

# DOCKET SECTION

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

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POSTAL RATE AND FEE CHANGES, 1997 )

POSTAL RATE COMMISSION  
DOCKET NO. R97-147

**NASHUA PHOTO INC., DISTRICT PHOTO INC.,  
MYSTIC COLOR LAB AND SEATTLE FILMWORKS, INC.  
MOTION TO STRIKE SPECIFIC PORTIONS OF THE TESTIMONY OF  
POSTAL SERVICE WITNESS CHARLES L. CRUM (USPS-T28)  
AND POSTAL SERVICE WITNESS JOSEPH D. MOELLER (USPS-T36)  
(September 25, 1997)**

Pursuant to Rule 1.C. of the Special Rules of Practice in this docket, 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, hereby move to strike pages 10-12 of the direct testimony of Postal Service witness Charles L. Crum (USPS-T28) and that portion of the direct testimony of Postal Service witness Joseph D. Moeller (USPS-T36) beginning at page 11, line 3, and ending at page 15, line 6.<sup>1</sup>

## BACKGROUND

This motion to strike portions of the testimony of two Postal Service witnesses in this docket is similar in necessity and purpose to the motion to strike certain testimony of Postal Service witness Fronk previously filed by NDMS in this proceeding on August 29, 1997. That motion -- which was submitted by NDMS in the face of the Postal Service's refusal to provide an expert witness to sponsor a library reference which is the exclusive basis supporting certain testimony of one of its witnesses in this docket, thereby attempting to bootstrap into the record

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<sup>1</sup> Under Special Rule of Practice 1.C., this motion to strike a portion of witness Crum's testimony and a portion of witness Moeller's testimony is timely, as it has been filed more than 14 days before the scheduled appearance of both witnesses.

otherwise inadmissible evidence — was based upon solid legal ground. Although it was denied, it was denied *without prejudice* in Presiding Officer's Ruling No. R97-1/20 (September 17, 1997), in order to give the Postal Service an opportunity to correct the situation that led to the filing of the motion.<sup>2</sup> This motion rests upon the same legal reasoning as the previous NDMS motion to strike, in that the Postal Service, once again, is attempting to advance a proposal for a rate change on the basis of testimony that has no proper evidentiary support.

Through this motion, NDMS seek to strike the following testimony of Postal Service witness Crum in this docket, set forth on pages 10 through 12 of his direct testimony, where he relies exclusively on costs by shape and volumes presented in USPS Library Reference H-108 (LR-H-108) in an effort to show cost differences between Standard A flats and parcels:

### VIII. STANDARD MAIL (A) NONLETTER COST DIFFERENCES

#### A. BACKGROUND

In 1990, the Postal Service took the first step towards recognizing the effects of shape in Standard Mail (A) (then third-class) when witnesses Moeller and Shipe produced studies showing shape-based cost differences between letters and nonletters (Docket No. R90-1, USPS-T-9 and USPS-T-10). This cost distinction was supported by the models presented in Docket No. MC95-1. Though the rate distinction has always been limited by low "passthroughs," this concept still is integral to current Standard Mail (A) rates. My testimony will further distinguish costs on the basis of shape by showing the additional shape-based cost differences within nonletters, between flats and parcels.

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<sup>2</sup> Postal Service witness Fronk's testimony in support of the Postal Service's proposal for an increase in the nonstandard surcharge for First-Class Mail relied entirely on Library Reference H-112, which was unsponsored by any Postal Service witness. Although denying the NDMS motion to strike, the denial was without prejudice, and the Presiding Officer gave the Postal Service one week within which to name a witness to sponsor and vouch for the accuracy and reliability of LR-H-112.

The following table presents total bulk Standard Mail (A) volume shares based on Tables 1 and 2 of **Library Reference H-108**.

**FY 1996 VOLUME SHARES**

| <u>Letters</u> | <u>Flats</u> | <u>Parcels</u> |
|----------------|--------------|----------------|
| 58.5%          | 40.1%        | 1.4%           |

While the relative volume of parcels is low, the absolute volume is not and there is sufficient data to separate parcels from flats in Standard Mail (A). This effort to more closely align rates with costs will help reduce the rate averaging that currently exists within Standard Mail (A).

**B. INTRODUCTION**

My testimony uses the volumes and costs by shape presented in **Library Reference H-108** to show the cost differences within Standard Mail (A) nonletters between parcels and flats. Volumes by shape and rate category within third-class Bulk Rate (now Standard Mail (A) Regular/Nonprofit and Enhanced Carrier Route) are derived from the Permit/Bravis system and tied to official Revenue, Pieces, and Weight (RPW) totals. Volume variable costs are based on the In-Office Cost System (IOCS) and the Cost and Revenue Analysis (CRA) report and its associated workpapers where possible. Several studies supply additional data as necessary. Total volume variable unit costs by shape are found by dividing costs by volumes in each category.

**C. ANALYSIS AND PRESENTATION**

I combine Regular and Enhanced Carrier Route as well as Regular Rate and Nonprofit costs and volumes for the purposes of my analysis. The following table summarizes cost per piece data from **Library Reference H-108** for fiscal year 1996.

**FY 1996 STANDARD MAIL (A) COSTS BY SHAPE**

|            | <u>Cost per Piece (cents)</u> |
|------------|-------------------------------|
| Parcels    | 51.7                          |
| Flats      | 11.3                          |
| Difference | 40.4                          |

To find the FY 1998 test year cost difference per piece, I multiply the 40.4 cents described above by the test year/base year wage rate adjustment factor of 1.053 (described in Library Reference H-146). This yields 42.5 cents as my estimate of the FY 1998 test year cost difference between parcels and flats in bulk Standard Mail (A).

The degree of presort and depth of dropshipment can each have an impact on costs. Standard Mail (A) flats are somewhat more finely presorted and deeply dropshipped than parcels. I have adjusted the parcel/flat cost difference to account for this. Table 7 of **Library Reference H-108** shows that .3 cents of the 42.5 cent cost difference is due to the deeper entry of flats and 7.0 cents is due to the finer presort of flats. This leaves 35.2 cents per piece as my estimate of the FY 1998 shape-related volume variable cost difference between Standard Mail (A) parcels and flats.

#### D. SUMMARY

My testimony has identified cost differences between flats and parcels within Standard Mail (A). I have been quite conservative and backed out the portion of the cost differences due to differing levels of dropship and presort. As previously stated, my purpose is to support witness Moeller's proposed 10 cent surcharge of nonletter, nonflat-shaped mail. My costs and volumes cover the same full range (Regular Rate and Nonprofit, Regular and ECR) of pieces that witness Moeller's surcharge will impact. On the basis of my analysis I estimate the adjusted FY 1998 test year cost difference between flats and parcels within bulk Standard Mail (A) nonletters to be 35.2 cents per piece. [USPS-T28, pp. 10-12 (*emphasis added*).]

USPS Witness Crum cites and relies exclusively on the Postal Service's **Library Reference H-108** for his support of the proposed surcharge of nonletter, nonflat-shaped mail. **Library Reference H-108** purports to be a study of "Standard Mail (A) Unit Costs by Shape."

NDMS filed and served NDMS/USPS-T28-1 in this proceeding on August 8, 1997. In his responses to NDMS/USPS-T28-1(a)-(d), (f) & (g), filed on September 9, 1997,<sup>3</sup> witness Crum responded under oath as follows:

On August 8 NDMS asked: "Did you prepare, or participate in any way in the preparation of, the study contained in LR-H-108?"

On September 9 witness Crum responded: "Yes."

On August 8 NDMS asked: "Unless your answer to preceding part (a) is an *unqualified negative*, please describe your role with respect to preparation and conduct of the study contained in LR-H-108."

On September 9 witness Crum responded: "I personally supervised both the planning and conduct of the studies described in LR-H-108. I produced and/or assisted with the separate analyses to varying degrees. I completely reviewed the printed version of the library reference, other than the computer documentation."

On August 8 NDMS asked: "Are you sponsoring the study contained in LR-H-108? Please indicate whether any other witness in this docket is sponsoring LR-H-108."

On September 9 witness Crum responded: "As a library reference, it is my understanding that **LR-H-108 is not sponsored by any witness.** However, I have answered, and am available to answer further questions about it. I understand that my responses can be entered into the record. [Emphasis added.]

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<sup>3</sup> Previously, the Postal Service had objected to the interrogatory, and NDMS was forced to file a motion to compel a response to the interrogatory. Witness Crum's response was filed "in lieu of a response to [NDMS'] motion to compel."

Postal Service witness Moeller, in his direct testimony with respect to the proposed "residual shape surcharge," relies exclusively on the above-quoted testimony of witness Crum.

According to witness Moeller:

Witness Crum's testimony (USPS-T-28) conclusively demonstrates that there is a measurable difference between the costs for flat-shaped pieces and the costs for the remaining pieces in the non-letter categories of Regular and Enhanced Carrier Route Mail. [Moeller Direct Testimony, p. 12, ll. 10-13.]

Obviously, therefore, if witness Crum's testimony with respect to the proposed surcharge is stricken, the testimony of witness Moeller which relies exclusively on the Crum testimony should also be stricken.

#### ARGUMENT

The Postal Service has adopted, in rate and classification cases, the position that it is not required to identify expert witnesses to sponsor library references in the proceeding, and thereby to vouch for the accuracy and reliability of such studies. The Postal Service appears to believe that it can effectively maneuver such library references into the record, either by direct admission (if no party should object and it should escape the Commission's attention), or through the testimony of witnesses who purport to rely on such library references and who testify about them, either in direct or rebuttal testimony, in oral testimony, or in answers to interrogatories.<sup>4</sup> Obviously, however, such a procedure skirts the rules, and taints the evidentiary record. As the Special Rules of Practice in this proceeding expressly state,

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<sup>4</sup> See response of witness Crum to NDMS/USPS-T28-1(c-d), quoted, *supra*, where he reveals this strategy by saying "I understand that my responses can be entered into the record."

un-sponsored library references do not constitute evidence. See Rule 5, Special Rules of Practice.

That being so, witnesses should not be able to base their entire testimony on such un-sponsored "studies," and should not be permitted to introduce into evidence, through their testimony or responses to discovery, the substance of such non-admissible library references. This was the subject of the previous NDMS motion to strike in this proceeding, where NDMS sought to have stricken a portion of the direct testimony of Postal Service witness Fronk, because of its exclusive reliance on an un-sponsored (and thus inadmissible) library reference. In the case of witness Fronk, the un-sponsored "study" was LR-H-112.

Presiding Officer's Ruling No. R97-1/20 (September 17, 1997) ("POR No. 20") addressed the consequences of the Postal Service's refusal to identify a witness to sponsor a library reference in this proceeding, where the library reference was the exclusive foundation for the testimony of a Postal Service witness. POR No. 20 discussed the Postal Service's position that it was not required to name sponsors of library references, and thoroughly rejected that position, stating:

the Service's position on the use of library references conflicts with the proper construction of the Commission's rules, and impedes evaluation of the proposals referred to in the NDMS motion [to strike] in a manner consistent with basic evidentiary standards. [POR No. 20, p. 2.]

POR No. 20 provided the Postal Service one week to identify a sponsoring witness,<sup>5</sup> and denied NDMS' motion to strike witness Fronk's testimony **without prejudice** to NDMS' right

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<sup>5</sup> If the Postal Service chooses not to do so, then "the Commission will evaluate Fronk's testimony with due regard for the amount of evidentiary support for his surcharge proposals." *Id.*, p. 6.

to refile. *Id.*, pp. 6-7. Presumably, a refiled motion to strike may be granted if no sponsoring witness is identified by the Postal Service.<sup>6</sup>

NDMS submit that the Postal Service's refusal to identify a sponsoring witness to LR-H-108 reflects the same abuse of process found in LR-H-112. Therefore, they move to strike that portion of witness Crum's testimony, pages 10-12, which relies entirely upon LR-H-108 as the evidentiary basis for its conclusions. Similarly, the testimony of witness Moeller which relies exclusively on the objected-to testimony of witness Crum (and thus also relies exclusively on the inadmissible library reference, LR-H-108) should also be stricken.

Un-sponsored library references, such as LR-H-108 which witness Crum attempts to incorporate by reference, do not constitute record evidence for purposes of rendering a recommended decision in this docket. *See* Rule 5, Special Rules of Practice, Docket No. R97-1 (Presiding Officer's Ruling No. R97-1/4, August 1, 1997, Attachment B). Such documents have no protections applied to them to ensure reliability, a pre-condition to being made part of the record. Without such protection, any party would be able to submit a library reference in evidence, with virtually no scrutiny or limitation.

The Postal Service appears to believe that "sponsorship" of a library reference is not important with respect what is actually in evidence, but the Commission's recommended decision in this case must be based upon the record evidence. Section 31(b) of the Commission's rules of practice and procedure, entitled "Evidence," states in pertinent part:

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<sup>6</sup> As of the end of the allotted seven days from the Presiding Officer's Ruling, close of business on September 24, 1997, the Postal Service had failed to make any filing or identify any sponsor for LR-H-112.



**Designation of a document as a library reference is a procedure for facilitating reference to the document in Commission proceedings and does not, by itself, confer any particular evidentiary status upon the document. The evidentiary status of the document is governed by this section. [Emphasis added.]**

Section 31 of the Commission's rules of practice and procedure also clearly provides that documents shall be: presented as exhibits; offered into evidence; and received into evidence subject to a showing of relevance and materiality. *See* 39 C.F.R., sections 31(a), 31(b), 31(h).<sup>7</sup>

Rule 5 of the Special Rules of Practice governing this docket is directly on point and should be dispositive of the fundamental question of LR-H-112's inadmissibility. Rule 5 provides, in pertinent part, as follows:

Library references may be submitted when documentation or materials are too voluminous reasonably to be distributed... **Library material is not evidence unless and until it is designated and sponsored by a witness.** [The Special Rules of Practice are set out in Presiding Officer's Ruling No. R97-1/4, Attachment B (August 1, 1997) (emphasis added).]

LR-H-108 has not been sponsored and vouched for by any Postal Service witness. The fact that witness Crum (unlike witness Fronk) may have knowledge about the study, and may be able to respond to questions regarding the study, is not relevant to the question of its admissibility in evidence. And if LR-H-108 itself is not record evidence, witness Crum's

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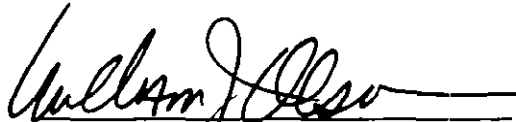
<sup>7</sup> In addition to these general rules applicable to all documents, section 31 of the Commission's rules of practice and procedure prescribes further conditions for the admissibility of a study (such as LR-H-108). Section 31(k)(1) requires that when a study or analysis is **offered into evidence or is relied upon** as support for other evidence, there shall be, *inter alia*, a clear statement of the **study plan** (to include all relevant **assumptions** and the **techniques** of data collection, estimates or testing), and a clear statement of the **facts and judgments** upon which conclusions are based. The section 31(k) requirements were not met for LR-H-108, and witness Crum's derivative testimony has no solid basis on which to rest.

testimony attempting to incorporate it by mere reference, and thereby shoehorn it into the record as the exclusive basis for a proposed rate increase, cannot be permitted.

### CONCLUSION

For the foregoing reasons, NDMS submit that pages 10-12 of witness Crum's testimony herein (USPS-T28, pp. 10-12), which purport to support the proposed Standard A residual surcharge solely by reference to LR-H-108, an unsponsored library reference that cannot be record evidence in this proceeding, should be stricken, and that witness Moeller's testimony (USPS-T36, p. 11, l. 3 through p. 15, l. 6), which relies exclusively on witness Crum's testimony supporting the Standard A residual surcharge, should also be stricken.

Respectfully submitted,



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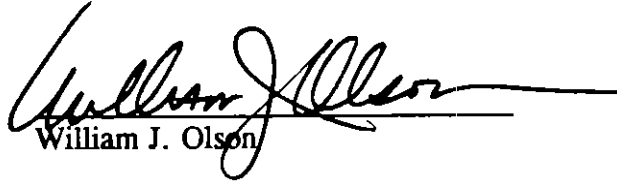
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CERTIFICATE OF SERVICE

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 25, 1997