

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Sherwood Post Office  
Topeka, KS

Docket No. A2023-2

PUBLIC REPRESENTATIVE'S RESPONSE IN OPPOSITION TO  
THE UNITED STATES POSTAL SERVICE SUPPLEMENTAL MOTION TO DISMISS

(September 26, 2023)

I. INTRODUCTION AND PROCEDURAL HISTORY

On August 16 2023, Catherine Hackett-Brown (Petitioner) appealed the Postal Service's determination to close the Sherwood Carrier Annex (Sherwood Annex) located in Topeka, KS 66614.<sup>1</sup> On August 22, 2023, the Commission issued Order No. 6636 establishing this docket to consider the Petition, setting forth a procedural schedule, and designating the undersigned as Public Representative.<sup>2</sup> On August 25, 2023, the Postal Service filed its Motion to Dismiss Proceedings, arguing that the Commission must dismiss the Petition because the closing was not appealable and the Petitioner lacked standing to bring the appeal.<sup>3</sup> In terms of the latter argument, the Postal Service contended that only an individual served by a post office may appeal its closure and that there is no indication in the Petition that Petitioner fit such a

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<sup>1</sup> Petition for Review Received from Catherine Hackett-Brown Regarding the Sherwood, KS Post Office, August 18, 2023 (Petition). The Petition was filed on August 16, 2023, but was not posted until August 18, 2023. As part of the Petition, the Petitioners submitted an initial Participant Statement, a copy of the Postal Service's public notice announcing the closing of the Sherwood Annex, and three supporting documents under seal: (1) an email chain exchange with the Topeka, KS postmaster, (2) a grievance, and (3) a list of customer signatures. See *generally* Petition.

<sup>2</sup> See Notice and Order Accepting Appeal and Establishing Procedural Schedule, August 22, 2023 (Order No. 6636).

<sup>3</sup> See United States Postal Service Motion to Dismiss Proceedings, August 25, 2023, at 1 (First Motion to Dismiss).

description. First Motion to Dismiss at 6-8. The undersigned filed a response opposing the First Motion to Dismiss on September 5, 2023.<sup>4</sup>

On September 13, 2023, the Commission issued Order No. 6681, in which it addressed the Postal Service's arguments that the Petitioner lacked standing to appeal the Sherwood Annex's closing and that it was not a "post office" subject to Commission jurisdiction.<sup>5</sup> To address the issue of standing, the Commission ordered that, should the Petitioner contend that she was a patron of the Sherwood Annex (and thus has standing to bring the instant appeal), she must file a statement indicating as much. Order No. 6681 at 6. In the alternative, the Commission continued, another patron of the Sherwood Annex could assert standing for purposes of this appeal and essentially substitute in place of the Petitioner. *Id.* at 6-7. However, because the statute of limitations for appealing the closing had already run, the substitute petitioner would have to argue that the statute of limitations was tolled because *either* the Postal Service had failed to give proper notice of the closing *or* had affirmatively interfered with the substitute petitioner's ability to file the appeal:

Within 7 days from the issuance of this Order (September 20, 2023), any patron served by the Sherwood Carrier Annex other than the Petitioner may seek to substitute in her place by filing two items: (1) a statement indicating that they were a patron served by the Sherwood Carrier Annex (and if so, their address), as required by 39 C.F.R. § 3021.10(b); and (2) a declaration signed in conformance with 28 U.S.C. § 1746 (stating "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)."), if they assert that the Postal Service has not met its notice obligations or has interfered with their ability to file a timely appeal.

*Id.* at 8. The Commission explained that, in the case that the Petitioner continued to assert standing or another patron intervened as a substitute, the Postal Service must file, within 10 days, certain factual information that would allow the Commission to better

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<sup>4</sup> Public Representative's Response in Opposition to the United States Postal Service Motion to Dismiss, September 5, 2023 (First Opposition).

<sup>5</sup> Order on Motion to Dismiss, September 13, 2023 (Order No. 6681).

decide the substantive issues underlying the appeal. *Id.* at 9-10. The Commission also gave the Postal Service 3 days to oppose the declaration of either the original or substitute Petitioner. *Id.* at 9.

On September 18, 2023, Nelson Nolan filed his Statement and Declaration of Substitute Petitioner, stating that he had been a patron of the Sherwood Annex before it closed.<sup>6</sup> Mr. Nolan also noted that “[a]ccording to title 39 C.F.R., the] USPS did not meet its notice obligation” because it failed to give “60 day notice” of the closing. Statement of Substitute Petitioner at 1.

On September 21, 2023, the Postal Service filed two related motions: 1) its Supplemental Motion to Dismiss, which argued (among other things) that Mr. Nolan’s Statement of Substitute Petitioner was insufficient to toll the 30-day statute of limitations to appeal the closing of the Sherwood Annex;<sup>7</sup> and 2) its Motion to Stay, which asked that the 10-day period for filing the additional factual material requested by the Commission be stayed until the Commission resolved the Postal Service’s Supplemental Motion to Dismiss.<sup>8</sup> The Commission subsequently granted the Motion to Stay on September 26, 2023.<sup>9</sup>

For the reasons that follow, the Public Representative respectfully recommends that the Supplemental Motion to Dismiss should be denied.

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<sup>6</sup> Statement and Declaration of Substitute Petitioner, September 18, 2023, at 1 (Statement of Substitute Petitioner).

<sup>7</sup> United States Postal Service Supplemental Motion to Dismiss, September 21, 2023 (Supplemental Motion to Dismiss). The Postal Service also pointed out that the original Petitioner also filed an amended Participant Statement along with an attached declaration from Catherine Crawford and that neither of those statements served to satisfy the conditions imposed by Order No. 6681. Supplemental Motion to Dismiss at 2-3, 5-6. The Public Representative believes that these documents were most likely simply attempts to assert additional facts relevant to the appeal but, nevertheless, agrees that they do not satisfy said conditions.

<sup>8</sup> United States Postal Service Motion to Stay, September 21, 2023 (Motion to Stay).

<sup>9</sup> Order Granting Motion to Stay, September 26, 2023, at 3 (Order No. 6705).

## II. ANALYSIS

As explained above, the determinative question central to the Supplemental Motion to Dismiss is whether the Statement of Substitute Petitioner contains sufficient factual declarations to toll the statute of limitations for appeal of the closing of the Sherwood Annex. Under 39 U.S.C. § 404(d)(5), the closure or consolidation of any post office may be appealed within 30 days after the written determination is made available to persons served by that post office. However, “the time limit for filing post office appeals acts as a statute of limitations, rather than as a limitation on the Commission’s jurisdiction.” Order No. 6681 at 7. “[T]he distinction between a limitation on its jurisdiction and a statute of limitations [is] that a statute of limitations may be subject to a waiver, estoppel, and equitable tolling whereas a jurisdictional finding is not subject to the same.” *Id.* According to the Commission, then, “the 30-day time limit for filing a post office appeal will be strictly construed *provided the Postal Service has met its notice obligations*, including posting notice of a final determination pursuant to 39 U.S.C. § 404(d)(3) (or absent of evidence to the contrary), *and has not interfered with a petitioner’s ability to file a timely appeal.*” *Id.* at 7-8 (emphasis added). Therefore, as the Commission explained in Order No. 6681, an appeal in the instant case would be timely, even if brought by a substitute Petitioner, if “the Postal Service has not met its notice obligations *or has interfered with their ability to file a timely appeal.*” *Id.* at 8 (emphasis added).

In terms of the Postal Service’s notice obligations, before closing a post office, the Postal Service “shall provide adequate notice of its intention to close or consolidate such post office at least 60 days prior to the proposed date of such closing or consolidation to persons served by such post office to ensure that such persons will have an opportunity to present their views.” 39 U.S.C. § 404(d)(1); *see also* 39 C.F.R. § 3021.3(a). “This notice must include a provision stating that, pursuant to section 404(d)(5) of title 39, United States Code, a final Postal Service determination to close or consolidate a post office may be appealed by any person served by such office to the

Postal Regulatory Commission at 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, within 30 days after such determination is made available to such person by the Postal Service.” 39 C.F.R. § 3021.3(b).

In this case, Mr. Nolan asserts that the Postal Service did not meet its notice obligations because it failed to provide notice 60 days prior to closing the Sherwood Annex. See Statement of Substitute Petitioner at 1. This accords with the limited facts currently available, which demonstrate that notice that the Sherwood Annex would be closing was posted on July 17, 2023, less than 60 days prior to the closing date of August 26, 2023.<sup>10</sup> Further, based on a photograph of the closing notice attached to the Petition, the notice failed to provide the information regarding appeal rights required by 39 C.F.R. § 3021.3(b). See Petition, Attachment 1. Accordingly, based on the test set forth in Order No. 6681, the Statement of Substitute Petitioner, as well as the facts as currently presented to the Commission, are sufficient to render Mr. Nolan’s appeal timely on its face.

Nevertheless, the Postal Service argues that the Statement of Substitute Petitioner “is insufficient to toll the 30-day limitation on filing an appeal” because it does not assert that “the Postal Service impaired the timely filing of the appeal by failing to post the notice or otherwise interfering with a petitioner’s ability to timely appeal.” Supplemental Motion to Dismiss at 4. The Postal Service imposes stricter requirements than those apparent from the plain language of Order No. 6681. In Order No. 6681, the Commission stated that the declaration of a substitute petitioner would have to *either* state that the Postal Service had “not met its notice obligations” *or* that the Postal Service had interfered with the petitioner’s ability to file a timely appeal. The Commission did not state that *both* of these conditions had to be satisfied in order for the statute of limitations to be tolled. Rather, under the plain language of Order No.

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<sup>10</sup> See Petition at 1; see also *id.* PDF file “NOTICE.pdf” (photograph of “Public Notice,” dated July 17, 2023, that states that mail at the Sherwood Carrier Annex would be relocated effective August 26, 2023).

6681, Mr. Nolan’s sworn assertion that the Postal Service neglected its notice obligations is enough to meet the Commission’s test.<sup>11</sup> As such, the Postal Service’s Supplemental Motion to Dismiss should be denied.

### III. CONCLUSION

For the reasons described above, the Commission should deny the United States Postal Service’s Supplemental Motion to Dismiss, filed September 21, 2023.

Respectfully submitted,

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<sup>11</sup> Assuming for the sake of argument that the Commission determines that the Statement of Substitute Petitioner is not sufficient to toll the running of the statute of limitations, the Public Representative respectfully recommends that the Commission take this opportunity to determine whether the doctrine of relation back would act in this circumstance to render the appeal brought by Mr. Nolan timely. Under the relation back doctrine, codified by Rule 15(c) of the Federal Rules of Civil Procedure, an amendment to a pleading—such as the substitution of one plaintiff for another—“relates back to the date of the original pleading” for statute of limitations purposes when “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]” See Fed. R. Civ. P. 15(c)(1)(B). Thus, the District of Columbia Circuit has held that a suit is not time-barred when it is timely brought by an improper plaintiff, the statute of limitations subsequently runs, and then a proper plaintiff is substituted. See *Link Aviation, Inc. v. Downs*, 325 F.2d 613, 614 (D.C. Cir. 1963); see also *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 550-52 (1974) (finding that the commencement of a class action tolls the applicable statute of limitations as to all asserted members of a class who would have been parties had the suit been permitted to continue as class action); *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 614-16 (7th Cir. 2020) (holding that the timely filing of investors’ securities fraud class action against an insurance corporation tolled the applicable statutes of limitations for all persons within the scope of the class, including unnamed plaintiffs who were later substituted as class representatives at the certification state of the suit). In this case, should the Commission adopt the relation back doctrine, Mr. Nolan’s appeal would relate back to the timely-filed Petition and would not be time-barred.