

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

OPPOSITION OF UNITED STATES POSTAL SERVICE  
TO MOTION TO STRIKE TESTIMONY OF POSTAL SERVICE WITNESSES  
BARON (USPS-T-12) AND RAYMOND (USPS-T-13)  
(June 27, 2000)

On June 20, 2000, a coalition of mailers including Advo, Inc., the Alliance of Nonprofit Mailers, the American Business Media, the Association for Postal Commerce, the Association of American Publishers, the Coalition of Religious Press Associations, the Direct Marketing Association, Dow Jones & Company, Inc., the Magazine Publishers of America, Inc., the Mail Order Association of America, the National Newspaper Association, The McGraw-Hill Companies, Inc., the Parcel Shippers Association, and Time Warner Inc. ("Movants"), filed a motion to strike "the direct testimony of, written and oral cross-examination responses, and library references sponsored by Postal Service witnesses Baron and Raymond that relate to the Engineered Standards/Delivery Redesign (ES) Study: specifically, USPS-T-12 at 31-37 (Baron), USPS-T-13 (Raymond), Tr. 7368-8000 (Raymond), USPS-LR-I-159 (sponsored into evidence by Baron at Tr. 7075), and USPS-LR-I-163 (sponsored into evidence by Raymond at Tr. 7357-58)." Motion to Strike ("Motion") at 1-2.<sup>1</sup> The Postal

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<sup>1</sup> While Movants specify Postal Service library references I-159 and I-163 as within the scope of their Motion, no mention is made of a number of other library references and other materials incorporated by reference in responses to interrogatories and or provided in response to Presiding Officer's Information Requests. For example, it is unclear whether Movants seek to strike USPS-LR-I-310, witness Raymond's response to Presiding Officer's Information Request No. 8, and other unspecified materials.

Service hereby responds in opposition to the Motion.

Movants Must Carry a Very Heavy Burden if the  
Extraordinary Remedy They Seek is to be Imposed

At the outset of the Motion, Movants concede that they have a uniquely heavy burden to carry if their Motion is to be granted. Quoting from prior Commission Orders, specifically Nos. 1024, 1143 and 562, Movants acknowledge that in administrative proceedings such as this one, striking evidence is an extraordinary remedy, and that even serious deficiencies can be adequately taken account of in determining what weight to give to the evidence, and/or through procedural mechanisms such as extended discovery. Motion at 2, 3. In accordance with administrative practice, the Commission generally has limited the granting of motions to strike to instances in which rebuttal testimony presents new analyses that could have been presented at an earlier stage of the proceeding, or does not properly constitute rebuttal to another party's direct case. See Order No. 362 (November 24, 1980) (striking a Postal Service study presented in rebuttal phase based on the conclusion that the study belonged in the Postal Service's direct case); Order No. 874, at 3 (October 23, 1990) (striking rebuttal testimony of Dow Jones because it could have been filed as direct testimony); Order No. 1028 (striking testimony of USPS witnesses Pham and Mallonee because their testimony could not be based upon Brooklyn Union's "comments" on an update to the USPS's Docket No. R90-1 BRM cost study); see also Presiding Officer's Ruling R83-1/68 at 3-4. It is only in the rarest of circumstances that testimony filed in the direct case of a party has been struck from the record. See Order No. 562 (portions of

Merewitz testimony struck).<sup>2</sup>

Because of the heavy burden they must carry, one might reasonably have expected that Movants would have attempted to allege violations of specific, applicable rules of practice and procedure, or specific instances of improper Postal Service conduct, backed up their allegations with reference to specific instances in this case, argued that these specific violations or other conduct harmed their interests in this proceeding, established that the harm was serious and irreparable, and shown how the only recourse possible is the extreme remedy of striking testimony. They have utterly failed to do so. Movants instead rely on misguided complaints that the use of updated data causes changes in costs and cost allocations among parties, and conclusory statements and allegations virtually unsupported by specific references to the Commission's rules or to the massive amounts of documentation made available by the Postal Service in support of the ES database.<sup>3</sup> As will be shown below, despite their crowded membership, the host of parties aligned against the ES study have not even begun to lift, let alone carry, their burden.

#### Movants Have Failed to Carry Their Burden

The vast majority of the Motion consists either of conclusory statements of irregularities, extensive quotes from prior Commission holdings which are not applicable to the circumstances at hand, or vague and unsubstantiated allusions to violations of the Commission's rules or principals of due process. In each instance, Movants fail to

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<sup>2</sup> Note that in Order No. 1024, frequently cited by Movants, no testimony was struck. Instead, the Commission decided to accord certain testimony no weight.

<sup>3</sup> In describing the documentation pertaining to the ES study filed by the Postal Service during the course of this case as a "Niagara of information" (Motion at 8), Movants undercut their contention that insufficient information regarding the study was provided to the parties.

provide any convincing basis for the extraordinary relief they seek.

For example, at the outset of the Discussion section of their motion, Movants spend fully two pages on the argument that the type of data collected by witness Raymond has heretofore not been used in omnibus rate cases to estimate city carrier load time costs, and that the use of these new data, if accepted in place of the STS data relied upon by the Commission in recent cases, could have significant cost and rate impacts in the current case, impacts adverse to the Movants' interests. Motion to Strike at 9-11.

The Postal Service readily concedes that the ES data used for the first time by witness Baron in this case is different from the old STS data that it supplants. For one thing, the ES data is much more recent, and thus much more representative of the Postal Service's current operating environment than the STS data. The STS data date back to 1986, long before the advent of much of today's automation, DPS and other significant operational developments. In moving to strike, Movants implicitly argue that this older data must be used in place of the ES data they seek to discredit.

The Postal Service also agrees that the ES data was not produced with an eye towards inclusion in a future rate case, as Movants contend. Motion at 10. This characteristic, which Movants claim undercuts the potential usefulness of the ES data in this rate case, can just as easily be viewed as a positive aspect of the data set, eliminating any contention that the data collection was biased to meet a particular ratemaking goal. Furthermore, the use of data not designed for use in postal ratemaking is hardly unprecedented in Commission proceedings, as the Commission has relied upon data from MODS, HCSS and other Postal Service data systems in the past.

Regardless of the merits of this particular debate, however, it is clear that this issue has no direct bearing on whether the data should be stricken from the record of

this case. These arguments, which are more pertinent to brief writing at a later stage in the case, go to the weight to be given to the data, not to their admissibility as evidence.

The Postal Service also agrees with Movants that the use of the new ES data could have a significant effect on the costs and rates under review in this proceeding.<sup>4</sup> This is hardly a surprise. When one replaces data that date back to 1986 with data collected in recent years, one would expect that the significantly different operating environment observed in the latter data collection effort would result in significant shifts in costs when the updated data were incorporated into the ratemaking process. Movants appear to be urging the Commission to view with alarm or antipathy any attempt to update old data collection efforts solely because to use new data might cause significant changes in attributable costs, and might shift cost allocations among parties. The absurdity of this position is obvious. If the Commission were to institute a bias against data updates on the basis that the new data might cause a significant change in outcomes, the costing process, and, indeed, the overall ratemaking process would become stuck in an unrealistic, unrepresentative prior time period, with decreasing ability to project costs accurately into the test year.

In any event, the fact that a particular change in data alters cost allocations among the parties may support an argument that the use of the data should be carefully examined, but it clearly is not a proper basis for the striking of testimony.<sup>5</sup> If those

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<sup>4</sup> The Postal Service does take issue, however, with Movant's characterization of the degree of change caused by the new data. At page 10, footnote 9 of their Motion, Movants compare load time and other cost projections between this case and Docket No. R97-1, implying, for example, that the Postal Service's estimate of load time shows a 60 percent increase in costs over a period of a mere 20 months. These comparisons ignore the fact that the changes in cost estimates are not intended to reflect changes in costs behavior only since the last rate case, but reflect changes in cost behavior between the present and 1986, when the STS data were collected.

<sup>5</sup> See Presiding Officer's Ruling No. R94-1/5 ("Motions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence.")

parties who do not benefit from the data change wish to bring to the Commission their concerns regarding the consequences of using new data, they are free to do so during the briefing of this case.

When one sifts the bombast and irrelevancies from Movant's argument, one is left with essentially two components: (1) the assertion that the Postal Service failed to comply with certain of the Commission's filing requirements and failed to cure this defect within a reasonable period of time, and (2) the contention that the Postal Service irreparably prejudiced Movants' review of the ES data by failing to produce answers to discovery requests in a timely, clear, and responsive fashion. Citing to prior Commission orders, Movants contend that the Postal Service's alleged misdeeds fatally denied them due process and thus require that the ES data and testimony be stricken from the record. See Motion at 5-9, 11-14.

Each of these contentions is without merit. Consider, for example, Movant's allegations of rule violations. Although Movants do make one passing reference to the Commission's Rules when claiming that the Postal Service failed to provide adequate foundational materials for the ES Study (citing, at page 5, "section 31[k][1], [2]and [2][ii][b] (sic)"), the Motion to Strike is strikingly devoid of any details which would permit an evaluation of this claim. The Motion makes only the most meager attempt to identify the pertinent rules and apply them to the facts at hand, leaving unaddressed the critical issues of what type of study the ES Study is, which of the Commission's foundational requirements apply to that type of study,<sup>6</sup> what foundational materials were made available by the Postal Service both at the outset of the case and later, in what respects

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<sup>6</sup> Movants' citation to the general requirements of Rule 31[k][1], which apply only to a certain residual category of analyses, is completely inexplicable. See Motion to Strike at 5.

the available materials are purportedly deficient,<sup>7</sup> and why these alleged deficiencies are deemed to require imposition of the extreme remedy sought. Because the Presiding Officer allowed Movants to submit their motion to strike long after the rules ordinarily would have required its filing, Movants have absolutely no excuse for failing to make specific allegations of documentation deficiencies, and their failure to do so can only be construed as an inability to do so. Movants have clearly failed to sustain the heavy burden that is theirs, in this respect and in others.

Even if Movants had addressed the specifics of the documentation filed by the Postal Service, they would have been hard pressed to show any deficiency sufficient to sustain a motion to strike. At the time of filing, the Postal Service did present documentation of witness Raymond's collection of the work-sampling data provided to witness Baron for use in the Postal Service's city carrier cost analyses. For example, witness Raymond's direct testimony consists almost entirely of a descriptions of the design of the ES Study, stages of implementation, data collection efforts, types of work-sampling data collected, scanning procedures, classification of observations into STS categories, and quality assurance. USPS-T-13 at 3-15, Appendices A-F. In the course of discovery, this information was supplemented by hundreds of pages of responses concerning not only the collection of work-sampling data relevant to the Postal Service's direct case, but also of time-study and other information not used by witness Baron. See, e.g., Tr. 18/7368-7931. In addition, the Postal Service went to extraordinary lengths to make available to interested participants unprecedented, *complete* access to

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<sup>7</sup> Movants' citation of Rule 31[k][2][ii][b] (Motion to Strike at 5), for example, is very difficult to understand. This subpart, which calls for the provision of an explanation of the method of selecting the sample in a sample survey and the characteristics measured or counted, has been satisfied many times over by the Postal Service. See, e.g., Direct Testimony of Lloyd Raymond, USPS-T-13, at 7-12; Tr. 18/7407-09, 7797-801.

*all* existing ES study documentation, not only in an informal technical conference held pursuant to Presiding Officer's Ruling No. 27, but also on numerous later occasions.

Just as the Motion alleges gross violations of the Commission's rules without reference to concrete examples, it similarly replaces reasoned argument from the specific facts of this case with oblique, out-of-context quotations from prior Commission orders. Movants repeatedly invoke passages from Commission Orders No. 1024 and 562 in support of their conclusion that the Postal Service has effectively prevented participants from "analyzing and assessing a significant Postal Service study." Motion at 4, *passim*. Unfortunately for Movants, their heavy reliance on these two prior orders is misplaced, as the circumstances underlying those orders are easily distinguished from the current dispute.

Movants cite to Order Nos. 562 and 1024 in making the sweeping generalization that the Postal Service has failed to establish a foundation for the ES study because of "continuing revisions" to the ES study, and the continuing "unavailability of essential information." Motion at 5 (quoting Order No. 1024 at 12, quoting Order No. 562 at 20). Despite their numerous citations to these orders as authority, Movants nevertheless fail to demonstrate a factual similarity between the ES study sponsored in this current proceeding and the studies that were the subject of those orders.

In Order No. 1024, the Commission declined to accord weight to the Business Reply Mail Accounting System (BRMAS) study in part because of numerous amendments to the study which were of sufficient magnitude to require changes in a proposed fee which depended on the study. See Order No. 1024 at 13. In that instance, the Commission was concerned that errata submitted during the course of the Docket No. R94-1 proceeding directly resulted in a substantial revision in the proposed rate for the BRM subclass. See *id.* at 6. In fact, the Commission took pains to note that amendments to the BRMAS study continued beyond the filing date for intervenors'



responsive testimony. *See id.* at 13. In Order No. 1024, the Commission also relied upon the failure of the key witness to provide an explanation of the substantial study revisions and the reduction in the proposed fee. *See id.* at 8. Furthermore, Order No. 1024 hinged, in part, on the Commission's determination that the Postal Service had initially failed to proffer a sponsoring witness and that the witnesses who testified as to the BRMAS study lacked a firm understanding of either the underlying BRM system or the integrity of study data. *See id.* at 13, 3, 9. Finally, the Commission relied on the fact that witness McCartney revealed that he had no "firsthand knowledge" of BRMAS operations. *Id.* at 3.

In the current proceeding, no such defects of excessive revision or inadequate knowledge have been shown to exist. Witnesses Raymond and Baron have filed relatively few errata, and no change has been shown to be so substantial as to affect any proposed rates. Furthermore, voluminous explanations of any seeming anomalies have been provided throughout this proceeding, as the Commission's docket clerks can surely attest. Finally, as the designer and implementer of the ES study, witness Raymond is without question intimately knowledgeable of the study and the data it produced, and he also clearly has demonstrated firsthand knowledge of postal delivery operations gained during the course of the study. Similarly, witness Baron has demonstrated his first-hand knowledge not only of the data provided to him by witness Raymond, but also of their application to city carrier costing in this proceeding. Any argument that Movants have been denied access to knowledgeable witnesses simply cannot hold water.

Similarly misplaced is Movants' reliance upon Order No. 562, in support of their hypothesis that the Postal Service has not provided sufficient documentation as a foundation for the ES study. In that instance, the Commission's decision to strike, in part, the testimony of witness Merewitz was based on its determination that specific

material requested by intervenor Time, Inc. had not been provided by the Postal Service during the course of the proceeding. See Order No. 562 at 3. Specifically, the Commission determined that the source code and Job Control Language necessary to execute the MPCM program, relied upon by witness Merewitz, had not been properly produced in response to Time's interrogatories. *Id.* In contrast, Movants in this case have completely failed to establish that the Postal Service has not produced a response to a single one of their hundreds of discovery requests.<sup>1</sup> Furthermore, it is fair to say that in this proceeding the Postal Service has done everything within its power to facilitate responses to discovery requests of Advo, Inc., MPA and all other interested intervenors. The very first informal technical conference held in this proceeding was initiated by the Postal Service and featured witnesses Raymond and Baron. Later, in a subsequent technical conference scheduled in response to Presiding Officer's Ruling No. 27, the Postal Service made available to the parties not only witness Raymond, but also working exemplars of the equipment used in the ES study, videotapes made in the course of the study, all study data, and organized volumes of all of the thousands of pages of documentation produced during the course of the study. In a productive and cooperative session, representatives of the parties received answers to all of their technical questions regarding the conduct of the study, the nature of the documentation produced, and any other matter of concern. These representatives were allowed to browse through the documentation on display without restriction. Furthermore, at the request of the parties, the Postal Service agreed to make the documentation available

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<sup>1</sup> Movants rely largely upon their *dissatisfaction* with witness Raymond's responses to their query as to the rationale for selecting the LR-1-163 dataset out of the larger database collected during the ES study. See Motion at 13. Despite their inability to cite to a specific Commission requirement for it, Movants also fuss over witness Raymond's failure to produce certain hardcopy documentation relating to the training of data collectors used in the study.

on three later occasions for additional inspection, and even made available to the parties facilities for private viewing and analysis of videotapes on site.

Given the cooperation of the Postal Service and the unprecedented access to confidential materials afforded to the parties in this case, Movants' citation of the MPCM controversy at the heart of Order No. 562 lends no support to their call for the extreme remedy of striking the Raymond and Baron testimonies.

Perhaps because the current situation stands at odds with the few prior instances in which testimony was struck from the record (or, in the case of Order No. 1024, accorded no weight), Movants resort to inflammatory, conclusory statements designed to create the appearance that a gross injustice has been visited upon them. Once again relying on Order Nos. 1024 and 526 as their sole controlling authority, Movants argue that they have been subject to "prejudicial delays" and a "quagmire of constantly changing confusion." *Id.* at 12.

The Postal Service admits that there have been significant delays in responding to interrogatory requests directed to witness Raymond, in many cases requiring motions for acceptance of interrogatory responses that have been many weeks late. It would be incorrect, however, for the Commission to accept Movants' implication that these delays were avoidable, and were solely the responsibility of the Postal Service. First, if one appropriately counts the distinct questions included within interrogatories, it is clear that witness Raymond was subjected to a deluge of questions, easily numbering in the many hundreds. Second, even a cursory review of the interrogatories at issue reveals that many of the delayed responses were to interrogatories that were extremely technical in nature, often hypothetical, and difficult to answer. Although the Postal Service made every effort to expedite the proceedings by responding to these discovery requests within a reasonable period of time, the sheer volume of questions, coupled with their detailed nature, made significant delays inevitable. In fact, the

Presiding Officer has attributed part of the delay in the proceedings to Movant's overly-detailed hypothetical interrogatories, highlighting the "substantial risk that this approach will not produce a thorough understanding of witness Raymond's mapping procedure in what little remains of the discovery period." Presiding Officer Ruling No. R2000-1/35 at 6-7. Third, Movants' penchant for motions practice required Postal Service counsel and witnesses to devote an extraordinary amount of time to procedural matters, such as defending against motions to compel. Fourth, the attention of the Postal Service city carrier cost witnesses have at several points in this proceeding been diverted to the task of informally providing information regarding the ES study to intervenors, in numerous technical conferences, and in response to other informal requests for information. Finally, in the midst of discovery, the Postal Service devoted large amounts of time to providing extensive documentation of the means of categorizing ES observations into STS categories, both in response to Presiding Officer's Ruling No. 8 and otherwise.

It is clear that a number of unusual circumstances, some of which were dictated by Movants' chosen modes of discovery, and most of which were beyond the control of the Postal Service, resulted in delays in responding to various interrogatories. In this situation, it would be unfair both to the Postal Service and to the Commission, which is charged with compiling the evidentiary record upon which it must base its recommendations, for the extensive, up-to-date, valuable and informative ES data to be struck from the evidentiary record simply because delays in responding to certain interrogatories were encountered. This is especially so in the case of the current Motion, which, apart from general allegations of harm, does not explain how the delay in responding to any particular interrogatory, or groups of interrogatories, so seriously and irreparably prejudiced the due process rights of any party that striking testimony is the only reasonable option.

Virtually the only specific reference provided by Movants to support their Motion comes in the context of their argument that witness Raymond's answers have so confused them that, in their dazed state, they have been unable to fairly examine his study. Motion at 12-13. Movants point to a number of different data sets referred to by witness Raymond in the course of the proceeding, claiming that the existence of more data than those relied upon by witness Baron was a late revelation that irreparably harmed their participation in the case.

This argument is fallacious for many reasons. First, as the Commission's staff can attest, it has been made apparent to the parties since the first informal technical conference that the ES data collectors were involved in collecting more information than that included in the subset provided to witness Baron.<sup>2</sup> If Movants did not register this fact from the first technical conference, they certainly had the opportunity to inform themselves at the second such conference, held pursuant to Presiding Officer's Ruling No. 27, during which *all* of the information collected during the course of the study was made available for questioning and inspection.

Second, the simple reason that different, larger data sets, exceeding the bounds of the work sampling subset relied upon by witness Baron, were referred to in responses to requests made by MPA and other Movants, is that Movants did not confine their discovery requests to the data set relied upon by the Postal Service in this case, but in many cases chose to make requests that were extremely broad in scope, seeking virtually all information collected during the course of the ES study. See Tr. 18/7949-51. Movants' attempt to punish the Postal Service for being responsive to their

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<sup>2</sup> In fact, to the obvious chagrin of some participants, the scope of questions at the initial technical conference was deliberately limited to only those aspects of the ES study that pertained to the work-sampling data relied upon by the Postal Service in its filing.

unbridled demands for irrelevant documentation should not be countenanced by the Commission.

Third, the confusion experienced by Movants does not appear to have been experienced by other parties interested in the ES database. For example, counsel for the Newspaper Association of America had little difficulty sorting out differences in route days in one data set which had concerned counsel for Advo, Inc. See Tr. 19/8062-70. Furthermore, the only other parties besides MPA and Advo, Inc. to conduct discovery relating to the ES data base, UPS, NAA and the OCA, have not indicated any confusion regarding its contents.

Finally, even if the Postal Service had been responsible for some confusion regarding the existence of observations beyond that provided to witness Baron and relied upon by the Postal Service, that confusion can hardly be said to form a basis sufficient to require striking from the record the entire Raymond testimony and portions of the Baron testimony. It has been clear from the filing of this case what data was provided to witness Baron: the data contained in LR-I-163. It has been clear what use witness Baron made of the data, and how he made use of the data. The fact that additional data may have been collected which were not relevant to his testimony may provide grist for argument over the weight to be given to his analysis, or adjustments that might be made to it to include or exclude certain observations, but this is the province of rebuttal testimony,<sup>3</sup> not a motion to strike.<sup>4</sup>

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<sup>3</sup> It is significant that although Movants have for some time had access to additional observations not included in the database used by witness Baron, they have not made any showing that inclusion of additional data points would have any material effect on witness Baron's analysis or conclusions.

<sup>4</sup> Movants deride witness Raymond's explanations for excluding certain data points from the set provided to witness Baron. Motion at 13, note 15. Movants base these criticisms on references to total observation times deduced from the information provided which, Movants claim, indicate that some observations excluded as work sampling partial scans were actually complete scans and should have been included.

Conclusion

In their Motion to Strike, Movants seek to establish a standard for the use of updated or non-rate-case data that is so demanding that, if followed, it would prevent the Postal Service and the Commission from using any such data. If the Motion is granted, all parties adversely affected by the introduction of new data in future cases will have an incentive to bombard the proponent with so many complicated and technical interrogatories that the proponent could not possibly respond in a timely fashion, engage in extensive motions practice premised on the allegation that certain answers are confusing and non-responsive, object to admission of the data into evidence based on the proponent's failure to provide timely responses, and later move to strike on the basis of unspecific, conclusory statements of lack of foundation, assertions of confusion and allegations of continuing revisions. In ruling on the Motion, the Presiding Officer surely will take care not to encourage such tactics.

Although Movants have throughout the course of this dispute repeatedly criticized the methods and conclusions of witnesses Raymond and Baron, such criticism is insufficient to require testimony to be stricken, and is irrelevant to the decision to strike such testimony. Even if their criticisms did have some merit, "[s]triking testimony because of its questionable probity is unnecessary in administrative proceedings, where decision-makers are able to accord appropriate weight to evidence." Order No. 1143 at 4. The Postal Service is confident that the Commission, faced with the heavy burden faced by Movants, and the paucity of specific reasons presented by Movants in support of the extreme remedy they seek, will deny the Motion

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Unfortunately, the total times deduced by Movants appear to include both in office and street observations, as well as scans not necessarily related to work-sampling, and thus do not clearly raise an issue regarding whether the time recorded on the street (time relevant to witness Baron's street time analysis), was improperly excluded because it allegedly was not partial or incomplete.

in its entirety, and allow the examination of city carrier costs in this case to proceed without further procedural wrangling.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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June 27, 2000

**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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