

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

**Station and Branch Optimization and
Consolidation Initiative, 2009**

Docket No. N2009-1

**AMERICAN POSTAL WORKERS UNION, AFL-CIO
REPLY BRIEF
(December 16, 2009)**

On December 1, 2009, the APWU and four other parties¹ in this docket submitted Initial Briefs to the Postal Regulatory Commission (“PRC” or “Commission”) regarding the Postal Service’s Station and Branches Optimization and Consolidation (“SBOC”) Initiative. The APWU hereby submits its Reply Brief in response to the those submissions.

I. The Commission has Jurisdiction to Issue an Advisory Opinion in this Case

In its Initial Brief, the Postal Service asserts that “any changes in the nature of postal services that could result from the SBOC Initiative will not be substantially nationwide.” USPS Brief at 2. It argues that “[a]ccordingly, the Commission lacks jurisdiction to issue an advisory opinion.” Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. (collectively referred to herein as “Valpak”) also claim that the Commission is without jurisdiction in this case. As explained more fully below, both the arguments advanced by USPS and Valpak are without merit; the Commission has jurisdiction and should issue an advisory opinion holding the

¹ Initial Brief of Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc.; Initial Brief of David B. Popkin; Initial Brief of the United States Postal Service; Initial Brief of the Public Representative. The National League of Postmasters also submitted an Initial Brief on December 3, 2009, on day out of time.

current Initiative does not conform with the policies of Title 39 as outlined in our Initial Brief.

A. Contrary to Valpak's Assertion, the Commission has the Authority to Decide its Jurisdiction in this Matter.

As an initial matter, the Commission has the authority to decide its jurisdiction. Valpak asserts that the Postal Service has the sole statutory authority to decide whether its SBOC Initiative falls under the purview of the Commission. Valpak Brief at 3-8. This is contrary to the generally accepted rule that "an agency has jurisdiction to determine the scope of its authority, in the first instance." Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 952 (D.C. Cir. 1979). Valpak's assertion also overlooks Commission precedent directly on this point. In Docket No. N75-1, the Commission rejected the argument that the Postal Service could determine Commission jurisdiction:

[a]s we have stated in other jurisdictional determinations, our authority to define the ambit of a proceeding before the Commission is **not determined either by the Postal Service's views of our jurisdiction** or the particular contents of or omissions from the Service's formal filings. On the contrary, this **Commission determines the boundaries of its proceedings**, as do all administrative agencies, by an application of its basic statutory authority, the Postal Reorganization Act,² and other governing legal authority to the facts presented to us.

PRC Op. N75-1 at 12-13 (April 22, 1976) (emphasis added). Therefore, the Commission has clear authority to decide its jurisdiction in this docket.

B. The Commission has Jurisdiction to Issue an Advisory Opinion

Judicial and Commission precedent clearly support jurisdiction in this case. In Buchanan v. United States Postal Service, three Congressman, acting on behalf of a class of postal users, sought to the enjoin the Postal Service from implementing three programs prior to seeking an advisory opinion from the Postal Rate

² The Postal Accountability and Enhancement Act revised the Postal Reorganization Act, however, it left untouched Section 3661.

Commission pursuant to Section 3661 of Title 39. 506 F.2d 259 (5th Cir. 1975). The three programs at issue were (1) a plan to consolidate and eliminate district offices throughout the United States; (2) a retail analysis program (“RAP”); and (3) the “national bulk mail system program.” Id. at 262. The United States District Court for the Northern District of Alabama granted a temporary injunction for the consolidation of district offices and the RAP. Id. The Postal Service appealed this decision. On appeal, the Fifth Circuit Court of Appeals upheld the District Court’s decision pertaining to the RAP. Id. at 266-267. In its decision, the Court enumerated “three factors that must coexist before § 3661 applies. Id. at 262.

First, there must be a ‘change.’ ... Second, the change must be ‘in the nature of postal services.’...Third, the change must affect service ‘on a nationwide or substantially nationwide basis.’ A broad geographical areas must be involved.

Id. at 262-263. In upholding the lower courts decision, the Court of Appeals found that there had been a “sufficient showing of substantial likelihood the plaintiffs would prevail on the merits,” that is, all three factors had likely been met, including a sufficient showing that the retail analysis program represented a “change in the nature of postal service which will generally affect service on a nationwide or substantially nationwide basis.” Id.; see also 39 U.S.C. § 3661(b). Like the SBOC Initiative at issue in this Docket, RAP involved a process for analyzing the needs of a geographic area regarding postal retail facilities and a decision making process “whereby postal facilities are relocated or altered.” Id. at 265

In its Initial Brief, the Postal Service “readily concedes,” as it must, that discontinuing a station or branch would result in a “‘change’ and that it would be ‘in the nature of postal services.’” USPS Brief at 7. Nevertheless, the Postal Service claims that the Commission is without jurisdiction because the SBOC Initiative does not fulfill the third criteria. It argues that the Initiative will not affect service on a “nationwide or substantially nationwide basis.” Id. at pp. 8-13. The Postal Service’s argument rests primarily on the fact that the list of facilities under consideration for discontinuance or consolidation has been reduced from the original “candidate pool

of approximately 3300 retail stations and branches” to just under 250.³ USPS Brief at 4 fn 3. It contends that even if it is assumed that all 241 facilities remaining on the list were discontinued this would not amount to “changes in the nature of postal services of at least a substantially nationwide character.” This argument is without merit.

That only a portion of the facilities are currently under consideration for possible discontinuance is immaterial to the Commission’s jurisdiction in this case. For example, in N2006-1, the Postal Service sought review of its program to streamline its area mail processing facilities through its Evolutionary Network Development program that primarily utilized its longstanding AMP review.⁴ The Commission exercised its jurisdiction in that case and issued an advisory opinion seeking great improvements to the program.⁵ At the time of that case, only a handful of AMPs were being studied; yet no objection was raised as to the Commission’s jurisdiction. Contrary to Valpak’s assertion (Valpak Brief at 5), the Commission’s determination that it had jurisdiction was not based solely on the fact that the Postal Service did not object. Admittedly, the Commission stated that it need not address the “abstract jurisdictional question” but then it did just that. The Commission enumerated three reasons its jurisdiction was proper; that no objection was raised was only one of the three reasons discussed. Importantly, the Commission found that program was “likely to involve qualitative changes in the nature of postal services” and that “implementation of [Postal Service’s] proposal is likely to cause at least a small degradation in the current level of service provided to First-Class Mail on a nationwide basis, (PRC Op. N2006-1 at ¶ 3003), thus satisfying all three prongs of the Buchanan test enumerated above.

Likewise, it is immaterial that the Postal Service has reduced the list of facilities currently under consideration for discontinuance. Had the Postal Service begun this docket with the list of facilities as it currently stands, the Initiative would

³ On December 14, 2009, the Postal Service provided another revised list which now contains 168 facilities. USPS-LR-N2009-1/4.

⁴ Request of the United States Postal Service for an Advisory Opinion on Changes in Postal Services, February 14, 2006.

⁵ PRC Op. N2006-1 (December 19, 2006).

still have a “substantially nationwide effect.” As stated by the Commission in Docket No. N75-1 a “broad geographical area” must be affected for the change to be “substantially nationwide.” PRC Op. N75-1 at p. 73. The revised list produced by the Postal Service on December 14, 2009, contains 168 facilities in approximately 45 states and territories. Obviously, a “broad geographical area” is implicated even in this reduced list.

The Postal Service further argues that the “potential discontinuance of 241 stations and branches will affect a fraction of one percent of all approximately 27,200 Post Office service areas” and that this can be neither “meaningful” nor amount to a broad geographic scope. USPS Brief at 11. The Postal Service’s reliance on aggregate data is misplaced. In Docket No. N75-1 the Commission held that a change is “nationwide or substantially nationwide” if

a **significant number of postal customers** experience the requisite change in services in their **local areas**, and these local areas cover a ‘broad geographical area’ ... **regardless of whether the local changes produce an aggregate change** in the level of postal services provided by the Postal Service.”

PRC Op. N75-1 at 29 (emphasis added). The SBOC Initiative does not result in the discontinuance of facilities that will have an impact on only a handful of members of a community. In fact, quite the opposite is true. Entire communities, in numerous locales across every state may experience the loss of a retail post office as a result of this Initiative.

Furthermore, in its Docket No. N75-1 Advisory Opinion the Commission made clear that it considers not just the effect of a program, but also its goal. In its Request for an Advisory Opinion in this docket, the Postal Service states “the objective of the Initiative is to realign the postal retail network with current and future postal customer needs, to reduce inefficiency and redundancy, and to capture the resulting cost savings.” USPS Request at 6. Thus, under review in this docket is the Postal Service’s **plan** to review for possible closure or consolidation **all** retail stations and branches that report Postmaster at or above the EAS-24 pay grade in

all 50 states with the goal of changing the retail network. It stretches the mind to imagine a more obvious example of a program with a nationwide impact.

In addition, conveniently missing from the Postal Service argument is the testimony of Postal Witness Alice VanGorder acknowledging that simply because a facility is removed from the list today it does not mean it cannot be considered under this Initiative in the future.⁶ Tr. 2/359-360. There has been no assertion by the Postal Service that the Initiative has run its course and will be terminated. Moreover, in its Request, the Postal Service acknowledged that “[e]xperience with this initial focus will inform any decision whether to continue or expand the Initiative to include a broader pool of stations and branches.” USPS Request at 6. Thus, it is possible that at the conclusion of the SBOC Initiative many more facilities will be discontinued than are presently under consideration.

Like the program at issue in N2006-1, the SBOC Initiative is a process used over time that may result in facilities being removed from consideration initially but later added back to the list for possible discontinuance. Moreover, the Postal Service has provided no evidence of objective decision making criteria by which the Commission or members of the public could predict which facilities might undergo future closures. Because this list will continue to evolve and grow the Commission must exercise jurisdiction now. To do otherwise would allow the Postal Service to evade Section 3661 review for any nationally directed program that may affect postal services on at least a substantially nationwide basis simply by implementing a program slowly over time. This is not what Congress intended and the Commission has soundly rejected this prospect:

The fact that an action or program is “evolutionary” and affects a relatively few postal customers at a time, or redistributes the services currently provided by the Postal Service rather than bringing about a net increase or cutback, does not except the action or program from the purview of the statute.

PRC Op. N75-1 at 21.

⁶ It is worth noting that in every revised candidate list produced by the Postal Service in USPS-LR-N2009-1/4, it states that facilities have been removed from the list because “Not feasible **at this time.**”

For the reasons explained above, the arguments from the Postal Service and Valpak regarding the jurisdictional issue must be rejected. Record evidence in this case, as well as judicial and Commission precedent clearly show that the Commission has jurisdiction to issue an advisory opinion on the SBOC Initiative.

II. Postal Service Must Comply with 404(d)

The Public Representative asserts that the Postal Service's failure to apply the 404(d) processes to the closing of stations and branches despite continued rulings from the Commission over the past 30 years that this process applies not just to post offices in the technical sense, but also applies to stations and branches may be considered contempt. PR Brief at 13. We agree that the Postal Service's continued callous defiance of Commission rulings is contemptuous. We request that the Postal Service be precluded from arguing that 404(d) does not apply to station and branches in this and all future dockets on this subject.

Since the first docket detailing the application of Section 404(b)⁷ of Title 39, the Postal Service has argued for a limited reading of the phrase "post office." Likewise, since its first decision on the matter, the Commission has recognized that "post office" refers to a broader category of postal facilities than merely those staffed by postmasters. In that first docket, *In re Gresham*, SC, Docket No. A78-1, in determining its jurisdiction the Commission recognized that "post office" in its "ordinary sense" would mean "a fixed retail facility serving the public and acting as the point of origin for delivery routes." Order No. 208 at 6-7.

In *In re Knob Fork, WV*, Docket No. A83-30, the Commission held that Section 404(b) applies to Community Post Offices despite the Postal Service argument to the contrary. PRC Op. A83-30 at 2. In so doing, the Commission discussed at length the Postal Service's argument and relevant legislative history. The Commission reasoned:

In ordinary usage, "post office" is a retail facility where patrons may purchase postal services and dispatch and possibly receive mail. The technical or

⁷ The substance of Section 404(b) dealing with post office closing appeals was not changed by the Postal Accountability and Enhancement Act, however it is now contained in Section 404(d).

specialized usage of “post office” adds to the ordinary definition the requirement of a specific degree of managerial independence. That is, the technical meaning of post office is a retail postal facility with a managerial structure including a postmaster position. Postmasters have authority concerning operational decisions in the area served by their post offices.

Id. at 3 (internal citations omitted). The Commission explicitly rejected this “technical usage” of post office. It concluded that

a more reasonable reading of Section 404(b) is that it is to apply whenever the Postal Service proposes to close or consolidate a community’s retail postal facility. The public generally describes these facilities as ‘post offices.’ Congress was concerned about the effects of the community resulting from the Postal Service’s decisions on retail facilities.

PRC Op. A83-30 at 7. The Commission further noted that its definition comports well with the broad policies related to the Postal Service – “freedom to manage and responsiveness to the public.” *Id.*

In Docket No. A94-8, the Commission again rejected the Postal Service’s narrow reading of “post offices” under Section 404(b) and stated that the “more reasonable reading of section 404(b) and Congressional intent is that 404(b) applies whenever there is a proposed closure or consolidation of a community’s retail postal facility.” PRC Op. A94-8 at 9.

Further, in *In re Oceana Station Virginia Beach*, Docket No. A82-10, Order No. 436, the Commission declined to exercise jurisdiction over the closing of the Oceana Station. In its Order, the Commission reasoned that “the Postal Service is not required to follow the formal section 404(b) when it is merely rearranging its retail facilities in a community.” Order No. 436 at 1. If the Commission believed that 404(d) only applied to “post offices” as asserted by the Postal Service (Order No. 436 at 4, citing Postal Service Memorandum at 18-30), it could have simply ruled that the Oceana Station was not a “post office” and therefore it lacked jurisdiction. However, it did not do so. Instead, it undertook the far more complicated analysis of what amounts to a closing or consolidation of a postal retail facility and issued its ruling on that basis alone.

Despite the Commission’s unwavering definition of “post office” over the past 30 years up to and including its most recent decision, *In re Observatory Finance*

Station, discussed at length on our Initial Brief at pages 11-13, the Postal Service continues to ignore this definition. Enough is enough. The Commission has spoken, it is time to make clear that the Postal Service must adhere to the jurisdictional assessment of the PRC. There has not been and cannot be an argument that stations and branches are not postal retail facilities. Therefore, the Postal Service must apply the 404(d) process to stations and branches. If the Postal Service does not comply, it should be found in contempt as suggested by the Public Representative.

III. Testimony by APWU Witnesses Should be Considered by the Commission and Postal Service Arguments to the Contrary Must be Rejected.

A. The Postal Service Mischaracterizes APWU Witness Barrett's Testimony

The Postal Service's objections to APWU Witness Michael Barrett's testimony are unfounded. Evidence in this case show that the Postal Service can vastly improve the way it measures values attributed to many of the factors relied on in making a determination to discontinue a postal facility. The Postal Service does not deny the existence of this data, and it is only through mischaracterizing what Mr. Barrett presents can it argue that his suggestions are without merit.

The Postal Service argument rests primarily on the erroneous assertion that Mr. Barrett prefers the Postal Service reduce its process for determining whether to discontinue a station or branch to a "mere accounting exercise." USPS Brief at 25. At no point in his testimony or during examination by Postal Service counsel did Mr. Barrett deny that these determinations have a qualitative element. Instead, Mr. Barrett offered ways to improve the data relied on by Postal Service management to make these qualitative decisions. Mr. Barrett highlights the important information the Postal Service could easily be collecting and reviewing in the discontinuance studies but chooses to ignore. The suggestions offered by Mr. Barrett do not amount to a system where no qualitative measures are considered. However, his testimony in conjunction with APWU Witness Morrison demonstrate the need for better training, guidance, and metrics to ensure that the SBOC Initiative does not run afoul of the policies of Title 39.

B. The Postal Service's Objections to APWU Witness Morrison's Testimony are Not Valid

APWU Witness Anita Morrison is an expert in her field with exemplary credentials, facts not contested by the Postal Service.⁸ Instead, the Postal Service relies on its own mischaracterizations of her testimony to claim that it should be given no weight.

The Postal Service first takes issue with the amount of time devoted to the preparation of her testimony. As stated in her testimony, Witness Morrison was engaged by the APWU to evaluate the postal facilities "being studied for closure to determine if the process used was adversely impacting low-income, elderly and/or minority persons." She is an expert in her field, with 32 years of experience working with communities and business districts "evaluating their conditions and developing strategies to improve the factors affecting their economic health." APWU-T-2 Autobiographical Sketch. It should not be surprising that an expert of her caliber and experience is able to assess quickly the apparent and abundant flaws in the Postal Service's SBOC Initiative as outlined in further detail in our Initial Brief.

The Postal Service also complains that Ms. Morrison did not examine the entire candidate pool. Ms. Morrison was commissioned to evaluate whether the SBOC Initiative would have adverse impacts on vulnerable populations. She was asked to examine the list of facilities still being under consideration for discontinuance as that list stood at the time. The Postal Service makes great hay that she did not look at the entire list of 3300 facilities but as the record in this case shows and as stated in her response to USPS/APWU-T2-2(c) "the complete list of the entire universe of potential candidate branches and stations was not filed in the docket for this case until after we completed our analysis." Thus, the Postal Service bemoans the absence of analysis of information that did not exist and therefore could not be analyzed. Moreover, Ms. Morrison's analysis of the revised lists showed that as the SBOC Initiative progressed, it became more likely to affect vulnerable populations, not less. APWU Initial Brief at 4-6. Whether her analysis began with the entire universe of candidate postal facilities

⁸ See Appendix A to APWU-T-2; see also Response of APWU Witness Morrison to USPS/APWU-T2-6.

or simply focused on the most recent candidate lists, the discriminatory impacts on vulnerable populations would remain. Id. That is the inherent and undeniable flaw of the Initiative; it, by design, targets areas with high concentrations of low income, minority and elderly populations.

The Postal Service also argues that that Ms. Morrison makes an “apples to oranges” comparison when she compared the demographics of populations directly surrounding candidate stations and branches to those of the national average. USPS Brief at 27. In making this argument, the Postal Service evidences a fundamental misunderstanding of the purpose of Ms. Morrison’s testimony. Ms. Morrison’s testimony shows that the SBOC Initiative is targeting areas with high concentrations of vulnerable populations, populations that have a need for more and more nearby government services as compared to the national population. That she did not make the comparison the Postal Service wants is beside the point.

VII. The Commission should Require the Postal Service to Implement a Final Accounting/Data Collection Plan as Suggested by the Public Representative.

In its Initial Brief, the Public Representative requests the Commission to require the Postal Service to submit a final accounting of “the efficiency gains achieved and the actual effect on ready access to essential postal services following the closure or consolidation of station and branch post offices under this Initiative.” PR Brief at 34.

APWU endorses the Public Representative’s request. A final accounting will contribute greater transparency to the process and help the Commission, the Postal Service and the public ensure that the policies of Title 39 are complied with.

V. Conclusion

For the reasons explained above and those contained in our Initial Brief, the Commission should find that it has jurisdiction to issue an advisory opinion on the Postal Service SBOC Initiative. In its decision, the Commission should advise the Postal Service that in its present form the SBOC Initiative does not comport with the policies of Title 39. Specifically, the Commission should once again clearly articulate

that the Postal Service must comply with the requirements of 39 U.S.C. § 404(d) when considering the discontinuance of postal stations and branches. The Commission should further advise the Postal Service to adopt the recommendations found in APWU-T-1 and APWU-T-2 to ensure the Initiative is not discriminatory.

Respectfully submitted,

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