

DOCKET SECTION

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, 1997)

Docket No. R97-1

NASHUA PHOTO INC., DISTRICT PHOTO INC.,
MYSTIC COLOR LAB AND SEATTLE FILMWORKS, INC.
MOTION TO STRIKE SPECIFIC PORTIONS OF THE TESTIMONY OF
VARIOUS POSTAL SERVICE WITNESSES AND CERTAIN LIBRARY REFERENCES
AND FOR OTHER RELIEF
(October 16, 1997)

INTRODUCTION

From the outset of the hearings on the Postal Service's case, the dominant issue confronting the Commission has been how to proceed in light of the heavy reliance on non-record, unsponsored library references by many Postal Service witnesses. After many weeks of motions practice challenging the admissibility in evidence of certain unsponsored Postal Service library references and correspondingly inadequate witness testimony, the Presiding Officer established a final deadline — October 14, 1997 — for the Postal Service to list those currently unsponsored library references it intends to introduce into evidence, together with a list of witnesses who would sponsor those library references. *See* Presiding Officer's Ruling No. R97-1/42. In response, the Postal Service has listed some 49 newly-sponsored library references and more than a dozen sponsoring witnesses, including three new witnesses, in these proceedings. The Postal Service also stated that it was "in the process of inquiring about availability of individuals who would be in a position to testify as to other library references...." Clearly the list filed with the Commission is not final in any sense.

Therefore, as of today, with less than a week remaining in the originally scheduled hearings for cross-examination of Postal Service witnesses, the parties still have no idea of

what the Postal Service's case-in-chief will eventually contain. NDMS respectfully submit that it is critical for the Commission to take control of the proceedings, enforce its own rules, and allow intervenors a reasonable chance to scrutinize and test the Postal Service's various filings. It is hoped that the following will be of some assistance to the Commission in deciding among the alternatives it has to deal with the situation.

MOTION TO STRIKE

Pursuant to Rule 1.C. of the Special Rules of Practice in this docket, and in accordance with Presiding Officer's Ruling No. R97-1/42 (October 10, 1997), 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 the following specific testimony and portions of witness testimony, as well as library references offered in evidence by the Postal Service in this docket:

1. Lines 3-11 of page 24 of the direct testimony of Postal Service witness David R. Fronk (USPS-T32), and all testimony of witness Fronk on written and oral cross-examination referring to such direct testimony and/or the matters contained therein;
2. Pages 10-12 of the direct testimony of Postal Service witness Charles L. Crum (USPS-T28), and all testimony of witness Crum on written and oral cross-examination referring to such direct testimony and/or the matters contained therein;
3. 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, and all testimony of

witness Moeller on written and oral cross-examination referring to such direct testimony and/or the matters contained therein;

4. Supplemental Testimony of Postal Service Witness Sharon Daniel (USPS-ST-43), and all testimony of witness Daniel on written and oral cross-examination referring to such testimony and/or the matter contained therein;

5. Announced but unfiled direct Testimony of Postal Service Witness Mark Smith (USPS-ST-___), and all testimony of witness Smith on written and oral cross-examination; and

6. The following library references offered by the Postal Service in this proceeding: USPS-LR-106, 108, 112, and 114.

The grounds for this motion are (1) that the witness testimony and library references sought to be stricken from the record were incompetent as evidence or as foundation for evidence at the time they were originally filed by the Postal Service, (2) that such testimony and exhibits were admitted into the record, subject to review at this time, over the objections of NDMS, or may be admitted in evidence over the objections of NDMS, and (3) NDMS would be severely prejudiced by such testimony and library references if they are allowed to constitute a part of the record herein.

BACKGROUND

This motion to strike portions of the testimony of several Postal Service witnesses and library references 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 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 filing of the motion.¹ Subsequently, NDMS filed a motion to strike the testimony of Postal Service witnesses Crum and Moeller, based upon substantially similar grounds.² This motion rests upon the same legal reasoning as the previous NDMS motions to strike, in that the Postal Service has attempted to advance proposals for rate changes on the basis of testimony that has no proper evidentiary support in this proceeding. Accordingly, NDMS renew their motions to strike previously filed herein.

¹ 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 without prejudice, the Presiding Officer gave the Postal Service seven days to name a witness to sponsor and vouch for the accuracy and reliability of LR-H-112. *Approximately 13 days later, the Postal Service produced the Supplemental Testimony of Witness Daniel (USPS-ST-43) at a time, several months into this proceeding, when there was no opportunity to propound written discovery, and only a few days to prepare for cross-examination of that witness on October 9, 1997, which was deferred to October 23, 1997. Witness Daniel did not adopt LR-H-112 as submitted. Instead, it was materially amended, thereby constituting entirely new evidence after discovery has ended.*

² The motion to strike the testimony of witness Crum, whose testimony on the proposed surcharge for non-letter, non-flat Standard A mail is based on an unsponsored cost study, Library Reference H-108, and that of Mr. Moeller, whose testimony is based upon the testimony of Mr. Crum, was premised upon the fact that, under the Commission's rules, LR-H-108 could not be admitted as evidence in this proceeding. Thereafter, in view of the denial of the NDMS motion to strike the testimony of witness Fronk, and the apparent decision of the Presiding Officer to allow the Postal Service to sponsor previously unsponsored library references with supplemental testimony, *the motion to strike the testimony of witnesses Crum and Moeller was withdrawn.*

In addition, insofar as the Presiding Officer's rulings have permitted such testimony and/or library references into the record, NDMS hereby perfect their prior objections thereto, and submit that such testimony and/or library references should be stricken from the record.

In Notice of Inquiry No. 1, issued on September 17, 1997, the Commission invited the parties to address the question of the Postal Service's practices regarding the use of library references. A number of parties, including NDMS, responded. Several Comments articulated concerns similar to those expressed by NDMS in their previously-filed motions to strike, as well as in the NDMS Comments filed herein on October 3, 1997. *See, e.g.*, Parcel Shippers Association Response to Notice of Inquiry No. 1 (filed October 2, 1997); Newspaper Association of America Comments in Response to Notice of Inquiry No. 1 (filed October 3, 1997); OCA Response to Notice of Inquiry No. 1 (filed October 3, 1997).

The concerns expressed by the parties in their written Comments responding to Notice of Inquiry No. 1 were also addressed by the parties in their oral comments to the Commission at the proceedings herein on October 7, 1997. Several of the parties, reiterating concerns that had been expressed in their written Comments, noted the unfairness resulting from the Postal Service's practice of filing witness testimony relying on unsponsored library references and emphasized the importance of the Commission enforcing its rules designed to prevent such practices.³

³ There may have been some confusion introduced by the comments of certain parties regarding Federal Rule of Evidence 703. As explained at the October 7 hearing, the Rule 703 argument is a red herring, Rule 703, or any analogous rule of evidence, would not even come into play in the situations complained of by NDMS in this proceeding, which involve clearly inadmissible documents and testimony.

Subsequently, although the Presiding Officer decided not to restrict witness testimony that relied on unsponsored library references or that was submitted long after the time required by Rule 53 of the Commission's rules of practice, he indicated that his rulings were not necessarily final. Parties were directed to file, on or before October 16, 1997, any further motion addressing the problems caused by these practices of the Postal Service in this docket. This NDMS motion is in response to that directive.

ARGUMENT

Overview: Only Clearly Inadmissible Testimony and Exhibits Are Sought to be Excluded

This motion argues only for the striking of testimony and exhibits that have been offered in clear violation of the Commission's rules. Although motions to strike testimony are considered requests for extraordinary relief, such motions should be granted when the circumstances warrant, as they do here.

The proffered evidence that NDMS seeks to strike is comprised of testimony and exhibits that were submitted in clear violation of the rules. The testimony of the Postal Service witnesses that NDMS seeks to strike is testimony that either (a) **admittedly is not based upon record evidence** or (b) is based on evidence that was **proffered months after the filing** of the Postal Service's request for a recommended decision, **in violation of Rule 53** of the Commission's rules of practice (39 C.F.R. sec. 3001.53). The Postal Service exhibits that NDMS seeks to exclude from the record (along with testimony regarding those exhibits) are documents that **could not possibly be admissible as evidence in this proceeding**, because they are unsponsored library references. See Rule 5, Special Rules of Practice.

According to the Commission's Rules, the Postal Service's Testimony and Exhibits in Question Are Not Admissible in Evidence

As NDMS have consistently argued in this matter, unsponsored library references, such as LR-H-112, which witness Fronk attempted to incorporate by reference, or LR-H-108, which witness Crum attempted 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, not just the Postal Service, but any party, would be able to use library references, to avoid scrutiny of their case.

The Postal Service appears to believe that "sponsorship" of a library reference is not an important consideration to determine what is record evidence. This view disregards the Commission's rules. 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:

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).⁴

Rule 5 of the Special Rules of Practice governing this docket is directly on point and should be dispositive of the fundamental question of the inadmissibility of LR-H-106, LR-H-108, LR-H-112, LR-H-114, and any other library references not sponsored by witnesses as of the commencement of this proceeding. 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).]

At the time the Postal Service filed its request for a recommended decision and this docket was initiated, LR-H-106, LR-H-108, LR-H-112, and LR-H-114 had not been sponsored and vouched for by any Postal Service witness. Thus, these documents were not capable of constituting record evidence in this docket. Since the documents could not constitute record evidence, the testimony of the various Postal Service witnesses attempting to incorporate the documents into their testimony by mere reference (thereby shoehorning the

⁴ 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, now Exhibit K of USPS-T-28). 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 or Exhibit K, and witness Crum's derivative testimony has no solid basis on which to rest. *Nor were the section 31 (k) requirements met for Library References 106, 112 and 114.*

documents into the record as the exclusive bases for certain rate increases proposed by the Postal Service) should not be allowed into the record.

Even if silence regarding sponsorship can be viewed as creating an ambiguity, any ambiguity was removed when the Postal Service witnesses denied under oath that they (or any other Postal Service witness) were sponsoring these studies. See Responses to NDMS/USPS-T28-1, NDMS/USPS-T32-1, NDMS/USPS-T32-2, and NDMS/USPS-T33-20 (redirected to witness Treworgy).

The attempts by the Postal Service to rehabilitate its case with new witnesses, new testimony and new library references, months after the case had been filed, should not be allowed. Rule 53 expressly provides that the Postal Service shall file "all" of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission "simultaneously" with the filing of the formal request for a recommended decision. The Postal Service's filing is governed by the Commission's rules of practice. This constant flow of changes to testimony and library references, many of which are substantial, effectively constitutes a new filing — especially when coupled with a series of new, "supplemental" testimonies. The rules prohibit the Postal Service from twisting the Presiding Officer's ruling allowing them to identify sponsors for existing Library References into carte blanche approval for filing a substantially new case **during and following** oral cross-examination of its witnesses.

Allowing the Postal Service's Revised Evidence into the Record Would Subvert the Rules of Practice and Prejudice NDMS

To date, the Presiding Officer's rulings in this proceeding reflect the relaxation of the rules of practice, which has resulted in substantial prejudice to NDMS (and, evidently, other intervenors as well, according to the Comments in Response to Notice of Inquiry No. 1). Their current effect has been to allow the Postal Service to modify its initial evidentiary presentation in this case so as to effectively deprive the intervenors of meaningful discovery and cross-examination.

In arguing against the original NDMS motion to strike in this proceeding, the Postal Service essentially admitted (and still tried to justify) a 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, we would submit, was attempting effectively to 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.⁵ Obviously, however, this strategy violates the rules, and taints the evidentiary record. The Presiding Officer appears to have recognized this danger in his Ruling No. R97-1/42.

⁵ See response of witness Crum to NDMS/USPS-T28-1(c-d), where he reveals this strategy by saying "I understand that my responses can be entered into the record."

Presiding Officer's Ruling No. R97-1/20 (September 17, 1997) ("POR No. 20") also addressed this issue, and in particular the Postal Service's position that it was not required to name sponsors of library references. The Presiding Officer 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.]

Although POR No. 20 denied NDMS' motion to strike witness Fronk's testimony *without prejudice* to NDMS' right to refile, it allowed the Postal Service an opportunity to sponsor the theretofore unsponsored library reference. The Postal Service then submitted Supplemental Testimony of Sharon Daniel (USPS-ST-43), which purported to cure the defects in Library Reference H-112. This occurred on or about September 30, 1997, months after initiation of this case by the Postal Service, almost two weeks after the close of written discovery of the Postal Service's case, and only days before scheduled cross-examination of the Postal Service's witnesses.

That was only the beginning. NDMS filed its motion to strike with respect to certain portions of the testimony of Postal Service witnesses Crum and Moeller, based upon their complete reliance upon unsponsored library references,⁶ and other parties filed motions to

⁶ NDMS argued that the Postal Service's refusal to identify a sponsoring witness to LR-H-108 would have the same "bootstrapping" effect as the Postal Service had threatened in the case of witness Fronk and LR-H-112. Therefore, they moved 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, NDMS argued that 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.

strike other Postal Service testimony in this proceeding, based upon similar arguments. The Postal Service has responded by offering new testimony (Crum Exhibit K) and attempting to sponsor or offer new testimony to rehabilitate dozens of previously unsponsored library references (*see* USPS Response to Presiding Officer's Ruling No. R97-1/42, October 14, 1997).

Previous attempts to rehabilitate library references, such as witness Daniel's supplemental testimony, and witness Crum's Exhibit K, have incorporated changes to the data previously filed under the library references. Thus, permitting such amended testimony to be entered into the record has already substantially altered the Postal Service's case. If the Commission were to permit the Postal Service to incorporate several dozen "updated" library references into the record as testimony, in essence a new case will have been filed more than three months after the initial filing. Thus far, the Presiding Officer has allowed the modified Postal Service testimony to be received for the record, although he has indicated that the matter has not been finally decided, thereby permitting this and perhaps other motions to be filed (Tr. 3/546, ll. 2-14; 3/547, ll. 15-20).

The Postal Service's Modified Testimony Would Severely Prejudice the Intervenors and Should Not Be Part of the Record

The critical issue, at this stage of the proceeding, is not simply whether the original Postal Service presentation was defective — requiring proffered testimony relying upon unsponsored library references (as well as the library references themselves) to be ruled inadmissible — but also whether the Postal Service should be precluded from rehabilitating its defective case. NDMS submit that there is no other reasonable choice.

From the very beginning of a postal rate case, time is of the essence. By statute, the Commission's opinion and recommended decision must be rendered within a period of 10 months. An entire schedule of proceedings is promulgated which, after giving the parties an opportunity to request changes based upon perceived discovery and briefing needs, is finalized and faithfully observed. Discovery of the Postal Service's case is critical to intervenors, such as NDMS, who would be substantially affected by the Postal Service's proposals. Thus, Rule 53 of the Commission's rules of practices requires that the Postal Service's case-in-chief be **complete** at the time the Postal Service files its request for a recommended decision. To allow the Postal Service to modify its case substantially two or three months (or more) after it is filed subverts the rule and negates its salutary effect. In this case, for example, permitting library references H-106, 108, 112, and 114 — which were unsponsored by the Postal Service and which Postal Service witnesses denied under oath they or any one else were sponsoring throughout most of the critical period for discovery of the Postal Service's case-in-chief — to become part of the record clearly would undermine and contradict the Commission's rules. To allow into the record *new* Postal Service testimony attempting to sponsor such library references, and/or other Postal Service testimony relying on the previously unsponsored library references, would equally subvert the clear intent of the rules, and would obviously prejudice NDMS, which would be deprived of discovery and a reasonable period to prepare its own case relative to the Postal Service's proposals.

It should be emphasized that the intervenors are not seeking to gain an advantage by proceeding according to the rules. They have diligently labored to investigate the proposals in light of their own interests, and to argue to the Commission whether the proposals, based upon

the legitimate evidence in the case, are justified in light of the statutory criteria. *See* 39 U.S.C. sections 3622(b) and 3623(c). If the record evidence changes as the time for discovery and cross-examination of postal witnesses is ending, denying an adequate period of time to investigate and discover the case, the substantial prejudice to the intervenors' interests should be obvious. By contrast, the Postal Service has had total control over the submission of its own evidence in this case. Any prejudice that it may suffer as a result of the Commission's exclusion of some of its evidence, filed far too late in the process, is justified.

To the extent that the Commission somehow may feel that allowing late evidence of the Postal Service is somehow more fair or more appropriate, by allowing as full or expanded a record as possible, NDMS would respectfully ask the Commission to reconsider. The record in any case is a function of time and effort. It can change considerably, depending upon how much time the parties have to investigate and prepare. If the Postal Service were permitted to submit a substantially new record mid-way through the case, by filing revised and/or supplemental testimony, the record would not be improved. On the contrary, the Postal Service's final case would not have been rigorously examined by the other parties, and in that sense it would be less complete than if it had been filed by the Postal Service at the start of the docket.

Of course, another alternative exists to striking the testimony of postal witnesses whose evidence relies on unsponsored library references or newly-minted testimony. The Commission has authority, at 39 U.S.C. sec. 3624(c)(2), to promulgate a new schedule for this docket. As noted above, the Postal Service has violated 39 C.F.R. sec. 3001.53, which expressly provides that the Postal Service shall file "all" of the prepared direct evidence upon

which it proposes to rely in the proceeding on the record before the Commission "simultaneously" with the filing of the formal request for a recommended decision. Whenever the Postal Service, has filed all the supplemental testimony referenced by its Response to Presiding Officer's Ruling No. R97-1/42 (October 14, 1997), the Commission can legally and appropriately promulgate a new schedule for this docket, starting the deliberative process where it belongs, with written discovery against the Postal Service. The Commission could terminate hearings as of October 22. The Postal Service could be given some time to file all the supplemental testimony it intends to file, and sponsor all of the library references it intends to sponsor in this docket. The Postal Service should be required to complete its evidentiary presentation by a date certain. The parties could then be given perhaps a month to file discovery concerning the Postal Service's case. The oral cross-examination relating to newly-filed supplemental testimony and library references would follow. Other deadlines could be postponed accordingly.⁷

CONCLUSION

The Commission's Rules of Practice impose a burden on the Postal Service: the Postal Service must ensure that every proposal it makes is adequately supported by evidence that is both competent and on the record. The Postal Service has attempted to avoid this burden, enlisting the Commission's help in supplementing the evidentiary record. The Commission cannot serve as impartial fact finder in postal ratemaking and classification dockets if it is

⁷ Oral cross-examination of witness Tayman on October 16 made it abundantly clear that the Postal Service would suffer no financial hardship were the Commission to re-promulgate or amend the current docket schedule. See Tr. 9/____.

investing its time and effort to fill the gaps in the Postal Service's case. The Commission should return to its statutory role, and enforce its rules of practice — even against the Postal Service.

For the foregoing reasons, NDMS submit that the previously-identified testimony of Postal Service witnesses Fronk, Crum, Moeller, Daniel, and Smith, and Postal Service library references 106, 108, 112, and 114 should not be received into evidence in this proceeding if it is continued under the existing 10-month statutory limit, and if already received, should be stricken, along with the testimony of any other witnesses herein which rely upon such testimony or exhibits. In the alternative, the Commission must reset the calendar so as to not prejudice and disadvantage intervenors.

Respectfully submitted,



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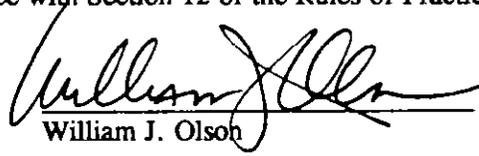
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CERTIFICATE OF SERVICE

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

October 16, 1997