

ORDER NO. 68

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Dan G. Blair, Chairman;
Mark Acton, Vice Chairman;
Ruth Y. Goldway; and
Tony L. Hammond

Complaint on Bound Printed Matter

Docket No. C2008-2

ORDER DISMISSING COMPLAINT
ON BOUND PRINTED MATTER

(April 2, 2008)

Douglas F. Carlson (Carlson or Complainant) alleges that the Postal Service has acted unlawfully by restricting access to Bound Printed Matter (BPM) service at retail windows.¹ The Postal Service responds, first, by denying that its actions are unlawful and, second, by filing a notice of classification change in Docket No. MC2008-3 which, it believes, moots the Complaint. The Commission concurs that the classification change in Docket No. MC2008-3, if not found to be inconsistent with the Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198, moots issues raised by the Complaint. Accordingly, the Commission dismisses the Complaint. This finding,

¹ Douglas F. Carlson Complaint on Bound Printed Matter, January 3, 2008 (Complaint).

however, is without prejudice should the Commission subsequently determine that the classification change is inconsistent with the PAEA.

I. PROCEDURAL HISTORY

A. The Complaint

Carlson's Complaint, filed pursuant to 39 U.S.C. § 3662, contends that the Postal Service's decision not to offer BPM at retail windows unduly discriminates against individual and small business mailers. *Id.* at 3. The Complaint relates Carlson's efforts to mail a book at BPM rates at retail windows and provides correspondence with the Postal Service on the topic. He argues that postal policy prohibits the window clerk from offering or suggesting BPM to the customer. *Id.* at 1-2. Quoting a Postal Service publication, he notes that single-piece BPM "is only available to mailers who can affix the correct postage using stamps, postage meter, or PC Postage." *Id.* at 3-4. He argues that the Postal Service's actions effectively deny customers access to BPM service and thus violate 39 U.S.C. § 403(c).² Carlson requests the Commission to direct the Postal Service to offer BPM service to customers at retail windows. *Id.* at 5.

B. The Postal Service Response

The Postal Service submitted an answer in opposition to the Complaint,³ accompanied by a motion to suspend the proceedings temporarily to enable the Postal Service to present to the Governors for their consideration "classification changes

² *Id.* at 4. The Complaint also notes that, in Docket No. R2006-1, the Postal Service advanced a similar plan, which the Commission rejected, concluding that it was a classification change and that Carlson, who had objected to the plan in that proceeding, made "a reasonable case that the proposal unduly discriminates against individuals." PRC Op. R2006-1, February 26, 2007, ¶ 5916.

³ Answer of the United States Postal Service, February 4, 2008.

intended to resolve the substance of the instant Complaint.”⁴ The Commission denied the Motion because the schedule proposed by the Postal Service did not adequately accommodate the requirement in 39 U.S.C. § 3662 that the Commission act on a complaint within 90 days of receiving it. PRC Order No. 61, February 21, 2008, at 2. The Commission directed the Postal Service to file a statement of position by no later than March 7, 2008. *Id.*

In its statement of position, the Postal Service argues that its actions do not constitute undue discrimination, contending that the restrictions represent rational efforts to function efficiently and to provide services through appropriate channels.⁵ The Postal Service provides a brief historical overview of BPM, from prior to the Postal Reorganization Act (PRA) when it was limited to matter consisting entirely of advertising through its expansion to include books without incidental advertising matter in Docket No. R90-1. Statement at 1-3. The Postal Service argues that, even prior to passage of the PRA, BPM catered to commercial mailers and that only its expansion to books without incidental advertising made BPM service available to retail customers.⁶ The Postal Service also discusses its rationale for limiting BPM retail options and the outcome of its similar proposal in Docket No. R2006-1. *Id.* at 3-4.

⁴ Motion of the United States Postal Service to Suspend Proceedings Temporarily, February 4, 2008, at 1 (Motion). In its Motion, the Postal Service indicates that if the Governors approve the changes, it will give notice in accordance with the Commission’s rules and, in a separate pleading, explain how the action resolves the Complaint. If the changes are not approved, the Postal Service states that it will give notice no later than April 4, 2008, so that appropriate further proceedings may ensue at that time. *Id.* Complainant did not submit an answer opposing the Motion.

⁵ Statement of Position of the United States Postal Service, March 7, 2008, at 1 (Statement).

⁶ The Postal Service indicates that commercial mailers send 97 percent of BPM volumes. *Id.* at 1.

In light of the Complaint and other factors, the Postal Service concluded that a further classification change was needed to resolve the issues raised by the Complaint, indicating that it would seek the Governors' approval for such a change. *Id.* at 5.⁷

On March 20, 2008, the Postal Service filed a notice of classification change, in Docket No. MC2008-3, that would require all BPM mailings to be paid by mailing permit.⁸ Currently, only destination-entered BPM mailings must be paid by permit imprint. On March 21, 2008, the Commission noticed the classification change, providing interested persons an opportunity to comment on it by April 3, 2008.⁹

In an addendum to its Statement, filed concomitantly with its notice of classification change, the Postal Service stated that as a result of the classification change BPM will not be accepted at retail.¹⁰ This change, according to the Postal Service, "will have the effect of making the complaint moot" because it undermines the Complainant's claims, *e.g.*, that the Postal Service lacks authority not to offer BPM at retail. *Id.* at 1-2. Given the change, the Postal Service argues that the Complaint does not raise substantial or material issues of fact or law and, therefore, should be dismissed. *Id.* at 2-3.

On March 27, 2008, the Postal Service filed an amendment to its classification change that would require all BPM mailings to be paid by permit imprint only.¹¹ The

⁷ The Postal Service undertook to file notice of the classification change (or lack thereof) with the Commission sufficiently in advance of the statutory deadline to begin proceedings or dismiss the complaint. *Id.*

⁸ Notice of the United States Postal Service of Classification Change, Docket No. MC2008-3, March 20, 2008.

⁹ Notice of Classification Change for Market Dominant Products, Docket No. MC2008-3, March 21, 2008.

¹⁰ Addendum to Statement of Position of the United States Postal Service, March 20, 2008 (Addendum).

¹¹ Notice of United States Postal Service of Amendment to Conforming Changes in Mail Classification Schedule submitted with Notice of Classification Change, Docket No. MC2008-3, March 27, 2008 (Amendment).

Amendment also restates the requirement that destination-entered BPM is subject to an annual mailing fee. Comments in Docket No. MC2008-3 are now due April 9, 2008.

II. COMMISSION ANALYSIS

The Complaint has its origins in Docket No. R2006-1. In that proceeding, a witness for the Postal Service indicated that the Postal Service planned to restrict the retail availability of single-piece BPM by requiring postage to be paid by customer-generated postage meter or permit imprint.¹² Carlson opposed the proposal, arguing that customers are entitled to use services listed in the Domestic Mail Classification Schedule without discrimination and that management cannot bar access to an approved service by decree.¹³ The Commission found the planned restrictions to be a classification change and rejected it. PRC Op. R2006-1, ¶¶ 5915-18.

Docket No. R2006-1 was initiated prior to passage of the PAEA, which was enacted December 20, 2006. The Commission's opinion in that proceeding, including its conclusion that the planned restrictions on single-piece BPM required a classification change, was rendered pursuant to the provisions of the PRA. The PAEA fundamentally alters the manner in which rates and classification changes become effective.

As noted above, the Postal Service has now filed, in Docket No. MC2008-3, a notice of classification change, as amended, that would require all BPM mailings to be paid for by permit imprint. This change, if found not inconsistent with the PAEA, would moot the Complaint.

39 U.S.C. § 3662 requires the Commission to act within 90 days of receiving a complaint by either (a) commencing a proceeding upon finding that the complaint raises material issues of fact or law or (b) dismissing the complaint. The Complaint was filed

¹² See Docket No. R2006-1, USPS-T-38 at 6, n.2. The witness indicated that window clerks would not offer retail customers BPM as a mailing option. *Id.*

¹³ Docket No. R2006-1, DFC-T-1 at 32.

January 3, 2008; thus, the Commission must act by no later than April 2, 2008. The comment period in Docket No. MC2008-3, however, runs until April 9, 2008.

The issues raised by the Complaint have been overtaken by the subsequent developments in Docket No. MC2008-3. A decision in the latter cannot be made prior to the tolling of the 90-day period prescribed by section 3662. Given the pendency of the related issues in Docket No. MC2008-3, the Commission finds it appropriate, for purposes of the instant proceeding, to dismiss the Complaint as moot. This finding, however, is without prejudice should the Commission subsequently determine that the classification change, as amended, is inconsistent with the PAEA.

Given that the Complaint raises related issues, Docket No. MC2008-3 takes on added significance. Consequently, the Commission will incorporate by reference in Docket No. MC2008-3 all pleadings in the instant docket.

It is ordered:

The Douglas F. Carlson Complaint on Bound Printed Matter, filed January 3, 2008, is dismissed, without prejudice, as moot.

By the Commission.

Steven W. Williams
Secretary