

BEFORE THE
POSTAL RATE COMMISSION

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POSTAL RATE AND FEE CHANGES, 2000

DOCKET NO. R2000-1

RESPONSE OF UNITED PARCEL SERVICE IN OPPOSITION
TO 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 6, 2000)

United Parcel Service ("UPS") hereby files its response in opposition to the *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 ("Motion to Reconsider")*, filed on September 1, 2000.

APMU makes a number of claims in its effort to keep the Commission from *considering this highly relevant information, which impeaches one of APMU's main arguments in support of a reduced cost coverage for Priority Mail*. In particular, APMU asserts that:

1. The report was not authenticated, *see, e.g., Motion to Reconsider at 1-2 (¶¶ 2 and 3), 3-4 (¶¶ 4C and D)*;
2. The report is hearsay, *id.* at 4 (¶¶ 4E and F);

3. It should have been submitted as rebuttal testimony, *id.* at 2-3 (¶¶ 4A and B);

4. It should have been provided to APMU prior to the hearing, *id.* at 4-5 (¶ 4G); and

5. It should be deemed to be unreliable, *id.* at 1-2 (¶¶ 2 and 3), 3 (¶ 4A), 5-6 (¶¶ 4H and 4K-M).

APMU is wrong on all counts.¹

ARGUMENT

1. APMU asserts that this highly relevant information should be excluded from the record on the ground that UPS “failed to even attempt to authenticate” the exhibit. Motion to Reconsider at 1. It cites Commission Rule 31(a), 39 C.F.R. § 3001.31(a).

Rule 31(a) provides, “In any public hearing before the Commission, or a presiding officer, ***relevant and material evidence*** which is not unduly repetitious or

1. APMU characterizes the report as a “special” or “private” report prepared “expressly for UPS.” Motion to Reconsider at 1, 3. While the report was requested by UPS, the report itself and the Statement of Work filed today (see attachment to the Response of United Parcel Service to Request of Presiding Officer During Hearings at 1) -- as well as the trivial cost of the report, see Statement of Work at 1 -- all indicate that the data were merely taken from The Colography Group, Inc.’s regularly compiled **U.S. Expedited Traffic And Yield Analysis By Competitor And Market Segment Reports**, which consist of “quarterly and annual Colography Group estimates of shipments, weight, revenue, . . . and percent carrier share results” for the market in which Priority Mail competes. Tr. 45/19625 (page 1 of Exhibit UPS-XE-Haldi-RT-1). In any event, the report was properly admitted into evidence, for the reasons given herein.

cumulative shall be admissible" (emphasis added). The exhibit is certainly relevant and material evidence.

On the subject of authentication, we have previously noted (in connection with APMU's earlier, rejected attempt to strike from the record other evidence relating to Priority Mail's market dominance) that the Presiding Officer has previously held in this proceeding -- and correctly so -- that "The Administrative Procedures Act, rather than the Federal Rules of Evidence, governs the admissibility of evidence in Commission hearings" ² Similarly, APMU's statement (Motion to Reconsider at 5, ¶ 4H) that "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" has also already been rejected in this case. See Presiding Officer's Ruling No. R2000-1/89, *supra*, at 10; Presiding Officer's Ruling No. R2000-1/99 (July 26, 2000) at 2.

But even assuming that the Federal Rules of Evidence did apply here, the report is nevertheless admissible because it falls within the types of self-authenticating documents described in Rule 902, despite APMU's argument to the contrary (Motion to Reconsider at 3, ¶ 4C). In particular, Rule 902(7) expressly provides that "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . **(7) Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating

2. Response of United Parcel Service in Opposition to Association of Priority Mail Users, Inc. (APMU) Motion to Strike the Questioning of Witness Haldi by UPS Concerning a Press Release by the Colography Group, filed July 24, 2000, at 3, quoting Presiding Officer's Ruling No. R2000-1/89 (July 14, 2000) at 4-5.

ownership, control, or origin." F.R.E. 902(7), 28 U.S.C. The letterhead of The Colography Group, Inc. ("Colography") that is part of the report is clearly an inscription, sign, or label that "purport[s] to have been affixed in the course of business and indicating . . . origin." See, e.g., *New Orleans Saints v. Griesedieck*, 612 F. Supp. 59, 62 (E.D. La. 1985) ("*Griesedieck*").³

Moreover, aside from Rule 902(7), self-authentication under Rule 902 is not the only method (in addition to the testimony of a witness) that may be used to authenticate a document. Federal Rule of Evidence 901(a) generally states that "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence *sufficient to support a finding that the matter in question is what its proponent claims*" (emphasis added). Rule 901(b) presents examples "by way of illustration only, and not by way of limitation," including not only the testimony of a witness, but also "Distinctive characteristics and the like," such as the "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Federal Rule of Evidence 901(b)(4), 28 U.S.C. The report certainly meets this test.

What APMU's authentication argument boils down to is a claim that UPS manufactured the document rather than having obtained it from Colography. A finding that the document is not what it purports to be would require a finding that UPS

3. APMU refers to "the photocopy . . . of the letterhead." Motion to Reconsider at 2. UPS provided the original of the report, with the original letterhead on it, to the court reporter at the August 30 hearing, as one of the two copies of cross-examination exhibits normally given to the reporter. Thus, the court reporter has the original document, not just photocopies.

somehow obtained a piece of Colography's letterhead, and then manufactured all of the information contained both in the data table and in the cover letter.

UPS submits that there is more than sufficient evidence, both in the document itself and in the Statement of Work filed today, to rebut that claim.

2. APMU protests that the report is hearsay. However, as APMU's own witness readily recognized during cross-examination, the report stands on no worse footing in this regard than the market share information reproduced in his original testimony. Tr. 45/19628-29.

Indeed, UPS submits that the report stands on a more secure footing, accompanying (as it does) Colography's letterhead. Furthermore, the market share information originally relied on by APMU is not only hearsay, but it is double hearsay: APMU obtained that information from the Postal Service, which apparently received it from Colography.

In any event, the Federal Rules of Evidence on hearsay do not apply here. If the Federal Rules of Evidence did apply, the report (though not APMU's double hearsay data) would still be admissible under Rule 803(17). That rule specifically states that "Market reports" such as this one "are not excluded by the hearsay rule, *even though the declarant is available as a witness*" (emphasis added). See *Griesedieck, supra*.⁴

4. Certain types of hearsay are admissible only if the declarant is unavailable as a witness. F.R.E. 804(b), 28 U.S.C. However, Rule 803(17) states that "Market quotations, tabulations, lists, directories, or other published compilations, *generally used and relied upon by the public or by persons in particular occupations*" are not excluded by the hearsay rule even if the declarant is available to testify (emphasis added). Given the Postal Service's and APMU's past and current reliance on Colography data, UPS submits that Colography
(Footnote continued on next page)

APMU repeatedly notes that “this cross-examination exhibit was not sworn to” (Motion to Reconsider at 3, ¶ 4B) and that it was not “susceptible to cross-examination” (*id.* at 4, ¶ 4F). But that is always true of hearsay. Information of the type at issue here is admissible because “The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.” Advisory Committee Notes to 1972 Proposed Rules regarding paragraph 17 of Rule 803, 28 U.S.C.

3. APMU argues that the report could have been used in rebuttal testimony, suggesting that “UPS had the opportunity to introduce the special report through its own witness, or even a witness from The Colography Group.” Motion to Reconsider at 2, ¶ 4A. But that makes no difference. As shown above, such market compilations are admissible even if the declarant is available to testify.

Had UPS attempted to present the Colography report “through its own witness,” APMU would almost certainly have objected to its admission into evidence because the UPS witness would have been able to testify only that UPS had obtained the report

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reports are “generally used and relied upon . . . by persons in particular occupations.” Indeed, a Colography representative testified on behalf of the Postal Service in Docket Nos. R87-1 and R90-1 (see Docket No. R90-1, USPS-RT-10, and Tr. 44/23134), and the Postal Service apparently still relies on Colography data. See Tr. 2/2728 (Postal Service interrogatory response presenting 1999 market share data).

from Colography. And since the Commission does not have subpoena power, UPS was not in a position to compel a witness from Colography to testify.⁵

The bottom line is that the use of a cross-examination exhibit is permissible whether or not the party using it could also have presented such evidence as rebuttal testimony. As long as the exhibit addresses a point made by the witness, it is properly used on cross-examination.

APMU complains that permitting the Commission to have this information available to it would “open up the floodgates to attempts by counsel for other parties to back-door reports into the evidentiary record” Motion to Reconsider at 3.⁶ But it is APMU which originally attempted (successfully) to “back-door” into the evidentiary record data from Colography, without any authentication, without any assurances of reliability, and without any real opportunity to cross-examine a witness on how the data was developed. Again, as APMU’s own witness aptly stated, the market share numbers in his testimony stand on no better footing than those contained in the Colography report. Tr. 45/19628-29. Rather, as we have already noted (page 5, *supra*), the report stands on a better footing, since it at least has been expressly endorsed by Colography -- which is more than can be said for the data relied on by APMU.

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5. As we have previously noted, a representative of Colography testified on behalf of the Postal Service as long ago as Docket No. R87-1 (as well as in Docket No. R90-1), and the Postal Service has apparently continued to obtain data from Colography. See pages 5-6, n.4, *supra*.
 6. See also Response of United States Postal Service in Support of APMU’s Motion to Reconsider, dated September 5, 2000 (“Postal Service Response”).

4. APMU complains that the report should have been given to it before the hearing. Motion to Reconsider at 4, ¶ 4G. As APMU itself notes, that is required only where a party “intend[s] to use complex numerical hypotheticals, or to question using intricate or extensive cross-references.” 39 C.F.R. § 3001.30(e)(3). That certainly is not the case here.

The rule requiring certain types of cross-examination exhibits to be supplied beforehand recognizes that the normal practice is not to supply cross-examination exhibits in advance. In fact, the rule has itself been largely ignored in this case even where it applies. Certainly, it does not serve as a reason for excluding relevant evidence from the record where it does not apply.

5. Finally, APMU and the Postal Service complain that the data in the report is unreliable. See, e.g., Motion to Reconsider at 6; Postal Service Response at 2. For example, the Postal Service and APMU both argue that the report refers to “shipments” rather than “pieces,” suggesting that data on shipments may be different from data on, and may overstate Priority Mail’s market share as measured by, pieces. *Id.* However, testimony from a Colography representative presented in Docket No. R90-1 and cited by the Postal Service here (Postal Service Response at 2 n.1) indicates that Colography has long equated the terms “shipments,” “pieces,” and “volume.” See, e.g., Docket No. R90-1, Tr. 44/23136, 23142, 23161, 23167, 23171, 23181, 23187.⁷

7. Curiously, the Postal Service relies on a minor “inconsistency” (of a few tenths of a percent) between the revenue shares in the Colography report as compared to the data previously supplied by the Postal Service to argue that “The significance of [the Colography report] is . . . called into question” Postal Service Response at 2.

In short, arguments that the Colography report is unreliable go to the weight of the evidence, not to its admissibility. As UPS will show in its initial brief, other information in the record confirms that the Postal Service has an overwhelmingly dominant position in the market in which Priority mail competes -- a market in which approximately 25% of Priority Mail's volume is subject to the Private Express Statutes, Tr. 11/4220. Such information corroborates the data in the Colography report, and vice versa. See, e.g., Tr. 45/19630-31 (data in the testimony of APMU's witness shows that Priority Mail volume is about 5 1/2 times greater than comparable UPS volume).

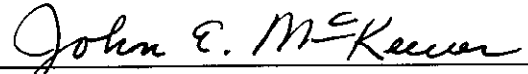
* * *

UPS agrees that the proper disposition of APMU's Motion to Reconsider boils down to a question of fairness. See Motion to Reconsider at 4, ¶ 4E (referring to the "rules of fairness that should govern in proceedings before the Commission"). Is it fair to allow the record to contain double hearsay information about Priority Mail's market share that is said to come from a specific organization, but at the same time to exclude *a report on the letterhead of that same organization which contains more recent and more complete market share data?* UPS submits that the question answers itself: *To permit APMU to rely on incomplete and dated information obtained from Colography via the Postal Service while at the same time excluding more complete evidence supplied on the letterhead of that company would be tantamount to a finding that data is not admissible in postal rate cases unless it is first run by the Postal Service and then supplied by it. That certainly is the antithesis of fairness.*

WHEREFORE, United Parcel Service respectfully requests that the 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 be denied.

Respectfully submitted,



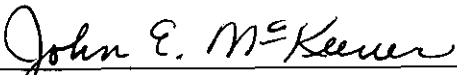
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document by first class mail, postage prepaid, in accordance with Section 12 of the Commission's Rules of Practice.



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Dated: September 6, 2000
Philadelphia, Pa.

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