

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

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POSTAL RATE AND FEE CHANGES, 2000)

POSTAL RATE COMMISSION
Docket No. R2000-18

ASSOCIATION OF PRIORITY MAIL USERS, INC.
MOTION TO RECONSIDER APMU AND POSTAL SERVICE OBJECTIONS
TO THE ADMISSIBILITY INTO EVIDENCE OF
UPS CROSS-EXAMINATION EXHIBIT BY THE COLOGRAPHY GROUP
(September 1, 2000)

The Association of Priority Mail Users, Inc. ("APMU") moves, pursuant to section 21(c) of the Commission Rules of Practice, 39 CFR §30001.21(c), to reconsider the ruling of the Presiding Officer to admit into evidence UPS cross-examination exhibit UPS-XE-Haldi-RT-1 together with questioning of witness Haldi (APMU-T-1) at Vol. 45, pp. 19611-19631, of the transcript herein, by counsel for United Parcel Service ("UPS"), and to strike this exhibit and related questioning from the record. The grounds for this motion are as follows.

1. On August 30, 2000, during oral cross-examination of APMU rebuttal witness Dr. John Haldi (APMU-RT-1), counsel for United Parcel Service ("UPS") presented witness Haldi with a special report prepared expressly for UPS during the pendency of this litigation on August 3, 2000, by the Colography Group, marked for identification as UPS-XE-Haldi-RT-1, then read from the report, asking witness Haldi to confirm the contents of the report, and then asked the Presiding Officer to admit the report into evidence, which he did, over the objection of both APMU and the Postal Service, subject to the filing of a motion to reconsider by September 1, 2000. Tr. 25/11730-32.

2. Counsel for UPS failed to even attempt to authenticate the UPS special report in any way, so that the Commission could ensure that only reliable evidence, sworn to by a witness,

entered the record of this docket, as required by Commission rules. Commission Rule No. 31(a), 39 C.F.R. section 3001.31. UPS counsel primarily relied on the Presiding Officer's prior ruling, POR No. R2000-1/99, permitting counsel for UPS to cross-examine Dr. Haldi on his Initial Testimony using a press release from the Colography Group allegedly obtained on the internet. Previously, counsel for UPS argued the document was obviously authentic as he represented that it came from the internet. Now, counsel for UPS asserts that the new document not on the Colography Group web site is self-authenticating because the photocopy was of the letterhead of a company and the Presiding Officer's prior ruling should govern. (Tr. 45/19612, ll. 25-25.)

3. The special report was not offered by any person or party capable of authenticating it. The requirement for the authentication of evidence is not a technicality which can be disregarded, but rather a rule designed to ensure that only reliable information become part of the evidentiary record. Dr. Haldi expressed no familiarity with the UPS special report, and did not vouch for its authenticity, but was allowed to be cross-examined on it nonetheless. As such, the UPS special report should be deemed to be unreliable. In the absence of such testimony or other corroborating evidence, no foundation, let alone any proper foundation, was laid for the admission of either the document or its selective recitation into the record.

4. APMU submits that the efforts by UPS to utilize the UPS special report it obtained and introduce it into evidence during the cross-examination of APMU's witness were inappropriate, for the following reasons:

A. Presiding Officer's Ruling R2000-1/71 establishes that the date for rebuttal testimony to the cases -in-chief of participants other than the Postal Service in this docket was August 14, 2000. UPS obtained its special report on August 3, 2000. UPS had the opportunity to introduce the special report through its own witness, or even a witness from the Colography Group, but

chose not to do so. UPS thereby forfeited the opportunity that it had under the rules to have the special report entered into evidence. UPS' effort to back-door this special report into evidence after the deadline for filing rebuttal testimony should not be countenanced. Allowing this document into evidence would open up the floodgates to attempts by counsel for other parties to back-door reports into the evidentiary record at the last minute without any authentication, without any assurances of reliability, and without any of the due process protections required by Commission rules and good administrative practice.

B. To become record evidence in this docket, according to Commission Rule 31(a), witness testimony must be sworn to, and this cross-examination exhibit was not sworn to by anyone, but nevertheless entered into evidence in this docket.

C. Counsel for UPS asserted that the document was self-authenticating because it was on the letterhead of a company. This is patently wrong. Under Rule 902, Federal Rules of Evidence, documents are capable of self-authentication only where they constitute one of the following classes of documents: (1) domestic public documents under seal; (2) domestic public documents not under seal; (3) foreign public documents; (4) certified copy of public records; (5) official publications; (6) newspapers and periodicals; (7) trade inscriptions and the like; (8) acknowledged documents before a notary public; (9) commercial paper and related documents; and (10) presumptions under acts of Congress. None of these 10 categories even remotely resembles the UPS special report.

D. Dr. Haldi was not even asked to identify the UPS special report, and could not have identified it if he were asked. It purported to be a private report obtained by UPS from the Cologrophy Group. UPS provided no witness, no affidavit, and no authentication of any sort.

Therefore, the document could not possibly have been properly authenticated and identified under Rule 901 of the Federal Rules of Evidence.

E. The UPS report was pure hearsay, defined under Federal Rule of Evidence 801(c) as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” None of the exceptions to the hearsay rule in Rules 801-807 of the Federal Rules of Evidence has any application to this “written statement made by out-of-court declarant.” It would not be admissible in the federal courts unless it qualified under one of the exceptions to the hearsay rule, for obvious reasons. *See United States v. Williams*, 661 F.2d 528, 530 (5th Cir. 1981) (prejudicial error to admit verified statement with no opportunity to examine preparer of statement). The person(s) responsible for drafting the document not being available for examination, neither APMU nor the Commission has any opportunity to really examine the document — including testing not only the genuineness of the document, but also the foundation for its preparation, to say nothing of the expertise and authority of the person who actually prepared it. To admit such a document at the eleventh hour, during cross-examination of a witness who has no knowledge of the document, is tantamount to an end-run around the rules of evidence and procedure, as well as the rules of fairness that should govern in proceedings before the Commission.

F. To become record evidence in this docket, evidence must be susceptible to cross-examination by other intervenors. Here, the written report of an employee of the Colography Group has been made a part of the evidentiary record in a way that immunized that employee from cross-examination.

G. Counsel for UPS failed to provide a copy of the special report to Dr. Haldi or counsel for APMU prior to the hearing. Even if this cross-examination report did not require complex

computations or constitute lengthy documents, counsel for UPS had cross-examined Dr. Haldi the evening before, concluding at 8:30 p.m., and even at that late date declined to either provide a copy or provide any notice of his intention to try to supplement the record with the UPS special report.

H. It is not sufficient to say that the Commission will give evidence of this sort the degree of attention which it believes that it deserves. The rules of the Commission are designed to provide certain substantive and procedural due process to ensure that the record does not contain unreliable information, and those rules are sought to be flaunted by UPS in this docket.

I. UPS would not be prejudiced by the granting of this motion. Commission rules afford UPS adequate opportunities to insert information of this type into the record through its own witnesses. It has failed thus far to make use of such opportunities.

J. APMU acknowledges that a motion to strike is a request for extraordinary relief, but such relief clearly is warranted in this case. Unless this motion is granted, it is highly likely that on brief UPS will refer to, and base arguments upon, this irrelevant and unsubstantiated UPS special report.

K. Counsel for UPS represented that the Colography Group “is not a consultant to UPS” (Tr. 45/19620, ll. 5-6), but the UPS special report expressly stated that the data table contains the results of “the project referred to as the UPS Priority Mail Market Share Analysis.” The UPS special report concludes “[w]e trust that the enclosed satisfies your requirements; if we have in anyway [sic] misunderstood your instructions, or if you have any questions concerning this analysis, please call me....” If UPS provides a “project” to the Colography Group, and is furnished with the hope that it “satisfies your requirements,” it appears that the Colography Group has operated as a consultant, paid or unpaid, with respect to this “project” for UPS.

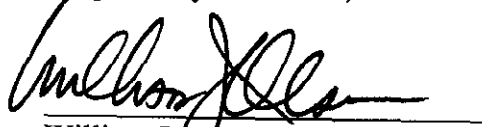
L. Counsel for UPS represented that the Colography Group had a report that “was available and they provided it...” (Tr. 45/19620, ll. 6-7), but the cover letter and the data chart are called the “UPS Priority Mail Market Share Analysis.” The cover letter states the definitions that were used “for the purposes of this analysis....” The report clearly was not “off the shelf” as appears to have been represented. The report had not been prepared for other purposes, having some type of independent reliability, but was a report prepared to unknown specifications (since UPS says that it was requested verbally, not by written request) during the pendency of the litigation, expressly to be used in this litigation.

M. After the conclusion of the cross-examination of Dr. Haldi, it was realized that the data in the UPS special report related to “shipments” rather than to “pieces” of Priority Mail. No party has had an opportunity to analyze or compare the differences in significance. Such analyses are possible only when the rules of the Commission are adhered to, and evidence can be properly studied and challenged.

Conclusion

For the reasons stated above, APMU moves that the above ruling of August 30, 2000 be reconsidered and that the UPS Special Report as well as the questioning of rebuttal witness Haldi regarding the Colography Group be stricken from the transcript and the evidentiary record.

Respectfully submitted,

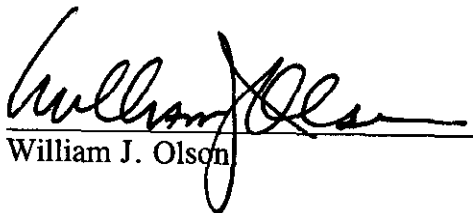


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CERTIFICATE OF SERVICE

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.



William J. Olson

September 1, 2000