

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT OF THE CONTINUITY
SHIPPERS ASSOCIATION

Docket No. C99-4

STATEMENT OF THE UNITED STATES POSTAL SERVICE
IN ACCORDANCE WITH ORDER NO. 1265
AND MOTION TO DISMISS COMPLAINT
(October 14, 1999)

The Postal Service hereby provides its statement in accordance with Order No. 1265, "indicating whether it wishes to present evidence on matters raised in CSA's complaint." Order at 3. The Order also indicates that if the Postal Service "declines to present evidence," its brief and those of other interested parties would be due on October 21. *Id.*

In light of the current state of the record and complainant's stated intention not to file direct evidence, the Postal Service does not intend to file evidence in this case. The Postal Service also believes that it would be inappropriate and unwarranted for it to file a reply brief in this case, in the absence of any record. The only appropriate next step in these circumstances is dismissal of the complaint, because the complainant has failed to meet its burden of proof and there is no basis for a recommended decision by the Commission.

The Postal Service has refrained from filing other pleadings in this docket in the absence of an established procedural framework, in an effort to avoid further

complication for the Commission in sorting through the various filings in this docket. These include: a letter,¹ a clarification of the statement contained in the letter,² a response to the letter,³ a response to the response,⁴ and a "brief."⁵ The Postal Service also had been awaiting a response from the complainant on the Postal Service's counteroffer to the complainant's offer for a settlement. After an inquiry by undersigned counsel, counsel for the complainant informed the Postal Service that its counteroffer had been rejected; no further settlement offers were made by the complainant.

The Postal Service notes that all that the Commission had requested, previous to Order No. 1265, was a statement by the complainant of the time it needed to prepare its case. Instead, the complainant informed the Commission, by letter of October 23, that it would not be filing testimony and proposed a briefing schedule. Although it indicated that it would "stipulate" to a cost figure of its own calculation for FY 2000, it took no action to put this figure into evidence. It then filed a "brief" on October 5, 1999.

The complainant has taken no action of any kind to create a factual record on which the Commission can proceed. Instead, in its "brief," it "propose[d]" a "roll forward

^{1/} Letter of October 23, 1999, of the Continuity Shippers Association to the Postal Rate Commission.

^{2/} Clarification to Statement of the Continuity Shippers Association

^{3/} Office of the Consumer Advocate Response to Continuity Shippers Association Statement on Proposed Schedule (Oct. 1, 1999).

^{4/} AMMA Response to "OCA Response" (Oct. 5, 1999).

^{5/} Brief of the Continuity Shippers Association (dated Oct. 1, filed Oct. 5, 1999).

factor” to be applied to BPRS costs,⁶ made numerous unsupported factual assertions, and discussed its views regarding an appropriate cost coverage for Bulk Parcel Return Service.

The Commission’s rules provide that briefs “shall include...[a] discussion of the evidence, reasons, and authorities relied upon with exact references to the record and the authorities.” 39 C.F.R. §3001.34(b) & (b)(3). Virtually none of factual assertions in CSA’s “brief” contain any supporting citations. Although some factual assertions could be verified by reference to available sources, as with the cost coverages recommended by the Commission in the last rate case, there are many important factual assertions that are unsupported, unverifiable in the absence of a factual record, and erroneous. Examples of erroneous factual allegations include:

- “[T]he Postal Service processes, transports and delivers both Special Standard (B) and Standard (A) parcels in the same manner.” CSA “Brief” at 2.
- “The Postal Service guarantees delivery of the return B[ound] P[rinted] M[atter] mail to the sender.” *Id.* at 3.
- “Participants in e-commerce may well use BPRS for their returns even if they deliver their goods initially through a private carrier.” *Id.* at 4.

The complainant’s “brief” could not cite evidence as required by the Commission’s rules, because there is no factual record supported by evidence in this case. There is no factual record in this case, because the complainant has chosen not to offer any

^{6/} CSA “Brief” at 1.

testimony or other evidence to create a record. Facts that are alleged in a complaint and repeated in a “brief” do not constitute an evidentiary record. All the complainant has offered is argument. As stated succinctly in the special rules the Commission generally adopts: “Argument will not be received in evidence.”

Moreover, despite the complainant’s preference, cost coverages are not recommended by the Commission solely on the basis of lawyers’ arguments. Rather, in determining cost coverages, as in all its determinations, the Commission relies upon evidence presented and interpreted by expert witnesses. While parties’ lawyers summarize the record evidence in briefs and suggest how they believe the Commission should apply the law to the particular facts on the record, the lawyers’ arguments do not create a record.

In the absence of a record, there is no basis for the Commission to issue a recommended decision. Section 3662 provides that the Commission may issue a recommended decision in a complaint case only if it finds the complaint to be justified “after proceedings in conformity with section 3624....” Section 3624 states that “the Commission shall not recommend a decision until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded...”

The complainant’s tactic of choosing not to file testimony and proceeding to “brief” would completely deny due process to the Postal Service, and perhaps other participants. The Postal Service has not been accorded an opportunity for a hearing on the record regarding the factual allegations or proposed stipulations made by the complainant in its complaint and brief. The Postal Service has had no opportunity for

discovery or cross-examination concerning the complainant's proposed "stipulated" cost,⁷ its other factual assertions, or its theories regarding the appropriate cost coverage. It would be arbitrary and capricious and a denial of due process for the Commission to issue a recommended decision in the absence of a record and without an opportunity for discovery and cross-examination, as required by the Postal Reorganization Act and the Administrative Procedures Act. 39 U.S.C. §§ 3662, 3624; 5 U.S.C. §§ 556 and 557.

It is not sufficient that the Postal Service has been offered the opportunity to present its own testimony. The burden is not on the Postal Service to disprove the allegations made by the complainant. The purpose of testimony by the Postal Service in complaint cases is to rebut the evidence presented by the complainant. In the absence of any evidence, there is nothing to rebut.

The fee challenged was lawfully established by the Commission and the Governors in accordance with the Postal Reorganization Act. In the absence of an evidentiary record that attempts to support the allegations of the complaint, there is no factual basis for a finding by the Commission that the complaint is justified, and therefore no basis for a recommended decision under the statute. A recommended decision in the absence of a record would certainly not be supported by substantial evidence, and

⁷ Although the complainant indicated a willingness to "stipulate to" to an FY 2000 cost for BPRS, the number offered is based on a Postal Service number, multiplied by an inflation factor of CSA's sole crafting. It is meaningless for a party to create a number and then "stipulate" to it in the absence of agreement by the adverse party.

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.

A handwritten signature in cursive script, appearing to read "Scott L. Reiter", is written over a horizontal line.

Scott L. Reiter

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could be nothing more than arbitrary and capricious.⁸ The only appropriate course of action in the circumstances of this case is for the complaint to be dismissed, and the Postal Service respectfully requests that the Commission do so.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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^{8/} An agency decision must be based on "such 'relevant evidence as a reasonable mind might accept as adequate to support the conclusion.'" *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 279 (D.C. Cir. 1986) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). The evidence must be found "within the record of closed-record proceedings to which it exclusively applies." *Ass'n of Data Processing Serv. Orgs v. Board of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984). See *Mail Order Ass'n of America v. U. S. Postal Service*, 2 F.3d 408, 420 (D.C. Cir. 1993). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 227 (1938). If substantial evidence cannot be found when there is a mere scintilla, then it cannot be found when there is no record evidence at all.