

BEFORE THE
POSTAL REGULATORY COMMISSION

RULES PURSUANT TO
39 U.S.C. 404a

DOCKET NO. RM2013-4

INITIAL COMMENTS OF UNITED PARCEL SERVICE
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING
ESTABLISHING RULES PURSUANT TO 39 U.S.C. § 404a
(July 29, 2013)

United Parcel Service, Inc. hereby responds to Commission Order No. 1739 (June 5, 2013) seeking comments on the Commission's proposed rules to govern complaints alleging violations of 39 U.S.C. § 404a.

I. **Procedural Rules**

UPS believes two aspects of the Commission's proposed procedural rules will be beneficial to the proper resolution of complaints alleging violations of Section 404a(a).

a. **Proposed Rule 3032.15 – Depositions**

Proposed Rule 3032.15 would allow participants in non-accelerated Section 404a(a) complaint proceedings to take depositions in accordance with Federal Rule of Civil Procedure 30. UPS supports this proposed rule.

As the Commission states, depositions would "streamline the discovery process for section 404a complaints" and "allow participants to exchange information in a more efficient manner than the interrogatory procedures typical

of the Commission’s general rules of practice and procedure.” Order at 14. We agree with the Commission that complaints alleging a violation of Section 404a(a) are “well-suited for depositions” and that depositions would allow “participants to promptly narrow the issues for Commission review and decision.” Id. Accordingly, we encourage the adoption of this proposed rule.

b. Proposed Part 3033 – Accelerated Procedures

UPS also supports the Commission’s proposal to adopt optional accelerated procedures for Section 404a complaints. The proposed procedures would give the Commission and litigants flexibility to resolve the full spectrum of potential complaints using the procedures that are best suited for each type of complaint; those in which the issues are straightforward and the facts are known can be resolved quickly without the need for protracted litigation.

UPS understands the Commission’s concern that “the proposed accelerated procedures [may] place additional burdens and due process limitations compared to those traditionally afforded to complainants under [the Commission’s standard complaint procedures].” Order at 13. However, at least two features of the Commission’s proposed procedures mitigate this concern.

First, the accelerated procedures would be voluntary, at the election of the complainant. See Proposed Rules 3030.1(c) and 3033.1(a). The complainant is in the best position to determine whether it has the information and documentation needed to support its claim, or whether “the Postal Service is in possession of much of the information and documents necessary [to prove the complainant’s case].” Order at 14. It would be contrary to due process to

prevent a Section 404a complainant from using the standard complaint procedures under Part 3030 in situations where discovery is needed to prove the case. Making the accelerated procedures optional, at the choice of the complainant, obviates this problem.

Proposed Rule 3033.11, which, like the Commission's regular complaint procedures, allows participation by third parties who may be affected by the resolution of a complaint, also mitigates any due process concerns that might otherwise be raised by the accelerated procedures. This proposed rule helps ensure that potentially-affected parties are not excluded from participation simply because the complainant chose to use the accelerated procedures. This is an important feature of the proposed accelerated proceedings.

II. Substantive Rules: Proposed Rule 3032.5 – Unfair Competition

The Commission has also proposed substantive rules governing complaints alleging violations of Section 404a. Proposed Rule 3032.5 requires a complainant who is alleging a violation of Section 404a(a)(1) to show that:

- “(1) A Postal Service rule, regulation, or standard has the effect of:
 - (i) Precluding competition; or
 - (ii) Establishing the terms of competition; and
- (2) The rule, regulation, or standard harms or harmed the person filing the complaint and competition.”

Proposed Rule 3032.5(a). The proposed rule defines the term “rule, regulation, or standard” to include, “among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity.” Proposed Rule 3032.5(c).

UPS supports the broad definition of the term “rule, regulation, or standard,” but opposes the requirement of Proposed Rule 3032.5(a)(2) that a complainant establish additional elements, not required by the statute, to assert a Section 404a(a) complaint.

a. Proposed Rule 3032.5(c)

The Commission’s proposed rule broadly defines “rule, regulation, or standard” to include all types of action taken by the Postal Service in its capacity as a regulatory authority or a governmental entity. Proposed Rule 3032.5(c).

This expanded definition properly recognizes that the Postal Service is able to establish the terms of its competition with the private sector in ways other than by adopting formal “rules, regulations, or standards.” Such actions may take many different forms -- including, for example, operating procedures -- all of which should be covered by the rule. See Order at 8. As the Commission states, “[i]t would be inappropriate for the Postal Service to be able to avoid violations of [Section 404a(a)(1)] by merely titling its governmental policies as ‘manuals’ or ‘operating procedures’ as opposed to ‘regulations’ or ‘standards.’” Id. The proposed rule “ensures that form is not elevated over substance,” proscribing such conduct regardless of the form in which it is taken, and we support its adoption. Id.

b. Proposed Rule 3032.5(a)(2)

Another aspect of Proposed Rule 3032.5 raises concerns. While Section 404a(a)(1) prohibits the Postal Service from taking action “the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the [action] does not create an unfair competitive advantage for itself . . . ,” Proposed Rule 3032.5(a) would also require a Section 404a(a)(1) complainant to show -- as part of its prima facie case -- that the Postal Service’s action “harms or harmed the person filing the complaint and competition.” Proposed Rule 3032.5(a)(2). The proposed rule would add to the complainant’s burden additional elements that are not set forth in the statute.

The Commission appears to have read these additional requirements into Section 404a(a)(1) based on case law analyzing Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) and federal antitrust laws. See Order at 7-8. We respectfully submit that this reliance is misplaced.

In Section 409(e) of PAEA, Congress explicitly made the Postal Service subject to federal antitrust laws and to unfair competition claims under Section 5 of the FTC Act. It adopted Section 409(e) at the same time that it adopted Section 404a(a)(1). By importing into Section 404a(a)(1) elements required under the antitrust and unfair competition laws, the Commission would render Section 404a(a)(1) superfluous. That is contrary to the normal rules of statutory interpretation. See Washington Hospital Center v. Bowen, 795 F.2d 139, 145 (D.C. Cir. 1986), quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (“To accept the Secretary [of Health and Human Service’s] interpretation we

must assume that Congress added sixty words to [the statute] for no reason at all. This we cannot do consistently with our obligation to construe a statute so as ‘to give effect, if possible, to every word Congress used.’”)

Since Congress expressly made the Postal Service subject to Section 5 of the FTC Act and the federal antitrust laws under one section of PAEA, Congress likely did not intend, at the same time, to apply the very same standards to the Postal Service by implication under Section 404a(a)(1). Instead, Congress must have intended in Section 404a(a)(1) to impose on the Postal Service a restriction different from that imposed (through Section 409(e)) by Section 5 of the FTC Act and federal antitrust laws.

The legislative history cited by the Commission supports the view that Congress added a different restriction on the Postal Service in Section 404a(a)(1). The House Committee Report states that “[u]nder [PAEA], the Postal Service will compete on a level playing field, under many of the same terms and conditions as faced by its private sector competitors, *albeit with stronger controls, oversight, and limitations in recognition of its governmental status.*” H. Rep. No. 66, Part I, 109th Cong., 1st Sess. at 44 (April 28, 2005) (emphasis added). By making the Postal Service subject to the antitrust laws and to Section 5 of the FTC Act in Section 409(e), Congress imposed on the Postal Service “the same terms and conditions as faced by its private sector competitors.” Section 404a(a)(1) is one of the “stronger controls, oversight, and limitations [adopted] in recognition of [the Postal Service’s] governmental status.” Otherwise, as noted, Section 404a(a)(1) would be redundant, imposing only what is already explicitly

applied to the Postal Service by Section 409(e) because it would impose no greater duty on the Postal Service than that which is required of private competitors. See also S. Rep. No. 318, 108th Cong., 2d Sess. at 28 (August 25, 2004) (PAEA “makes clear that the Postal Service is barred from using its rulemaking authority to put itself at a competitive advantage or put another party at a competitive disadvantage. *In addition* it is put on the same legal ground as its private sector competitors [including that] all Postal Service activities outside the postal monopoly are subjected to federal antitrust laws and all prohibitions on unfair competition.”) (emphasis added).

In any event, Section 404a(a)(1) cases are *not* like federal unfair competition cases, where “the burden is on the plaintiff to demonstrate that the conduct has the requisite anticompetitive effect.” See Order at 7. Instead, the statute imposes that burden on the Postal Service when it says that the Postal Service must “demonstrate[] that the [action] does not create an unfair competitive advantage for itself” Section 404a(a)(1). Unlike the antitrust and unfair competition laws, Section 404a(a)(1) prohibits certain conduct by the Postal Service because of the Postal Service’s special status as a government entity, not because the conduct has (yet) harmed competition. Only when *the Postal Service* can prove that its challenged action does not create an unfair competitive advantage may its action continue under this section. In short, at best the proposed rule improperly shifts to the complainant a burden that the statute imposes on the Postal Service.

The proposed rule, but not the statute, requires the complainant to show harm to the person filing the complaint, as well as to competition. If the Commission would otherwise find that the Postal Service's action would "preclude competition" or "establish the terms of competition," that is enough under the statute to require the Commission to take up and act on the complaint. It is then up to the Postal Service to demonstrate that the challenged action does not create an unfair competitive advantage for the Postal Service.

It is unclear what evidence the Commission would require a complainant to proffer to assert a showing of harm to competition or to the complainant. Demonstrating a harmful effect on competition and on consumers (see Order at 7) may be difficult to do until a period of time has passed after the challenged Postal Service action, and then the harm the statute is meant to prevent will have actually occurred. In contrast, a complainant may be able to demonstrate that a Postal Service action "establish[es] the terms of competition" -- the sole showing explicitly required by Section 404a(a)(1) -- before any harm occurs. Barring a complainant from filing a complaint until actual harm has occurred is not required by the statute and could inflict injury on the complainant that may otherwise be avoidable.

Finally, even if Section 404a(a)(1) arguably requires a showing of harm to competition and the complainant, we urge the Commission to refrain at this time from incorporating additional requirements into the statutory standard until it gains experience with adjudicating these types of complaints. The Commission will be in a better position to consider whether it makes sense to impose a

heightened evidentiary standard on Section 404a(a)(1) complaints in the context of an actual complaint proceeding. Thus, UPS urges the Commission to follow its usual approach of limiting new, untried rules to procedural matters and to substantive rules that parallel the statutory language, rather than requiring from the outset a complainant to prove elements that are not explicitly required by the statute.

Respectfully submitted,

John E. McKeever
Laura B. Mitchell
Attorneys for United Parcel Service

McKeever & Mitchell
335 Wyndmoor Lane
Huntingdon Valley, PA 19006
(215) 947-5765