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UNITED STATES OF AMERICA
Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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Complaint on Charges for the)
Bulk Parcel Return Service)

Docket No. C99-4

REPLY BRIEF

OF

THE OFFICE OF THE CONSUMER ADVOCATE

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March 10, 2000

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The Office of the Consumer Advocate ("OCA"), pursuant to Rule 34 of the Rules of Practice and Procedure of the Postal Rate Commission ("Commission"), 39 C.F.R. §3001.34, and pursuant to Order No. 1282,¹ hereby submits its Reply Brief in response to the initial briefs filed March 3, 2000 by Continuity Shippers Association ("CSA") and the Postal Service on the CSA complaint seeking a recommendation for a reduction in the Postal Service's rate for Bulk Parcel Return Service ("BPRS").

EXECUTIVE SUMMARY

This proceeding arises from a complaint filed by CSA, an association of shippers, some of whom utilize the Postal Service's Bulk Parcel Return Service. CSA

¹ "Order Scheduling Hearings and the Submission of Testimony," January 28, 2000.

objects that the BPRS rate of \$1.75 is too high because it includes a cost coverage for institutional costs that is set at the systemwide average for cost coverage rather than a lower amount similar to that of other services which CSA believes are comparable.

Initial Briefs were filed on March 3, 2000 by the Postal Service and the OCA seeking rejection of the complaint on two grounds: first, that CSA has failed to meet its burden to justify changing the rate outside of the pending omnibus rate case because nothing has changed since the Commission's approval of the BPRS rate; and, second, that contrary to CSA's contention, the BPRS service is very different from, and of higher value, than both Standard (A) Mail and Standard (B) Mail. In its initial brief, CSA argues for a lower rate based on the cost coverage of 135 percent provided for Standard (A) Mail.

This reply brief responds to CSA's initial brief that discusses primarily the factors to be considered under Section 3622 of the Act in setting a rate, and shows that cost coverage at least as high as the system average is warranted for BPRS service. This reply brief also opposes the position raised on brief by the Postal Service regarding its view that, in any event, the Act prohibits the Commission from recommending a rate change in this complaint case without the Postal Service first filing an application to change the BPRS rate.

STATEMENT OF THE CASE

The OCA presented a statement of the case in its initial brief at pages 2-5. In addition, the Postal Service contends in its initial brief that the remedy in this case is

limited by the Commission's authority under the Postal Reorganization Act to requesting the Board of Governors to file an application with the Commission for a further recommended decision to change the BPRS fee. The Postal Service concludes, therefore, that because such a request has already been filed by the Board in Docket No. R2000-1, "there would be no point to any recommended decision in the instant docket." Postal Service Br. at 14. The OCA refutes the Postal Service's contention regarding the Commission's authority under the Act.

**STATEMENT OF POSITION
OF THE OFFICE OF THE CONSUMER ADVOCATE**

The OCA reiterates the position that it expressed in its initial brief with respect to the complaint of CSA:

1. CSA has not met its burden under Section 3662 of the Postal Reorganization Act to demonstrate that the current cost coverage is unreasonable and in violation of the statute. The cost coverage today in FY 2000 is virtually the same as estimated by the Commission in 1997 and no circumstances have changed that justify a change in the cost coverage for BPRS service.

2. If the Commission determines that CSA has met its burden of going forward, or otherwise determines to review the BPRS cost coverage in relation to other mail services or mail return services, the Commission should find that the BPRS service is not comparable to other services cited by CSA for comparison. The appropriate cost coverage for BPRS service is the systemwide average or higher. The current rate of

\$1.75 is based upon the present systemwide coverage and is reasonable and appropriate.

Additionally, a further issue has been presented by the Postal Service in its initial brief.

3. The OCA responds in opposition to the Postal Service argument presented in its initial brief that even if the Commission finds the current BPRS fee is unlawful and must be changed, the Commission has no authority under the Postal Reorganization Act to recommend a rate change as a remedy in this complaint proceeding.

ARGUMENT

I. CSA MISAPPLIES THE NINE FACTORS UNDER THE POSTAL REORGANIZATION ACT

CSA continues to complain that the "current cost coverage for BPRS of 168% is too high" and that, "As shown in this proceeding, the current BPRS coverage of 168% contradicts [the fairness and equity factor under §3622(b)(1)]." CSA Br. at 3, 4. CSA is mistaken. The cost coverage of 168 percent is irrelevant. As explained in OCA's initial brief, the current cost coverage for BPRS service is not 168 percent but 157 percent as testified to by CSA's witness. OCA Br. at 9. This is virtually identical to the 156 percent coverage recommended by the Commission when it approved the BPRS rate in 1997.

CSA attempts to equate BPRS with Bound Printed Matter and Standard (A) Mail in its discussion of the value of service, factor 2 of Section 3622 of the Act. It points to

the cost coverage of 136 percent for Bound Printed Matter, which is similar to the cost coverage for Standard (A) Mail, as appropriate for BPRS. OCA's initial brief explained why the cost coverages for BPM and Standard (A) Mail are not relevant to BPRS. OCA Br. at 12-15. Moreover, CSA's own brief notes that Bound Printed Matter is used for "bulk national mailings of (among other things) advertising material." CSA brief at 4 (emphasis supplied). As the subclass for the delivery of "heavy weight" advertising material, it is not unreasonable to expect similar cost coverage for BPM and Standard (A) Mail. However, neither is relevant for determining the cost coverage for BPRS service. BPRS service is not intended for bulk advertising mailing, but serves a more select market—product returns.

CSA claims that because half of BPRS users pick up their BPRS returns, a lower value of service is present. Unstated by CSA is the fact that the Postal Service delivers BPRS returns to mailers. Moreover, this ignores the fact that the BPRS users pick up returns at their option. Rather than reducing the value of the BPRS service, the option to pick up the returns provides added flexibility and value to the BPRS service.

CSA claims that BPRS receives low priority in terms of transportation and processing. Nevertheless, as discussed in the OCA's initial brief, there are numerous features that make BPRS a service of high value, including access to the collection system for BPRS returns. OCA Br. at 16-19.

CSA also contends that the return service provided by BPRS is of lower value to customers than the service when merchandise is originally mailed to customers, at least for Cosmetique. Thus, it believes the lower value of BPRS warrants a lower cost coverage. However, CSA confuses the value of the merchandise and the value of the

mail service. CSA cites “[c]ustomers of Cosmetique [who] pay around \$20.00” as evidence of the high value of the outbound Standard (A) leg. CSA Br. at 7. There is, of course, a relationship between the value of merchandise and the value of service. Because of such a relationship, there are special services that are highly valued, such as Registered Mail, for truly valuable merchandise. Nevertheless, customers would value a mail service that reliably delivered any \$20.00 item purchased. But, common sense suggests that customers might value the BPRS return service more highly than the original mail service. When customers order merchandise, they generally pay for it at the time of purchase. In so doing, they have exchanged items of equal value—money for merchandise. If, however, the merchandise is subsequently unwanted and returned, a reliable return service is essential—for obvious reasons. In the absence of a reliable return service, the customer has neither the use nor enjoyment of the returned merchandise, and has already paid for the merchandise that has not been received by the mailer.

In its discussion of factor 4, CSA claims a beneficial impact in reducing the BPRS rates to consumers and mailers. CSA states, “Further relief is now known to be warranted.” CSA Br. at 5, citing witness Buc’s testimony, CSA-T-1 at 9. This statement is unsupported by the facts in this proceeding or by the law. CSA’s supposed “knowledge” is merely the statement of its witness who believes relief might be desirable. This statement may serve to suggest that reducing the rate might be a good idea, but it does not demonstrate that the current rate is outside the range of reasonableness and must be reduced in order to comply with the terms and policies of the Act.

CSA also states that, "The establishment of BPRS only provided interim relief to the general public and BPRS users." CSA Br. at 5. CSA's contention is baseless. There is no suggestion or discussion in the Commission's opinion in Docket No. MC97-4 that the Commission intended the rate it recommended would be an interim or temporary rate.

With respect to factor 5, CSA concludes that consideration of the impact on alternative services "favors lower BPRS rates." CSA Br. at 5. CSA's own brief admits that available alternatives are priced considerably higher. Thus, there would not be an impact on alternatives if the rate remains unmodified. In fact, the rate could probably be higher without an impact on alternatives. Certainly, the lack of available alternatives does not favor lower BPRS rates.

CSA claims that factor 6 involving a mailer's preparation and other actions regarding the BPRS mail reduces the Postal Service costs. CSA Br. at 5. CSA would lower the BPRS rate on account of the mailer's preparations to assure machinability. However, as discussed in the OCA's initial brief, these actions are undertaken to qualify for Standard (A) Regular Mail on the outgoing leg. OCA Br. at 21. Machinability is considered in establishing the rate for Standard (A) Regular Mail. In effect, CSA would like to receive double credit for a single effort.

Moreover, the machinability of the BPRS parcels is considered in the development of the costs of processing BPRS returns. Processing costs are reduced because BPRS returns are machinable. Tr. 1/95. On the other hand, the mailer is not entitled to receive a rate reduction (other than already accounted for in the costing process) for preparations undertaken to meet the requirements on the outgoing leg that

enable the mailer to qualify at that time for the Standard (A) Regular Mail rate. CSA also suggests that because half of BPRS mailers pick up their returns, the Postal Service costs for the service are reduced and this should be reflected in the rates. As noted, above, the Postal Service delivers BPRS returns, and the pick-up by mailers is optional for their own convenience.

CSA states factor 8, the ECSI factors, do not apply. CSA Br. at 5. To the contrary, they do apply. See OCA Br. at 22.

II. CSA'S OTHER REASONS FOR A COST COVERAGE OF 135 PERCENT DO NOT PROPERLY CONSIDER THE VALUE OF THE MODIFICATION TO BPRS

CSA's brief contends that a cost coverage even lower than Standard (A) mail could be justified. CSA errs for at least two reasons. Its references rely only on experiences that are primarily that of one mailer, Cosmetique. The record is silent as to the value of the BPRS service to other mailer's and how they benefit from the service. Also, Cosmetique says no additional value has been added by the recent modification to the BPRS service. However, Cosmetique admits that it has not attempted to benefit from the modifications. It has not placed labels in the packages for its customers to return items without paying postage. Tr. 1/51. One mailer that has placed labels in its parcels claims the labels have enhanced customer service. *Id.* Therefore, Cosmetique's data demonstrating the recent modifications have not added value to the BPRS service cannot be taken at face value. The service was proposed and approved by the Commission to meet a need foreseen by the Postal Service and at least some of the BPRS customers. There is no doubt that the modification added to the value of the original BPRS service. CSA is clearly making the argument as a last ditch attempt to

prove that the value of service has not increased since the time it was originally approved. Nevertheless, CSA has failed to show the value of service has not increased with respect to all of the BPRS mailers. More importantly, it has failed to demonstrate a decrease in value since the initial BPRS service was approved.

III. CSA'S CLAIM THAT THE COST COVERAGE OF MERCHANDISE RETURN IS RELEVANT TO BPRS IS MISPLACED

CSA claims on brief that “merchandise return service and BPRS provide the same service.” CSA Br. at 10. Therefore, “they should carry the same cost coverage.” *Id.* at 11. The cost coverage of Merchandise Return Service is 128 percent. CSA is belatedly groping for an argument. CSA’s claim suggests that it now believes BPRS is a special service in order to use Merchandise Return to support its case. However, its analogy to Merchandise Return is confused and misplaced.

In support of its claim, CSA minimizes “[t]he only two differences” it can see to distinguish BPRS and Merchandise Return. CSA Br. at 10. The differences are significant with respect to the cost coverage for each service. While Merchandise Return can be used in conjunction with many basic mail classes,² it is normally used as a supplement to parcel post. PRC Op. R94-1, ¶ 5559. Consequently, most of the parcels returned need not, and are unlikely to, be machinable. This fact means relatively higher Postal Service processing costs, and there is no required degree of Preparation for mailers. Moreover, and ignored by CSA, is the fact that BPRS is a bulk

² See DMM §S923.1.1. However, Standard (A) Mail cannot be returned via Merchandise Return Service. *Id.*

return service. BPRS returns may be delivered, or picked-up at the mailers option, in bulk—unlike Merchandise Return. These features, among others, reveal BPRS to be a much more valuable service than Merchandise Return Service, and deserving of a cost coverage far higher than Merchandise Return Service.

IV. THE COMMISSION'S REMEDY POWER IS GREATER THAN THAT SUGGESTED BY THE POSTAL SERVICE

The Postal Service asserts the remedy in this case is limited to the Commission recommending, at most, that the Postal Service file a request for a rate change. In support of this claim, the Postal Service cites *Dow Jones, Inc. v. United States Postal Service*, 656 F. 2d 786 (D.C. Cir. 1981), for the proposition that the Commission may not recommend a rate change to the Postal Service following proceedings upon a complaint filed with the Commission unless there is first "a rate proceeding initiated by the Postal Service." *Id.* at 789.

The Act is not so restrictive, nor does *Dow Jones* limit the Commission as the Postal Service claims. In fact, the Postal Service's argument is contrary to logic and a fair reading of the Act. It would effectively cut off relief to a complainant whose claim that the rates charged do not conform to the policies of the Act is determined to be justified.

The OCA offers these views in response to the Postal Service's argument. These comments are not intended to explore the limits, if any, that the Commission might face in fashioning a rate remedy pursuant to a complaint. CSA requests a specific change in one rate. In the OCA's view, it is within the Commission's authority

to recommend the change requested if the Commission so determines. Because CSA has failed to meet its burden, and because the record does not support the change requested in this docket, the issue need not be reached. In the event the Commission determines to grant such relief, however, the Postal Service's argument must be addressed.

The Court's discussion in *Dow Jones* involved a case under Sections 3622 and 3623 of the Act in which the Commission recommended a rate change in the course of a classification proceeding. The court held, "A valid rate change proposal may not issue from a classification proceeding in the absence of a rate request from the Postal Service." *Id.* at 791. That case interprets the interplay of Sections 3622 and 3623 and the powers granted to the Commission pursuant to those sections of the Act. The court did not speak to the special interaction of a complaint filed pursuant to Section 3662 and Sections 3624 and 3625. The court opinion does not even mention Section 3662 or the Commission's powers granted by Section 3662. Thus, the court did not speak to the situation here, and therefore is not instructive in this case.

Section 3662 provides Commission authority to act upon filed complaints pursuant to designated procedures. To determine the extent of the Commission's authority to act upon complaints, interpretation is assisted by reviewing the whole of Section 3662 as well as the preceding Section 3661, (the only other section in Subpart IV of the Act covering Postal Services and Complaints). Also significant is an overview of the structure of the entire Act to determine the type of Commission action Congress had in mind for the Commission when acting pursuant to Section 3662. A fair construction of Section 3662 in the context of the entire Act indicates that, upon

complaint, the Commission has the authority to issue a recommended decision to change rates which the Postal Service may implement immediately pursuant, to the provisions of Section 3625, without first filing a rate application with the Commission.

Section 3662 provides that, upon complaint, the Commission may in its discretion hold hearings on the complaint. Where the complaint involves a matter covered by subchapter II (*i.e.* permanent rates and classes of mail), as the CSA complaint does, then the Commission may hold “proceedings in conformity with section 3624 of [title 39].” The Commission’s notice of formal proceedings in this case specifically ordered, “Proceedings in conformity with 39 U.S.C. §3624 shall be held in this matter.” Notice at 6.³ Section 3662 continues, if the Commission then “determines the complaint to be justified, it shall issue a recommended decision which shall be acted upon in accordance with the provision of section 3625...” (Emphasis supplied.)

Section 3625 provides for alternative action by the Board of Governors upon receiving a recommended decision from the Commission. Section 3625 does not provide for separate Commission authority relevant here. Also, significantly, Section 3625, in providing authority for the Board to act upon receiving a recommended decision from the Commission, requires only that the Board act upon the recommended decision. The section neither refers back to nor requires action by the Board upon any underlying rate application filed with the Commission, nor does it assume that any Board application has initiated the Commission decisional process.

³ “Order Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings,” Order No. 1260, September 3, 1999.

Also, Section 3662 does not specifically restrict the Commission from making a rate or classification recommendation pursuant to a complaint proceeding. In fact, the section specifically provides for Commission action to determine whether rates charged conform to the policies of the Act. If the Commission determines that there is a violation of the policies of the Act, it is only logical, given the organizational structure of the Act, in order to remedy a violation of the policies of the Act to expect the Board is able to immediately implement that change without delay, as long as it conforms to Section 3625.⁴

It is useful to look to the powers granted the Commission in another part of Section 3662: "If a matter not covered by subchapter II of this chapter is involved," then the commission may only "render a public report thereon to the Postal Service which shall take such action as it deems appropriate." Thus, if neither a rate or classification matter is involved in the complaint, Congress explicitly provided the Postal Service with wide discretion to not act on the Commission's decision upon the complaint. Where the Congress wished to limit the authority of the Commission to issuing a report, it did so with specific language. On the other hand, the first portion of Section 3662 provides that the Commission, upon determining a rate charged is in violation of the Act, "shall" issue a recommendation and the Board "shall" act upon it.

⁴ The distinction between Sections 3662 and 3622 is important. In a complaint proceeding the Commission must determine the rates charged are in violation of the Act in order to determine the complaint is justified and to issue a recommendation to remedy the matter. In such case, the initial burden on the complainant is greater than it is for the Postal Service when it files an application to change rates. In that case, the Commission is not required to first determine the existing rate violates the policies of the Act before recommending a new rate "in accordance with the policies of [tile 39] and the [nine] factors" listed in Section 3622. Thus, it is inappropriate in a complaint proceeding for the Commission to consider a new rate *de novo* without first finding the existing rate charged violates the policies of the Act merely because some people think it is time to review the rate.

Furthermore, Section 3662 is in Subchapter IV of the Act. The only other section in Subchapter IV, §3661, involves proposals by the Postal Service for nationwide changes in the nature of postal services. That section also provides for the opportunity for hearings, but specifically provides that the Commission's opinion shall be "advisory." The section does not provide for Section 3625 procedures following the Commission's advisory opinion. Thus, Congress was clearly able to describe and provide for procedures that would yield advisory opinions to the Postal Service which, in the Postal Service's discretion, it might act upon. Congress did not use that language in prescribing the Commission's powers when reviewing rate and classification matters raised by Section 3662 complaints. Yet the Postal Service position here would effectively render the Commission's actions on a rate matter advisory, in clear contravention of the organization of the statute.


Further support for the Commission's authority to recommend a rate change pursuant to a complaint is found in a review of the overall symmetry of the Act in the way in which it grants authority to the Commission. The Commission is afforded authority to act upon a rate matter only if the issue is brought before it by the Postal Service (Section 3622) or another party (Section 3662), but it may not itself initiate a rate review. On the other hand, Congress expressly permitted the Commission to initiate review of classification matters under Section 3623 of the Act. It is only logical that in administering the policies of the Act, the remedy for their violation with respect to rates charged ought to be assured. The advisory opinion route suggested by the Postal Service does not provide that assurance.

CONCLUSION

Wherefore, the OCA respectfully requests the Commission to find the BPRS rate does not violate the policies of the Act, deny the relief requested, and dismiss the CSA complaint.

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE



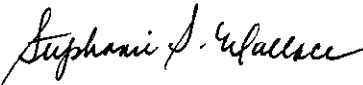
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.


Stephanie S. Wallace

Washington, D.C. 20268-0001
March 10, 2000