experts to base opinion on reliable hearsay and other facts that are not admissible because of the absence of the declarant or for some other reason..." (2 Graham, Handbook of

Federal Evidence §703.1 (4th Ed. 1996)). And under the more relaxed standards of the Administrative Procedure Act, agencies like this Commission need not exclude evidence unless it is "irrelevant, immaterial, or unduly repetitious" (5 U.S.C. §556(d)).

In addition, contrary to the Postal Service's belief, Mr. Bentley is not testifying to the accuracy of PRC-LR-1 and LR-2, but is using those library references for illustrative purposes only. Even that limited use, Mr. Bentley notes, is a "second best" approach, necessitated by the Service's refusal to comply with Commission orders. If the Service believes that Mr. Bentley's illustration are inaccurate, the Service can refute them by providing the information that the Commission has directed the Service to file.

There is another important reason to deny the Postal Service's motion. It is untimely. The Commission's Special Rules of Practice for this proceeding provide (p. 1, §1.C): "All motions to strike testimony or exhibit materials are to be submitted in writing at least 14 days before the scheduled appearance of the witness." The Service's motion is dated November 14, four business days before Mr. Bentley is due to take the stand. There is no valid excuse for the Service's delay.

DISCUSSION

A. An Expert's Opinion Testimony Is Admissible Even If It Relies Upon Materials That Are Not Themselves Admissible In Evidence

The Postal Service does not offer any citations for its view that an expert's testimony cannot rely upon non-evidentiary sources. Nor could the Service do so, since all authority is to

the contrary.

The Federal Rules. For over twenty years, the Federal Rules of Evidence have permitted expert witnesses to base their opinions upon facts or data that are not themselves admissible in evidence. Rule 703 provides (56 F.R.D. 183, 283; 28 U.S.C.A. Rule 703):

BASES OF OPINION TESTIMONY BY EXPERTS. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence (Emphasis supplied).*

The Advisory Committee's Note (*Id.*) emphasizes that:

In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice in line with the practice of the experts themselves when not in court.

The result is that Rule 703 "allows expert testimony to be based on hearsay...." (Rothstein, Federal Rules of Evidence 290.6-290.7 (Clark Boardman Callaghan 1995) "and other facts that are not admissible because of the absence of the declarant or for some other reason... (2 Graham, Handbook of Federal Evidence §703.1 (4th Ed. 1996)).

Court Decisions. Federal courts have uniformly interpreted Rule 703 as authorizing expert witnesses to rely upon nonrecord information that is not itself admissible in evidence (See annotations to 28 U.S.C.A. Rule 703).

One illustrative case is *Baumholser v. Amax Coal Company*, 630 F.2d 550 (7th Cir. 1980). There, the lower court's admission into evidence of a defective survey was held, on appeal, to be error. Nonetheless the Court of Appeals ruled that an expert

could properly testify about his conclusion that was based upon the inadmissible survey. Citing Rule 703, the Court of Appeals said (630 F.2d at 553):

Barnes was testifying as an expert and as such was entitled to rely on hearsay evidence to support his opinion, so long as that evidence was of a type reasonably relied upon by other experts in the field. That evidence need not be independently admissible.

The Seventh Circuit quoted (*Id.*) a Ninth Circuit decision, *Standard Oil Company v. Moore*, 251 F.2d 188, 222 (1957), cert. denied, 356 U.S. 975 (1958), stating:

It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay....This, however, does not necessarily stand in the way of receiving such expert opinion in evidence.

The Administrative Procedure Act. It is hornbook law that administrative agencies "apply rules of evidence considerably more relaxed than those used by courts" (4 Stein, *Administrative Law* §28.01 (Matthew Bender)). Thus (*Id.* at §26.01):

Even before enactment of the Administrative Procedure Act, the Supreme Court, in a long line of cases, established the general rule that administrative agencies are not to be bound by formal rules of evidence. One of the direct results of this decision was the elimination of the usual rule which declares hearsay evidence inadmissible. This view has been statutorily adopted in the Administrative Procedure Act which provides for the admission of all evidence which is not "irrelevant, immaterial, or unduly repetitious" (citing 5 U.S.C. §556(d) and other authorities).

Whether judged by the standards for courts or the "more relaxed" standards for administrative agencies, MMA witness Bentley's opinion testimony would be admissible even if based upon the Commission's library references.

B. Mr. Bentley's Testimony Is Not Dependent Upon the Commission's Workpaper, Which Is Used Only For Illustrative Purposes

A second reason for denying the Postal Service's motion is that Mr. Bentley's testimony is not predicated upon PRC-LR-1 and LR-2. "The purpose of my testimony," Mr. Bentley states, "is to oppose the Postal Service's proposal to establish new rates and classifications without disclosing information showing the consequences of using the Commission-approved methodology for attributing city carrier delivery costs" (Test., p. 1). To substantiate his position, Mr. Bentley states his opinion that

1. The Commission should use consistent methodologies in all cases (Test., p. 2);
2. If the Commission does not insist upon the use of consistent methodologies, there will be difficulties in comparing financial data from one proceeding to another, from one year to another, or from Commission opinions to CRA reports (Test., p. 4);
3. The importance of using consistent methodologies is underscored by comparing the dollar amount of overhead costs assigned by the Service's preferred methodology, as compared with the Commission-approved methodology (Test., pp. 4-7);
4. The Commission should adopt a regulation requiring the Postal Service, in all future proceedings, to provide information showing its costs under the Commission-approved methodology (Test., pp. 7-8);
5. The Commission should insist upon full disclosure in this proceeding in order to forestall the Service from filing future rate and classification requests with inadequate information (Test. pp. 2-3).

Before the Commission issued its Library Reference PRC-LR-1 and LR-2, Mr. Bentley had drafted testimony in which he illustrated point (3) by using numbers derived from outmoded Docket No. R94-1 cost data. After the Commission issued those library references, MMA asked that the date for filing its testimony be extended "to allow it to incorporate the 1995 cost

information made available...in Library References...PRC-LR-1 and PRC-LR-2. (POR No. MC96-3/15).

Mr. Bentley's testimony does not purport to say that the PRC-LR-1 and LR-2 data are correct. On the contrary, after noting that "it would have been helpful to have access" to similar calculations "presented on the record by a Postal Service witness," Mr. Bentley noted that the Postal Service refused the Commission's request for such information--and that "I am thus compelled to seek a second-best basis for the calculation" (Test., p. 4).

Mr. Bentley's use of the PRC-LR-1 and LR-2 data is thus for illustrative purposes only. Mr. Bentley's conclusion is that "the dollar consequences of choosing a methodology for apportioning city carrier delivery costs are huge..." (*Id.*). This conclusion is true whether or not the PRC-LR-1 and LR-2 data are used, and is apparent from the attribution of postal costs in Docket No. R94-1.

C. The Service Cannot Object To Mr. Bentley's Use of PRC-LR-1 and LR-2 As A "Second-Best" Source When That Is Necessitated By the Service's Withholding of Data That the Commission Has Ordered the Service To Provide

In any event, it is the Postal Service's refusal to obey Commission orders to provide data that has required Mr. Bentley to rely upon PRC-LR-1 and LR-2 as a "second-best basis for the calculation" (Test., p. 4). "[T]he Commission found that the Service is in the best position" to provide the cost information that PRC-LR-1 and LR-2 approximate (Order 1134, p. 4) and that "It should not be left to the parties or the Commission to disentangle the effect of the Postal Service's proposed changes

to established attribution methods from the effects of its proposed changes in fees" (Order 1126, p. 12). The Commission has ordered the Service to supply that information, but "the Service has failed to comply with [these] lawful Commission orders..." (Order No. 1134, p.16). The Postal Service cannot object to Mr. Bentley's employment of a "second-best" approach that the Service's own conduct has necessitated.¹

D. The Service's Motion Was Filed After The Deadline Established In the Commission's Rules, With No Valid Excuse For the Delay

The Postal Service's motion is untimely. In its Special Rules of Practice for this case (p.1 §1.C), the Commission specified:

1. EVIDENCE

C. *Motions to Strike.* Motions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence. All motions to strike testimony or exhibit materials are to be submitted in writing at least 14 days before the scheduled appearance of the witness... (2d emphasis supplied).

The Service's motion is dated Thursday, November 14, which is

¹ The Service's failure to produce the requested information, which would prove or disprove the accuracy of PRC-LR-1 and LR-2, justifies a presumption that PRC-LR-1 and LR-2 are correct and are an accurate update of the Commission's Docket No. R94-1 cost attribution methodology. "It is generally held that, where [one] party...possesses positive and complete knowledge concerning the existence of facts...or has peculiar knowledge or control of evidence of such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disproved by the party having such knowledge or control." 31A C.J.S., Evidence §113 (1964)(citations omitted). "In the absence of explanation, the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and where, the courts have declared, the evidence which the party fails or refuses to produce is within his power to produce, is not equally accessible to his opponent, and is such that he would naturally produce it if it were favorable to him." *Id.* at §156(1)(citations omitted). Accord, 2 Wigmore on Evidence §§285-91 (Chadbourne Rev. 1979); Jones on Evidence §3:91 (1972).

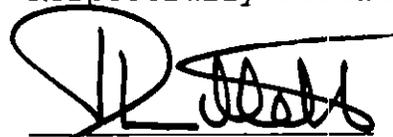
only four business days before Mr. Bentley is due to testify on November 19. (The Service waited until mid-day on the following day to notify MMA counsel about its motion. See USPS' date stamp on Attachment 1, pp. 1-2.)

There is no valid excuse for the Service's tardiness. Six weeks ago, on September 30, Mr. Bentley filed his testimony, explaining his use of PRC-LR-1 and LR-2. And on October 25, in response to the Service's First Set of Interrogatories, Mr. Bentley acknowledged that he had "not attempted to make the detailed calculations" that the Service requested about the apportionment of costs (USPS/MMA-6(c)) and that he had simply "accept[ed] the Commission's representation" in PRC-LR-1 and LR-2 (USPS-MMA-8(a)).²

The Postal Service's tardiness is sufficient reason to deny its motion.

FOR THE FOREGOING REASONS, MMA asks that the Postal Service's Motion to Strike, dated November 14, 1996, be denied as to MMA witness Bentley's testimony.

Respectfully submitted,



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November 18, 1996

Counsel for MMA

² Although Mr. Bentley elaborated these points in his November 7 response to the Service's Second Set of Interrogatories, the Service did not need to await these in order to file its motion (especially since it had filed a similar motion to strike Mr. Bentley's testimony that relied upon a similar PRC workpaper in Docket No. R94-1).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document (1) upon the U.S. Postal Service by facsimile (transmitted at 11:30 a.m.) (2) upon the Office of the Consumer Advocate by hand delivery and (3) upon the other parties by First-Class Mail.



Jeffrey Plummer

November 18, 1996

ATTACHMENT 1
TO MMA'S RESPONSE TO USPS' MOTION
TO STRIKE TESTIMONY OF MMA WITNESS BENTLEY

(USPS Facsimile to MMA Counsel,
Dated November 15, 1996, pages 1-2)

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FAX COVER SHEET

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NO. OF PAGES
(including this page): 8

RE: MC96-3

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005925

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

SPECIAL SERVICES REFORM, 1996

Docket No. MC96-3

UNITED STATES POSTAL SERVICE
MOTION TO STRIKE TESTIMONY OF WITNESSES
BENTLEY AND THOMPSON,
OR, IN THE ALTERNATIVE, FOR PRODUCTION
OF A COMMISSION WITNESS
(November 14, 1996)

On September 20, 1996, the Commission gave notice that it had placed two library references, PRC LR-1 and LR-2, in the Docket Section for public use. According to the Commission, these workpapers provided "cost information described in the Commission's Order No. 1134," which was also issued on September 20, 1996. Notice of Filing of Workpapers (September 20, 1996).¹ In Order No. 1134, the Commission indicated that the two library references were produced pursuant to the Commission's instruction to its staff "to prepare documents showing the base year 1995 calculation of the direct and indirect city carrier costs using the established methodology of single subclass stops," and "showing the base year costs attributed to the classes and service using approved methods, and the established test year attributions employing, to the extent possible, the roll-forward procedure used by Postal Service witness Patelunas." Order No. 1134 at 16.

Following issuance of the two Commission library references, various parties to this proceeding have made reference to, and relied upon, those library references in written

¹ The Commission revised these library references on September 30, 1996. Notice of Filing of Revised Workpapers (September 30, 1996).