

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, 2000

Docket No. R2000-1

**NEWSPAPER ASSOCIATION OF AMERICA
COMMENTS ON MOTION OF ADVO, INC. *ET AL.* TO STRIKE
TESTIMONY OF POSTAL SERVICE WITNESSES
BARON (USPS-T-12) AND RAYMOND (USPS-T-13)
June 27, 2000**

Pursuant to the Presiding Officer's ruling at Tr. 18/7066, and section 21 of the Commission's rules of practice, the Newspaper Association of America ("NAA") respectfully comments on the Motion to Strike Testimony of Postal Service witnesses Baron (USPS-T-12) and Raymond (USPS-T-13) ("Motion") in behalf of ADVO, Inc *et al.* ("Movants"). Movants seek to strike all evidence relating to the Engineered Standards/Delivery Redesign (ES) project reported by Mr. Raymond, data from which was used by Mr. Baron to attribute city carrier street time. Their Motion should be denied.

Summary

NAA has long contended that current city carrier attribution methodologies systematically and seriously understate city carrier costs. The testimony of Mr. Raymond, which explains the ES study, provides the first fresh evidence regarding city carrier activities in more than a dozen years. The ES study, in conjunction with Mr. Baron's testimony, indicates that Movants' mail incurs greater attributable delivery costs

than in 1986. Movants' understandable fear of this evidence, however, is not sufficient reason for it to be struck.

NAA respectfully disagrees with Movants' arguments. That the ES project studied carriers' actual activities, and was not performed for a rate case, is a reason for relying on the study, not grounds for striking it. That it produces a different – and NAA believes more much improved – picture of carrier activity is also not grounds for striking it, but if anything, grounds for admitting it. Nor are the alleged design and tracking flaws cited by Movants without scrutiny. Finally, although NAA would have preferred that Mr. Raymond's ES study have been done differently in certain respects and his interrogatory responses more timely, we do not believe that any participant's due process rights have been violated. The Commission has taken measures to accommodate parties' concerns, and NAA has been able to understand Mr. Raymond's testimony sufficiently well that its ability to participate has not been impaired.

Background

Since Docket No. R87-1, city carrier costs have been attributed on the basis of the 1986 Street Time Sampling (STS) survey —a survey that in and off itself was not perfect. As the Commission well knows, however, the activities of city carriers have changed materially since the STS survey was undertaken nearly fifteen years ago. These changes in the delivery environment include, among other things, the increased use of cluster boxes and centralized delivery points, the replacement of many foot routes with motorized or partly motorized routes, increased delivery point coverage, increased volume per delivery, changes in mail mixtures, and the introduction and implementation of Delivery Point Sequencing (DPS).

NAA has for some time has contended that the STS survey is severely outdated and systematically under-attributes city carrier load and access costs. NAA is gratified that the Commission increasingly shares this concern. In fact, in the last omnibus rate proceeding, the Commission stated it would prefer a current, valid study to the STS survey. *Docket No. R97-1 Opinion and Recommended Decision* at 157 (May 11, 1998). In similar vein, the April 1999 A. T. Kearney Data Quality Study (a joint effort of the Postal Service, this Commission, and the GAO) recommended that operational data on carrier operations from the ES study—the very study Movants are trying to strike—be considered for use in the Postal Service’s city carrier cost analyses. See *A. T. Kearney, Data Quality Study, Technical Report #4: Alternative Approaches For Data Collection* (April 16, 1999) at 53-56.

In response to these requests, the Postal Service has submitted testimony by Mr. Raymond regarding the ES study. The ES study provides detailed and comprehensive observations describing what city carriers do in today’s operating environment. As such, the ES study provides the Commission with data clearly preferable to the stale 1986 STS data which Movants treat as gospel. Mr. Raymond’s testimony also translates the more than 39,000 observations into the six cost attribution categories in a manner he explains on the record – coherently explained in his lengthy response to POIR No. 8 – and which NAA has been able to replicate. Thus, Mr. Raymond’s ES data in effect substitute new proportions (based on the 39,000 observations) for the city carrier street time activity proportions generated from the 1986 STS survey (based on fewer than 6,000 observations derived from 3 carrier self-reports a day). Mr. Baron uses the data from the ES study (in lieu of that which would be

derived from use of the 1986 STS survey) to propose attributions of city carrier street costs.

Discussion

Movants correctly cite the controlling legal principle that it “is axiomatic that striking evidence, particularly in administrative proceedings, is an extraordinary measure.” *Motion to Strike* at 2 (citations omitted). Davis and Pierce put the point rather more poignantly, stating that an agency “should admit all relevant and arguably reliable evidence and then should determine the relative probative value of the admitted evidence . . .” 2 K. C. DAVIS & R. J. PIERCE, *ADMINISTRATIVE LAW TREATISE* 117 (1994).

In an administrative hearing, where the expert agency is capable of properly evaluating the weight to be given evidence, it is better to accept disputed evidence than to exclude it, given the probability of judicial review. As the Eighth Circuit long ago noted in what has become a frequently-cited passage:

One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider competent or material. . . . If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as being admissible, a new trial or rehearing cannot be avoided.

Builders Steel Co. v. Commissioner, 179 F.2d 377, 379 (8th Cir. 1950) *citing with approval* *Donnelly Garment Co. v. NLRB*, 123 F. 2d 215, 224 (8th Cir. 1942). It is for this reason, no doubt, that the Fourth Circuit has rather stated rather directly: “we

strongly advise administrative law judges: if in doubt, let it in." *Multi-Medical Convalescent and Nursing Center v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977).

In this case, the Postal Service has submitted the testimony of witnesses Baron and Raymond as evidence to support a rate change. Since the Commission has extraordinary discretion to weigh the credibility of this evidence, the Commission should not strike this evidence unless *extraordinary* circumstances exist, as the authorities cited above clearly indicate, and as Movants themselves acknowledge.

NAA submits that Movants have failed to overcome their burden to show such circumstances, and that such extraordinary circumstances do not exist here.¹ Given their heavy burden, it is not surprising that Movants' Motion is noticeably long on rhetoric and short on argument. Movants make essentially two: (1) that the ES study was not designed for ratemaking and that its results are inherently implausible; and (2) that their due process rights have been violated by their inability to understand the ES study and obtain timely interrogatory responses. None of these contentions pass muster.

Movants engage in much bluster about the fact that the ES study was initially designed as a comprehensive operational study rather than a cost attribution study, and suggest that this fact should weigh against it. To the contrary, this fact bolsters the ES study's credibility because it tends to ensure the objectivity of the data. This can be contrasted to other Postal Service studies in the past that were designed for ratemaking

¹ Indeed, although now is not the time to argue the weight of this evidence, NAA submits that the Commission not only can, but should give significant weight to Mr. Raymond's evidence.

purposes, and gave the impression that the “facts” of the studies were tailored to the USPS proposal rather than having the proposal being designed to reflect the facts.² The ES study reports more than 39,000 observations of city carrier street activity, with detailed data entries that facilitate a determination of the type of activity engaged in by carriers at six minute intervals.³ This produces an impressive amount of data, yielding a clear snapshot of the activities undertaken by today’s carriers. It is difficult to take seriously an argument that this mountain of data regarding actual carrier activities lacks credibility and bears no relevance to costing issues.

Movants also argue that, perhaps stemming from its original non-costing purpose, the ES study results because the increased attribution of carrier time to which they point is “facially improbable.” *Motion to Strike* at 9. This argument fails. Movants are necessarily assuming that the 1986 STS survey is correct, despite its obsolescence. The validity of such an assumption has not been shown. Indeed, not only was the STS survey itself not necessarily a model of methodological perfection, but changes in postal operations since 1986 provide ample reason to doubt the continued usefulness of that limited survey. Thus, the “sharply different” attributable cost levels

² NAA notes that the Commission in the past has found mailer surveys or other special studies to be suspect precisely *because* they were conducted for use in rate cases. The 1986 STS survey itself relied on after-the-fact debriefings and recompilations which could have introduced revisionism. And this Commission routinely relies on Postal Service systems that are not designed for rate cases.

³ The numerous, regular observations at six-minute intervals in the ES study surely provides a better indication of actual city carrier activities than the 3 random daily observations (self-performed by carriers with no external observation) that constituted the 1986 STS survey.

derived from the ES study may just confirm that the STS survey no longer accurately describes actual postal operations.⁴ Movants do not demonstrate why evidence that fails to conform to their preconceived notions must be struck.

Movants' further argue that the ES data is too confusing, the survey design too "carelessly prepared", and the responses to interrogatories far too tardy, to be used consistent with due process.⁵ NAA respectfully disagrees. For its part, NAA and its representatives have been able to understand the ES study data collection methodology and Mr. Raymond's classification of that data into the STS categories sufficiently well such that it does not believe its ability to participate has been violated. NAA also finds it interesting that Movants would assert such profound confusion, yet nevertheless be able to sponsor voluminous testimony addressing in detail not only the ES study but also to critique witness Baron's use of that data. The testimony of Movants' witnesses Hay and Crowder certainly display an understanding of the ES.

⁴ In this vein, Movants complain that the ES study produces total load time costs, access costs, and collection costs starkly different than those in Docket No. R97-1 (*Motion to Strike* at 10, note 9). In so asserting, they conveniently ignore the crucial fact that the street time attributions in Docket No. R97-1 were based not on 1997 postal operations, but on the much thinner STS survey of delivery operations from 1986 STS. The only 1997-era data used in attributing street time costs were accrued carrier costs, which are independent of the STS data.

⁵ Movants argue (at n.10) that Mr. Raymond and the Postal Service conflict as to when he became aware that the STS study would be used in the rate case. We see no inconsistency. As the Movants acknowledge, Mr. Raymond stated that he became aware of the possibility in August/September 1999. This is not "the same time" as the fall of 1999, which is when the Postal Service has stated that it had planned to file this case. Indeed, it was widely believed that the Postal Service would file in November 1999. However, this tight timeframe could also explain why Mr. Raymond's files were not in optimal condition when the case was filed.

NAA does partly share Movants' frustration with Mr. Raymond's numerous late-filed responses to interrogatories. Indeed, NAA's own interrogatories to Mr. Raymond were filed a month late. However, these delays do not justify striking Mr. Raymond's testimony (and Mr. Baron's related testimony) for several reasons. One, Movants ignore the fact that they themselves were partly at fault for these delays. As the Presiding Officer has previously noted, some of Movants' interrogatories contributed to their frustration by being perhaps ill-conceived (see *Presiding Officer's Ruling No. R2000-1/35* (April 11, 2000) at 7). Two, the Commission has accommodated Movants to a considerable degree by allowing extra discovery, delaying Mr. Raymond's appearance, and setting a different time schedule for testimony addressing the Raymond/Baron analyses. Three, notwithstanding these delays (or perhaps because of them), Movants were able to file extensive testimony demonstrating a good understanding of Mr. Raymond and Mr. Baron's testimony.

Movants rely heavily upon the Commission's Orders No. 1024 in Docket No. R94-1 and No. 562 in Docket No. R84-1. However, these orders are inapposite. In Order No. 1024, the Commission struck *unsponsored* USPS testimony regarding BRMAS business reply rates that underwent constant revisions over the course of the Docket No. R94-1 proceeding. The Commission held that there was no longer sufficient time adequately to interpret the ever-changing study. This is simply not the case with the ES study. The study is sponsored, and the ES data provided by witness Raymond has not constantly changed as was the case with the BRMAS study stricken

by the Commission in Order No. 1024. There is no “moving target;” as the data and conclusions in Mr. Raymond’s testimony have remained essentially unchanged.⁶

Order No. 562, on which Movants also rely, is readily distinguishable. In that Order, the Commission partially struck testimony regarding a complex, custom-designed software model as to which the Postal Service provided no witness, allowed no technical conference, and failed to provide the requisite source code data which would enable participants to replicate the analysis. Here, in contrast, not only do Movants seem not to challenge the replicability of what limited software programs Mr. Raymond used,⁷ but the Postal Service has been far more forthcoming in this case than in the circumstances in Order No. 562. If anything, Order No. 562 is noteworthy for its remarks regarding the Commission’s “extreme reluctance to exclude apparently relevant and material evidence that might advance the analysis of postal rates.” Order No. 562 at 2.

NAA is in ready agreement with Movants that the presentation and explication of witness Raymond’s ES study data has not proceeded in the most efficient or comprehensible manner. However, we differ from Movants in believing that the Commission has adequately addressed, and cured, Movants’ reasonable complaints.

⁶ For example, Mr. Raymond has never retreated from his testimony that 844 route days were sampled. The data he gave to Mr. Baron have not changed since the case was filed.

⁷ For example, NAA is unaware of any participant having claimed to be unable to replicate Mr. Raymond’s program that assigned ES study tallies to the STS categories.

Conclusion

For the foregoing reasons, the Newspaper Association of America respectfully opposes Movants' motion to strike the identified portions of the testimony of Mr. Raymond and Mr. Baron.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the instant document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

June 27, 2000

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