

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO AMERICAN
POSTAL WORKERS UNION, AFL-CIO MOTION FOR SANCTIONS UNDER RULE
25(C) AGAINST THE UNITED STATES POSTAL SERVICE**
(September 9, 2008)

On September 3, 2008, American Postal Workers Union, AFL-CIO (APWU) filed a “Motion for Sanctions Under Rule 25(c) Against the United States Postal Service” (motion). The motion consists of unsubstantiated and unsupportable characterizations concerning the representation of the United States Postal Service by its counsel (“counsel”) at a last-minute deposition of now-former Postal Service employee Jessica Dauer Lowrance.¹ The deposition was held at the Commission on August 27-29, 2008, after notice to the Postal Service mere hours before it began. The deposition was based on an Application filed by Capital One Services, Inc. (Capital One) on August 21, 2008, then supported by an emergency motion on August 25, and granted by the

¹ As the transcript of the deposition substantiates, Ms. Lowrance was but one of several postal officials involved in a large, cross-functional team who worked on negotiated service agreements (NSAs). Members of this team dealt with the regulatory, financial and operational issues necessary to a special agreement with a single mailer that enters mail in volumes measured by the hundreds of million annual pieces.

Presiding Officer on August 26, 2008, approximately four hours before close of business on the day before the deposition's commencement.²

Capital One succeeded in making this matter an emergency by exaggerating the importance of one employee's role, sought relief citing the need to explore a limited range of issues before the deponent's voluntary departure from Postal Service employment, and then improperly expanded the deposition to encompass the full range of discovery issues already being explored through other discovery methods traditionally employed in practice before the Commission. In the face of this unprecedented motions practice, in which APWU joined, and manifest violations of the Postal Service's due process rights, APWU now also seeks sanctions for the advocacy of the Postal Service's interests by its counsels. APWU's motion is deeply flawed, and seeks inapplicable and inappropriate remedies, and thus, should be denied in its entirety.

I. Legal Basis

As a preliminary matter, APWU's motion has no legal basis in the Commission's rules. The Commission has reserved to itself the authority to issue sanctions for failure to obey an order of the Commission or the Presiding Officer "to provide or permit discovery pursuant to §§ 3001.26 to 3001.28." 39 C.F.R. § 3001.25(c). Depositions, however, are authorized under Rule 33, which is not governed by Rules 26-28.³

² Effective preparation for the deposition was thus precluded entirely. Notwithstanding, as described below, the Postal Service attempted substantive preparation that also extended to collection of those documents immediately available to the deponent.

³ Indeed, the manner by which Rules 26-28 might be incorporated into deposition procedures under Rule 33, particularly given the unprecedented and emergency nature

Consequently, the Commission has *not* subjected deposition procedures to sanctions under Rule 25(c). APWU's motion completely fails to acknowledge or even address this critical distinction. This failure is fatal to APWU's request for relief under the current rules. APWU's motion should be denied.

Examination of APWU's specific allegations leads to the same result.

Accordingly, the Postal Service offers a detailed reply to the allegations raised in APWU's motion, below.

II. Background

Before addressing the allegations in APWU's motion, it is important to present a brief recap of the context and series of events before and during the August 27-29 deposition.

First, it is critical that all concerned keep in mind the urgency, timing, and uncertainties around this deposition. The time between the filing of Capital One's amended Application, the authorization for that deposition, the initial ruling establishing the procedures for that deposition, and the beginning of that deposition was extremely short. The Postal Service opposed the deposition and offered the alternative of written discovery. The Postal Service was notified of the Presiding Officer's intention to approve Capital One's motion for the deposition the day before it was scheduled to commence on August 27. The procedures for the deposition, as well as document requirements, were issued hours before its start. On August 27, two "emergency

of the immediate circumstances, raises a range of due process questions that should be addressed carefully, a necessity that neither APWU nor Complainant appear to recognize. Moreover, these issues may be further informed by the pending complaint rulemaking proceeding in Docket No. RM2008-3.

motions” to clarify procedures and a motion for additional time were filed by Capital One while the deposition was in progress. On August 28, two more motions appeared on the Commission’s web site before the deposition was scheduled to start for that day, an “emergency motion” on procedures, and a motion for production of documents and other matters, both filed by APWU. During the deposition itself, a “joint emergency motion” on procedures was filed. The urgency of the deposition, the short time available before its start, and its procedural uncertainties form a context around the deposition on August 28 and 29 that accounts for the length of that session.

Second, the Commission deposition process has been rarely, if ever, used. The deposition was, to counsel's knowledge, the first in decades of Commission practice and was ordered owing to the exceptional circumstances prompted by the recently announced departure of one postal employee among several with personal knowledge of any facts alleged in the complaint. This presented many questions of first impression that were decided through motions, renewed motions and various rulings mere hours apart, as indicated above. Moreover, owing in part to joint efforts by the three participants interested in the deposition, motions could be filed contemporaneously with argument before the Hearing Officer, even though postal counsel was neither apprised in advance that motions had been filed nor that rulings by the Presiding Officer became imminent.⁴ It was, therefore, unclear how certain matters should be properly handled and resolved as a matter of procedure.

⁴ While the Postal Service recognizes and supports the Commission's efforts to afford participants their due process rights, this situation presents an instance where the Postal Service's due process rights seem to have been accorded less consideration.

Third, the ruling granting the Application for the deposition, together with the hasty necessity of preparing documents, must be understood in the context of the recently enacted statutory authority in 39 U.S.C. § 504(g). This new provision entitles the Postal Service to designate information exempt under the Freedom of Information Act (“FOIA”) and/or special exceptions for Postal Service records in 39 U.S.C. § 410(c), which can shield such information from further disclosure to third parties or to the public. The Commission only recently has promulgated a proposed rule to implement this authority. Such rules are currently not in place, however, and the rules promulgated by this Commission's predecessor, the Postal Rate Commission, remain applicable in this proceeding.⁵ These factors added a considerable dimension of complexity and uncertainty regarding procedures to be employed at the deposition and prompted the need for additional discussions among the participants on the procedures to be followed.

The context in which the deposition arose and was conducted, the very short lead times involved in the deposition, and the procedural uncertainties associated with it, lead the Postal Service to review and comment below on the major events of the August 28 and 29 deposition in response to APWU's motion.

⁵ With respect to the instant Docket, the Presiding Officer has stated his expectation that the Commission “will adhere to current rules for this case.” Tr. 1/14, Docket No. C2008-3. See *also* Postal Regulatory Commission Press Release, PRC Issues Proposed Rulemaking for Complaints (August 22, 2008) (“Pending complaints will be considered under the current complaint rules. If the new rules are implemented while a pending case is under consideration, the Commission will issue any necessary procedural rulings to clarify the parties’ obligations.”).

III. The August 28 and 29 Deposition

The deponent, now former Postal Service employee Jessica Dauer Lowrance, and counsel for the Postal Service were present at 9:30 a.m. Thursday, August 28, the time specified in P.O. Ruling No. C2008-3/6 for continuation of the deposition. Ms. Lowrance was not deposed at that time, however, pending rulings from the Presiding Officer on the numerous procedural motions filed by the participants on August 27, and an hour and a half before the scheduled beginning of the deposition on August 28, as provided for by the Presiding Officer in P.O. Ruling No. C2008-3/6.

P.O. Ruling No. C2008-3/7, addressing certain procedures for the conduct of the deposition, was issued at 10:38 a.m., and by the time copies became available and counsel reviewed them, the time was around 11:00. Postal Service counsel focused particularly on the paragraph in the ruling indicating: "Ruling C2008-3/3 is reaffirmed, and the Postal Service is directed to provide the requested documents for use during the deposition. A good faith effort must be made to produce all such documents by 12:00 noon on August 28, 2008." Postal Service counsel interpreted "all such documents" as referring back to the "requested documents" in the prior line, and that the "requested documents" were those described in P.O. Ruling No. C2008-3/3 at page 4:

Procedure for Production of Documents. Ms. Lowrance must bring all documents from her offices relating to the issues in the Capital One Complaint to the deposition for her reference. If a request for production is made, a claim of exemption under 39 U.S.C. 410 (c) or 5 U.S.C. 552(b) or privilege may be interposed. With regard to any documents not produced at the deposition by Ms. Lowrance based on a claim that the documents are either privileged or exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b), the Postal Service must expressly allege the privilege or exemption claim asserted, and provide a detailed privilege log within 7 days.

The required documents fell into several categories. A number of documents were present that had been the subject of objections raised at the deposition on Wednesday. Counsel determined that, under P.O. Ruling No. C2008-3/3, these would be provided. Another category of documents consisted of material not currently in Ms. Lowrance's possession, but related to activities while she was an acting manager of pricing, and e-mails on her computer. The materials associated with her activities while acting manager had been identified, and Postal Service counsel obtained their delivery. Ms. Lowrance and Postal Service counsel reviewed the materials to identify those associated with issues in the Capital One complaint. Materials within the scope of the complaint were copied.

A final category of materials consisted of two documents for which the Postal Service claimed privilege from disclosure as pre-decisional documents and protected from disclosure under 39 U.S.C. § 410(c)(4).⁶ One document was a memo sent by the Postmaster General to the Postal Service Board of Governors providing guidance to the Governors regarding their decision on the Commission's Opinion and Recommended Decision in Docket No. MC2007-1, the Bank of America (BAC) Negotiated Service Agreement (NSA). The other was a Power Point presentation to the Board of Governors by Anita Bizzotto, Chief Marketing Officer, in a session lawfully closed to the public, reviewing the BAC NSA and management's recommendation regarding it just prior to the Governor's vote on the Commission's recommended decision. Postal Service counsel indicated that these documents fell into the category of documents privileged

⁶ The Postal Service notes that many of these specific representations were made off the record during the course of the Lowrance deposition, and thus do not appear in the transcript to the same extent as they were asserted during discussions between counsel.

from disclosure as pre-decisional documents and pursuant to § 410(c)(4), and so would not be produced, but would be treated in accord with the language in P.O. Ruling No. C2008-3/3 above that “any documents not produced at the deposition by Ms. Lowrance based on a claim that the documents are either privileged or exempt from disclosure” would be included in a “detailed privilege log.” Both Capital One and APWU objected to this procedure, arguing that the rulings relied upon by counsel mandated provision of the privileged documents. Postal counsel relied on the plain meaning of the rulings, as indicated above.

Review of documents by Ms. Lowrance and Postal Service counsel, and copying and preparation of documents to become possible exhibits required about two and one half hours, from 11:00 a.m. to 1:30 p.m.⁷ Counsel returned to the proceeding with the documents at 1:30 p.m., as indicated at Tr. 2/254, line 11. The time between 1:30 p.m. and 2:00 p.m. was consumed by discussion among Postal Service and opposing counsels and by other matters. The proceeding went on the record at approximately 2:00 p.m., and Postal Service counsel identified with precision the two documents for which the Postal Service asserted privilege. Tr. 2/254-260. The deposition of Ms. Lowrance then resumed in open session. Ms. Lowrance identified meeting notes and e-mails involved in analyses underlying the two documents, for which Postal Service counsel also asserted privilege from discovery as pre-decisional and deliberative documents. Capital One then asked Ms. Lowrance a series of questions on the contents of the two documents, and on a third document, the Postal Service General Postal Service counsel’s memorandum to the Board of Governors, for which the Postal

⁷ Lunch for Ms. Lowrance and counsel was brought in and consumed while both were reviewing the documents and the e-mails.

Service had asserted privilege from discovery as attorney client and work product. The questions focused on whether the documents contained information on functional equivalence, similarly situated mailers, or harm in the marketplace as related to the BAC NSA. Tr. 2/263 and 264. Then counsels for APWU and Capital One continued their examination of Ms. Lowrance on these and other matters. Tr. 2/265-295.

During examination and cross-examination of Ms. Lowrance, counsel for the Postal Service interrupted proceedings only twice, objecting to two questions by APWU. The first objection was to a question that was out of scope of the proceeding as indicated in P.O. Ruling No. C2008-3/8, with which counsel for APWU was then unfamiliar, and the question was temporarily withdrawn for the time being. Tr. 2/282-285. The second objection also was to a question that appeared to be out of scope under P.O. Ruling No. C2008-3/8. APWU clarified the question, and the objection was withdrawn. Tr. 2/288-289.

The proceeding continued, and after a brief recess, went into closed session. Tr. 2/295. Except for three documents, Postal Service counsel made available to participants documents whose provision had been contested during the first day of the deposition, Wednesday, August 27, 2008⁸. The documents were organized and were identified for the record. Tr. 2/295-302. APWU and Capital One examined Ms. Lowrance on these documents and other matters without interruption by Postal Service counsel. Tr. 2/302-338. Shortly after Postal Service counsel became aware of P.O.

⁸ The three documents consisted of documents prepared for the Board of Governors to supply it with information related to a decision by the Governors on the Commission's recommended decision on the BAC NSA. They were a memorandum from the Postal Service's General Counsel, a memorandum from the Postmaster General, and a Power Point presentation.

Ruling No. C2008-3/10, which was issued around 5:30 p.m., the deposition was recessed for counsels to read and react to the ruling.

Since counsels for the Postal Service were engaged in the deposition during the day, they were unaware of a “Joint Emergency Motion to Clarify Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance” (joint motion), filed just before the Commission’s close of business at 4:30 p.m. After obtaining a copy of P.O. Ruling No. C2008-3/10 shortly after its issuance,⁹ Postal Service counsel sought to discuss the ruling with postal management at Postal Service headquarters. Counsel at Headquarters, of course, did not have a copy of P.O. Ruling No. C2008-3/10, because it was produced after business hours and was not posted on the Commission’s website until the next day. Postal Service counsel undertook to send a copy of the ruling to appropriate counsels at headquarters for their review. After their review, counsel for the Postal Service discussed the ruling.

The Postal Service had no opportunity to prepare a response to the joint motion, or to consider its options in the face of the Ruling in light of the circumstances. Most importantly, the ruling would require production of the two contested pre-decisional documents containing postal management’s recommendations on the Commission’s recommended decision on the BAC NSA. This result would create the very situation that § 410(c)(4) and the deliberative process privilege would seem to be designed to prevent, in the absence of due consideration of the merits of disclosure according to

⁹ While the Ruling bears a time stamp of 5:34 p.m. on August 28, it was made available to counsel present at the Commission for the deposition shortly thereafter. By operation of Rule 9(c), the Ruling was actually issued on August 29 well after the deposition concluded.

available statutory exemptions, and perhaps resort to appeal authorized by the Commission's rules.

Counsel nonetheless sought to achieve a solution that would protect postal management's pre-decisional materials from disclosure, and yet would allow the deposition to proceed. The deposition went on the record, and Postal Service counsel engaged in discussions with counsels for Capital One and for APWU. Postal Service counsel proposed to identify the subject matter headings associated with the content of the two documents, in the hope that only material associated with "functional equivalence," "similarly situated," "competitive effects," and similar subject matter could be provided, without providing other material beyond the scope of Capital One and APWU's interests Tr. 2/338-343. Opposing counsels for Capital One and APWU indicated the desire for further discussion, which took place off the record. Counsel for Capital One considered contacting her client to determine whether the approach was satisfactory. The deposition was recessed for a dinner break.

When the deposition resumed after dinner, counsel for Capital One indicated that she had not yet reached a decision, and that she was trying to contact appropriate clients. Tr. 2/344. Lead counsel for the Postal Service provided the subject headings in each of the two documents, and provided clarifications of the headings, so that the appropriate individuals within Capital One could have a clear description of the subject matter covered by the two documents. Tr. 2/344-353. Ms. Lowrance was then examined further. Tr. 2/353-400. Postal Service Counsel posed no objections during this period. There were also several short breaks during this period in which counsel for Capital One continued attempts to contact appropriate clients.

After the break indicated at Tr. 2/401, counsel was informed by counsel for Capital One that she had not obtained approval of her client for the procedure on the two contested documents suggested by counsel for the Postal Service. Postal Service Counsel considered his options, favoring completion of the deposition rather than further pursuit of protection for the two contested documents. Counsel then produced the two documents, which were marked subsequently as Exhibits 15 and 16.

Exhibit 15, the Postmaster General's memorandum to the Board of Governors, "Bank of America Negotiated Service Agreement," consisted of about three and one half single-spaced pages of material. Exhibit 16, a Power Point presentation to the Board of Governors, totaled 15 slides. The subject heading of each slide had been provided earlier by Postal Service counsel. In total the slides presented about 60 bullets, two tables of information, and generally less than a page of talking points associated with each slide. Counsel for Capital One and APWU were familiar with the subject matter covered by these documents through their work on matters related to the BAC NSA. Examination of Ms. Lowrance on these documents began immediately, and continued until the end of her appearance. Tr. 2/401-79.

After Ms. Lowrance was excused, Postal Service counsel sought assurances that copies of the two contested documents would not leave the room with opposing counsel, but would be left with the deposition's presiding officer for disposal. Tr.2/479. Regarding other materials relating to the documents, such as notes, Postal Service counsel sought assurances that they would be disposed. Tr. 2/480. Finally, Postal Service counsel asked for material relating to the documents contained on computers in the hearing room, and in use during the proceeding, to be deleted. Tr. 2/481.

IV. APWU Motion

APWU bases its motion on unsubstantiated and unsupported characterizations of Postal Service counsels' representation in the August 28 and 29 portion of the deposition. According to the motion:

Presiding officer Ruling C2008-3/3 directed that Ms. Lowrance "bring all documents from her offices relating to the issues in the Capital One Complaint to the deposition for her reference." This ruling was reaffirmed in Presiding Officer Ruling C2008-3/7 which once again, directed the Postal Service "to provide the requested documents for use during the deposition." The Postal Service was to make a "good faith effort" to "produce all documents by 12:00 noon on August 28, 2008." Despite the clear and numerous rulings, the USPS failed to produce the documents as requested in a timely fashion.

Contrary to APWU's assertions, the Postal Service provided the requested documents as soon as possible, in substantial compliance with P.O. Ruling No. C2008-3/3, as clarified by P.O. Ruling No. C2008-3/7, except for two contested documents, as indicated in Section III above. These two documents were not supplied at that time, since the Postal Service reasonably interpreted the rulings to incorporate the conclusion that documents for which privilege was claimed might not be produced at the deposition, in accordance with the terms of the ruling. Counsel for APWU examined Ms. Lowrance at Tr. 2/264, shortly after 2:00 p.m. It is not true, therefore, that "the Postal Service did not provide any responsive documents until approximately 10:30 p.m. on August 28," nor is it true that the Postal Service's actions resulted in a "fruitless day as there simply was not enough time to fully digest the material and conduct a full examination." The description of the deposition provided in Section III above, and nearly 200 pages of transcript containing Ms. Lowrance's examination by counsels for APWU and Capital One, indicate otherwise. Both APWU's and Capital One's counsels used most of their allotted times under the procedures established for the deposition,

and their questioning was interrupted by counsel only several times during almost five hours of questioning. There was nothing improper about behavior of counsel for the Postal Service during this deposition and, on this ground alone, the relief requested in the motion should be denied.

V. Relief

APWU seeks the imposition of punitive measures in the form of payment of attorneys' fees and deposition costs and waiver of objections based on deliberative process privilege or relevance. As explained above, however, none of these remedies are available in this instance because depositions under Rule 33 are not made subject to the Commission's sanction authority in Rule 25(c). Even assuming sanctions would be available in connection with depositions ordered under Rule 33, none of the requested forms of relief are available.

Unlike a court with equitable powers, the Commission's authority is limited by its statutory charter and the principles of administrative law. With respect to punitive measures, the law carefully circumscribes the Commission's authority to issue fines to violations of statutory provisions in Title 39, which are in no way implicated here.¹⁰ Further, Subsection 9(a) of the Administrative Procedure Act, 5 U.S.C. § 558(b), provides that an administrative agency's power to impose civil penalties must be within its delegated authority and authorized by law.¹¹ Absent explicit statutory authority, an

¹⁰ See 39 U.S.C. § 3662 (authorizing the Commission to order fines for "deliberate noncompliance by the Postal Service with the requirements of [Title 39]").

¹¹ The Commission is subject to the Administrative Procedure Act. 39 U.S.C. § 503.

administrative agency may not impose penal measures.¹² No such authority exists in Title 39 to assess penalties for alleged violations of the Commission's discovery rules. Hence, penal measures in the form of monetary relief or cost recovery are not available in this instance.

Furthermore, deeming the Postal Service to have waived deliberative process privilege objections is not available relief. Unilateral waiver of objections on grounds of deliberative process privilege would be inconsistent with the nature of civil discovery privileges, and, at least with respect to matters concerning commercial decisions, would be inconsistent with 39 U.S.C. § 504, which requires that the Commission perform a balancing test based on potential commercial harm to the Postal Service and the public interest in transparency.¹³ Sanctions for conduct in depositions are in no way mentioned as part of that balancing test, and should not enter into the Commission's formulation.¹⁴

In sum, the remedies APWU seeks are not appropriate here. APWU's request, moreover, stretches well beyond the limits of the Commission's rules. The types of remedies available in cases warranting sanctions are limited. Specifically, remedies such as establishment of certain facts, prohibition of the introduction of evidence, or

¹² See *Gold Kist, Inc. v. United States Dept. of Agriculture*, 741 F.2d 344, 349 (11th Cir. 1984) (a "statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty").

¹³ Subparagraph 504(g)(3)(A) provides that "[i]n determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service under paragraph (1), the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets."

¹⁴ In addition, a decision overruling a relevance objections a punitive measure is not available for Rule 33 depositions, nor would it be warranted under the circumstances.

striking of evidence are expressly limited to the context of Rules 26-28. Even if such remedies were available in the context of Rule 33 depositions, they would in no way be warranted here.

VI. Summary

As explained above, APWU's motion is legally defective and is misleading. It would be inappropriate and unauthorized to apply the requested sanctions in connection with Rule 33 depositions. Moreover, the allegations presented in the motion lack substance, misstate key facts, and mischaracterize events. Further, APWU is not entitled to any of the punitive and equitable relief it seeks. The Postal Service here provides a detailed review of the August 28-29 deposition, demonstrating sound legal reasoning and appropriate responses to presiding officer rulings that support the good-faith positions taken by Postal Service counsel. The extreme measure of issuing any sanctions against the Postal Service, not only would be manifestly unjust under these circumstances, it would seriously chill appropriate advocacy by members of the postal bar and would leave the Presiding Officer and Commission without the benefits of a full and fair argument mounted by participants. APWU's motion for sanctions against the Postal Service should accordingly be rejected completely, with prejudice.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

R. Andrew German
Managing Counsel, Pricing & Product
Development

Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing

Anthony Alverno
Chief Counsel, Global Business

Ken Hollies
Frank Heselton
Elizabeth Reed

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-2997; Fax -6187
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