Postal Regulatory Commission
Submitted 6/20/2012 4:18:58 PM
Filing ID: 83099
Accepted 6/20/2012

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

COMPLAINT OF AMERICAN POSTAL WORKERS UNION, AFL-CIO	Docket No. C2012-2

UNITED STATES POSTAL SERVICE
ANSWER IN OPPOSITION TO AMERICAN POSTAL WORKERS UNION, AFL-CIO MOTION FOR AN EMERGENCY ORDER

Pursuant to 39 C.F.R. § 3001.21(b), the Postal Service files this Answer in Opposition to the Motion for an Emergency Order filed by the American Postal Workers Union, AFL-CIO (APWU), on June 13, 2012 (Emergency Motion). For the reasons set forth below, the Postal Regulatory Commission (Commission) should deny the motion.

Preliminary Statement

On September 15, 2011, the Postal Service announced and explained its proposal to rationalize its processing network in order to increase efficiency and save costs.[1] Since that time, the Postal Service has twice sought comments on the plan through notices in the *Federal Register*[2] and has filed a request for an advisory opinion from the Commission. At all times, the Postal Service has been clear that it intended to implement its financially critical plan after the completion of notice-and-comment rulemaking. With the rulemaking now complete and with the first phase of implementation less than two weeks away, the APWU suddenly seeks to derail the plan on an allegedly "emergency" basis. The Commission should reject this attempt, which not only ignores the governing law and the factual history of the Postal Service's plan,

[1] *See* Postal Service Press Release PR 11-103, *Postal Service Faces New Reality* (Sept. 15, 2011).

[2] *See* Proposal to Revise Service Standards for First-Class Mail, Periodicals, and Standard Mail, 76 Fed. Reg. 58,433 (Sept. 21, 2011); Service Standards for Market-Dominant Mail Products, 76 Fed. Reg. 77,942 (Dec. 15, 2011).

but is premised on an alleged "emergency" that is entirely the product of the APWU's decision to wait until the eleventh hour to challenge the implementation of a plan of which it has long been aware.

Furthermore, under the guise of its position as a mailer,[3] the APWU's motion attempts to litigate its labor relations concerns regarding the consolidation of Postal Service processing plants before the Commission.[4] This is inappropriate under Titles 29 and 39 of the U.S. Code, the Code of Federal Regulations and the collective bargaining agreement between the APWU and the Postal Service, as well as being beyond the scope of the Commission's statutory authority.

For the reasons set forth below, including the Commission's lack of authority to grant extraordinary relief and the APWU's complete failure to satisfy its burden of proving any elements of its Emergency Motion or Complaint, the Commission should deny the Emergency Motion.

Background

On September 21, 2011, the Postal Service published an advance notice of proposed rulemaking (ANPR) in the *Federal Register* to revise 39 C.F.R. Part 121.[5] The proposed revisions would increase the service standards for some market dominant products, thereby permitting the Postal Service to reduce the number of facilities required to process mail. The ANPR stated that, if the Postal Service

[3] Throughout the Emergency Motion and underlying Complaint, the APWU presents its arguments both on its own behalf and on account of mailers as a whole. The APWU lacks standing to present claims on behalf of other mailers and may only present claims directly related to its use of the mail. *See Prosser v. Fed. Agric. Mortg. Corp.*, 593 F. Supp. 2d 150, 154 (D.D.C. 2009) ("Plaintiffs have no standing to bring a case on behalf of third parties who are strangers to [the] suit.").

[4] *See, e.g.*, Emergency Mot. at 6.

[5] Proposal to Revise Service Standards for First-Class Mail, Periodicals, and Standard Mail, 76 Fed. Reg. 58,433 (Sept. 21, 2011).

determined to go ahead with its plan, it would seek an advisory opinion from the Commission pursuant to 39 U.S.C. § 3661 and would publish a notice of proposed rulemaking. As a result of the ANPR, the Postal Service received over 4,200 comments, including comments from the APWU.

On December 5, 2011, the Postal Service filed a request for an advisory opinion from the Commission (Request) on its proposal to revise the service standards for market dominant products. The Commission docketed the case as Docket No. N2012-1. The Request also informed the Commission that the Postal Service was conducting parallel notice-and-comment rulemaking to revise the service standards. The Request noted that, pursuant to 39 C.F.R. § 3001.72, the Request was being filed "not less than 90 days" before implementation.[6] This permitted the Postal Service to begin implementation on March 5, 2012, but the Postal Service indicated that no changes to the service standards would occur before the rulemaking was complete and in no event before "some time in the first half of April 2012."[7]

On December 13, 2011, the Postal Service announced a voluntary moratorium on closing Post Offices and processing plants until May 15, 2012, to provide Congress and the Administration the opportunity to pass comprehensive postal legislation. The moratorium on closing processing plants delayed the proposed service changes until after May 15, 2012. Two days later, on December 15, 2012, the Postal Service published a Notice of Proposed Rule (NPR) in the *Federal Register* proposing new

[6] Request at 13.

[7] *See id.* at 13-14; *see also* Docket No. N2012-1, Direct Testimony of David E. Williams on Behalf of the United States Postal Service (USPS-T-1) at 15 n.16;

service standards for certain market dominant products.[8] In response to the NPR, the Postal Service received more than 100 written comments.

On January 12, 2012, the Presiding Officer of Docket No. N2012-1 established a procedural schedule under which final briefs were to be due on either July 9, 2012, or July 20, 2012, depending on whether surrebuttal testimony was later filed. The Postal Service moved for reconsideration of the procedural schedule on January 18, 2012 (Motion for Reconsideration), highlighting that the Postal Service's Board of Governors had "directed Postal Service management to pursue expeditious implementation of the service and operational changes" to realize the possible cost savings, and requesting that the Commission set a schedule which would allow an advisory opinion by mid-April 2012.[9] On January 31, 2012, the Commission denied the Motion for Reconsideration.[10]

On April 25, 2012, the United States Senate passed S. 1789, which included provisions regarding service standards for some market dominant products, such as language restricting the Postal Service's ability to reduce the overnight delivery standard for First-Class Mail and Periodicals that originate and destinate in the same geographic area served by a single sectional center facility and that are entered before the critical entry time (Intra-SCF Mail).[11]

On May 17, 2012, the Postal Service announced its intention to move forward with implementing new service standards[12] for market dominant products and

[8] Service Standards for Market-Dominant Mail Products, 76 Fed. Reg. 77,942 (Dec. 15, 2011).

[9] Mot. for Reconsideration at 3.

[10] Order No. 1183.

[11] S. 1789, 112th Cong. § 201 (2012). The House of Representatives has not passed complementary legislation, and so these provisions have not yet been signed into law.

[12] Throughout the winter and spring of 2012, the Postal Service responded to hundreds of interrogatories, produced thousands of pages of documents, updated testimony and library references and participated in

consolidating its network.[13] The changes, however, will now be implemented in two phases. The Postal Service indicated that on July 1, 2012, it will implement the first phase, which generally mirrors the language in S. 1789 regarding Intra-SCF Mail. The second phase will be implemented on February 1, 2014, unless the circumstances of the Postal Service change. The Postal Service published its final rule adopting this phased implementation plan on May 25, 2012 (Final Rule).[14]

On May 24, 2012, the Commission issued Order No. 1353, requesting information concerning the modifications from the proposal filed on December 5, 2012 as compared with the Final Rule. Order No. 1353 noted that the original proposal and the Final Rule "share many similarities," but that the Final Rule "includes additional information that appears to supersede" testimony that the Postal Service submitted in Docket No. N2012-1.[15] The Commission requested that the Postal Service file "up-to-date information" in Docket No. N2012-1, but did not suggest that the modifications were significant enough to render moot the original request, nor that it should close Docket No. N2012-1 and order the Postal Service to file a new request for an advisory

---

days of hearings before the Commission in the Docket No. N2012-1 case. During this period, the Commission and the parties were on notice that the Postal Service would update testimony and supporting documentation once it published its final rules on service standard revisions. *See* Order No. 1301 at 2.

[13] Postal Service Press Release PR 12-058, *Postal Service Moves Ahead with Modified Network Consolidation Plan* (May 17, 2012).

[14] Revised Service Standards for Market-Dominant Mail Products, 77 Fed. Reg. 31,190 (May 25, 2012) (to be codified at 39 C.F.R. pt. 121). The APWU incorrectly identifies May 21, 2012, as when the Postal Service published its Final Rule in the *Federal Register*.

[15] Order No. 1353 at 1.

opinion.[16] In fact, the Commission announced that it "intends to adhere to the original procedural schedule in [the N2012-1] docket."[17]

On June 12, 2012, the APWU filed a Complaint with the Commission, docketed as Docket No. C2012-2, requesting that the Commission issue a permanent injunction against the Postal Service implementing the Final Rule. The following day, June 13, 2012, the APWU filed its Emergency Motion requesting expedited relief.[18]

Argument

I. THERE IS NO REMEDY FOR ISSUANCE OF INJUNCTIVE RELIEF UNDER 39 U.S.C. § 3662(c) OR COMMISSION RULES OF PRACTICE AND PROCEDURE

There is no statutory or regulatory basis for the relief sought by the APWU in its Emergency Motion. Congress has not delegated to the Commission the authority to issue emergency injunctive relief, and the Commission has found no violation of law arising from the Postal Service's conduct described in the Emergency Motion. Rather, the plain language of section 3662(c) limits the Commission's remedial authority to retrospective relief. For this reason alone, the Commission should deny the relief requested in the Emergency Motion.

When Congress intends to provide an agency with the authority to issue injunctive relief, it delegates this authority expressly.[19] Although all the powers possessed by an agency require conferment from Congress, the requirement of express

---

[16] *Id.*

[17] *Id.* at 2.

[18] The APWU titles its filing as a "Motion for an Emergency Order;" however, the requested relief and the standard cited in its Emergency Motion is that of a party seeking a preliminary injunction. As such, the Postal Service will treat this filing as a request for a preliminary injunction from the Postal Service's implementation of its Final Rule on July 1, 2012.

[19] *See Trans-Pac. Freight Conference of Japan v. Fed. Mar. Bd.*, 302 F.2d 875, 880 (D.C. Cir. 1962). This is no less true for the Commission. *See* 39 U.S.C. 404(d)(5).

delegation is particularly strong with respect to the power to issue injunctive relief.[20] The APWU can cite no source for the Commission's alleged authority to issue emergency injunctive relief because none exists. Congress has not conferred the power to issue emergency injunctive relief on the Commission, and without this grant from Congress, the Commission cannot provide the relief sought in the Emergency Motion.[21]

The language of section 3662, which establishes the Commission's authority under complaint procedures, reinforces the Commission's lack of authority to issue emergency injunctive relief. The relief requested in the Emergency Motion is contrary to section 3662(c)'s requirement that the Commission find "noncompliance" before exercising its remedial power.[22]

Courts have rejected attempts to impose injunctive relief made by other regulatory agencies operating pursuant to complaint authority similar to that of the Commission.[23] Like the requirement that the Commission make a finding of noncompliance before issuing a remedy under its complaint authority, in *Trans-Pacific*

---

[20] *Trans-Pac.*, 302 F.2d at 880. ("We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency [in the absence of express authority].").

[21] In contrast, section 404(d)(5) of Title 39 provides an example of Congressional delegation of authority to issue preliminary relief. Section 404(d)(5) provides the Commission with the authority "to suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal." The comparison of these two sections demonstrates that Congress delegates authority for preliminary relief expressly where it intends for an agency to possess such authority.

[22] Section 3622(c) states: "If the Postal Regulatory Commission finds the complaint to be justified, it shall order that the Postal Service take such actions as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance (such as ordering unlawful rates to be adjusted to lawful levels, ordering the cancellation of market tests, ordering the Postal Service to discontinue providing loss-making products, or requiring the Postal Service to make up for revenue shortfalls in competitive products)."

[23] *See, e.g., Trans-Pac.*, 302 F.2d at 878-80 (reversing order of Federal Maritime Board imposing preliminary injunctive relief in the form of cease and desist order, where FMB's remedial authority was conditioned upon finding a violation of the Shipping Act, and no violation was found).

Freight Conference of Japan v. Federal Maritime Board, the Federal Maritime Board (FMB) only had remedial authority conditioned upon a finding of a legal violation.[24] The D.C. Circuit explained that where an agency's remedial authority is conditional, that agency cannot issue a remedy without satisfaction of the condition placed upon that remedial authority.[25] The court reversed a cease and desist order of the FMB directing a private enforcement body acting for a shipping industry organization to suspend its issuance or collection of fines "until the [FMB] issues a final order in this proceeding."[26] Section 22 of the Shipping Act defined the FMB's remedial authority, authorizing the FMB "to make such order as it deems proper, including an order for reparations to the complainant for the injury caused by the violation of the Act."[27] The FMB issued its cease and desist order before it issued a final order, and it had no opportunity to find a violation of the Shipping Act.[28] In reversing the FMB order, the D.C. Circuit explained that FMB's remedial authority under section 22 was conditioned upon the finding of a violation of the Shipping Act.[29] The FMB supported its cease and desist order with a finding of "irreparable injury," but not a violation of the Shipping Act, and thus the court found that issuance of the cease and desist order fell outside the FMB's authority.[30]

Application of the reasoning in *Trans-Pacific* to the current case compels a finding that APWU cannot obtain the emergency injunctive relief it requests in the Emergency Motion. Like the FMB, the Commission's remedial authority under

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

the complaint procedures is conditional on a finding of noncompliance or a legal violation. Here the APWU seeks issuance of emergency injunctive relief without completion of the complaint process and before the Commission has been given any opportunity to determine compliance, much like the cease and desist order that was granted and subsequently reversed by the D.C. Circuit in *Trans-Pacific.* The Commission should recognize the precedent of *Trans-Pacific* and apply its reasoning to deny the relief sought in the Motion.

The plain language of 3662(c) provides further support for the limits on the Commission's remedial authority described above. The remedial authority afforded the Commission by section 3662(c) is retrospective, and does not extend to preliminary relief. Section 3662(c) is titled "Action required if complaint found to be justified" and describes the Commission's remedial authority in complaint proceedings. The focus of section 3662(c) on the "effects" of Postal Service conduct clarifies the retrospective nature of the Commission's remedial authority. Generally, no effects emanate from an action not yet taken. The examples provided as part of section 3662(c) reinforce this retrospective nature. The acts of "adjusting," "cancelling," "discontinuing," and "making up for" all serve to reverse an action already taken.[31] It is significant that the plain language of section 3662(c) offers four examples of the Commission's remedial power, and none concern preemptive action. Consistent with this language, section 3691(d) provides that established service standards, and any violations of those service standards, are subject to review under complaint procedures. Importantly, this section does not provide for prospective relief. Accordingly, based on its plain language,

[31] 39 U.S.C. 3662(c).

section 3662(c) does not grant the Commission the authority to issue preliminary relief.[32]

II. THE APWU FAILS TO MEET THE STANDARD FOR A PRELIMINARY INJUNCTION

Even if the Commission had the authority to award injunctive relief, which it does not, the APWU has wholly failed to establish that it would be entitled to such relief. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[33] A plaintiff seeking a preliminary injunction must establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) that injunction is in the public interest.[34] As complainant, the APWU bears the burden of proof, a burden that it completely fails to satisfy on any of the four elements.[35]

A. The APWU Cannot Succeed on the Merits.

The APWU's motion advances two arguments on the merits: (1) that 39 U.S.C. § 3661 requires the Postal Service to receive and consider, not merely request, an advisory opinion from the Commission before implementing its network

[32] In fact, an earlier version of the Postal Accountability and Enhancement Act of 2006 (PAEA) would have given the Commission the power to suspend competitive negotiated service agreements pending the outcome of a complaint proceeding, based on factors substantially identical to the standards for issuing an injunction. See H.R. 22, 109th Cong., § 205 (2005) (as passed by House). Even this limited authority was not included in the final version of the PAEA, which clearly demonstrates that Congress considered, but rejected, giving the Commission injunctive authority under section 3662.

[33] *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

[34] *Id.* at 20; *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (agreeing with the Ninth Circuit that the Supreme Court's decision in *Winter* requires plaintiffs to prove likelihood on each factor of the preliminary injunction analysis).

[35] The APWU cites *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011), in support of application for a preliminary injunction; however, the court in *Sherley*, using the standard set forth in *Winter*, vacated the district court's grant of a preliminary injunction because the plaintiff failed to show likelihood of success on the merits. The APWU's Emergency Motion similarly fails to prove any likelihood of success.

consolidation plan, and (2) even if it does not, the modifications to the plan—*i.e.*, the so-called "New Rule" of May 2012—differ from the original proposal of December 5, 2011, and therefore requires the Postal Service to request a new advisory opinion. The APWU cannot succeed on the merits of either argument.

1. Section 3661 does not require the Postal Service to obtain an advisory opinion before implementing a nationwide service change; it requires the Postal Service to "request" such an opinion "within a reasonable time" before implementation, which it did.

The APWU's argument that the Postal Service cannot implement a change in its service standards without first *obtaining* an advisory opinion is belied by the language of section 3661(b). That provision makes clear that, before implementing a change in postal services that will affect service on a nationwide basis, it "shall submit a proposal" to the Commission "requesting an advisory opinion on the change."[36] Here, there is no dispute that the Postal Service submitted a request for an advisory opinion on December 5, 2011, and this request is the subject of Docket No. N2012-1, still pending before the Commission.

Nothing in the language of section 3661(b) states that the Postal Service may not implement its proposal before *receiving* the Commission's advisory opinion. And the APWU's inference that it does is foreclosed by section 3661(b)'s requirement that the Postal Service must submit its proposal "within a reasonable time prior" to the proposal's effective date. The Commission's implementing regulations further provide that the Postal Service must file its request for an advisory opinion "not less than 90 days in advance of the date on which the Postal Service proposes to make effective the

[36] 39 U.S.C. § 3661(b) (emphasis added); *accord* 39 C.F.R. § 3001.72 (Postal Service must "file . . . a formal request for such an opinion").

change."[37] If the Postal Service were required to wait for the Commission's decision before implementing a service change, then the phrases "within a reasonable time" or "not less than 90 days" (or any other set period of time after filing) would be unnecessary, [38] and it is a bedrock principle of statutory construction that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[39] If implementation could not take place until the Commission issued its advisory opinion, as the APWU suggests, it would have been pointless for Congress to require that a proposal be submitted a "reasonable time" before implementation. This is because the statute imposes no time period by which the Commission must issue an advisory opinion.[40]

Other provisions of the Postal Reorganization Act of 1970 (PRA), the same law in which section 3661(b) first appeared, confirm that Congress acted deliberately in not requiring the Postal Service to wait for an advisory opinion before implementing a service change. For example, at the same time it enacted section 3661, Congress enacted separate provisions governing Commission input on postal rates and classes.[41] These provisions created an elaborate scheme according to which, whenever the Postal

[37] 39 C.F.R. § 3001.72.

[38] Put differently, perhaps section 3661(b) could be read as ambiguous and open to alternate interpretation if it stated only that "[w]hen the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal [] to the Postal Regulatory Commission requesting an advisory opinion on the change."

[39] *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1094 (2011) (quoting *TRW Inc. v. Andrews*, 541 U.S. 19, 31 (2001)).

[40] Indeed, the statute does not require the Commission to issue an advisory opinion at all. *See* 39 U.S.C. § 3661(c).

[41] *See* PRA sec. 2, §§ 3621–3641, 84 Stat at. 760-64. (These provisions were repealed or substantially rewritten in 2006, *see* Postal Accountability and Enhancement Act ("PAEA"), Pub. L. No. 109-435, sec. 201, 203, 120 Stat. at 3200-05, 3207-09, but as contemporaneously enacted provisions, they can still help to shed light on the meaning of § 3661.)

Service wanted to make a change in postal rates or fees or in the mail classification schedule, it had to request a "recommended decision" from the Commission on the changes, which was issued after a hearing.[42] Congress created a safety valve, specifically authorizing the Postal Service to implement "temporary changes" to rates and classes if the Commission did not issue a decision within 90 days; such temporary changes could continue in effect for however long it took the Commission to issue its decision.[43] By contrast, Congress did not provide any similar safety valve for service changes under section 3661, confirming that Congress recognized that no safety valve was necessary; the plain language of section 3661 already permitted the Postal Service to move forward in the absence of an advisory opinion, so long as the effective date of the service change has arrived and a reasonable time has elapsed.

Similarly illuminating is 39 U.S.C. § 404(d), discussed in section I above, enacted as part of the PRA Amendments of 1976, which requires the Postal Service to provide written notice of its intent to close or consolidate a Post Office "at least 60 days prior to the proposed date of such closing or consolidation."[44] Any person served by such Post Office can appeal the Postal Service's decision to the Commission, which has 120 days to make a decision.[45] Congress expressly empowered the Commission to "suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal."[46] Section 404(d) confirms that, when Congress provides for Commission review of a Postal Service decision a set amount of time before the decision's effective

[42] PRA sec. 2, §§ 3622(a), 3623(b), § 3624(a), 84 Stat. at 760-61.

[43] *Id.* § 3641(a), 84 Stat. at 763.

[44] 39 U.S.C. § 404(d)(1).

[45] *Id.* § 404(d)(5).

[46] *Id.*

date, the Postal Service is not automatically constrained from implementing the decision until the Commission completes its review. Rather, Congress recognizes that, if the proposed date of closing or consolidation arrives during the pendency of a section 404(d) appeal, the Postal Service will be entitled to move forward unless it is prevented from doing so by an intervening order of the Commission. The fact that Congress did not authorize the Commission to "suspend the effectiveness of" a planned service change during a proceeding under section 3661, but did include such authorization in section 404(d), is further evidence that Congress did not intend the Commission to have the power to delay implementation of a service change so long as the Postal Service submitted the change to the Commission a "reasonable time" (*i.e.*, not less than 90 days) before its planned implementation date.

For all these reasons, it is hardly surprising that Chairman Goldway confirmed, in a Commission public meeting on March 14, 2012,[47] that the Postal Service need not wait for an advisory opinion before implementing a service change such as the one at issue in this case.[48]

The APWU expresses concern that, notwithstanding the language of the statute and implementing regulations, allowing the Postal Service to proceed in the absence of an advisory opinion would render the Commission's role "nugatory."[49] This concern is unfounded. First, much of the value of the section 3661 process, as well as the rulemaking proceeding, is in the exchange of views and information by the Postal

[47] Notice of Sunshine Act Meetings, 77 Fed. Reg. 12,889 (Mar. 2, 2012).

[48] *See* http://www.youtube.com/watch?v=V0_ZD_sWTZg (Mar. 14, 2012); *accord* James Cartledge, Hopes of a Senate Hearing for US Postal Reform "Within Weeks," Post & Parcel, Mar. 14, 2012, *available at* http://postandparcel.info/46411/news/companies/hopes-of-a-senate-hearing-for-us-postal-reform-within-weeks/.

[49] Emergency Mot. at 9.

Service and its stakeholders. That exchange has been taking place for more than six months since the Postal Service submitted its proposal; the APWU cannot seriously contend that it has not had an opportunity to be heard. Second, the Postal Service—largely as a product of the give-and-take mentioned above—has elected to implement its network rationalization plan in two discrete phases, with the final and more significant phase not occurring until February 2014, presumably long after the Commission will have rendered its advisory opinion in Docket No. N2012-1. It will accordingly have the benefit of the Commission's opinion, and will consider it before final implementation of the totality of the Postal Service's network rationalization plan.

But the issue here is what the statute requires, and it does not require the Postal Service to wait for an opinion before moving forward with its plan. It requires the Postal Service to request an advisory opinion and to do so a "reasonable time" before the proposal's implementation date. The Postal Service complied with these requirements. Here, the Postal Service submitted its request on December 5, 2011.[50] Although it argued then—over the objection of no one—that it could move forward 90 days later,[51] it stated that it would not implement its proposal until it completed the rulemaking affecting 39 C.F.R. Part 121, which it then expected to be completed by mid-March 2012.[52] As it turned out, the rulemaking ended in mid-May, and the Postal Service will go forward with its first phase of the plan on July 1, 2012—210 days after its request—and will go forward with the final phase on February 1, 2014—790 days after its request. Because the Postal Service complied with both requirements set forth in section

[50] *See* Request.

[51] *Id.* at 13.

[52] *Id.* at 13-14.

3661(b), and because well over ninety days (in fact more than six months) have passed since the Postal Service submitted its request, the Postal Service can proceed with its network rationalization plan and the APWU's argument that it violated section 3661(b) must fail.

2. The May 2012 modification to the Postal Service's proposal did not require it to submit a new request for an advisory opinion.

Most of the APWU's motion is devoted to its second argument, that the modification of the Postal Service's December 5, 2011 proposal somehow required it to abandon its initial request and initiate a brand new request for an advisory opinion.[53] This argument fares no better. Even assuming that in the abstract there may be circumstances in which subsequent modifications to a proposal are so dramatic that they can be tantamount to an abandonment of an original proposal and a replacement with a new proposal, the APWU does not come close to establishing such circumstances here.

The overarching difference between the proposed service standards submitted to the Commission in December 2011 and the May 2012 Final Rule is the phased implementation schedule. In the December 2011 proposal, the Postal Service stated that it expected to implement the new service standards in early April 2012, after the end of the rulemaking (which it then expected to end by mid-March) to amend 39 C.F.R. Part 121.[54] The rulemaking ended in mid-May, at which time the Postal Service announced that, rather than implementing the new service standards in one fell swoop, it would do so incrementally. Specifically, it would implement the standards in two

[53] Emergency Mot. at 7-11.

[54] *See* Request at 13-14.

discrete phases: an interim (and limited) phase in July 2012, and a final phase in February 2014.[55] The service standards remain fundamentally the same as those the Commission is presently reviewing in Docket No. N2012-1, other than the fact that final implementation will now begin in February 2014 rather than April 2012. The type of change that could support a claim that the Postal Service has effectively abandoned its original proposal and has replaced it with something new and fundamentally different is not present here.

The APWU baldly asserts that this more gradual implementation schedule is a "material" change,[56] but more useful than the APWU's rhetoric is its actions. Under the theory that the APWU now advances—that a change in implementation date is tantamount to an abandonment of a proposal and requires the Postal Service to submit a new proposal under section 3661—one would have expected the APWU to file a motion to dismiss Docket No. N2012-1 as moot once it became apparent that the new service standards would not be implemented in early April, the implementation date set forth in the Postal Service's December 5, 2011 proposal.[57] In fact, however, the APWU did not file a motion to dismiss then in early April. Nor did it file a motion to dismiss when the Postal Service announced in mid-May that implementation would begin in July and would occur in two phases. In fact, the APWU still has not sought to dismiss Docket No. N2012-1 as moot.

Nor has the Commission suggested that the change in implementation date is sufficient to moot Docket No. N2012-1 and to trigger an obligation for the Postal Service

[55] Revised Service Standards for Market-Dominant Mail Products, 77 Fed. Reg. 31190, 31192 (May 25, 2012) (to be codified at 39 C.F.R. pt. 121).

[56] Emergency Mot. at 10.

[57] *See* Request at 13-14.

to file a new request under section 3661. When it learned of the Postal Service's plan for a two-phase implementation, the Commission asked for additional information so that its advisory role would be "most informative to the Postal Service, Congress, and users of the mail."[58] The Commission did not suggest that the phased implementation of the network rationalization plan was so fundamentally different from its original proposal that it may warrant dismissal of the entire proceeding in Docket No. N2012-1. In fact, the Commission stated that it could consider and incorporate the evidence concerning the modified implementation plan within the "original procedural schedule" in Docket No. N2012-1.[59] In other words, far from questioning whether the modifications would warrant termination of its consideration of the Postal Service's request, the Commission correctly recognized that the modifications should not even delay its consideration of the plan.

Finally, the APWU's theory, if accepted, would undermine the primary utility of both the rulemaking process and the advisory-opinion proceeding. These proceedings are designed to be dynamic; they give interested parties an opportunity to exchange evidence and comments and to have the Postal Service consider them. In fact, the Postal Service's decision to implement its plan more gradually and in two phases was the direct result of arguments expressed by Postal stakeholders. If such revisions were to be deemed an abandonment of an earlier request for an advisory opinion, the Postal Service—particularly in matters such as the instant one where time is of the essence—would have every incentive to ignore all arguments for even the slightest modifications, knowing that any change would require the Postal Service to delay implementation and

[58] Order No. 1353 at 1.

[59] *Id.* at 2.

to start the section 3661 process anew. This would not only disserve the section 3661 and rulemaking processes, it would result in a waste of the time and resources already devoted to this matter by the Commission, the Postal Service, and other stakeholders.

B. The APWU Will Not Suffer Irreparable Harm in the Absence of Preliminary Relief.

The APWU alleges that it will suffer irreparable harm if the Postal Service implements its service standard change, however the alleged harms—to the extent that they are harms—are not irreparable, nor are they likely to be suffered by the APWU. Moreover, as indicated throughout the Emergency Motion, the APWU's primary concern is the impact that the service standard changes will have on its members as employees of the Postal Service, which is an inappropriate argument for this venue and beyond the authority of the Commission to resolve.

1. The APWU does not identify any irreparable harm that it is likely to suffer in the absence of a preliminary injunction.

The APWU asserts that an implementation of the service standard change on July 1, 2012 will harm the purpose of the advisory opinion process as required by section 3661 of Title 39, including limiting the role that both the public and the Commission play in the process.[60] This argument fails to show a likelihood of irreparable harm for a number of reasons. First, as described above in section II.A, the Postal Service's implementation of the Final Rule on July 1, 2012 is wholly consistent with section 3661, thus maintaining the integrity of the statute. Second, the public has already had meaningful opportunity to present views and opinions on the Postal Service's plans, as evidenced by the rulemaking process and the extensive record in

[60] Emergency Mot. at 11-12.

Docket No. N2012-1, as the APWU outlined in its Complaint.[61] Finally, at the APWU's own admission, the proceedings in Docket No. N2012-1 will continue after implementation of the rule, and if the Postal Service chooses to do so, it can adapt its service standard changes based on the Commission's advisory opinion once it is issued.[62] As such, the harm alleged is minimal at best, and is certainly not irreparable.[63]

Next, the APWU asserts that the Postal Service will "incur substantial costs in implementing the proposed changes and would incur additional substantial costs if it sought to undo the changes it had already made."[64] This argument also fails to show a likelihood of irreparable harm. First, the fact that the Postal Service may suffer harm does not satisfy the APWU's burden of showing that the APWU itself is likely to suffer irreparable harm.[65] Second, by definition, the costs potentially incurred by the Postal Service are not irreparable, as the alleged harm is monetary in nature.[66]

The APWU further asserts that mailers will suffer costs when adjusting their production and delivery schedules as a result of the new standard and any potential

[61] *See generally* Complaint at 10-14 outlining the responsive testimony provided by 17 witnesses.

[62] *See, e.g.* Emergency Mot. at 5 (recognizing that the Postal Service can seek "to undo the changes it had already made in response to the Commission's Advisory Opinion").

[63] *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") (quoting *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (1958)).

[64] Emergency Mot. at 12.

[65] *See Jayaraj v. Scappini,* 66 F.3d 36, 40 (2nd Cir. 1995) (vacating preliminary injunction in part because the plaintiff's allegations that the defendant, his government employer, would suffer harm by not reinstating him during the course of the law suit "presents no direct injury" to the plaintiff).

[66] *See Sampson*, 415 U.S. at 90 (1974); *see also Jayaral*, 66 F.3d at 39 ("Therefore, where monetary damages may provide adequate compensation, a preliminary injunction should not issue.").

reversal of the new standard.[67] This assertion does not satisfy the APWU's burden to show a likelihood of irreparable harm for the reasons cited above, namely that monetary damages are not irreparable and that these costs are not specifically borne by the APWU.

Further, the alleged harm resulting from adjustment of production and delivery schedules and alignment of operations with new delivery service standards and related changes does not constitute a hardship—it is a routine practice for any organization that conducts business as a mailer.[68] Additionally, at this point, many mailers have already begun adjusting their practices in anticipation of the July 1, 2012 implementation of the Final Rule. As such, delay in implementation, as requested be the APWU, would actually be a cost to many mailers.

The APWU does not identify a single specific harm it will suffer as a mailer by a potential delay in the delivery of its mail by a day or two. This is because such harm to the APWU as a mailer does not exist. As such, the APWU does not satisfy its burden of showing a likelihood of irreparable harm.

2. The APWU's attempt to litigate a labor relations matter before the Commission should be rejected.

The APWU's irreparable harm arguments are a veiled attempt by the APWU to litigate its labor relations concerns regarding the consolidation of Postal Service processing plants before the Commission. Specifically, the APWU is concerned that

> [T]housands of employees represented by APWU will have to change their work schedules and home schedules to conform to the new work schedules at processing facilities.

[67] Emergency Mot. at 12-13.

[68] It is telling that the APWU, and not a major user of the mail, filed this Emergency Motion alleging harm in the form of costs to mailers.

> Such changes will have financial and home life impacts on those employees. If the USPS were to reverse its decision after receipt of the Commission's Advisory Opinion the affected employees would then face additional financial cost and additional home life disruptions.[69]

Such concerns are beyond the scope of the Commission's jurisdiction, and the Emergency Motion should be rejected as inappropriate for this venue.[70]

The PAEA explicitly states that the Act shall not affect the "rights, privileges, or benefits of either employees or labor organizations representing employees" of the Postal Service. [71] This limit on the scope of the PAEA is further illustrated by the legislative history regarding 39 U.S.C. § 3662(a), where Congress limited the Commission's complaint jurisdiction to specific provisions of Title 39, and never considered including the chapters governing postal employment (chapters 10 and 12). Additionally, Congress eliminated from the scope of section 3662 any provision in chapters 1 and 4 that might implicate employment matters.[72] It is also telling that Congress has consistently maintained the title for section 3662 as "Rate and service

[69] *See, e.g.*, Emergency Mot. at 6.

[70] Not only is this allegation misplaced, it is also inaccurate as the Postal Service had made clear that it will meet its legal and contractual obligations to its labor unions. *See, e.g.*, Our Future Network – Frequently Asked Questions, available at: http://about.usps.com/what-we-are-doing/our-future-network/faqs.htm.

[71] Pub. L. No. 109-435, sec. 505(b), 120 Stat. 3236 (2006) (nothing in the Act "shall restrict, expand, or otherwise affect any of the rights, privileges, or benefits of either employees of or labor organizations representing employees of the United States Postal Service under chapter 12 of title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations within the United States Postal Service, or any collective bargaining agreement").

[72] Prior versions of the PAEA would have given the Commission broad jurisdiction over the entirety of chapters 1 and 4. *See, e.g.*, H.R. 22, 109th Cong. § 205 (2006); S. 662, 109th Cong. § 205 (2006). However, beginning with the approval of S. 662 (styled as an amendment to H.R. 22), Congress spelled out specific provisions in those chapters that were subject to the Commission's complaint jurisdiction and excluded reference to any provisions governing employment matters.

complaints."[73] As such, it is clear that the scope of section 3662(a) does not extend to labor relations matters.[74] Finally, the National Labor Relations Act explicitly provides that suits by a labor organization on behalf of its employees are properly brought in district court.[75]

For the Commission to grant this motion, or to even accept the underlying complaint as valid, would be contrary to the Commission's statutorily granted authority and inappropriate under Titles 29 and 39 of the U.S. Code.

C. The Balance of Equity Does Not Tip in the APWU's Favor.

If the Commission had the authority to grant the APWU's motion and decided to provide the requested relief, namely a preliminary injunction preventing the Postal Service from implementing the Final Rule until after the Commission rules on the APWU's complaint, the Postal Service would suffer real harms. Such a delay would be a severe impediment to the Postal Service's ability to ensure sustainable and comprehensive postal services for the public. The daily financial losses suffered by the Postal Service are significant and widely recognized, and any further financial loss caused by a delay in implementation of the Final Rule would also be significant.[76]

---

[73] *See Almandarez-Torres v. United States*, 523 U.S. 224, 232 (1998) (noting that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute") (internal quotations omitted).

[74] 39 U.S.C. § 3662(a) provides that complaints may be filed by persons who believe that "the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601 . . . ." Consistent with sec. 505(b) of the PAEA, none of the enumerated provisions address labor issues.

[75] 29 U.S.C. § 185 ("Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.").

[76] *See, e.g.*, Letter from Sen. Tom Carper filed in Postal Regulatory Commission, June 15, 2012, Docket No. RM2012-4 ("At a time when the Postal Service is reporting losses of $25 million a day and is doing all it can to head off financial collapse, there is a clear need for postal management to take a number of steps to streamline operations and adjust the Postal Service's network and product offerings to reflect the

Contrary to the APWU's assertion, the Postal Service has made clear from the beginning of Docket No. N2012-1 that implementation of the service standard changes must take place promptly.[77]

Even a short-term delay in implementation will have real consequences for the Postal Service. The Final Rule provides that the Postal Service will suspend implementation from September through December 2012.[78] Given this schedule, a delay in the July implementation of the Final Rule could mean a delay in implementation until 2013. Further, a new implementation date would require a significant overhaul to the Postal Service's current operations plans, leading to even more expense to the Postal Service in terms of costs and resources.

The APWU asserts that the effect on the USPS in a delay in implementation is limited.[79] This assertion does not take into consideration the costs associated with a delay in implementation as outlined above. And, once again, the APWU fails to identify any harm that the APWU suffers in its capacity as a user of the mails, or that mailers generally, will suffer due to a delay in the delivery of its mail by a day or two to balance against the Postal Service's interest in the swift implementation of its service standard changes.

Finally, any risk of harm to the APWU and other mailers that may exist if the Postal Service moves forward with the Final Rule on July 1, 2012 is mitigated by the Postal Service's decision to implement the service standard changes in phases, as the

---

changing demand for hard-copy mail"); *see also* Direct Testimony of Stephen Masse (USPS-T-2) from Docket No. N2012-1 at 5-10 describing the recent and current financial troubles of the Postal Service.

[77] *See, e.g.*, Request at 13-14.

[78] Revised Service Standards for Market-Dominant Mail Products, 77 Fed. Reg. 31,190, 31,192 (May 25, 2012) (to be codified at 39 C.F.R. pt. 121).

[79] Emergency Mot. at 13.

phased implementation provides the Postal Service with enough flexibility to revisit the second phase of the implementation plan set forth in the Final Rule if necessary.[80]

D. A Preliminary Injunction Is Not in the Public Interest.

The issuance of an injunction, were that possibility available in this case, would harm the Postal Service and would not advance the public interest. A stable Postal Service providing sustainable and comprehensive postal services is in the public interest. In order to ensure such stability, the Postal Service must be able to address the significant financial losses it is suffering daily.

The Postal Service is "an independent establishment of the executive branch of the Government of the United States."[81] As such, it "operate[s] as a basic[,] fundamental service provided to the people by the Government."[82] The Postal Service "give[s] highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail."[83] In order to continue providing universal mail service, the Postal Service must find ways to reduce costs in order to survive. As the Commission itself has previously recognized, "the Postal Service's ability to continue to meet its service obligation is in serious jeopardy. . . ."[84]

[80] Revised Service Standards for Market-Dominant Mail Products, 77 Fed. Reg. 31,190, 31,191-92 (May 25, 2012) (to be codified at 39 C.F.R. pt. 121) ("The phased application of the new rules . . . provides the Postal Service with enough flexibility that, should subsequent events or changed circumstances so warrant, the Postal Service will be able to revisit the final version before February 1, 2014, and amend or withdraw it, as appropriate, through a new notice-and-comment rulemaking.").

[81] 39 U.S.C. § 201.

[82] 39 U.S.C. § 101(a).

[83] 39 U.S.C. § 101(e).

[84] 2011 Annual Compliance Determination Report (ACD) (Mar. 28, 2012) at 21. The ACD further explains the financial problems the Postal Service currently faces throughout Chapter 4, entitled "Postal Service Financial Condition." *Id.* at 21-41; *see also* the Postal Service's 2011 Annual Report to Congress and Comprehensive Statement.

Moreover, Congress has given the Postal Service specific authority to manage its operations. Section 404(a) states that "the Postal Service shall have the following specific powers, among others:

> (1) to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail."
>
> * * *
>
> (3) to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed."

Thus, Congress has explicitly given the Postal Service the power to determine what processes and locations would best and most efficiently meet the needs of the service. The issuance of injunctive relief would frustrate the public interest, as expressed by Congress, in allowing the Postal Service to make appropriate management decisions in order to operate most effectively.

The APWU identified section 3661 as establishing the public interest at issue in this case. This assertion ignores the fact that the proceedings in Docket No. N2012-1 have already satisfied this public interest. Further, the procedural steps associated with the rulemaking process have also satisfied this public interest. Finally, by the APWU's own admission, the proceedings in Docket No. N2012-1 will continue after implementation of the Final Rule on July 1, 2012, ensuring that the public interest identified by the APWU will be even further satisfied. As explained earlier, the APWU cannot seriously contend that it has not had an opportunity to be heard.

Requiring the Postal Service to delay implementation of the Final Rule until the Commission rules on the APWU's Complaint does nothing to further the public interest. It simply causes delay and further financial risk to an already vulnerable Postal Service.

Conclusion

Based upon the foregoing, the Commission should deny APWU's Motion for an Emergency Order.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

R. Andrew German
Managing Counsel
Legal Strategy

Kevin A. Calamoneri
Managing Counsel
Corporate & Postal Business Law

Anthony F. Alverno
Chief Counsel
Global Business & Service Development

David C. Belt
James M. Mecone
Keith C. Nusbaum
Caroline R. Brownlie

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2997; Fax -5402
June 20, 2012