

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

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COMPLAINT OF AMERICAN POSTAL  
WORKERS UNION, AFL-CIO

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Docket No. C2012-2

**AMERICAN POSTAL WORKERS UNION, AFL-CIO, REPLY TO USPS OPPOSITION  
TO APWU MOTION FOR AN EMERGENCY ORDER**  
(June 21, 2012)

The American Postal Workers Union, AFL-CIO (“APWU”) hereby replies to the Postal Service Opposition to APWU Motion for an Emergency Order, filed yesterday, June 20, 2012 (“Opposition”).

**I. The Commission Has Authority to Grant the Relief Requested**

The Postal Service’s argument that the Commission lacks authority to grant the relief we are seeking fails for several reasons. First, the Postal Service contention that the Commission has the authority to remedy implementation of the new service standard after that standard takes effect but not before would, if accepted, lead to an absurd result. By the Postal Service analysis, the Commission could issue an order on July 2 ordering the Postal Service to reverse its service standard changes, but it cannot issue an order now to prevent the July 1 implementation of the service standard changes announced in the Postal Service’s Final Rule.

Secondly, we observe that the Postal Service’s argument hinges on its contention that the Commission must make a final judgment on a Complaint before it can provide a remedy. But this case is ripe for the Commission to issue a final order on the Complaint. There is no disputed issue of fact pertinent to the point that the Postal Service must wait for an Advisory Opinion before going forward. The Postal Service not only does not deny that it plans to go forward without receiving the Commission’s Advisory Opinion, it is asserting a right to do so whenever the Commission takes moiré

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than 90 days to decide an N case. That contention calls upon the Commission to interpret the statute it is charged with enforcing and to issue an appropriate order requiring the Postal Service to comply with that statute.

Finally, even apart from the points made above, the Postal Service errs in its contention that Congress did not give the Commission the authority to issue a preliminary decision in a complaint case and to provide an appropriate order on the basis of that decision.

In this regard, the Postal Service's reliance on Trans-Pacific Freight Conf. of Japan v. Federal Maritime Board, 302 F.2d 875, 880 (D.C. Cir. 1962), is misplaced. As the D.C. Circuit later explained, the Court in that case "specifically noted that we were not deciding the question whether the Commission had the power to issue a cease and desist order prohibiting the parties from carrying out an agreement that had not, but should have, been filed with the Commission for Section 15 approval. 302 F.2d, at 879, n. 8." Persian Gulf Outward Freight Conf. v. Federal Maritime Commission, 375 F.2d 335, 338 (D.C. Cir. 1967).

In Persian Gulf Outward Freight Conf., *supra*, the Court expressly approved of the Commission's reasoning, where the Commission held that "the power of this Commission to issue cease and desist orders preventing the carrying out of unapproved agreements is a necessary corollary to the requirement that such agreements obtain approval before they may be carried out [and this power] has been recognized by the courts. [citing Trans Pacific Freight Conf. of Japan v. Federal Maritime Com'n, 314 F.2d 928, 935-36 (9th Cir. 1963)]." In approving of this reasoning and conclusion, the D.C. Circuit said "[w]e agree with the Commission that it is authorized to issue a cease and desist order after hearing to enjoin actions of a conference undertaken pursuant to an agreement, the nature of which requires it to be filed under Section 15." Persian Gulf Outward Freight Conf., *supra*, 575 F.2d, at 339.

Likewise, here, the authority of the Commission to issue orders to prevent the Postal Service from carrying out a plan with nationwide impact before the Commission has issued its Advisory Opinion is a necessary corollary of the power of the Commission to provide a remedy where the Postal Service has implemented a nationwide plan without receiving the Commission's Opinion. To hold otherwise would nullify the

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authority of the Commission to review nationwide plans in advance and create an anomalous situation in which a remedy could be provided by the Commission only after it had waited powerlessly for the Postal Service to commit an anticipated illegal act.

## **II. The Postal Service's Interpretation of Section 3661 is Untenable**

The Postal Service position that to comply with Section 3661 it need only request an opinion from the Commission, but not receive one, negates the role of the PRC and neuters the Commission and Section 3661. The Postal Service has acknowledged that it is a "bedrock principle" that no provision of a statute should be rendered superfluous. See Opposition at 12. The Postal Service also has acknowledged, as it must, that the statute requires it to seek an advisory opinion "a reasonable period of time" before the effective date of the proposed change. See Opposition at 11. But it takes the untenable position that a "reasonable period of time" means no more than 90 days **in any case**. Though Commission regulations require the Postal Service file a request for an advisory opinion "not less than 90 days in advance of the date on which the Postal Service proposes to make effective the change in the nature of postal services involved" this suggests that the Commission has decided that it needs **at least** 90 days to consider even the simplest proposal. However, nothing in the Section 3661 or in the Commission's regulations suggest that the Postal Service is entitled to act without a Commission opinion if it has filed its request 90 days before it intends to implement the proposed changes as the Postal Service contends.

That contention is further belied by the scope, complexity and importance of the issues in this case. It also is foreclosed by the Commission's Scheduling Order in Docket No. N2012-1 and by the Commission's Order denying the Postal Service's motion for reconsideration of that Order. In those orders, which were issued after the Commission considered the recommendations of interested parties on the question of procedures and schedule in this case, the Commission ruled that a reasonable time would extend until after the Commission receives briefs in July. The Postal Service may disagree with that ruling, but it can only change it by appealing to the Commission; it cannot ignore it.

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Furthermore, the Commission regulations require not only that a request be filed “at least 90 days in advance” they also require that the Postal Service’s request shall include such information and data and such statements of reasons and basis as are necessary and appropriate to fully inform the Commission and the parties of the nature, scope, significance and impact of the proposed change in the nature of postal services and to show that such change in the nature of postal service is in accordance with and conforms to the policies established under the Act.

39 C.F.R. § 3001.74(a); and

- (1) A **detailed statement** of the present nature of the postal services proposed to be changed and **the change proposed**;
- (2) The **proposed effective date** for the proposed change in the nature of postal services.

39 C.F.R. § 3001.74(b). If the Postal Service could implement its proposal simply by providing notice to the Commission and waiting 90 days, the Commission would not require the Postal Service to provide the information “to fully inform the Commission and parties of the nature, scope and significance and impact of the proposed change” in its initial filing. Presumably, the Commission has decided that it needs at least 90 days to consider a Postal Service proposal from when it has been “fully informed” about the proposal. Therefore, it is clearly reasonable to conclude more time is required when, as in Docket No. N2012-1, the Postal Service initial filings fall far short of these requirements, the proposal continues to be revised and when the complexity and scope of the proposed changes are significant.

### **III. APWU’s Complaint is Timely**

In its Opposition, the Postal Service asserts “that at all times, the Postal Service has been clear that it intended to implement its financially critical plan after the completion of notice-and-comment rulemaking” and asserts that the APWU complaint is untimely. These assertions are belied by the record in Docket No. N2012-1.

The record evidence in N2012-1 demonstrates that the Postal Service did not provide unambiguous information as to when it intended to implement its proposal.

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USPS Witness Williams response to an APWU interrogatory provides a good example of the Postal Service's cagey behavior:

**APWU/USPS-T1-19** Does the Postal Service intend to implement the Service Standard changes which are the subject of the Federal Register Notice published December 15, 2011 at 76 *Federal Register* 77942, apart from Network Rationalization and the mail processing changes proposed in this docket?

**RESPONSE**

The Federal Register Notice published on December 15, 2011 contains proposed service standard regulation changes. The rulemaking process will resolve the content of any service standard regulation changes that are ultimately implemented. Those service standard changes and the service changes (and underlying operational changes) discussed in this docket are inter-related and would be implemented accordingly.

Docket No. N2012-1 Tr. 2/121. See also the Oral Testimony of USPS Witness Williams at Tr. 2/213-221 and Tr. 2/403-404.

The APWU had no reason to expect that the Postal Service was going to violate the statute and implement service standard changes until it filed its Federal Register Notice on May 25, 2012. Up until that point the Postal Service had provided no specific implementation date. Therefore, had the APWU filed its complaint prior to May 25, 2012, the Postal Service could have easily claimed that it had not determined when it would implement its plan, therefore the complaint would have been labeled premature.

**IV. The Postal Service Opposition Misconstrues the Relief Sought by APWU's Motion**

The Postal Service errs in asserting that the APWU Motion is an effort to keep mail processing plants open between now and the end of this year. By its Motion, the APWU is seeking to preserve First Class Mail service standards until after the Commission has issued its Advisory Opinion in this case and the Postal Service has had an opportunity to consider that Opinion. The AMP process used to close or consolidate mail processing facilities will continue, and facilities may be closed or consolidated on that basis.

The Postal Service has not submitted any competent evidence to support its contention that the planned July 1 service standard changes are necessitated by the planned closure of 48 facilities. Nor has it submitted evidence that would permit the Commission to balance the lost revenue that will result from a reduction in service standards against the relatively small savings to be achieved by effectuating those reductions on July 1 instead of waiting until after the Commission has issued its Advisory Opinion. The problems caused by premature implementation cannot be solved by reversing the service standard changes. The costs incurred by mailers and the Postal Service, in changing standards and then changing back, will never be recovered. And the loss of revenue caused by the loss of business in response to reduced service standards is likely to be permanent even if the standards are later restored.

If the Postal Service does have evidence to support its decision to implement service standard reductions on July 1, it should have submitted that evidence to the Commission. Neither management's intuition nor a perceived political necessity can take the place of reasoned and measured analysis. The Postal Service contends that a delay from July 1 until the end of this year would cause "significant" financial loss, and "will have real consequences" for the Postal Service. But the Postal Service cites no record evidence and offers no calculation or even estimate of any financial loss it claims it might incur. See USPS Opposition at 23-24.

Instead of offering evidence in support of its July 1 plan, the Postal Service repeatedly invokes the provisions of S.1789 as passed by the Senate. It even goes so far as to cite a June 15, 2012, letter from Senator Carper. *Id.* at 23, n. 76. But action by one house of Congress does not make policy; much less does it change the law. The Commission has a duty to apply the law as written, and the Postal Service has an obligation to comply with the law as written.

**Conclusion**

For the foregoing reasons, and for the reasons explained in our Motion for Emergency Order, the Commission should grant the APWU's Motion and require the Postal Service to refrain from implementing any change to service standards until after the Commission has issued its advisory opinion.

Respectfully submitted,

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