

DOCKET SECTION

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

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POSTAL RATE AND FEE CHANGES, 1997)
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Docket No. R97-1

**MOTION OF THE MCGRAW-HILL COMPANIES THAT
PORTIONS OF THE REBUTTAL TESTIMONY BY USPS
WITNESS ORLANDO IN DOCKET NO. R84-1 BE ENTERED
INTO THE RECORD AS EVIDENCE IN THIS PROCEEDING
(March 23, 1997)**

At the invitation of the Presiding Officer (Tr. 35/18936), and pursuant to Rule 1(D) of the Special Rules of Practice, and for the reasons set forth below, The McGraw-Hill Companies, Inc. ("McGraw-Hill"), through its undersigned counsel, hereby respectfully moves that the following portions of rebuttal testimony of Postal Service witness James E. Orlando in Docket No. R84-1 be entered into the record as evidence in this proceeding: pp. 1-2, pp. 5-9 (through line 15), pp. 19 (line 10) - 20, and pp. 25-27.

Summary

Postal Service witness Young broadly relied on the R84-1 testimony of Postal Service witness Orlando at *two* distinct points in witness Young's testimony -- including the same paragraph in which witness Young concluded that "unused capacity is an inherent by-product" of efficient mail transportation. The Postal Service was therefore plainly wrong in objecting to McGraw-Hill's oral cross-examination of witness Young, based on the R84-1 Orlando testimony, on grounds that witness Young's written testimony invoking the Orlando testimony was somehow unrelated to the issue of unused

capacity that was discussed in both testimonies. Indeed, witness Young had confirmed a direct relationship on oral cross-examination.

The designated portions of the R84-1 Orlando testimony should be admitted into evidence in this case under two distinct legal theories: (1) because witness Young expressly relies on it in his written testimony, the Orlando testimony is analogous to a library reference for evidentiary purposes; and (2) the Orlando testimony is independently admissible under Special Rule 1(D), particularly since the predicate for seeking its admission did not arise until the filing of witness Young's testimony that relied on it. The Postal Service will suffer no prejudice. The designated portions of the R84-1 Orlando testimony are directly relevant to material issues in this case. Witness Young testified on oral cross-examination that the relevant portions of the R84-1 Orlando testimony had not been undermined by the passage of time. To the contrary, one relevant portion of that testimony has been bolstered by the testimony of Postal Service witness Nieto in this case.

I. Witness Young Broadly Relied -- at Two Distinct Points in His Rebuttal Testimony -- on the R84-1 Testimony of Witness Orlando.

In his written rebuttal testimony in this proceeding, Postal Service witness Young states:

Mr. Ball (Tr. 22/11387) compares Postal Service purchased highway transportation to the transportation generally available in the private sector. As James Orlando (Docket No. R84-1, USPS-RT-6) pointed out very clearly, such comparisons fail to take into account significant differences between our operations and private sector carriers. The Postal Service requires its highway transportation contractors to provide consistent, reliable and secure service everywhere, every day.

Tr. 35/18859 (lines 4-10) (emphasis added). Postal Service witness Young thus broadly invoked the R84-1 testimony of Postal Service witness Orlando in order to rebut certain testimony by Florida Gift Fruit Shippers Association ("FGFSA") witness Ball in this proceeding.

Witness Ball stated in his direct testimony that the Postal Service's purchased highway transportation system "has and uses capacity in excess of that needed for moving the mail." Tr. 22/11366 (lines 9-10).¹ This testimony was the subject of written cross-examination by the Postal Service, Tr. 22/11381 (USPS/FGFSA-T2-8),² which in turn was the subject of the following oral cross-examination of witness Ball by the Postal Service (to which witness Young referred in invoking the R84-1 testimony of witness Orlando):

Q. Okay. If I could refer you now to your response to USPS No. 8.

A. Yes.

Q. In preparing your testimony, did you read the testimony of postal operations experts from prior cases? I am referring specifically to James Orlando, from R80 or R84.

¹Witness Ball went on to state in this regard: "The costs of excess capacity are increasing. These costs have no causal relationship to the mail being handled, but rather [are] the result of the management decision to select and contract for excess capacity vehicles. This excess capacity is not a one-time or isolated situation, but appears to be of a continuing nature. * * * It appears that the management decision to maintain contracts for purchased transportation to provide capacity far in excess of the need to transport mail results in costs which are not caused by any class or subclass of mail and, therefore, should not be classified as attributable costs, but rather should be a part of institutional costs." Tr. 22/11366 (lines 13-16, 19-22).

²The written cross-examination, insofar as relevant here, was as follows:

"On page 13, lines 7-8 [9-10] of your testimony, you state that the 'USPS has and uses capacity in excess of that needed for moving mail.'

a. Please describe what you regard as the amount of capacity 'needed for moving the mail.'

* * *

ANSWER

a. The capacity to handle the average volume on the heaviest portion of the trip. Peak volumes could be handled by extra trips, probably at lower total cost."

A. No, I did not.

Q. So you would not know that he testified regarding the efficient procurement of transportation and how that is consistent with unused capacity, is that correct?

A. I would not be familiar with that, no.

Q. In your response to Interrogatory No. 8 from the Postal Service, you indicate in your answer to Part A that peak volumes could be handled by extra trips.

A. Yes.

Q. Is it your understanding that they are?

A. No, it is not my understanding that they are. My response to this is a response from private industry. It is what we -- it is what private industry would do if we were running that transportation system. We would plan our transportation, our average daily transportation, based on average daily volume, not on peak annual volume. When peaks occurred, we would contract out or arrange some different way to handle peak volume with specific -- specific trips.

Q. Have you analyzed the point at which it becomes more economical from the Postal Service's standpoint to add an extra trip, rather than obtaining a larger vehicle?

A. No, I have not.

Tr. 22/11386 (line 18) - 11387 (line 20) (emphasis added).

Furthermore, at an earlier point in his written testimony, witness Young again addressed this same testimony by FGFSa witness Ball (referring this time to the written cross-examination), and again invoked (by cross-reference) the R84-1 testimony by Postal Service witness Orlando:

. . . I disagree with Mr. Ball's assertion, made on behalf of the Florida Gift Fruit Shippers, that it is necessarily more efficient to add trips than to increase truck size or make other routing adjustments when additional capacity is needed. ("Peak volumes could be handled by extra trips, probably at lower total cost." Tr. 22/11381 [USPS/FGFSa-T2-8].) I do not dispute that this may be Mr. Ball's experience when purchasing

transportation for his association's members, but, as I explain below, the transportation service he is buying is inherently different from the transportation the Postal Service buys.³ If the Postal Service were to purchase additional transportation to meet anticipated and unanticipated peaks, I am confident, based on my experience, that our transportation costs would increase. In addition, the administrative complexity of such a strategy would add cost and confusion to the procurement of this transportation, and would almost certainly lead to service problems. The fact that we have less than full loads on some legs of transportation is not evidence of inefficiency. Rather, unused capacity is an inherent by-product of the provision of reliable, economical service.

Tr. 35/18857 (line 11) - 18858 (line 4) (emphasis added).

In summary, Postal Service witness Young twice invoked the R84-1 testimony of Postal Service witness Orlando in order to:

- rebut the testimony of FGFSAs witness Ball that unused capacity in the Postal Service purchased highway transportation network is not "needed for moving the mail" (Tr. 22/11366 [lines 9-10], 11381 [USPS/FGFSAs-T2-8]); and
- show that due to unique aspects of the Postal Service purchased highway transportation network (Tr. 35/18857 [lines 15-18], 18859 [lines 4-8]), such "unused capacity is an inherent by-product of the provision of reliable, economical [mail transportation] service." (Tr. 35/18858 [lines 2-4]).

Postal Service counsel had made the same point on oral cross-examination of FGFSAs witness Ball, asserting that in the R84-1 Orlando testimony, witness Orlando "testified regarding the efficient procurement of transportation and how that is consistent with unused capacity." Tr. 22/11386 (line 21) - 11387 (line 2) (emphasis added). Indeed, witness Young himself confirmed that like the Orlando testimony, his conclusion that "unused capacity is an inherent by-product of . . . reliable, economical service" was

³This is "explain[ed] below" by witness Young at Tr. 35/18859, where witness Young broadly invokes the R84-1 testimony of Postal Service witness Orlando.

based on his testimony that the Postal Service's highway purchased transportation network is unique. Tr. 35/18921 (line 32) - 18922 (line 4).

II. All Relevant Portions of the R84-1 Orlando Testimony Should Be Admitted Into Evidence Here, Both as Analogous to a Library Reference and under Special Rule 1(D).

All of the designated portions of the R84-1 testimony by witness Orlando should be admitted into evidence in this proceeding under each of two distinct legal theories. First, because Postal Service witness Young expressly relies on it in his rebuttal testimony in this case, the R84-1 Orlando testimony is analogous to a library reference for evidentiary purposes. As in the case of a library reference that is relied upon in Postal Service testimony, all relevant portions of the R84-1 Orlando testimony should be admitted into evidence in order to permit a full evaluation of witness Young's testimony. As the Commission recently declared in this regard, "when the Postal Service . . . provides detailed support underlying . . . rebuttal evidence[,] [a]ll or part of such a submission may be designated for admission into the evidentiary record . . . upon subsequent motion by a participant." Order No. 1201 at 10 (Nov. 4, 1997). Indeed, but for the fact that the Orlando "library reference" was relied upon in rebuttal testimony, intervenors could readily have entered it into the record through discovery. *See id.*

Second, the R84-1 Orlando testimony is independently admissible into evidence under Rule 1(D) of the Special Rules of Practice in this docket, which specifically contemplates that testimony received in prior proceedings may also be admitted in this proceeding. While the Rule provides that a participant must normally so request at least 28 days before the date for filing the participant's direct case,⁴ the predicate for seeking

⁴McGraw-Hill has been conscious of this requirement. On October 20, 1997 -- 28 days prior to the original date for filing its direct case -- McGraw-Hill timely filed a request (which was granted) to
(continued...)

admission of the R84-1 Orlando testimony did not arise until well thereafter, when the Postal Service filed witness Young's rebuttal testimony that expressly relied on the R84-1 Orlando testimony.⁵ Applicable here is the salutary principle that "[w]henver possible, the Commission will strive to avoid excluding relevant information for procedural reasons, especially when such a step is not necessary to assure due process to all participants." Order No. 1201 at 12.

The Postal Service will not be prejudiced by the admission into evidence of the designated portions of the R84-1 Orlando testimony. The Postal Service cannot legitimately complain of the admission into evidence of material on which Postal Service witness Young relied in his testimony. Nor can the Postal Service fairly object to the inclusion in the record of all directly related and relevant portions of the Orlando testimony. This point is particularly compelling because just as the Postal Service is the only source of the vast preponderance of data needed for rate cases (*see* Order No. 1201 at 12), the Postal Service is the only source of the type of information presented in the R84-1 Orlando testimony.

This is not at all like the situation where the Postal Service seeks to use the testimony of one of its witnesses in a prior proceeding in a manner adverse to a participant in a current proceeding absent opportunity for cross-examination. Because the Orlando testimony was sponsored by the Postal Service itself in R84-1, it constitutes

⁴(...continued)

incorporate in the record in this case an interrogatory response from MC97-2 that was relied upon by witness Bradley in his transportation testimony in this case. *See* The McGraw-Hill Companies' Motion That Evidence Filed in Another Proceeding Be Entered Into the Record in This Proceeding (October 20, 1997).

⁵To the knowledge of the undersigned counsel, the first reference to the R84-1 Orlando testimony in this case was during oral cross-examination of FGFSa witness Ball. Tr. 22/11386-87.

an admission on the part of the Postal Service for purposes of this case (although the Commission may of course determine the weight of such testimony in this case). *See* Federal Rule of Evidence 801(d)(2). The Postal Service therefore cannot object to inclusion of any portion of the Orlando testimony in the evidentiary record of this proceeding so long as such testimony has any relevance to any material issue in this proceeding (even apart from the extent to which such testimony was relied upon by Postal Service witness Young in this case).

In view of its adoption by Postal Service witness Young in this proceeding, the R84-1 Orlando testimony is not rendered irrelevant due merely to the passage of time. Indeed, witness Young testified on oral cross-examination with reference to the Postal Service's purchased highway transportation system: "In terms of change, the contracting process, the philosophy about meeting the needs of customers, and how we drive to do that, that has not changed since 1984." Tr. 35/18908 (lines 19-22). With reference to the R84-1 Orlando testimony, witness Young testified on oral cross-examination: "I don't see where things have changed dramatically, so I think it should be very consistent" with witness Young's testimony in this case. Tr. 35/18924 (line 25) - 18925 (line 2).

III. Each Designated Portion of the R84-1 Orlando Testimony Is Relevant to Material Issues in This Proceeding, and Relates Directly to the Rebuttal Testimony of Postal Service Witness Young.

As demonstrated in part I, *supra*, Postal Service witness Young (at two points in his written testimony) expressly invoked the R84-1 testimony of Postal Service witness Orlando (without citation to particular pages thereof) in order to show that due to unique aspects of Postal Service's purchased highway transportation network (*see* Tr. 35/18857 [lines 15-18], 18859 [lines 4-8]), "unused capacity is an inherent by-product of the provision of reliable, economical [mail transportation] service." Tr. 35/18858 (lines

2-4). Witness Young himself confirmed on oral cross-examination the nexus between his testimony regarding unused capacity and his testimony regarding unique Postal Service transportation (for which he invoked witness Orlando). Tr. 35/18921 (line 22) - 18922 (line 4). Postal Service counsel had recognized a similar nexus, with reference to the R84-1 Orlando testimony, on oral cross-examination of FGFSa witness Ball. Tr. 22/11386 (line 21) - 11387 (line 2).

Counsel for the Postal Service was plainly wrong, therefore, in objecting to McGraw-Hill's oral cross-examination of witness Young (Tr. 35/18926-27, 18934) on grounds that his written testimony on page 8 (Tr. 35/18859 [lines 4-8]), expressly invoking the R84-1 Orlando testimony regarding unique aspects of Postal Service transportation, supposedly was not directly related to witness Young's ultimate point (expressed on page 7) in adopting the Orlando testimony -- to show that due to those unique factors, "unused capacity is an inherent by-product of . . . reliable, economic [mail transportation] service." Tr. 35/18858 (lines 2-4). Indeed, the Orlando testimony regarding those unique factors was also invoked (by cross reference) on page 6 of Mr. Young's testimony (Tr. 35/18857 [lines 15-18]) -- in the same paragraph that concluded on p. 7 with the statement that unused capacity was therefore an inherent by-product of efficient mail transportation service.

The Postal Service cannot divorce witness Young's rationale (*i. e.*, unique aspects of Postal Service transportation) from the conclusion he draws from that rationale -- that "unused capacity is an inherent by-product" of Postal Service transportation. The same rationale supports the same conclusion in the R84-1 testimony of witness Orlando, which witness Young both relied on in his written testimony (discussed above) and adopted in his oral testimony (discussed below). McGraw-Hill has designated for inclusion in the

evidentiary record in this case only those portions of the R84-1 Orlando testimony that directly relate to such rationale and conclusion.⁶

Designated pages 5 through 9 (line 15) of the R84-1 Orlando testimony relate to his rationale -- that Postal Service transportation is unique due to the statutory universal service obligation of the Postal Service, its service standards and windows, and a "procurement policy which will meet peak days" (p. 9, line 13). Designated pages 19 (line 10) through 20 elaborate on the latter factor. Designated pages 25 through 27 relate to conclusions drawn by witness Orlando, based on the uniqueness of Postal Service transportation, that are relevant to material issues in this case and reflect (or directly relate to) conclusions drawn by witness Young in this case. Witness Orlando concludes that unused purchased highway transportation capacity persists -- "regardless of what actual volumes are" (p. 26, line 24) -- due to such factors as peak volumes and service standards/windows, and is inherent in efficient operation. Accordingly, he concludes that unused capacity is "incurred on behalf of all classes of mail" (p. 27 line 3), and tends to be relatively constant over time on a system-wide basis. Witness Young has agreed with these rationales and conclusions (except that he was not permitted to complete his answer on the last point).⁷

The designated portions of the R84-1 Orlando testimony are directly relevant to material issues raised in this case. *See, e.g.,* Tr. 22/11823 (Alliance of Nonprofit

⁶McGraw-Hill has also designated witness Orlando's autobiographical sketch (so that his testimony can be appropriately weighed).

⁷*See* Tr. 35/18855, 18857 (transportation capacity determined by weekly peak volumes and by service standards and windows), 18857-58 (due to unique factors of Postal Service transportation, unused capacity is an "inherent by-product" of reliable and economical mail service), 18900 (lines 15-17) (cost of unused capacity not caused by mail volume), 18928 (adopting "rationales and reasoning" on pp. 25-26 of Orlando testimony), 18930 (lines 13-19) (agreeing with Orlando that unused capacity is incurred on behalf of all classes of mail).

Mailers witness Haldi) (no causal nexus between unused capacity and mail on truck); Tr. 27/14712-13 (McGraw-Hill witness Hehir) (costs of unused purchased highway transportation should be treated as institutional to the extent they are caused by statutory obligations of the Postal Service rather than particular mail classes, and/or are not volume-variable).⁸ The Presiding Officer indicated in his colloquy with Postal Service witness Bradley that the "Commission of 1994 and subsequently" is open to these issues. Tr. 7/3848. Witness Orlando's testimony regarding unused capacity was not fully credited by the Commission in Docket R84-1 (¶¶3288-94) for lack of quantitative data. That gap has been filled in this case by TRACS data indicating a high level of unused capacity that has remained relatively stable (on a system-wide basis) over time. *See* Tr. 7/3520-22 (Postal Service witness Nieto).

The Postal Service has consistently taken the position that the testimony of its transportation operations experts -- and the R84-1 Orlando testimony in particular -- is relevant to the transportation issues in this case. The R84-1 Orlando testimony is the best available expert operations testimony to complement the quantitative testimony of witness Nieto in this case. The Postal Service cannot have it both ways -- advancing the Orlando testimony (through witness Young) to justify unused capacity as an "inherent by-product" of efficient transportation comporting with statutory obligations, while ignoring witness Orlando's directly related conclusion (now supported by witness Nieto) that on a system-wide basis, unused capacity accordingly tends to be stable over time (rather than vary directly with volume).

⁸*See also* Tr. 22/11366 (FGFSA witness Ball), 11412 (FGFSA witness Merewitz).

Conclusion

For the foregoing reasons, the Presiding Officer should grant McGraw-Hill's motion that the designated portions of the R84-1 Orlando testimony be entered in the record as evidence in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document in accordance with section 12 of the rules of practice in this docket.

March 23, 1998

Timothy W. Bergin

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