

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 CAPITAL ONE SERVICES, INC. MOTION FOR SANCTIONS UNDER RULE 25(C) AGAINST THE UNITED STATES POSTAL SERVICE
(September 4, 2008)

On August 28, Capital One Services, Inc. (Capital One) filed a “Motion for Sanctions Under Rule 25(c) Against the United States Postal Service” (motion). The motion consists of unsubstantiated and unsupportable characterizations of appropriately zealous 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 on August 21, 2008, then amended by motion on

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.

August 25, and granted by the Presiding Officer on August 26, 2008, approximately four hours before close of business on the day before the deposition's commencement.²

Complainant 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, and manifest violations of the Postal Service's due process rights, Complainant now also seeks sanctions for the rightfully zealous advocacy of the Postal Service's interests by its lead counsel.

Complainant's motion is deeply flawed (as the transcript itself substantiates), seeks remedies inapplicable and inappropriate to the immediate context, and makes vast mischaracterizations of what federal district court judges would do if faced with comparable situations, without even bothering to honor the usual standards of legal argumentation by citing reported precedent for its propositions.

The Presiding Officer has already extended every possible courtesy and favorable consideration to Complainant, thereby ensuring that Complainant cannot find fault in the consideration of its petitions and due process rights. The time has now arrived when the Presiding Officer should end Complainant's continued post-mortem motions practice: the motion should be denied in its entirety.

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.

I. Legal Basis

As a preliminary matter, Capital One'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 like Rules 26-28.³ Consequently, the Commission has *not* subjected deposition procedures to sanctions under Rule 25(c). Capital One's motion completely fails to acknowledge or even address this critical distinction. This failure is fatal to Capital One's request for relief under the current rules. Hence, Capital One's motion is legally defective and should accordingly be denied.

Should this defect be ignored, examination of Complainant's specific allegations leads to the same result. Accordingly, the Postal Service offers a detailed reply to each of the allegations raised in Capital One's motion, below.

II. Background

Before addressing the allegations in Capital One's motion, it is important to present a brief recap of the context and series of events leading up to the August 27 deposition.

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 of the immediate circumstances, raises a range of due process questions that should be addressed carefully, a necessity Complainant does not appear to recognize. Moreover, these issues may be further informed by the pending complaint rulemaking proceeding in Docket No. RM2008-3.

First, it is critical that all concerned keep in mind the urgency and timing of the lead-up to the Wednesday, August 27, 2008, 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. Further, the procedures for the deposition, as well as document requirements, were issued hours before its start and were not even seen by counsel until late afternoon of August 26.

Second, the Commission deposition process has been rarely, if ever, used. The Wednesday 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. 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.

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, the very short lead times, and the procedural uncertainties all require the Postal Service to provide below its responses to specific points raised in Capital One's motion.

III. Documents

Capital One faults postal counsel for failure to furnish certain records at the deposition. After P.O. Ruling No. C2008-3/3 was issued on the afternoon of August 26,

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.”).

counsel for the Postal Service met with the deponent and her manager to identify potentially responsive records. A good faith effort was undertaken to search for and identify all documents immediately available to the deponent in the very tight frames between the issuance of the ruling and the commencement of the deposition the next morning. Counsel then undertook to gather and copy those records so that they would be present during the deposition the next day.

At the beginning of the deposition, after discussion with Capital One counsel concerning the ruling's requirements, counsel provided Capital One counsel copies of the documents that were either non-exempt or non-privileged, as well as those records that were exempt under FOIA Exemptions 3, 4, or 5 but were otherwise subject to a nondisclosure agreement with Capital One.⁶ Tr. 2/9. When asked about other exempt or privileged records, counsel advised that he understood P.O. Ruling No. C2008-3/3 as permitting the Postal Service to withhold such records and provide a privilege log describing them within seven days. Tr. 2/13-14. This understanding was based on ruling's language that contemplated the deponent would bring records to the deposition "for reference."⁷ The ruling did not, however, compel that documents be produced at the deposition. Specifically, the ruling provided that:

[i]f 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)

⁶ This offer actually exceeded what was required by P.O. Ruling No. C2008-3/3. In lieu of providing the documents concerning Capital One that were subject to FOIA Exemptions 3 and 5, the Postal Service could have listed them on a privilege log due the following week.

⁷ "Ms. Lowrance must bring all documents from her offices relating to the issues in the Capital One Complaint to the deposition for her reference." P.O. Ruling No. C2008-3/3 at 4.

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.

Thus, at the start of the deposition, counsel submits that his good faith understanding of the ruling rested squarely upon its language, such that it was reasonable and consistent with the ruling for counsel not to provide exempt or privileged records. This outcome was also consistent with 39 U.S.C. § 504(g), which authorizes the Postal Service to designate records as privileged or exempt and requires the Commission to perform a balancing test to determine whether such records should be disclosed, and in what form. No such balancing test had yet been performed when the parties arrived at the deposition, since there had yet been no opportunity to make a statement regarding application of the exemption provided in the statute. It appeared that the Presiding Officer intended to rule on whether the balancing test favored any type of disclosure of the exempt or privileged records after receipt of the privilege log, which was permitted to be filed up to one week after the deposition.

Furthermore, in the view of counsel, it would not have been logical to interpret the ruling as requiring the production of exempt or privileged records to counsel for Capital One at the start of the deposition. Such an action would have risked waiving all privileges associated with such records, since counsel for Capital One was not under any order by the Presiding Officer to protect such records in the open session of the deposition of Ms. Lowrance. A further complication consisted of the risk that, absent an order to compel production of exempt or privileged records, disclosure of records containing Bank of America's confidential business information would constitute a violation of the nondisclosure agreement with Bank of America; such an order clearly did not exist at the time the deposition commenced. Issuance of P.O. Ruling No.

C2008-3/4 did not change this situation. That ruling stated the Presiding Officer's view that there was "no apparent reason" why Capital One counsel could not attend any closed portion of the deposition. This ruling did not change the manner in which documents were compelled to be disclosed, or permitted to be withheld, during the deposition.

Capital One also criticizes the Postal Service based on its understanding that the deponent only had documents within her custody available at the deposition. Counsel and the deponent met in the late afternoon of August 27 to begin the process of identifying responsive documents. Counsel reasonably interpreted the requirements of the ruling to relate to documents that could be identified and located within the short time frames available from the deponent's custody, not to documents of other employees. This interpretation is entirely consistent with P.O. Ruling No. C2008-3/3, which, when describing the procedures for the deposition, reasoned that "the deposition document request is specifically directed to documents associated with Ms. Lowrance concerning this case. This request is relatively narrow and appears reasonably calculated to lead to the discovery of admissible evidence."⁸

Moreover, Counsel's position was reasonable in light of the fact that the deponent could only be expected to testify about documents that relate to her, rather than the documents of other employees with which she would not be expected to be familiar, especially given the brief preparation time available. This position is consistent with the emergency nature of the deposition of Ms. Lowrance, as well as with the Capital One's representation in its Emergency Motion that "Ms. Lowrance is an

⁸ P.O. Ruling No. C2008-3/3, at 2.

indispensable witness because she was the only other person present at disputed conversations between the Postal Service and Capital One.”⁹ Thus, it was entirely reasonable for Postal Service counsel to assume that the deposition of Ms. Lowrance would focus on documents under Ms. Lowrance’s control that only Ms. Lowrance would be able to testify about, rather than the voluminous records at Postal Service Headquarters related more broadly to the Bank of America NSA, of which a number of other postal employees have personal knowledge.

IV. Organizational chart

Capital One complains that counsel failed to furnish an organizational chart to facilitate questioning. As information, after receipt of the Presiding Officer's ruling on Tuesday afternoon, counsel for the Postal Service undertook to coordinate with the deponent and identify responsive records, in addition to dealing with multiple other litigation-related preparations and Commission filings. Counsel specifically asked the deponent for the organizational chart and was advised that she did not possess one. Instead, the deponent identified a memorandum announcing organizational changes in responsibilities, which upon review was determined to satisfy the underlying intent of the request. Moreover, the normal practice in discovery is to provide available records, not to generate new records, as Capital One appears to insist.¹⁰

⁹ Emergency Motion of Capital One Services, Inc. to Amend Date of Requested Deposition to August 27, 2008, Docket No. C2008-3, August 25, 2008, at 2.

¹⁰ In addition, it remains unclear as to how organizational charts fall within the scope of Capital One’s Application for Deposition of Ms. Lowrance, or could be considered essential documents that necessitate obtaining Ms. Lowrance’s personal knowledge of Postal Service organizational charts in an emergency deposition.

V. Objections & Instructions

Capital One asserts that counsel impeded the deposition by "repeatedly" directing the witness not to respond on grounds of relevance. The transcript stands clearly to the contrary. First, the occasions when counsel interposed directions to the witness that appear to be within the scope of Capital One's motion were not, as Capital One alleges, "repeated," but rather isolated to a single line of questions. Presumably, Capital One is referring to the events at Tr. 2/112-114, 2/116-121, and Tr. 2/121-124. Careful review of the transcript shows that the motion has grossly simplified and misstated the salient facts.

At Tr. 2/109-114, counsel for Capital One began questioning the witness on her awareness of any studies by the USPS Office of Inspector General (OIG) of Bank of America's read and accept rates. It is true that counsel for the Postal Service asserted an objection based on relevance.¹¹ Counsel went on, however, to explain in detail that the question was beyond the scope of the Application that Capital One submitted for the deposition pursuant to Rule 33, as well as that any such information was privileged. Tr. 2/113. After some discussion, postal counsel withdrew his objection. Tr. 2/114. Hence, Capital One clearly suffered no harm.

At Tr. 2/116, counsel for Capital One continued questioning the deponent on OIG studies related to Bank of America read and accept rates. This was followed by a related question at Tr. 2/121. In these two related instances, counsel asserted that the line of questioning was beyond the scope of the Commission's ruling authorizing the

¹¹ Counsel's concerns were consistent with P.O. Ruling No. C2008-3/7, wherein the Presiding Officer concluded that questioning on the OIG memorandum was "at best tangential to testimony being provided by Ms. Lowrance."

deposition. Counsel specifically directed the participants to Rule 33 and explained that it was inappropriate to permit questioning in the deposition on matters that the Commission had not approved.¹² Tr. 2/116-117.

Counsel's basic point was that, separate and apart from its irrelevance, the line of questioning was objectionable because neither the deponent nor the Postal Service had been placed on notice of it arising at the deposition, and the Commission had not approved such topics in granting the Application. Indeed, the Presiding Officer recognized this distinction in P.O. Ruling No. C2008-3/8, which was issued the second day of the deposition. In that Ruling, the Presiding Officer explained that

[t]here may be considerable overlap in objections based on relevance and objections based on out of scope material. To avoid further emergency motions practice, objections based on out of scope may be made and noted by the reporter, but the witness shall answer the question. See P.O. Ruling C2008-3/7.¹³

¹² This was further explained in the Response of United States Postal Service to P.O. Ruling No. C2008-3/6, Ruling Scheduling Additional Appearance. In that pleading, the Postal Service outlined the substance of this objection as follows:

The Postal Service will certainly heed the Presiding Officer's Ruling as it pertains to objections based on relevance. However, the Postal Service submits, as Postal Service counsel has repeatedly stated thus far during the deposition of Ms. Lowrance, that there is a difference between objections based on relevance, and the Postal Service's position that counsel for Capital One has gone far beyond the subject matter of Ms. Lowrance's deposition, as described in Capital One's Application, in violation of Rule 33 of the Commission's Rules of Practice and Procedure. Rule 33 clearly requires a participant, when filing an Application for Deposition, to state the subject matter of the witness's testimony. That Application may then be approved, and a deposition scheduled, pursuant to a Commission Order or Presiding Officer Ruling on the material contained in the Application. But, Rule 33 should not allow a participant to pose questions at a deposition that fall far outside the scope of Application of Capital One Services, Inc. ("Capital One") for Authorization to Depose Jessica Dauer Lowrance, Docket No. C2008-3 (August 21, 2008).

¹³ P.O. Ruling No. C2008-3/8 at 3.

Thus, the Presiding Officer acknowledged the distinction between scope and relevance objections, and he ultimately ruled that such objections would only be noted. It was accordingly not, in counsel's good-faith understanding of the all then extant rulings, improper for counsel to interpose direction to the witness, since his objection was based on scope grounds. This ground was not tantamount to relevance, and P.O. Ruling No. C2008-3/8 had not yet been issued to clarify the matter.

Counsel also undertook good-faith efforts in an attempt to resolve the controversy. For example, counsel twice invited Capital One to bring the matter to the Presiding Officer. Tr. 2/116, 2/119. In addition, he even asked the Hearing Officer if the Presiding Officer could be made available by telephone. Tr. 2/121. The Hearing Officer then asked if this was how Capital One wished to proceed. Tr. 2/122. Counsel for Capital One declined, thus choosing to drop the issue. Tr. 2/122. Finally, counsel for the Postal Service advised of his agreement that the matter could be revisited in the closed session with the Presiding Officer. Tr. 2/123. The Hearing Officer then asked for clarification as to whether counsel would permit the line of questioning in the closed session. Counsel answered by stating that foreclosure of response was his position; however, counsel's intent in responding in this manner was that the Postal Service would take the position that the line of questioning was beyond the noticed scope, even in the closed session. This position is entirely logical and consistent with the Postal Service having repeatedly sought to bring the matter of scope for immediate resolution by the Presiding Officer, an opportunity that Complainant's counsel chose to reject (at least while postal counsel was present). Counsel's statement was in no way intended

to state that the deponent would be directed not to respond were the Presiding Officer to have ruled on the scope objection prior to the closed session.

In sum, with respect to this line of questioning, Postal Service counsel explained his position that the questions were beyond the scope of the testimony and undertook to distinguish this objection from others on grounds of relevance. Counsel for the Postal Service further invited counsel for Capital One to bring the matter to the Presiding Officer, which, apparently, the Hearing Officer also could have done. Tr. 2/121-22. Counsel accordingly submits that his direction to the witness was proper, made in good faith, consistent with his duty of representing his client's interest, and in compliance with all outstanding rulings then in effect.

Capital One also alleges that "at the end of the deposition on August 27, counsel threatened to instruct the witness not to answer during the closed session to questions outside of her conversations with Niki Howard and related follow up." This presumably arises from the proposal counsel offered to deal with the deliberative process privilege. Before the deposition, in an effort to accommodate Capital One's interest embodied in its motion for clarification on the use of the deliberative process privilege, counsel circulated a proposed procedure to allow counsel for Capital One to pose such questions based on the deponent's conversations with Capital One's representatives. Tr. 2/18, 2/163.¹⁴ Counsel had developed such proposed procedures before arriving at

¹⁴ The proposed procedures counsel drafted for consideration by the participants were as follows:

- The deliberative process privilege (DPP) is a recognized privilege under FOIA and falls within FOIA Exemption 5.
- The DPP protects information that is both predecisional and deliberative.

the deposition, based on P.O. Ruling No. C2008-3/3, under which counsel for Capital One was to have been excluded from the closed session. Hence, counsel for the Postal Service had developed proposed procedures with the explicit intention that counsel for Capital One could be present to hear responses that gave rise to objections based on the deliberative process privilege on specified subject matter. The last bullet of the

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- Information protected under FOIA Exemption 5 is within the scope of matter that the USPS may designate as exempt in PRC proceedings under 39 USC 504(g)(1).
 - PRC Rules implementing section 504(g) are not yet finalized.
 - USPS has standing objections which have not been ruled upon in relation to Capital One (Cap One) discovery requests.
 - Hence, to the extent Cap One seeks information that is protected by the DPP, the Postal Service intends to interpose a standing objection to those questions.
 - However, in the interest of accommodating the parties, the Postal Service does not intend to assert individual objections to certain questions posed to Ms. Lowrance today during oral cross-examination and will allow the deponent to answer those questions, to the extent those oral questions are aimed at eliciting information on conversations Ms. Lowrance may have had with her management concerning conversations Ms. Lowrance is alleged to have had with Ms. Niki Howard of Capital One, on the following conditions:
 1. all parties in attendance agree that the USPS has NOT engaged in any waiver with respect to such information and are estopped from making arguments to the contrary;
 2. all parties in attendance agree that the USPS has not waived its rights to assert the DPP covering any internal documents subject to production in this proceeding and are estopped from making arguments to the contrary;
 3. This portion of the transcript will be placed under seal, but accessible to the participants in this case who have agreed to these terms, subject to the right of any party to move the PRC to lift the seal on any portions of the transcript that do not contain content protected by the DPP;
 4. this does not affect the procedures in PO Ruling C2008-3/3 with respect to the process of the court reporter posing and answering questions that give rise to any other claims of privilege or exemption;
 5. the USPS reserves the right to direct the witness not to testify in the event an answer would reveal information protected by the DPP to the extent it does not pertain to discussions the deponent may have had about matters other than those arising from conversations between Ms. Lowrance and Ms. Howard, and will decide to exercise its rights to object or allow the deponent to answer on a case-by-case basis.

proposed procedures, which presumably forms the basis of Capital One's criticism, was intended to express the Postal Service's right to object to questioning on grounds of the deliberative process privilege during the *open* session, which, at the time the proposal was drafted, was the only session in which objections could logically have been lodged based on the structure of the deposition laid out in P.O. Ruling No. C2008-3/3, that excluded participants' counsel.

In a later exchange with the participants' counsel, it is true that Postal Service counsel did not agree he was "prepared to reveal" information in the closed session that implicated the deliberative process privilege, other than with respect to the reaction of Postal Service management to conversations between the deponent and a representative of Capital One. Tr. 2/171. Counsel's intent in responding thus was that any other subjects would not necessarily be within the scope of the Application. Given counsel's position and the lack of further resolution on scope matters, there was no reason for counsel to state that he was "prepared to reveal" any other particular subject matter. Hence, Capital One has misapprehended counsel's representations.

VI. Closed Session

Capital One also complains that counsel suggested he might refuse to agree to allow counsel for Capital One to attend the closed portion of the hearing and to ask follow up questions. This does not fairly portray the content of the exchange between counsel. The subject conversation took place after the deposition session for the day had concluded. At that time, counsel was well aware that in P.O. Ruling No. C2008-3/4, the Presiding Officer had stated that "[t]here is no apparent reason why Capital One can not be represented at any closed portion of the deposition by skilled counsel able to

agree to appropriate protective conditions," and that P.O. Ruling No. C2008-3/5¹⁵ provided for the opportunity for follow-up by Capital One counsel "if" counsel was present. Counsel's response to Capital One counsel's query did not, however, in any manner express an intention not to comply with rulings applicable to the closed session.

To the contrary, counsel for the Postal Service advised that he "need[ed] to consult with [his] management" concerning this matter. This was because P.O. Ruling No. C2008-3/4 had been presented to counsel by Commission staff on the morning of the deposition, in response to an emergency motion filed by Capital One the day prior. In the crush of frenetic activity resulting from the rulings issued those two days, counsel did not have the opportunity to properly consider, let alone respond to, that motion before the Wednesday deposition.¹⁶

The ruling fundamentally changed the structure of the closed session as it had been established in P.O. Ruling No. C2008-3/3. In that ruling, the closed session was intended to be reserved for the presence of the witness, the Hearing Officer, and the reporter, if there was no agreement among the parties concerning the presence of counsel. The reporter was to present questions that gave rise to the need to reveal exempt or privileged information and that could not, under the terms of the initial ruling, be answered in the presence of the other participants' counsel. P.O. Ruling No. C2008-3/4 changed this procedure, by advising that the Presiding Officer saw "no reason" why

¹⁵ Counsel received this ruling at the end of the Wednesday session, but was given no opportunity to be heard or to respond.

¹⁶ The Commission's rules provide that motions be answered within 7 days. In unusual circumstances, the practice has been for the Presiding Officer to shorten the response period by issuing a ruling notifying the parties of shorter time frame. In this case, the pressures and urgency of the moment could have been fairly and expeditiously dealt with by oral motions practice by the Presiding Officer or a designee, yet they were not.

Capital One counsel could not be present for the closed session or ask follow-up discovery in the closed session upon agreement to appropriate protective conditions. Further, counsel interpreted the ruling as establishing a considered, definitive basis for Capital One counsel to appear at the deposition's closed session. Yet this ruling was issued without the benefit of any input from any postal counsel or other affected participants, let alone notice concerning the imminence of its issuance.

Because the Postal Service had been given no opportunity to be heard before the rulings were issued, counsel's inability to express agreement to the outcomes in the rulings was based on counsel's need to consult with his management at Headquarters regarding whether the Postal Service would seek reconsideration of P.O. Ruling No. C2008-3/4, or whether it would request certification of the matter to the full Commission. It was in no way counsel's intent to disregard a standing ruling. Further, counsel needed to consult with counsel for Bank of America concerning this matter, since the terms of a nondisclosure agreement between the parties were implicated by the ruling. As it was, once the Wednesday deposition session was concluded, counsel did manage to consult with management, as well as counsel for Bank of America. Based on those consultations, the Postal Service timely filed pleadings by 8:00 a.m. on August 28, 2008, to the effect that it did not oppose the presence of any other participant at the closed session, thereby satisfying Capital One's concerns. There was no requirement or obligation that counsel make a representation regarding the presence of Capital One counsel at the closed session before these consultations could take place. Counsel could not offer the assurances that Capital One's counsel sought precisely because it

was necessary to conduct further consultations, and counsel explicitly advised counsel for Capital One of the need for such consultations.

Postal Service counsel's extensive efforts to understand and act upon motions and rulings made without notice to himself or the Postal Service absolutely cannot stand as the foundation for sanctions sought by Complainant. Indeed, counsel's efforts to comprehend the pace and consequences of motions practice without any meaningful opportunity to meet further with clients or to discuss the situation with colleagues embodies an exceptional effort to represent the interests of the Postal Service, while accommodating changes in the playing field that took place without regard for the Postal Service's due process rights.

In addition, counsel would have been remiss in offering assurances to Capital One's counsel regarding the Postal Service's position on the presence of participants' counsel at the closed session on Wednesday if the outcome of his consultations had resulted in the Postal Service seeking reconsideration or certification. Hence, there was absolutely no impropriety in counsel's conduct. Counsel for the Postal Service was simply unable to make representations at the time Capital One counsel made its query. As such, the Presiding Officer must deny Complainant's motion, with prejudice.

VII. End of Session

Capital One also points to counsel's disagreement regarding the close of the Wednesday session. As background, shortly after 5 p.m. at the Wednesday session, the Hearing Officer advised that if all participants were in agreement, the hearing could be continued until Thursday. Tr. 2/179. Counsel expressed his disagreement with this suggested outcome and urged that the deposition continue, in the interest of achieving

closure.¹⁷ Tr. 2/180. As a result, the Hearing Officer undertook to consult with the Presiding Officer, who in turn decided that the hearing should be continued to the next day as the other participants had requested. Counsel for the Postal Service respected this outcome and made no further issue of it. There was nothing improper in counsel's proposal regarding the timing of the end of the Wednesday session, particularly given that P.O. Ruling Nos. C2008-3/2 and 3/3 did not specify a time for conclusion of the Wednesday session.

VIII. Relief

Capital One seeks the imposition of punitive measures in the form of payment of attorneys' fees and deposition costs, equitable relief in the form of the compelled appearance of at least two other witnesses for depositions, 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, with the exception of waiver of relevance objections, none of the requested forms of relief are available.

It is important to be mindful that the Commission is an executive branch establishment, not an Article III court. Hence, its 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

¹⁷ P.O. Ruling No. C2008-3/2 did not set an end time for the deposition other than to grant the participants seven hours for the deposition. The manner by which the seven hours would lapse was not made clear to all parties until Wednesday, August 27, 2008, during the deposition of Ms. Lowrance.

statutory provisions in Title 39, which are in no way implicated here.¹⁸ 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.¹⁹ Absent explicit statutory authority, an administrative agency may not impose penal measures.²⁰ 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.

Further, Capital One is not entitled to any relief in the form of two additional depositions. The Commission's Rule 33 limits the use of depositions to extremely unusual circumstances. Nowhere do the Commission's rules indicate that this exceptional and rarely used procedure should become an equitable remedy to relieve a perceived wrong. Moreover, close examination of what actually happened demonstrates that the wronged party, if any, is the Postal Service, which is not seeking any extraordinary relief. Unilateral waiver of objections on grounds of deliberative process privilege would be inconsistent with the nature of civil discovery privileges, as well as, at least with respect to matters concerning commercial decisions, 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 for

¹⁸ 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]”).

¹⁹ The Commission is subject to the Administrative Procedure Act. 39 U.S.C. § 503.

²⁰ 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”).

transparency.²¹ Sanctions for conduct in depositions are in no way mentioned as part of that balancing test, and cannot enter into the Commission's formulation.²²

In sum, none of the remedies Capital One seeks are appropriate here. Capital One'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 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.

IX. Summary

As explained above, Capital One's motion is legally defective and misleading. Sanctions cannot be imposed in connection with Rule 33 depositions. Moreover, the allegations presented in the motion lack substance, misstate key facts, and mischaracterize events. Further, Capital One is not entitled to any of the punitive and equitable relief it seeks. The Postal Service here provides detailed explanations for the exchanges among counsel that arose on August 27, demonstrating sound legal reasoning that supports the good-faith positions taken by Postal Service counsel. The

²¹ 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."

²² The Postal Service would not dispute, however, that overruling a relevance objection might be within the scope of the Commission's sanction authority. However, such relief is neither available for Rule 33 depositions, nor is it in any way warranted under the circumstances.

extreme measure of issuing any sanctions against the Postal Service or its counsel would not only be manifestly unjust under these circumstances, it would seriously chill appropriately zealous 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. Complainant's motion for sanctions against the Postal Service should accordingly be rejected completely, with prejudice.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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