DECISION **THE COMPTROLLER GENERAL OF THE UNITED STATES**
WASHINGTON, D.C. 20548

10,665

FILE: B-114874.115 DATE: July 6, 1979

MATTER OF: Exclusion of cost of indemnity from registered mail rate payable by Federal agencies

DIGEST: 1. Although as a matter of policy GAO favors the exclusion of the cost of indemnity from the fee for registered mail as a cost savings to the Federal Government, GAO is not the appropriate forum to determine whether the U.S. Postal Service has authority to achieve this objective by establishing this special rate for Federal agencies only, to the exclusion of other users of registered mail, without violating the Postal Reorganization Act.

2. The authority of GAO to render binding decisions with respect to matters involving agency expenditures stems generally from its authority to adjust and settle agency accounts under section 305 of the Budget and Accounting Act of 1921, 31 U.S.C. § 71. These settlements are final and conclusive upon the executive branch of the Government. 31 U.S.C. §§ 44 and 74. Opinions of GAO are not binding on either the U.S. Postal Service (USPS) or the Postal Rate Commission (PRC), since 39 U.S.C. §§ 410(a) and 3604(e) exempt the USPS and PRC from the provisions of the Budget and Accounting Act.

3. Where Postal Reorganization Act prescribes specific administrative procedures for consideration of proposed changes in mail classification and postal rates and fees and where question of whether a change will result in "undue or unreasonable discrimination among users of the mails" or "undue or unreasonable preferences to any such user" is such a pervasive and integral part of such decisions, GAO defers to agencies with primary jurisdiction on such matter, the USPS and the PRC, who can better resolve the issue after providing for opportunity for participation by the United States Government, as well as other users of registered mail, in a hearing on the record.

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The Acting Administrator, General Services Administration (GSA), has requested a clarification of our decision B-114874, October 13, 1978, 58 Comp. Gen. 14. We held there that neither the Government Losses in Shipment Act, 40 U.S.C. § 726 (1976), nor the Government's general self-insurance policy prohibit Federal agencies from using registered mail where administratively determined necessary in order to obtain the "special" service of greater protection in the handling and delivery of mail, rather than to obtain the insurance coverage also offered by registered mail. However, Federal agencies are prohibited from using insured mail under both 40 U.S.C. § 726 (1976) and the Government's self-insurance policy, since insured mail provides no "special" or "additional" service aside from the indemnity offered.

The question now posed by GSA is whether the cost of indemnity should be excluded from the registered mail rate payable by Federal agencies, leaving the resulting Federal agency rate based on the cost of providing the "special" service of greater protection in the handling and delivery of mail.

GSA's stated view is that the U.S. Postal Service (USPS) should provide such a new Federal agency rate for registered mail and has the necessary authority to do so. On the other hand, in correspondence from the USPS to the Administrator of GSA, which has been forwarded to us, officials of the USPS stated:

> "* * * we are evaluating the feasibility of selling indemnity as a separate feature of registered mail, rather than as a mandatory part of the fee structure. We have been advised on numerous occasions by our Law Department, however, that we can not establish separate fees for small groups (i.e., federal mailers) but must establish consistent fees that are applicable to everyone. Therefore, any new fee structure that is developed will be applicable to all registered mail users."

The apparent concern of the USPS is the policy of the Postal Reorganization Act, stated in 39 U.S.C. § 403(c) (1976), that:

> "In providing services and in establishing classifications, rates, and fees under this title,

> the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user."

We conclude that, although as a matter of policy GAO favors the exclusion of the cost of indemnity from the fee for registered mail as a cost savings to the Federal Government, GAO is not the appropriate forum to determine whether the USPS has authority to achieve this objective by establishing this special rate for Federal agencies only, to the exclusion of other users of registered mail, without violating the Postal Reorganization Act.

Initially, we note that a decision by GAO on the issue would not be legally binding on either the USPS or the Postal Rate Commission (PRC), the agencies having primary responsibility for mail classification and postal rates and fees. The authority of GAO to render binding decisions with respect to matters involving agency expenditures stems generally from its authority to adjust and settle agency accounts under section 305 of the Budget and Accounting Act of 1921, 31 U.S.C. § 71 (1976). These settlements are final and conclusive upon the executive branch of the Government. 31 U.S.C. §§ 44 and 74 (1976). We held in B-164786, October 8, 1970, that the Budget and Accounting Act of 1921, which includes these settlement provisions, was not applicable to the USPS as a consequence of the statutory exemptions set forth in 39 U.S.C. § 410(a) (1976). Accordingly, we have refrained from rendering certain opinions affecting the USPS. For example, we have not considered protests against the proposed award of contracts by the USPS. E.g., Thomas S. Brown Associates, Inc., B-188402, March 3, 1977, 77-1 CPD 161. Similarly, because of the provisions of 39 U.S.C. §§ 410(a) and 3604(e) (1976), GAO has determined that it has no jurisdiction to consider bid protests involving the Postal Rate Commission. E.g., Alderson Reporting Company, Inc., B-192653, October 10, 1978, 78-2 CPD 263; Federal Data Retrieval Systems, Inc., B-187660, November 26, 1976, 76-2 CPD 448. Therefore, due to the inapplicability of our settlement authority, the opinion of GAO would not bind either the USPS or the PRC. See Sierra Club v. U.S. Postal Service, 386 F. Supp. 1102 (N.D. Cal. 1973), affirmed 549 F.2d 1199 (9th Cir. 1976).

In addition, subchapter II of chapter 36 of the Postal Reorganization Act of 1970, as amended, 39 U.S.C. § 3621 et seq. (1976), establishes a specific, carefully delineated administrative procedure for developing a mail classification system and fixing postal rates

and fees. Under this procedure the USPS requests the PRC to render a recommended decision on changes in rates of postage or fees for postal services. 39 U.S.C. § 3622(a) (1976). The PRC then renders a recommended decision to the Governors of the USPS in accordance with a particularized list of criteria and the general policies of the Postal Reorganization Act. 39 U.S.C. § 3622(b) (1976). A similar procedure is set forth with respect to changes in the mail classification schedule, except that the PRC also has authority to initiate changes in the mail classification schedule. 39 U.S.C. § 3623 (1976). In both instances, the PRC may not recommend a decision until the opportunity for a hearing on the record under the Administrative Procedure Act has been accorded to the USPS, users of the mails, and an officer of the PRC who is required to represent the interests of the general public. 39 U.S.C. § 3624 (1976). Once the Board of Governors of the USPS has received the PRC's recommendation, it may (1) approve the recommended decision and order it placed in effect; (2) allow a recommended decision of the PRC to take effect under protest, and seek judicial review; (3) reject a recommended decision and return it to the PRC for reconsideration; or (4) modify a second recommended decision stemming from a PRC reconsideration, but only unanimously and under very specific circumstances. 39 U.S.C. § 3625 (1976). If a judicial appeal is taken, the court may only affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision. 39 U.S.C. § 3628 (1976). Even within this narrow dispositional framework, a court has limited the scope of its review to determining whether there was a lack of substantial evidence, irrelevant considerations were taken into account, relevant considerations were omitted, a statutory command was flouted, a constitutional right was denied, or the agency acted ultra vires. Association of American Publishers, Inc. v. Governors of U.S. Postal Service, 485 F.2d 768 (D.C. Cir. 1973). Thus a detailed administrative procedure has been prescribed for making changes in the mail classification schedule, postal rates or postal fees, and the roles and authorities of the participating entities have been carefully described and circumscribed.

It is our understanding that the establishment of a special rate for registered mail applicable only to Federal agencies, which would exclude the cost of indemnity, would involve both a change in the classification schedule and a change in the fees for postal services. Any change in the classification schedule must be recommended to the USPS by the PRC and would be invalid in the

absence of such a recommendation. National Retired Teachers Ass'n. v. U.S. Postal Service, 430 F. Supp. 141 (D.C.D.C. 1977). In addition, changes in fees for the furnishing of, among other things, registry of mail and insurance of mail cannot be made without the scrutiny of a PRC proceeding. Associated Third Class Mail Users v. U.S. Postal Service, 405 F. Supp. 1109 (D.C.D.C. 1975), affirmed sub nomine National Association of Greeting Card Publishers v. U.S. Postal Service, 569 F.2d 570 (D.C. Cir. 1976). Thus, regardless of whether GAO renders an opinion on the merits in this case, GSA's proposal could only be implemented after a proceeding before the PRC and a favorable conclusion of the administrative procedure described above.

With respect to the legal impact of these matters on other Federal agencies for which GAO does have settlement authority, in none of the three possible situations anticipated would a Federal agency's proper use of registered mail be precluded. If USPS and the PRC do not adopt any modification to the present fee structure for registered mail, our decision B-114874, October 13, 1978, 58 Comp. Gen. 14, permits Federal agencies to use registered mail where it is administratively determined to be necessary in order to obtain the "special" service of greater protection in the handling and delivery of mail, even though the cost of indemnity is included as part of the fee. If USPS and the PRC do establish a separate category and fee for registered mail which excludes the cost of indemnity, Federal agency use of this separate category of registered mail would likewise not be illegal under our past decisions, if otherwise proper, regardless whether the special rate were applicable to Federal agencies only or available to all mail users.

In these circumstances, where the statute prescribes specific administrative procedures for the consideration of proposed changes in mail classification and postal rates and fees and where the question of whether a change will result in "undue or unreasonable discrimination among users of the mails" or "undue or unreasonable preferences to any such user" is such a pervasive and integral part of such decisions, we defer to the agencies with primary jurisdiction on such matter. The USPS and the PRC can better resolve the issue after providing for an opportunity for participation by the United States Government, as well as other users of registered mail, in a hearing on the record. In so concluding, we are not unaware that a court has stated that "Congress unmistakably delegated its

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ratemaking and classification prerogatives to the PRC." National Retired Teachers Ass'n. v. U.S. Postal Service, supra, at 146.

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