

POSTAL REGULATORY COMMISSION

[Docket No. C2020-1; Order No. 5455]

Complaint Proceeding**AGENCY:** Postal Regulatory Commission.**ACTION:** Notice.

SUMMARY: The Commission is appointing a presiding officer to set a procedural schedule and conduct limited discovery for the purpose of determining disputed issues of fact in the case. This notice informs the public of the filing and takes other administrative steps.

FOR FURTHER INFORMATION CONTACT:

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I. Introduction and Procedural History

On December 23, 2019, Randall Ehrlich (Complainant) filed a complaint pursuant to 39 U.S.C. 3662(a) and 403(c) concerning an ongoing suspension of mail service to his home.¹

On January 13, 2020, the Postal Service filed a motion to dismiss the Complaint, asserting that the Complainant fails to state a claim upon which relief can be granted, the Commission lacks statutory authority to grant the remedy requested, and that *res judicata* precludes the Commission from considering the allegations set forth in the Complaint.² The Postal Service's Motion to Dismiss here stands in place of an answer as required by 39 CFR 3030.12 because the Motion to Dismiss contains the material issues of fact which the Postal Service relied upon in determining that it did not unlawfully discriminate against the Complainant. See 39 CFR 3030.14.

Complainant timely responded to the Motion to Dismiss on January 31, 2020.³

¹ Complaint of Randall Ehrlich, December 23, 2019 (Complaint).

² United States Postal Service Motion to Dismiss with Prejudice the Complaint of Randall Ehrlich, January 13, 2020 (Motion to Dismiss).

³ Response to Motion to Dismiss, January 31, 2020 (Response). Concurrent with the Response, Complainant also filed a motion requesting that the Commission accept his delayed filing. Motion for Extension of Time of Approximately Ninety Minutes, January 31, 2020 (Complainant's Motion). The Commission hereby grants the Complainant's Motion.

The Response disputes the basis of the Postal Service's claims and alleges that genuine issues of fact and law exist that preclude the Commission from granting the Motion to Dismiss. *See Response at 11–15.*

Chairman's Information Request No. 1 was issued on January 16, 2020,⁴ which the Postal Service responded to on January 23, 2020.⁵ Chairman's Information Request No. 2⁶ was issued February 4, 2020, to which the Postal Service responded on February 18, 2020,⁷ after requesting⁸ and receiving⁹ an extension of time to respond. Complainant replied to the Response to CHIR No. 2 on February 24, 2020.¹⁰

For the reasons discussed below, the Commission concludes that the Complaint raises material issues of fact, and therefore denies the Postal Service's Motion to Dismiss pursuant to 39 U.S.C. 3662(b) and 39 CFR 3030.30(a)(1). Accordingly, the Commission appoints a presiding officer to set a procedural schedule and conduct limited discovery for the purpose of determining disputed issues of fact in the case. 39 CFR 3030.21. The scope of the discovery proceeding will be limited only to fact-finding conducted by the presiding officer on specific matters of fact identified in this order.

II. Complaint

Complainant alleges that shortly after an encounter between his dog Cookie and a mail carrier at his residence in July of 2015, mail has not been delivered to his porch mailbox in violation of 39 U.S.C. 403(c). Complaint at 4–5. He states the cessation of mail has continued despite the fact that Cookie no longer resides at Complainant's home. *Id.* at 5. He states that he attempted to contact postal representatives at the Ballard Postal Annex to inquire about the non-delivery

⁴ Chairman's Information Request No. 1, January 16, 2020 (CHIR No. 1).

⁵ Responses of the United States Postal Service to Questions No 1–2 of Chairman's Information Request No. 1, January 23, 2020 (Response to CHIR No. 1).

⁶ Chairman's Information Request No. 2, February 4, 2020 (CHIR No. 2).

⁷ United States Postal Service Response to Questions 1–4 or Chairman's Information Request No. 2, February 18, 2020 (Response to CHIR No. 2).

⁸ United States Postal Service Motion for Extension of Time to File Response to Questions 1–4 of Chairman's Information Request No. 2, February 11, 2020 (Postal Service Motion).

⁹ Order Granting Motion for Extension of Time to File Responses to Chairman's Information Request No. 2, February 12, 2020 (Order No. 5425). Order No. 5425 also granted Complainant additional time to respond to the Postal Service's answers.

¹⁰ Response to USPS's Answers to Chairman Information Request No. 2, with Third Ehrlich Declaration, February 24, 2020 (Reply to CHIR No. 2 Responses).

of his mail and request restoration of mail service to his porch. *Id.* at 5–6. Complainant claims that he notified Postal Service representatives that Cookie had been adopted out of his residence but that notification did not result in the restoration of his mail. *Id.* at 6. Specifically, he states that he received a visit from a Postal Service inspector who had a positive interaction with the remaining dog at his residence, but that this report "had no impact on management" as the hold on Complainant's mail continued. *Id.* at 5.

Complainant alleges that the Postal Service's proffered solution to his mail delivery issue was to relocate his mailbox to the intersection of his driveway and sidewalk, which was unacceptable to Complainant because of his ongoing concerns about theft from his mailbox. *Id.* at 4, 7, Exhibit A. He states that his attempts at mounting the mailbox at another location on his side fence located "approximately 10 feet 6 inches from the sidewalk" were rebuffed by the Postal Service. Complaint at 9–10. He claims that his treatment was discriminatory because other similarly situated mailers, including neighbors with well-behaved dogs and "other resident[s] whose premises present no dangers to the letter carrier" are still receiving mail at their residences. Complaint at 13. He requests that the Commission require delivery to be restored to his porch mailbox and "that all discriminatory acts and omissions" against Complainant "cease immediately." *Id.* at 14.

III. Motion To Dismiss

The Postal Service contends that dismissing the Complaint is appropriate because Complainant fails to state a claim upon which relief can be granted, and cites lack of Commission jurisdiction, mootness, and *res judicata* as additional grounds for dismissal. Motion to Dismiss at 8, 20, 22. It justifies the cessation of mail delivery to Complainant's residence by framing the matter as one of carrier safety. *Id.* at 5–6. It cites section 623.3 of the Postal Operations Manual, which provides that "[d]elivery service may be suspended when there is an immediate threat (including, but not limited to threats due to loose animals) to the delivery employee . . ." *Id.* at 6 n.24. The Postal Service states that contrary to Complainant's claim, he is not similarly situated to other postal customers with well-behaved dogs and whose premises present no dangers to the letter carrier because "he has been and remains the owner of at least one dog that behaved in such a manner that a dog hold was issued." *Id.* at 10 (footnote omitted). As

such, it goes on to state, the allegations in the Complaint do not violate § 403(c) as any disparate treatment between him and well-behaved dog owners is reasonable to ensure carrier safety. *Id.* at 15. The Postal Service alleges that the Complainant “admits he has been and remains the owner of at least one dog whose behavior required the issuance of a dog hold.” *Id.* at 13.

On the issue of mailbox placement, the Postal Service cites section 623.1 of the Postal Operations Manual for the proposition that the Postal Service may withdraw service to a delivery point if a customer does not provide a mail receptacle in a postal-approved location after being given written notification to do so. *Id.* at 16. According to the Postal Service, the Complainant’s refusal to comply with mailbox placement at the alternate location approved by the Postal Service is a legitimate reason to continue suspending mail delivery to the Complainant’s residence. *Id.* at 18.

IV. Response to Motion To Dismiss

In the Response, the Complainant claims that without an individualized assessment of the dogs currently at his residence, the Postal Service is “excessive, unreasonable, and highly discriminatory” in applying a dog hold in perpetuity to a residence where the offending dog may no longer reside. Response at 9. Complainant also notes that the Seattle District’s Animal/Insect Policy¹¹ provides that mail delivery may be resumed when the carrier feels no immediate threat. Response at 13. Complainant notes that after the singular incident in July 2015, no further complaints were made and failure to restore mail to the porch mailbox after Cookie left constitutes an abuse of discretion by the district manager. *Id.*

V. Information Requests and Reply

The Postal Service clarified that it does not have specific knowledge of the dogs currently residing at Complainant’s residence, but states that “dog holds are not specific to a particular dog or animal at a customer’s residence.” Response to CHIR No. 1, question 1.a. It goes on to state that once a “dog hold” letter is issued, it “remains in effect indefinitely until management, in consultation with the letter carrier, determines that mail can safely be resumed.” *Id.* (footnote omitted).

The Postal Service states that Complainant’s offer to mount a mail box on his side fence is unacceptable because it would compromise the mail carrier’s safety by exposing the carrier to

a greater risk of an unexpected dog attack. *Id.* question 2. It states that the location chosen by the Postal Service is safer because it does not place the mail carrier in the direct path of the front door, should a dog run out. *Id.* It also allows the letter carrier to see the front door and have a few more seconds of warning to take cover by the bushes alongside the fence if a dog were to attack from Complainant’s residence. *Id.*

In Response to CHIR No. 2, the Postal Service states that after Cookie was adopted out, the Complainant allegedly acquired a second dog, who “also behaved aggressively when the letter carrier attempted to deliver mail to Complainant’s residence.” Response to CHIR No. 2, question 1.a. (footnote omitted). It goes on to state that if the Complainant contends that the second dog is also no longer present, the Postal Service may still continue to withhold mail from Complainant’s residence. According to the Postal Service, this ongoing hold is justified because Complainant has not notified management that there is no longer an aggressive dog present, has not demonstrated that the dog hold should be lifted, and has failed to comply with the mailbox relocation necessitated by the original dog hold. Response to *Id.* question 1.b. It states that Occupational Safety and Health Administration (OSHA) issued a complaint on February 15, 2017, related to Complainant’s aggressive dog(s), which resulted in a determination by local management that Complainant’s mailbox needed to be moved to ensure mail carrier safety. *Id.* question 1.d., Exhibit 3. The Postal Service also states that “a single, positive interaction with an animal while its owner/caregiver is present and nearby—whether experienced by a Postal Service employee or an OSHA inspector—is insufficient to warrant the discontinuance of a dog hold.” Response to CHIR No. 2, question 2.a.

In the Reply to CHIR No. 2 Responses, Complainant disputes a number of allegations made by the Postal Service, including: (1) That Cookie never attacked or was aggressive toward the mail carrier in 2015; (2) that any of the dogs residing at his home have been aggressive towards the mail carrier; and (3) the sidewalk fence mailbox location is not a viable option due to theft concerns. Reply to CHIR No. 2 Responses, Third Declaration of Randall Ehrlich at 2–4.

VI. Commission Analysis and Limited Discovery

The Commission finds that the pleadings raise issues of fact relevant to whether the actions or inactions of the

Postal Service violate 39 U.S.C. 403(c). Viewed in the light most favorable to Complainant, the allegations in the Complaint may raise a cognizable claim of undue or unreasonable discrimination. The Commission also recognizes that the Postal Service has a legitimate interest in ensuring mail carrier safety and providing a work environment consistent with OSHA regulations. Accordingly, the Commission’s role in this inquiry is not to question that interest, but to determine if the current postal policy, as applied to the Complainant, presents a potential violation of 39 U.S.C. 403(c).

Additionally, the Commission finds the Postal Service’s arguments of lack of jurisdiction, mootness, and *res judicata* unpersuasive. The Postal Service alleges lack of jurisdiction and mootness as overlapping grounds for dismissal, in effect stating that because an aggressive dog still resides at Complainant’s residence, the Commission has no authority to override internal postal policy on mail delivery¹² and that the Postal has “already offered any remedy the Commission might provide.” See *id.* at 20. Because the Postal Service assumes that aggressive dogs still reside at Complainant’s residence, despite Complainant’s statements, the Postal Service’s arguments regarding mootness and lack of jurisdiction necessarily fail. Similarly, it states that the Commission is precluded from considering the allegations set forth in the Complaint due to *res judicata*. *Id.* at 22. The Commission notes that although it has dismissed a previous complaint brought by the Complainant with some similar allegations,¹³ the instant complaint raises new allegations of discriminatory treatment distinct from other similarly situated mailers. Complaint at 13.

Therefore, the Postal Service’s Motion to Dismiss is denied pursuant to 39 U.S.C. 3662(b).

The outstanding issues of fact required to resolve whether a violation of 39 U.S.C. 403(c) occurred are:

1. Whether any dogs remain at Complainant’s residence that are aggressive or could be a threat to carrier safety.
2. Whether postal management followed non-discriminatory processes in its continuance of a dog hold on complainant’s residence.
3. Whether the alternate mailbox site proposed by the Complainant was a reasonable compromise between carrier safety and complainant’s security concerns.

¹² See Motion to Dismiss at 18–19.

¹³ Docket No. C2019–1, Order Granting Motion To Dismiss, December 12, 2018 (Order No. 4924).

¹¹ See Response to CHIR No. 1, Exhibit 1 at 1.

4. Whether the Complainant is obligated to comply with a mailbox relocation if there are no aggressive dogs remaining at his residence.

5. Whether a locked mailbox at the mailbox site approved by the Postal Service would alleviate Complainant's security concerns.

Pursuant to 39 CFR 3001.23, the Commission appoints Lauren D'Agostino to serve as presiding officer to ascertain outstanding issues of material fact in this matter. Parties may request that the presiding officer obtain specific discovery, but may not independently propound discovery. The presiding officer shall examine the disputed issues identified above and provide a public, written intermediate decision including findings of fact and conclusions of law on the issues raised in this proceeding. 39 CFR 3001.39.

The Commission finds good cause to waive the appointment of an officer of the Commission designated to represent the interests of the general public in this proceeding as required by 39 CFR 3030.30(c) because the violations alleged in the Complaint pertain solely to Complainant, who is represented by counsel, and not to the general public.

VII. Ordering Paragraphs

It is ordered:

1. The Commission finds that the Complaint of Randall Ehrlich, filed December 23, 2019, raises material issues of fact.

2. The Motion of the United States Postal Service to Dismiss with Prejudice the Complaint of Randall Ehrlich, filed January 13, 2020, is denied.

3. Pursuant to 39 CFR 3001.23, the Commission appoints Lauren D'Agostino as a presiding officer in this proceeding.

4. Parties may request that the presiding officer obtain specific discovery but may not independently propound discovery.

5. The presiding officer shall, pursuant to 39 CFR 3001.39, provide a public written intermediate decision including findings of fact and conclusions of law on the issues raised in this proceeding.

6. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2020-06048 Filed 3-20-20; 8:45 am]

BILLING CODE 7710-FW-P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

TIME AND DATE: March 19, 2020, at 8:00 a.m.

PLACE: Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Administrative Matters.
2. Strategic Matters.

On March 19, 2020, a majority of the members of the Board of Governors of the United States Postal Service voted unanimously to hold and to close to public observation a special meeting in Washington, DC, via teleconference. The Board determined that no earlier public notice was practicable.

General Counsel Certification: The General Counsel of the United States Postal Service has certified that the meeting may be closed under the Government in the Sunshine Act.

CONTACT PERSON FOR MORE INFORMATION: Michael J. Elston, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260-1000. Telephone: (202) 268-4800.

Michael J. Elston,

Secretary.

[FR Doc. 2020-06164 Filed 3-19-20; 4:15 pm]

BILLING CODE 7710-12-P

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes a temporary waiver of the co-location "Hot Hands" fee beginning on March 16, 2020 through March 29, 2020. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes a temporary suspension of the co-location⁴ "Hot Hands" fee beginning on March 16, 2020 through March 29, 2020, after which the Mahwah, New Jersey data center ("Data Center") is scheduled to reopen to third parties.

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. ("ICE"). Through its ICE Data Services ("IDS") business, ICE operates the Data Center, from which the Exchange provides co-location services to Users.⁵

⁴ The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission ("Commission") in 2010. See Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR-NYSEArca-2010-100).

⁵ For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR-NYSEArca-2015-82). As specified in the NYSE Arca Options Fees and Charges and the NYSE Arca Equities Fees and Charges (together, the "Fee Schedules"), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.