

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

RATE ADJUSTMENT DUE TO
EXTRAORDINARY OR EXCEPTIONAL
CIRCUMSTANCES

Docket No. R2013-11

COMMENTS OF AMERICAN POSTAL WORKERS UNION, AFL-CIO
IN SUPPORT OF POSTAL SERVICE MOTION TO SUSPEND EXIGENT
SURCHARGE REMOVAL PROCEDURES
(June 11, 2015)

The American Postal Workers Union, AFL-CIO respectfully submits these Comments in support of the U.S. Postal Service's Motion to Suspend Exigent Surcharge Removal Provisions of Order No. 1926, filed June 8, 2015.

The Postal Service's Motion must be granted, as a direct result of the D.C. Circuit's order vacating the "count once" method in *Alliance of Nonprofit Mailers v. Postal Regulatory Com'n*, --- F.3d ----, 2015 WL 3513394 *8 (D.C. Cir. 2015).

The D.C. Circuit decided to vacate the Commission's "count once" rule, rather than simply remanding it. *Alliance of Nonprofit Mailers*, --- F.3d ----, 2015 WL 3513394 *8. This order to vacate has important legal consequences on remand.

An order vacating an agency rule requires the agency to nullify the rule in the interim, not merely to reconsider it. See *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir.1993). This means that the Commission must suspend the current mechanism for removing the exigent rate, which is premised on the \$2.776 billion estimate in Order No. 1926 based on the "count once" method vacated by the D.C. Circuit. To proceed with removal of the exigent rate based on the invalid low estimate would be a contempt of the D.C. Circuit's order.

I. The D.C. Circuit’s Order to Vacate the “Count Once” Rule Forbids the Commission From Removing Exigent Surcharges Based On the Vacated Rule, Until the Correct Loss Amount is Recalculated.

A. Background

All parties must agree that the D.C. Circuit’s order vacating the “count once” rule has the effect of increasing the loss estimate well above the \$2.776 billion originally estimated. On remand, the Commission must decide exactly how much the increased loss estimate is. The Postal Service correctly estimates that the increased amount must be at least \$3.957 billion once this error is corrected. Furthermore, the D.C. Circuit invited the Commission to revisit its “new normal” analysis, which the Postal Service correctly argues is inconsistent with the Commission’s analysis of whether the rate increase was necessary in the first place. *Alliance of Nonprofit Mailers*, 2015 WL 3513394 *8 n.3.

While it decides how much higher this number should be in view of the problems with its “new normal” analysis, the Commission is without discretion to proceed with the requirement it previously imposed to remove the exigent surcharge, where that removal requirement was based on the improperly low \$2.776 billion figure premised in part on the vacated “count once” rule. To proceed with removal of the exigent rate would amount to a violation of the D.C. Circuit’s mandate, which vacated (and not merely remanded) the “count once” rule underlying it.

B. The legal significance of a Court order to vacate an agency rule

The D.C. Circuit has frequently discussed the difference between a mere remand, which leaves the underlying rule intact pending further agency consideration, and a stronger order to vacate the rule. The appropriateness of vacating an agency action depends on whether (1) the agency's decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir.1993); *see also, e.g., Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir.2005); *Ill. Pub. Telecomm. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir.1997); *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1061 (D.C. Cir.2000); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir.2001); *International Union UMW v. FMSHA*, 920 F.2d 960, 966–67 (D.C.Cir.1990); *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 98 (D.C.Cir.2002); *Sierra Club v. Van Antwerp*, 719 F.Supp.2d 77, 78 (D.D.C. 2010).

If the D.C. Circuit does not intend to change the agency's current practice, it will remand for explanation without vacating. For example, in *Northern Air Cargo v. U.S. Postal Service*, 674 F.3d 852, 860-861 (D.C. Cir. 2012), the Court declined to vacate a Postal Service order, but merely remanded it for further explanation. The Court explained that the Postal Service was likely to provide an adequate explanation for the rule, and that forcing an interim change in the Postal Service's policy by vacating the rule would be disruptive. *See also Heartland Regional Medical Center v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009).

But conversely, where (as here) the D.C. Circuit orders vacation rather than mere remand, it is ordering the agency not to follow its erroneous rule in the interim:

That decision depends on the “seriousness of the order's deficiencies” and the likely “disruptive consequences” of vacatur. *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C.Cir.1993). There is no indication [here] that vacatur would lead to disruptive consequences. This is not a case in which the “egg has been scrambled,” and it is too late to reverse course. *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C.Cir.2002). *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014). See also *American Equity Inv. Life Ins. Co. v. S.E.C.*, 613 F.3d 166, 179 (D.C. Cir. 2009) (vacatur appropriate where agency rule is unlikely to be justified and there would be no disruption of the status quo by preventing the agency from following the rule pending further proceedings.)

C. The D.C. Circuit’s order here prevents the Commission from proceeding based on the vacated “count once” method.

In this case, the D.C. Circuit’s decision to vacate the “count once” rule, instead of merely remanding, requires the Commission to suspend the removal of the exigent surcharge. That decision to vacate indicates the D.C. Circuit’s judgment that the “count once” rule cannot reasonably be justified on remand, and that the D.C. Circuit intends that the Commission maintain the exigent surcharge without the invalid “count once” limitations while it recalculates the total loss.

The exigent surcharge is still in effect. Maintaining that surcharge pending the Commission’s revision of its “new normal” analysis would not be disruptive. To the contrary, a premature removal of the exigent surcharge - based on a loss estimate

derived from a legally invalid “count once” rule - would irreparably harm the Postal Service, and require the surcharge to be re-imposed once the Commission rules on remand. This would violate the D.C. Circuit’s order, because it would impose interim consequences based on the very “count once” rule that the Court vacated.

Conclusion

The Commission should grant the Postal Service’s Motion to Suspend Exigent Surcharge Removal Provisions of Order 1926.

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Respectfully submitted,

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