

RULING NO. C2008-3/30

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

Complaint of Capital One Services, Inc.

Docket No. C2008-3

PRESIDING OFFICER'S RULING ON MOTIONS BY CAPITAL ONE
AND AMERICAN POSTAL WORKERS UNION
FOR SANCTIONS AGAINST THE POSTAL SERVICE

(Issued October 15, 2008)

I. INTRODUCTION

The deposition of Jessica Dauer Lowrance of the United States Postal Service was held on August 27-29, 2008. The deposition was held on an emergency basis because of Ms. Lowrance's imminent departure from the Postal Service.

Both Capital One Services, Inc. (Capital One) and the American Postal Workers Union, AFL-CIO (APWU) seek sanctions against the Postal Service related to Postal Service's attorneys' conduct during the deposition of Ms. Lowrance.¹ For the reasons discussed below, the motions are denied.

II. PROCEDURAL HISTORY

As a backdrop to this ruling, it is helpful to review the extensive motions practice that took place with regard to this deposition. Capital One applied for permission to hold the deposition on August 21, 2008, after becoming aware that Ms. Lowrance had

¹ Motion for Sanctions under Rule 25(c) Against the United States Postal Service, August 28, 2008 (Sanctions Motion); American Postal Workers Union, AFL-CIO Motion for Sanctions Under Rule 25(c) Against the United States Postal Service, September 2, 2008 (APWU Sanctions Motion); Supplemental Motion of Capital One Services, Inc. for Sanctions Against the United States Postal Service, September 3, 2008 (Supplemental Sanctions Motion).

accepted a new position outside the Postal Service and would soon be unavailable as a witness.²

Initially, Capital One requested that Ms. Lowrance be made available for a deposition on September 8, 2008. *Id.* at 4. In its response to the Application, the Postal Service indicated that Ms. Lowrance would leave the Postal Service on August 29, 2008.³ The Postal Service proposed that because of the short time frame until Ms. Lowrance's departure, Capital One should use interrogatories instead of a deposition to question Ms. Lowrance. *Id.* at 3.⁴ Capital One then filed an emergency motion on August 25, 2008, requesting that the deposition of Ms. Lowrance take place on August 27, 2008, before her departure from the Postal Service.⁵ The Postal Service objected to the request and reiterated that interrogatories posed to Ms. Lowrance should be sufficient.⁶ APWU submitted a response supporting Capital One's request for the deposition of Ms. Lowrance on August 25, 2008.⁷ Capital One's Emergency Motion for Deposition was granted on August 26, 2008, and the deposition of Ms. Lowrance was scheduled for August 27, 2008, at 10 a.m.⁸ It was deemed necessary to allow the deposition in this expedited manner because of Ms. Lowrance's imminent departure from the Postal Service and her concomitant unavailability as a witness after August 29, 2008. *See id.* at 3.

² Application of Capital One Service, Inc. for Authorization to Depose Jessica Dauer Lowrance of the United States Postal Service, August 21, 2008 (Application).

³ Response of the United States Postal Service to Application of Capital One Services, Inc. for Authorization to Depose Jessica Dauer Lowrance, August 22, 2008 (Response).

⁴ Bank of America filed a response in support of the Postal Service's position to obtain discovery from Ms. Lowrance through interrogatories rather than a deposition. Bank of America Corporation's Response to Ruling Number C2008-3/1, August 25, 2008.

⁵ Emergency Motion of Capital One Services, Inc. to Amend Date of Requested Deposition to August 27, 2008, August 25, 2008 (Emergency Motion for Deposition).

⁶ Response of the United States Postal Service to Emergency Motion of Capital One Services, Inc. to Amend Date of Requested Deposition to August 27, 2008, August 25, 2008.

⁷ Response of the American Postal Workers Union, AFL-CIO in Support of Application of Capital One Services, Inc. for Authorization to Depose Jessica Dauer Lowrance, August 25, 2008.

⁸ Ruling Granting Application for Deposition, August 26, 2008, (P.O. Ruling C2008-3/2).

Follow-up rulings set out the procedures to be followed during the deposition. P.O. Ruling C2008-3/3 directed that Ms. Lowrance “must bring all documents from her offices relating to the issues in the Capital One Complaint to the deposition for her reference.”⁹ The Presiding Officer further ruled that “[w]ith 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.” *Id.* P.O. Ruling C2008-3/3 also provided for a closed session of the deposition in which any questions objected to by the Postal Service based on a claim of privilege or exemption could then be answered by Ms. Lowrance subject to appropriate protective conditions. *Id.* at 5.¹⁰ Capital One filed additional emergency motions the day prior to the deposition asking for clarification of the procedures and the application of the deliberative process privilege. The requested clarification was provided before the deposition began.¹¹

The deposition of Ms. Lowrance proved to be contentious. The actual deposition was held during three consecutive days. It started on August 27, 2008 at 10 a.m., and was concluded on August 29, 2008 at about 1:30 a.m. As contemplated by P.O. Ruling C2008-3/3, all parties attending the deposition on the respective days signed protective conditions for their attendance at a closed session of the deposition where privileged information would be discussed.¹² Notwithstanding these rulings and protective conditions, the Postal Service on one side and Capital One and APWU on the other

⁹ Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, August 26, 2008, at 4 (P.O. Ruling C2008-3/3).

¹⁰ Clarification of Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, August 27, 2008, (P.O. Ruling C2008-3/4) provided applicable protective conditions.

¹¹ Emergency Motion to Clarify Application of the Deliberative Process Privilege to Deposition of Jessica D. Lowrance, August 26, 2008, and Emergency Motion to Clarify Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, August 26, 2008.

¹² Parties attending the deposition signed protective conditions on both August 27 and August 28, 2008, agreeing that “[t]he purpose of the closed session of the deposition is to obtain a sworn copy of written or oral testimony, or cross-examination, of Postal Service employee Lowrance that may be of a confidential nature.”

appeared to be unable to agree on almost any issue concerning the deposition. Disagreements over production of documents, privilege claims, forms of objections, and deposition timing and duration embroiled counsel in constant legal discussion devouring much of the time allotted for questioning the witness. During the days the deposition took place, Capital One and APWU filed several additional emergency motions to clarify issues of deposition procedure and the application of claims of privilege by the Postal Service. The Presiding Officer issued several rulings in response to the motions. Due to extensive disagreements among the parties about the appropriate procedures for the deposition and the need for rulings by the Presiding Officer on the related emergency motions, the questioning of Ms. Lowrance was not successfully concluded on August 27, 2008, and was continued on August 28, 2008, and into the early morning hours of August 29, 2008.¹³

III. SANCTIONS MOTIONS

Capital One seeks sanctions against the Postal Service under Commission rule 25(c) “for the conduct of Postal Service counsel during the deposition of Ms. Jessica Dauer Lowrance.” Sanctions Motion at 1. Among other things, Capital One alleges that attorneys for the Postal Service disregarded the Presiding Officer’s rulings by failing to produce specific documents relevant to the deposition, instructing the witness not to answer based on relevancy grounds, and threatening to object to Capital One being present during the closed portion of the deposition. *Id.* at 2. Overall, Capital One alleges that counsel for the Postal Service generally behaved in a manner to thwart the progress and frustrate the purpose of the deposition.

In its Supplemental Sanctions Motion, Capital One takes issue with the Postal Service’s refusal to produce two specific documents in contravention of P.O. Ruling C2008-3/10. Supplemental Sanctions Motion at 1-2. Specifically, Capital One states that the production of these two documents, though ultimately produced at 10:00 p.m.

¹³ See Appendix for additional procedural details.

on August 28, 2008, was unreasonably delayed by the Postal Service by means of a threat to certify the issue of production to the entire Commission. Such certification would have effectively precluded the production of the documents for the purpose of questioning Ms. Lowrance because Ms. Lowrance was scheduled to leave the employ of the Postal Service on August 29, 2008, prior to which the full Commission would not have been able to rule on the issue. *Id.* at 2-3. Capital One emphasizes that the Postal Service produced the documents at issue within five minutes after counsel for Capital One ceased trying to negotiate the issue and told the Postal Service to go ahead and certify the matter to the whole Commission. *Id.*

Capital One asks for the following sanctions and relief: (1) that any and all objections by the Postal Service based on relevance or deliberative process privilege in the context of the deposition and related document requests be waived; (2) that the Commission grant two additional depositions of employees identified as possessing essentially similar information as Ms. Lowrance; and (3) that the Postal Service be charged with the costs of the deposition and attorney's fees for the deposition including the fees associated with its "Emergency Motions." Capital One further asks that in addition to the previously requested relief the Postal Service should be considered to have "forfeited its right to assert any objection or claim of privilege or exemption with respect to the disputed documents" at issue in its supplemental motion. *Id.* at 4-5.

The APWU Sanctions Motion supports Capital One's position and complains that documents required to be produced were not made available in a timely manner, frustrating the purpose of the deposition by preventing adequate preparation by counsel and "result[ing] in an exceptionally long but ultimately fruitless day as there was simply not enough time to fully digest the material and conduct a full examination." APWU Sanctions Motion at 1-2. APWU requests that the Postal Service be deemed to have waived all relevance and deliberative process privilege objections for the deposition of Ms. Lowrance and related document requests. *Id.* at 2. APWU further requests that the Postal Service be required to reimburse APWU's attorney's fees, other expenses and costs for the deposition and related motions. *Id.* at 2-3.

The Postal Service responded separately to each of the three sanctions motions.¹⁴ It claims that it made good faith efforts to comply with all of the Presiding Officer's rulings and requirements and that, as evidenced by the record, the Postal Service's attorneys' behavior in the deposition was not improper, especially in light of the expedited and emergency nature of the deposition. The Postal Service specifically states that the motions for sanctions under rule 25 are legally defective since depositions are governed by rule 33, to which rule 25 is not applicable.¹⁵ See 39 CFR §§ 3001.25 and 3001.33. Furthermore, the Postal Service specifically claims that the alleged poor conduct by Postal Service attorneys is largely exaggerated and not substantiated in the record.¹⁶ The Postal Service points out that given the tight time constraints imposed by the emergency deposition, it was only able to produce documents which could be located in this extremely brief period of time. The Postal Service further points out that the documents claimed as privileged were only to appear in a privilege log and were initially only to be made available to the deponent for "reference" and not produced to Capital One or APWU. *Id.* at 5-9.

The Postal Service asserts that its attorneys' statements during the deposition are mischaracterized by opposing counsel. The Postal Service further states that its attorneys never indicated that they would not abide by the Presiding Officer's decisions, but only that they required opportunity to consult with their client concerning issues arising during the course of the deposition. See *e.g.*, *id.* at 15-18. The Postal Service also points out that Capital One's counsel failed to inform the Postal Service attorneys in advance that she was filing emergency motions while the deposition was proceeding

¹⁴ United States Postal Service Answer in Opposition to Capital One Services, Inc. Motion for Sanctions Under Rule 25(c) Against the United States Postal Service, September 4, 2008 (Answer to Capital One Sanctions Motion); 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 (Answer to APWU Sanctions Motion); and United States Postal Service Answer in Opposition to Capital One Services, Inc. Supplemental Motion for Sanctions Against the United States Postal Service, September 10, 2008 (Answer to Supplemental Sanctions Motion).

¹⁵ Answer to Capital One Sanctions Motion at 2-3; Answer to APWU Sanctions Motion at 2-3.

¹⁶ See Answer to Capital One Sanctions Motion at 10-15.

making it exceedingly difficult for the Postal Service to respond to the motions. *Id.* at 4. Lastly, the Postal Service contends that monetary sanctions, allowing additional depositions, and waiver of privilege or exemption are not available forms of relief under rule 25(c) for alleged deposition misconduct. *See id.* at 19-21.

IV. APPLICABLE LAW

Both Capital One and APWU rely on Commission rule 25(c) to support their claims for sanctions. The Postal Service contends, without elaborating, that deposition procedures are not subject to sanctions under rule 25(c). *Id.* at 2-3.

Rule 25 is titled “Discovery—general policy.” The deposition of Ms. Lowrance was approved for purposes of discovery in the face of her imminent unavailability. Rule 25(c) states it is applicable to orders “to provide or permit discovery pursuant to §§ 3001.26 to 3001.28” The deposition in lieu of interrogatories would seem to fall

within this language.¹⁷ However this finding does not seem to be central to this ruling as rule 23(a)(10) also would appear to authorize the type of actions sought in the pending motions.

Courts generally will impose sanctions of the scope requested in the pending motions only for blatant disregard of acceptable conduct. See, e.g., *Wolters Kluwer Financial Services Inc. v. Scivantage*, 525 F. Supp. 2d 448 (S.D. N.Y. 2007) (where an attorney misleads the court, flagrantly defies discovery orders without even a pretense of timely compliance, uses profanity and routinely verbally assaults opposing counsel in a deposition, she is liable for sanction under Fed. R. Civ. P. 37). Cf. *American Directory Serv. Agency v. Beam*, 131 F.R.D. 15, 17-18 (D.D.C. 1990) (where an attorney routinely instructed his client not to answer without any claim for privilege and coached the client's response with his objections, he was liable for sanction). See also Fed. R. Civ. P. 30(d)(2) and 37(b)(2)(A). "Provided that there is a clearly articulated order of the court requiring specified discovery, the district court has the authority to impose rule 37(b) sanctions for noncompliance with that order." *Jones v. Uris Sales Corp.*, 373 F.2d 644, 647-48 (2d Cir. 1967). *Daval Steel Products, a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991).

To justify sanctions under Fed. R. Civ. P. 37, a court must determine that: (1) a clearly articulated order for specific discovery exists; (2) the sanctions imposed are just; (3) the sanctions relate to the particular claim to which the discovery was addressed; and (4) the sanctions are necessary even when viewed in light of the 5th Amendment

¹⁷ This is another instance where the upcoming review of the Commission rules of practice and procedure may eliminate ambiguity. For example, the United States Department of Energy, in its administrative rules governing discovery, has created a rule by which it can sanction a party for any violation of a discovery order: "[i]f a person fails to comply with an order relating to discovery, the Office of Hearing and Appeals may order appropriate sanctions." 10 CFR § 205.198(h)(1). The Court interpreted this rule as appropriate, and upheld sanctions issued against a party due to the "overwhelming judicial support given to expansive agency readings of statutory rule-making authorization that are not flatly inconsistent with other statutory provisions." *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771, 795-796 (D.C. Cir. 1984), citing *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 691 (D.C. Cir. 1973).

due process rights of the offending party. See generally, *Daval Steel*, 951 F.2d 1357, 1366 (2d Cir. 1991). The Supreme Court has held that the “provisions of Rule 37...must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law.” *Societe Internationale Pour. v. Rogers*, 357 U.S. 197, 209 (1958).

The decision to impose sanctions is dependant on a finding that the alleged misconduct warrants their imposition. On this record, Postal Service’s counsel’s alleged misconduct did not rise to sanctionable level.

A careful reading of the transcript of the deposition does not reveal egregious behavior of the type that would warrant sanction under the established interpretation of Fed. R. Civ. P. 30 and 37 as discussed above. Nor can sanctionable behavior fairly be inferred from the descriptions of events surrounding the actual deposition as presented in the pleadings of the parties.

What can be said is that counsel appear to have lost sight of the purpose of an emergency deposition; namely, to preserve testimony that shortly will no longer be available. Some delay to allow counsel to present and defend the client’s position is appropriate and acceptable, but argument must not be so extended that it can be misinterpreted as a tactic to prevent the preservation of testimony.

In normal deposition practice, once an objection such as relevance is entered and explained by counsel the witness should be advised to answer with the merits of the objection reserved for subsequent resolution by the presiding officer. A separate, closed session of this deposition was established to allow this same procedure to be followed should objections of privilege be raised. Unfortunately, normal practice did not prevail. Instead, counsel for all participants spent hours arguing with each other. In this regard, the deposition record indicates that counsel for Capital One and APWU have some responsibility as well, as they revisited areas where the Postal Service had made its arguments, right or wrong, perfectly clear.

Document handling also did not reflect best practices. The Postal Service makes a plausible argument that it faced unequal time pressure that made obtaining all

relevant documents very difficult, and that it was attempting to comply with the letter of applicable Presiding Officer rulings. The delay in production of two documents until late at night on the second day of the deposition was unfortunate, but not sanctionable, as the Postal Service provides a plausible, if strained excuse.

The postal bar has earned an exemplary reputation for working well together even when under extreme time pressures and when contesting high dollar-value issues. Much of the credit for this must go to the Postal Service's attorneys, who regularly face and meet the burdens of quickly finding and providing the data all parties will use, including those parties that seek an outcome the Postal Service opposes. It is encouraging that Capital One and the Postal Service are now working together to narrow the issues in this case and make discovery more focused. Hopefully this cooperative spirit will carry forward through the remainder of this case.

RULING

1. The Motion for Sanctions under Rule 25(c) Against the United States Postal Service, filed August 28, 2008, is denied.
2. The American Postal Workers Union, AFL-CIO Motion for Sanctions Under Rule 25(c) Against the United States Postal Service, filed September 2, 2008, is denied.

3. The Supplemental Motion of Capital One Services, Inc. for Sanctions Against the United States Postal Service, filed September 3, 2008, is denied.

Dan G. Blair
Presiding Officer

APPENDIX*Deposition Day One – August 27, 2008*

On August 27, 2008, the first day of the deposition of Ms. Lowrance, Capital One filed several additional emergency motions to clarify issues of deposition procedures and the application of claims of privilege by the Postal Service: Second Emergency Motion to Clarify Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, and Third Emergency Motion to Clarify Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, both filed August 27, 2008.

The Presiding Officer issued two additional rulings clarifying the procedures applicable to the deposition of Ms. Lowrance: Clarification of Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance (P.O. Ruling C2008-3/4), and Second Clarification of Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance (P.O. Ruling C2008-3/5) both filed August 27, 2008. Due to extensive disagreements between the Postal Service and Capital One about the appropriate procedures for the deposition with its accompanying emergency motions and the need for rulings by the Presiding Officer, the questioning was not successfully concluded on August 27, 2008.

Capital One filed a motion to schedule an additional day for the continuation of questioning: Motion to Allow Additional Time to Depose Jessica Dauer Lowrance, filed August 27, 2008. The Presiding Officer ruled at 4:30 p.m. that afternoon that the deposition of Ms. Lowrance should be continued on August 28, 2008. Ruling Scheduling Additional Appearance, filed August 27, 2008 (P.O. Ruling C2008-3/6). P.O. Ruling C2008-3/6 at 1 stated that a total of “[s]even hours will be allotted to Capital One for questions and answers during this deposition,” but that “[t]ime spent by counsel making or responding to legal argument does not count against the 7 hours.”

Deposition Days Two and Three – August 28-29, 2008

The second (and third day)¹⁸ of the deposition proved to be only slightly less contentious than the first day. On August 28, 2008, Bank of America filed its opposition to allow Ms. Lowrance to be questioned about the Postal Service's non-disclosure agreement with the Bank of America: Opposition of Bank of America Corporation to Capital One Service's, Inc.'s Second Emergency Motion to Clarify Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, filed August 28, 2008.

Both Capital One and APWU filed motions to compel the production of documents by Ms. Lowrance and for clarification as to whether they could attend a closed session of the deposition: Emergency Motion of the American Postal Workers Union, AFL-CIO to Clarify Procedures for Closed Deposition of Jessica Dauer Lowrance; Motion of the American Postal Workers Union, AFL-CIO to Compel Production of Documents by USPS to Postpone Deposition of Jessica Dauer Lowrance Until Friday, August 29, 2008, at 9:30 A.M. and to Provide APWU Time to Ask Questions of Ms. Lowrance; Fourth Emergency Motion to Clarify Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance; Joint Emergency Motion to Clarify Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, all filed August 28, 2008.

As previously stated, Capital One also moved for sanctions against the Postal Service citing the Postal Service's failure to produce documents and Postal Service's counsel's instructions to witness not to answer based on relevancy grounds: Sanctions Motion.

The Postal Service filed with the Commission under seal its nondisclosure agreement with Bank of America: Notice of the United States Postal Service of Filing Documents under Seal Responsive to Presiding Officer's Ruling No. C2008-3/5, filed August 28, 2008..

The Postal Service also filed responses to P.O. Rulings C2008-3/5 and C2008-3/6: Response of the United States Postal Service to P.O. Ruling No. C2008-3/5, Second Clarification of Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance; Response of the United States Postal Service to P.O. Ruling No. C2008-3/6, Ruling Scheduling Additional Appearance, all filed August 28, 2008.

The Presiding Officer issued additional rulings clarifying deposition procedures: Ruling on Procedural Requests Related to the Deposition of Jessica Dauer Lowrance and Ruling Concerning Procedural Matters for the Deposition of Jessica Dauer Lowrance, both filed August 28, 2008 (P.O. Rulings C2008-3/7 and C2008-3/8).

Finally, late in the afternoon of August 28, 2008, P.O. Ruling C2008-3/10 held that counsel would be allowed to “use the documents [Postal Service considers privileged or otherwise exempt from disclosure] in a closed proceeding under protective conditions agreed to by the parties for purposes of conducting an effective deposition.” Ruling Concerning Availability of Documents for the Deposition of Jessica Dauer Lowrance, August 28, 2008.

¹⁸ The deposition continued into the early morning hours of August 29, 2008.