

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

COMPLAINT OF LANCE McDERMOTT

Docket No. C2010-2

**MOTION OF THE UNITED STATES POSTAL SERVICE
TO DISMISS COMPLAINT**
(May 20, 2010)

The Postal Service hereby files its motion to dismiss the Complaint filed by Lance McDermott because it is both substantively and procedurally defective. Substantively, the Complaint fails to state a claim under 39 U.S.C. § 3662 and the Postal Regulatory Commission's (Commission's) implementing regulations at 39 C.F.R. § 3030. If the Complaint is read as presenting an appeal of a final determination to close or consolidate a Post Office, pursuant to 39 U.S.C. § 404(d) and the Commission's implementing regulations at 39 C.F.R. § 3001 Subpart H, it is premature.¹ In either case, it should be dismissed.

If the Commission does not dismiss the Complaint based on its substance, the Complaint should be dismissed without prejudice because of its procedural defects. Even if the Complaint does state a proper claim and is not premature, Mr. McDermott

¹ The Postal Accountability and Enhancement Act's (PAEA's) amendments to Title 39 resulted in former section 404(b) being renumbered as current section 404(d). The Commission's implementing regulations continue to refer to the former section, and the Complaint refers to both the current and former sections. The Postal Service understands that Mr. McDermott intends to cite to the provisions of the law concerning the Postal Service's authority to determine the need for Post Offices. With that in mind, the Postal Service acknowledges that there is disagreement between it and the PRC concerning whether the closing or consolidation of a station falls within the scope of 39 U.S.C. § 404(d). For the purposes of this motion, however, that question need not be addressed, since even if it were finally decided that stations are "Post Offices" within the meaning of the PAEA, the Complaint is premature. The Postal Service reserves its right to raise that argument in its defense if the procedural posture of the case changes.

failed to properly serve the Complaint upon the Postal Service, and he has not complied with the requirements of 39 C.F.R. § 3030.10(a)(9) to meet or confer prior to the filing of a complaint before the Commission. If not for its substantive defects, then for these additional procedural reasons, the Complaint should be dismissed.

I. THE COMPLAINT FAILS TO STATE A CLAIM UNDER 39 U.S.C. § 3662 AND THE COMMISSION'S IMPLEMENTING REGULATIONS AT 39 C.F.R PART 3030

The essence of Mr. McDermott's Complaint appears to be his impression that the Postal Service made a final determination to close or consolidate the Seattle-Queen Anne Station without following the procedures required by 39 U.S.C. § 404(d). Attached to his Complaint as Exhibits 1-3, Mr. McDermott provides what he believes to be the Postal Service's "determination," as that term is used in the statute, to close or consolidate the Queen Anne Station. Nevertheless, Mr. McDermott does not base his Complaint on 39 U.S.C. § 404(d)(5); rather, he references the provisions of 39 C.F.R. § 3030.10, which is a part of the Commission's regulations implementing 39 U.S.C. § 3662.

As the Commission has noted previously, the plain language of section 3662 limits complaints to nonconformance with paragraph (d) of section 101, paragraph (2) of section 401, paragraph (c) of section 403, section 404a, section 601, or the provisions of chapter 36 concerning rates, classes and service. A careful reading of Mr. McDermott's Complaint reveals that it does not allege facts involving ratemaking principles, anti-competitive practices, the private carriage of letters or undue or unreasonable discrimination in the provision of services or establishment of rates.

Therefore, to the extent the Complaint relies upon 39 U.S.C. § 3662 to invoke the Commission's complaint jurisdiction, it must be dismissed.

II. THE COMPLAINT IS PREMATURE AS AN APPEAL OF A DETERMINATION TO CLOSE OR CONSOLIDATE A POST OFFICE

Should the Commission consider Mr. McDermott's Complaint to be an appeal of a determination by the Postal Service to close or consolidate a Post Office, it must still be dismissed.² The Complaint alleges that the Postal Service made a determination to close or consolidate the Queen Anne Station in Seattle, Washington. Mr. McDermott believes that because the facility is for sale, the retail operation there will be closed and that the Postal Service has already made that decision. Complaint at 1:15-18.³ Of course, Mr. McDermott conflates the issues. Exhibit 1, which is an internal communication from the District Manager to the Installation Head at the Seattle – Queen Anne Station, clearly states that the potential sale of that property is “not associated with the National SBOC [Station and Branch Office Consolidation] program and as a result **the FSO disposals noted will be developed in such a way as to**

² In addition to the Seattle-Queen Anne Station, the Complaint also makes mention of the SeaTac Air Mail Center, the Olympia Processing and Distribution Center, the Tacoma Processing and Distribution Center, a retail postal location in downtown Seattle, the Edmonds Post Office, the Covington Post Office, and the Mail Transportation Equipment Center in Auburn. The appeal provisions of section 404(d) are inapplicable to these facilities, with the exception of the Edmonds and Covington Post Offices. The Postal Service has specific authority to dispose of property and to lease property pursuant to 39 U.S.C. § 401(5). Without admitting the facts alleged, but assuming them to be true for the purposes of this motion, Exhibit 7, which is undated and bears no reference to its source, indicates that the building housing the Edmonds Post Office is for sale. There is no allegation that operations there have ceased or that the Postal Service has made any determination to close or consolidate that Post Office. The situation for the Covington Post Office, as demonstrated in Exhibit 9, involves the opening rather than the closing of a Post Office, which occurred in 2002. The Postal Service asserts that a fair reading of the Complaint is that the facts concerning these additional facilities are provided as additional evidence to support allegations that the Postal Service is not providing due process or following its procedures concerning the Queen Anne Station rather than as the direct subject matter of this Complaint. This assertion is supported by the Complaint's organization, which loosely follows the structure of 39 C.F.R. 3030.10. The additional facilities are included under the heading “Title 39 section 3030.10(a)(4) Similar Issues.” Complaint at 7:17.

³ Throughout this Motion, references to the body of the Complaint will include the page number followed by the numbered lines of text in this format: at [page]:[line number]-[line number].

continue the Retail presence within the disposal facility or immediate area.”

Exhibit 1, explanation and emphasis added. This facility, which houses the Seattle District Offices on the second and third floors of the building, may be sold with a lease-back provision that enables retail operations to continue in the same location. Until a buyer expresses interest and negotiations occur, the Postal Service will not know whether there is a need to initiate the community contact process for facility relocation.

Nevertheless, as Exhibit 2 demonstrates, the Postal Service provided notice to the public concerning the possibility that the property may be sold and that, if the retail operation had to be relocated, the community contact process would be initiated.

Exhibit 2. Finally, a stand-up talk concerning the potential sale of the property housing the Queen Anne Station demonstrates that no decision has been made concerning the retail operation there. The stand-up talk assures employees that “[t]he retail operation will remain in the existing facility or relocate to alternate quarters in the immediate area.”

Exhibit 3.

Assuming that the facts as asserted by Mr. McDermott in his Complaint and Exhibits are true, the most that can be said about the Seattle-Queen Anne Station is that the building that houses it is for sale and that the Postal Service does not believe that selling the property will necessarily mean that the station will move from the building. It is to be expected, therefore, that this facility does not appear on the “list of possible Post Office facility closures or consolidations given to Congress and the Public.” Complaint at 6:2-3. Nor is it inconsistent with proper procedures that the Western Area Facilities Services Office (FSO) would initiate the disposal of the property through a sale, while the District Manager would maintain responsibility for making a

determination regarding whether to close the office within that facility, once a buyer is identified and the terms of a sale, with or without a lease-back provision, are reached. The FSO is responsible for the efficient management of physical assets, while the District Manager is responsible for customer service and operations.

The facts alleged in the Complaint and the attachments demonstrate that if Mr. McDermott's Complaint is construed to be an appeal against a determination to close the Seattle-Queen Anne Station, or any other facility mentioned in the Complaint, it is premature or unfounded. Therefore, the Complaint should be dismissed.

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS PROCEDURALLY DEFECTIVE

If the Commission determines that the Complaint should not be dismissed on the basis of its substantive defects, then it should be dismissed without prejudice because it does not meet the form and manner requirements of subpart B of 39 C.F.R. Part 3030. Specifically, it was not properly served; it does not state that the issues have been resolved in existing Commission proceedings; and the certification that the complainant attempted to meet and confer with the Postal Service's General Counsel to resolve the matter is insufficient.

The Commission may waive any of the requirements as to the form and manner requirements of 39 C.F.R. § 3030.10 to serve the interests of justice. 39 C.F.R. § 3030.10(b). In this case, however, no interest of justice will be served by exercising this authority. With regard to Mr. McDermott's failure to properly serve the Postal Service, the Complaint itself clearly demonstrates that he failed to adhere to 39 C.F. R. § 3030.11. The Complaint includes a Certificate of Service to the Vice President of

Facilities rather than to the General Counsel. There is no evidence to support a waiver of service of process on the basis that Mr. McDermott does not have access to email. In fact, there is evidence to support the fact that Mr. McDermott does have internet access and is capable of using it, since the exhibits included with his Complaint include pages from internet websites.

The Commission's analysis of its final rules of procedure concerning complaints filed under 39 U.S.C. § 3662 note that the purpose of electronic service of process on the Postal Service to the e-mail address identified in the regulations is "to ensure that the appropriate individuals at the Postal Service receive[] the complaint as contemporaneously as possible with the filing." 74 Fed. Reg. 16741 (April 10, 2008). Further, the Commission explained that the "provision requiring e-mail service of the complaint on the Postal Service requires minimal effort. It is not a burdensome requirement." *Id.*

In this case, the Commission posted the Complaint on its website on Monday, May 3 and contemporaneously posted a letter addressed to the Postal Service's General Counsel, apparently in an effort to minimize the consequences of the procedurally defective Complaint. The Commission's practice in this regard, while helpful, cannot nullify its own requirement for service of process on the Postal Service. It would not serve the interests of justice and the purpose of the rule to require proper service from sophisticated complainants while waiving it for the unsophisticated. The Postal Service respectfully suggests that the interests of justice and the purpose of the rule might be better served if the Commission were to reject documents filed by those

who fail to make the minimal effort necessary to meet what is admittedly “not a burdensome requirement.”

The Complaint also fails to meet the form and manner requirements in that it does not clearly state that the issues it presents have already been addressed by the Commission. To the extent that Mr. McDermott is complaining that the Seattle-Queen Anne Station is the subject of a determination to close or consolidate a Post Office, he raised that issue with the Commission already. Attached to his Complaint as Exhibit 11 is the Commission’s response, dated March 18, 2010, advising him that the Complaint is premature. If Mr. McDermott’s complaint is more broadly read to be concerned with the Postal Service’s evaluation of stations and branches for consolidation in a nationwide effort, the Commission dealt with those issues in PRC Docket N2009-1.

Finally, the Complaint fails to meet the form and manner requirement concerning attempts at informal resolution of the complaint before filing. Mr. McDermott states that he wrote to the Postal Service’s General Counsel and received no reply. The undersigned counsel for the Postal Service made reasonable efforts to locate any such correspondence through the General Counsel’s office. That search was fruitless. Anticipating this very problem, in its comments to the Commission’s proposed rules, the Postal Service asked that the Commission require that complainants attach correspondence demonstrating their efforts to meet and confer when filing the complaint. The Commission rejected this request, stating that “complainants are likely to provide this information in support of the requirement in paragraph 3030.10(a)(9) that they explain why they believe settlement unlikely.” 74 Fed. Reg. 16740 (April 10, 2009).

In PRC Docket C2010-1, the Postal Service outlined the requirements of the meet or confer requirement as set forth by the Commission in its Order No. 195, *Order Establishing Rules For Complaints And Rate Or Service Inquiries* (“Order No. 195”). PRC Docket No. C2010-1, *Motion Of The United States Postal Service To Dismiss Complaint Without Prejudice*, December 24, 2009, 3-7. The argument made in that docket is applicable in this case as well. Mr. McDermott’s bald assertion that he wrote to the General Counsel fails to meet the purpose of the rule, which is to put the Postal Service on notice that a complaint may be forthcoming and to provide the possibility of resolving the matter without the need for a formal complaint filing. Therefore, even if the Commission determines that the Complaint states a claim within the scope of 39 U.S.C. § 3662, it should be dismissed.

IV. CONCLUSION

Mr. McDermott asserts that “Pursuant to Section 404a(c)—‘Any party who believes that the Postal Service has violated this section may bring a complaint...’” Complaint at 12:3-5. He fails to recognize that “this section” to which he is referring, 39 U.S.C. § 404a, limits the scope of complaints to those involving unfair competition by the Postal Service, certain actions concerning intellectual property, or the use of information to develop postal products. None of these matters are raised in Mr. McDermott’s Complaint.

Mr. McDermott’s Complaint fails to state a claim under 39 U.S.C. § 3662, 39 U.S.C § 404(b), or 39 U.S.C. § 404a, is premature as an appeal to a determination to close or consolidate a Post Office pursuant to 39 U.S.C. § 404(d), and is otherwise

procedurally defective. For these reasons, the Complaint should be dismissed with prejudice on substantive grounds.

Respectfully submitted,

UNITED STATES POSTAL SERVICE
By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business

Laree Martin

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-3816; Fax -5628
laree.k.martin@usps.gov
May 20, 2010