

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

Complaint of Capital One
Services, Inc.

Docket No. C2008-3

AMERICAN POSTAL WORKERS UNION, AFL-CIO
MOTION TO COMPEL PRODUCTION OF DOCUMENTS
(APWU/USPS-DR-1)
(September 19, 2008)

On August 26, 2008, the American Postal Workers Union, AFL-CIO (APWU) filed discovery requests to the Postal Service.¹ On September 5, 2008, the Postal Service partially objected to document request APWU/USPS-DR-1 on the grounds of relevance, undue burden, and privilege.² Pursuant to Rule 27(d) of the Commission's Rules of Practice, the APWU hereby moves to compel production of the documents requested in APWU/USPS-DR-1.

The full document request states:

APWU/USPS-DR-1. Please file at the PRC in this Docket, to make available for copying by the parties, copies of any speeches, presentations or other documents used in the past year by any Postal officials, including Mr. Donahoe, Mr. Galligan, Mr. Day, Ms. Kingsley, Ms. Mehra and their staff members, that discuss the number of participants using and/or the volume of mail bearing the Intelligent mail barcode prior to the implementation of the Bank of America NSA. These should include presentations on the topic of the IMB as well as presentations on the proposed Service Standards tracking methods that would use the IMB as part of the design.

¹ Document Request of the American Postal Workers Union, AFL-CIO to United States Postal Service (APWU/USPS-DR-1) August 26, 2008; Interrogatories of the American Postal Workers Union, AFL-CIO to United States Postal Service) (APWU/USPS-1-5) August 26, 2008.

² Objection of the United States Postal Service to Document Request of American Postal Workers Union, AFL-CIO (APWU/USPS-DR-1) September 5, 2008.

The Postal Service first objects to this document request on the grounds of relevance. The APWU submits that the topic of IMB is highly relevant to the issues in this docket. In numerous responses to discovery the Postal Service has touted Bank of America's status as a "first adopter" of "new processes and technologies, such as IMB" as a basis for not extending the terms of the Bank of America NSA to Capital One.³ Particularly illuminating is the Postal Service response to interrogatory COS/USPS-1(b). This response, in pertinent part, states:

There are two primary factors that compel the use of different baselines and discount schedules for a functionally equivalent NSA.¹ The first is the fact that Bank of America assumed considerable risk in becoming the first adopter of the NSA's requirements. Bank of America was confronted with numerous unknowns, particularly in dealing with unproven technological and mail processing initiatives. Any subsequent functionally equivalent NSA would present less risk and fewer unknowns to the customer and the Postal Service. Hence, the marginal value of any functionally equivalent NSA would be lower to the Postal Service, a factor which would have to be considered during the course of negotiating any functionally equivalent agreement.⁴

The document request at issue seeks discovery of information pertaining to the use of IMB, one of the central components of the Bank of America NSA, by other mailers prior to the Bank of America deal. If there were many mailers already adopting IMB, the "first adopter" rationale relied on by the Postal Service may be questioned. The Commission and the participants are entitled to know why Bank of America and not any other mailer receives special standing as a "first adopter." This is clearly relevant to whether the Postal Service granted Bank of America an undue or

³ Response of United States Postal Service to Interrogatory PR/USPS-10(a), September 8, 2008. See also, Response of United States Postal Service to Interrogatory PR/USPS-5, August 25, 2008; Response of United States Postal Service to Interrogatory PR/USPS-9, August 26, 2008; Response of United States Postal Service to Interrogatory COS/USPS-1, August 22, 2008.

⁴ Response of United States Postal Service to Interrogatory COS/USPS-1, August 22, 2008.

unreasonable preference in violation of 39 U.S.C. § 403(c), therefore, the objection is not valid.

The Postal Service next objects to the production of the requested documents based on undue burden. The Postal Service objection does not reach the level of particularity required by the Rules of Practice and should be deemed invalid. Rule 27(c) requires that “a participant claiming undue burden shall state with particularity the effort that would be required to answer the request, providing estimates of cost and work hours required, to the extent possible.” Yet the Postal Service objection merely states that “numerous postal employees” and “several work hours” would be required.

Also, contrary to the Postal Services characterization of the request as overbroad, the document request is narrowly tailored to minimize any burden that might be imposed on the Postal Service. Instead of asking for the entire universe of documents pertaining to IMB, the request is limited to those documents used by postal officials during the past year. The Postal Service appears to contend that the document request is burdensome because the requested materials are irrelevant. As discussed above, these documents are highly relevant and therefore should overcome any burden suffered by the Postal Service.

The Postal Service also objects to the production of the documents on the basis of privilege. The Postal Service claims that the deliberative process privilege applies “as many of the requested documents are **likely** predecisional and deliberative.” (emphasis added). Likewise, the Postal Service claims that “certain documents ... **may** be attorney client privileged.” This objection surely does not

meet the requirements of the Rule of Practice. Not only has the Postal Service failed to state with any particularity the reasons for the applicability of the asserted privileges as required by Rule 27(c), the Postal Service has failed altogether to state that any privilege unequivocally applies. Simply stating that documents “are **likely** predecisional and deliberative” or “**may** be attorney client privileged” does not adequately assert any privilege. Mere possibility of privilege is not enough. Moreover, even if this inadequate claim of privilege had merit, the Postal Service does not contend that all of the documents available for production are privileged. These documents should be made available immediately.

Similarly, the Postal Service only “partially objects to document request APWU/USPS-DR-1.”⁵ Accordingly, the Postal Service is required to provide the documents sought that are not covered by the partial objection. The initial document request was filed over three weeks ago. To date, no documents have been made available for inspection by the APWU. The Commission should require that the Postal Service immediately make available all documents not covered by the partial objection.

For the foregoing reasons, the APWU respectfully requests that the Commission find the Postal Service objections to not be valid and compel production of the requested documents.

Respectfully submitted,

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⁵ Objection of the United States Postal Service to Document Request of American Postal Workers Union, AFL-CIO (APWU/USPS-DR-1) September 5, 2008.