

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

POSTAL RATE AND FEE CHANGES, 1997)

RECEIVED

Docket No. R9740 PM '97
SEP 11

NASHUA PHOTO INC., DISTRICT PHOTO INC.,
MYSTIC COLOR LAB, AND SEATTLE FILMWORKS, INC.
MOTION FOR LEAVE TO FILE REPLY AND
REPLY TO OPPOSITION OF UNITED STATES POSTAL SERVICE
TO MOTION TO STRIKE TESTIMONY OF WITNESS FRONK
(September 11, 1997)

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Nashua Photo Inc. (hereinafter "Nashua"), District Photo Inc. ("District"), Mystic Color Lab ("Mystic"), and Seattle FilmWorks, Inc. ("Seattle") (hereinafter collectively referred to as "NDMS"), proceeding jointly herein through their undersigned counsel, pursuant to Rule 21 of the Commission's Rules of Practice and Procedure, 39 C.F.R. section 3001.21, hereby seek leave to reply to the Postal Service's Opposition (denominated "Reply of the United States Postal Service"), filed September 9, 1997, to the NDMS motion to strike certain testimony herein of Postal Service witness David Fronk (USPS-T32).

MOTION FOR LEAVE TO FILE REPLY

The NDMS motion to strike a portion of witness Fronk's testimony was based upon the fact that the Postal Service was apparently attempting, through witness Fronk's testimony, to bootstrap into evidence an unsponsored — and thus inadmissible as evidence — library reference (USPS Library Reference H-112) in circumvention of the Commission's rules. In its Opposition, the Postal Service has sought to avoid discussion of this central issue. Instead, it has taken the position that the NDMS motion to strike was "at best, premature," and that "the NDMS motion is not ripe for consideration at this time." (See USPS Response, pp. 1, 3.)

Thus, the Postal Service would avoid the merits of the important issue raised in the NDMS motion and would ask the Commission to deny the NDMS motion, or at least to defer

consideration of the issue until such time as the Postal Service decides to offer witness Fronk's testimony (and/or LR-H-112) into evidence, on the theory that no party is being denied discovery on the contents of the (inadmissible) library reference (LR-H-112).

In a word, therefore, while admitting the lack of sponsorship of Library Reference H-112, and virtually confirming NDMS's prediction about the Postal Service's bootstrapping efforts, the Postal Service nevertheless argues that the NDMS motion should either be denied or deferred.

Such argument mandates a reply. Rule 21 (b) of the Commission's Rules of Practice and Procedure (39 C.F.R. section 3001.21(b)) provides that, subsequent to the filing of an answer to a motion, no reply or further responsive document shall be filed unless the Commission or Presiding Officer otherwise provide. NDMS respectfully submit that the Postal Service's argument has confused the issue, and that the NDMS reply should be allowed in an effort to refocus on the core issue truly at stake here.

REPLY TO THE POSTAL SERVICE'S OPPOSITION TO MOTION TO STRIKE

The Postal Service has argued that sponsorship and evidentiary status of a library reference are irrelevant and that inadmissible documents should be allowed into the record through the back door by mere reference to them in testimony, so long as the Postal Service or witnesses can respond to questions about the contents of the library reference and discovery on the contents of the library reference is not refused. That position, it is submitted, does not make sense. Taken to its logical conclusion, such erroneous reasoning would allow the Commission to base any portion of its recommended decision, and the Board of Governors to base new postal rates, on non-record evidence.

The Postal Service is Attempting to Avoid the Issue Raised by the Motion to Strike

In this particular case, Postal Service witness Fronk makes no more than a passing reference to Library Reference H-112 as the exclusive reason for an increase in the First-Class nonstandard surcharge. It has been virtually acknowledged by the Postal Service that Library Reference H-112 cannot be admissible as evidence in this proceeding, since it is not a sponsored library reference, and unsponsored library references are not admissible. See Rule 5, Special Rules of Procedure, Docket No. R97-1 (P.O. Ruling R97-1/4, Attachment B). But the Postal Service is unconcerned because the Postal Service apparently hopes to have record evidence introduced, when witness Fronk testifies in this proceeding, through the admission into the transcript of responses to written interrogatories and responses to oral cross-examination.¹

Such an approach should not be allowed, as the Postal Service's initial filing contained no evidence which could be admitted as record evidence in support of the proposed increase in the nonstandard surcharge. **The Postal Service has failed to provide a single witness to sponsor LR-H-113, and thereby vouch for its accuracy and reliability under oath.**² By this failure, the Postal Service has made it impossible for the Commission to admit it into evidence. In

¹ The Postal Service reveals this very strategy, as its Opposition speaks to the designation of these responses to interrogatories "into the evidentiary record." *Id.* at 2.

² The Postal Service pretends that non-sponsorship of LR-H-112 is unimportant, and that witnesses can still respond to discovery requests concerning that document. Indeed, it even asserts that in the case of witness Fronk, the Postal Service "has found none of the interrogatories objectionable and intends to continue to... respond fully to those questions." (See Postal Service Opposition, p. 2.) That claim is false. The Postal Service objected to NDMS/USPS-T32-16, inquiring into the authorship of and other facts underlying LR-H-112, and the NDMS motion to compel an answer to that interrogatory is still pending. In any event, discovery is not the issue. The entire issue rests on the non-sponsorship of LR-H-112. If LR-H-112 is not admissible in evidence, discovery responses by Postal Service witnesses should not be considered an acceptable means of curing the defects in that non-admissible document.

addition, we submit the Postal Service has created a situation which would make it improper for the Commission to submit into evidence either (i) the scant testimony of witness Fronk referencing the library reference as the exclusive support for the increase in the surcharge, which is now sought to be stricken, or (ii) any responses to discovery requests regarding such testimony.

The NDMS Motion to Strike is Not Premature

The Postal Service's argument, that the NDMS motion to strike that portion of witness Fronk's testimony incorporating LR-H-112 is premature, is clearly wrong.

First, NDMS filed its motion at the proper time, since motions to strike testimony or exhibit materials are required to be filed "at least 14 days before the scheduled appearance of the witness...." Rule 1.C., Special Rules of Practice, Docket No. R97-1 (P.O. Ruling R97-1/4, Attachment B.)

Second, the Postal Service argues that it "has not yet moved into evidence any testimony in this proceeding..." and that it "has not yet moved into evidence the testimony of witness Fronk which relies on the results produced by the analysis of USPS-LR-H-112." (USPS Opposition, p. 2.) Of course it has not. And if NDMS were to wait for such evidentiary proffers to file its motion, the Postal Service would undoubtedly argue that it came too late.

Third, and most importantly, substantive reasons dictate that this issue should be resolved earlier in this proceeding, rather than later. If witness Fronk's testimony is not stricken with respect to LR-H-112, the Postal Service would use the occasion of his appearance on the witness stand to create record evidence in support of its proposal. This is not just a question regarding the admissibility of LR-H-112, as it appears to be conceded that this Library Reference cannot be

admitted in evidence, *see* Rule 5 of the Commission's Special Rules of Practice herein, and the Postal Service has not produced a single argument to the contrary. (*See* USPS Opposition, p. 2, acknowledging the plain language of Rule 5 and repeating the fact that LR-H-112 is not being sponsored by witness Fronk.) If LR-H-112 will not be admitted as evidence in this case, witness Fronk's testimony incorporating that document should not be admissible either. Furthermore, without any foundational testimony, no discovery responses about this portion of witness Fronk's testimony should be deemed admissible.

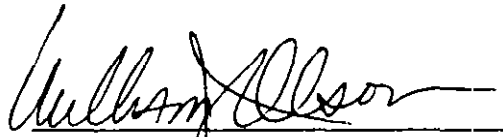
To delay a ruling on the motion to strike would allow the Postal Service to attempt to cure its total absence of competent record testimony in support of its own proposal by hoping that the reference to the inadmissible library reference in testimony, as well as responses to written interrogatories and oral cross-examination concerning the library reference, would all be admitted into the record virtually automatically. But this should not be allowed. If the Postal Service's case-in-chief contains no record evidence to support its proposal, that omission cannot be cured subsequently by a Postal Service witness treating the library reference as though it were evidence.

CONCLUSION

Thus, contrary to the Postal Service position, the issue presented by the NDMS motion to strike is not only ripe for decision, but also timely. We submit that the issue is an important one and that it should be resolved at the earliest possible time in this proceeding, before the Postal Service hopelessly complicates the issue through introduction into evidence of responses to written and oral cross-examination.

For the foregoing reasons, and for those previously articulated in their motion to strike, NDMS submit that lines 3-11 of page 24 of witness Fronk's testimony herein (USPS-T32, p. 24, ll. 3-11), which propose an increase in the First-Class nonstandard surcharge merely by reference to LR-H-112, an unsponsored library reference that cannot be record evidence in this proceeding, should be stricken.

Respectfully submitted,

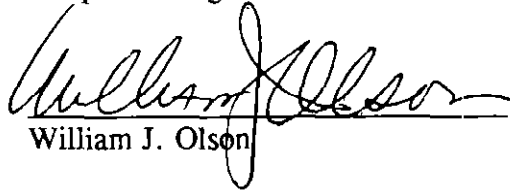


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served by hand delivery or mail 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 11, 1997