

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

RATE AND SERVICE CHANGES TO IMPLEMENT
BASELINE NEGOTIATED SERVICE AGREEMENT
WITH BANK OF AMERICA CORPORATION

Docket No. MC2007-1

**RESPONSE OF UNITED STATES POSTAL SERVICE IN OPPOSITION TO
MOTION OF AMERICAN POSTAL WORKERS UNION, AFL-CIO, FOR
ISSUANCE OF A SUBPOENA TO COMPEL TESTIMONY AND THE
PRODUCTION OF DOCUMENTS BY WALTER O'TORMEY**

(May 1, 2007)

On April 25, 2007, the American Postal Workers Union, AFL-CIO (APWU), moved for the Postal Regulatory Commission to issue a subpoena compelling Walter O'Tormey, Vice President, Engineering, of the United States Postal Service to appear for a deposition conducted by APWU counsel before the commencement of hearings in this case. The Postal Service hereby opposes that motion, and also requests that any subpoena issued in response thereto be quashed.

BACKGROUND

The requested testimony concerns the same information sought in APWU/USPS-T1-1, the related Motion to Compel Answer, and the Requests for Admission (RFA) filed by APWU on April 24, 2007. In each instance, APWU seeks recent information concerning an ongoing pilot study of the Intelligent Mail

Barcode (“IMB”). APWU evidently hopes to show that the current read/accept rates of such barcodes are higher than the read/accept rates adopted by the Postal Service and Bank of America Corporation (“BAC”) as baseline values for certain discounts offered in their proposed NSA.

The Postal Service is responding to the interrogatory and is answering the RFA without objection. The response to the RFA was filed on April 30, and the Postal Service intends to produce documents responsive to APWU/USPS-T1-1 under protective conditions. The Postal Service has also offered to produce Brent Raney, Manager, Technology Development/Apps, Engineering, during hearings on the Postal Service’s direct case on May 8, 2007, for cross-examination concerning the requested materials. APWU and other participants will have a full opportunity to cross examine Mr. Raney on improvements in letter mail read/accept rates since 1999, the purported subject of the subpoena.

The undersigned counsel have informed counsel for APWU of the Postal Service’s willingness to provide the above responsive information.

ARGUMENT

APWU has failed to justify (1) compelling the Postal Service to offer a witness (or witnesses) for a prehearing deposition, rather than at the May 8 hearing itself; (2) compelling Mr. O’Tormey, rather than another witness chosen by the Postal Service, to serve as the witness; or (3) the issuance of a subpoena. We discuss each point in turn.

(1) Depositions are an extraordinary remedy in rate and classifications cases. The Commission’s rules authorize the taking of depositions in only three

specified circumstances: (a) “the person whose deposition to be taken would be unavailable at the hearing”; (b) “the deposition is deemed necessary to perpetuate the testimony of the witness”; or (c) “the taking of the deposition is necessary to prevent undue and excessive expense to a participant and will not result in undue delay or an undue burden to other participants.” Rule 33(a), 39 C.F.R. § 3001.33(a). The first two circumstances do not apply here: the Postal Service is prepared to make Mr. Raney available for cross-examination at the hearing. Furthermore, conducting questioning at a deposition rather than at a hearing is likely to increase, not reduce the expense, delay and burden imposed on participants by forcing rescheduling of the hearing, and by generating potentially several hours of hearing time without any certainty that the resulting transcript will ultimately become available to the Commission as part of the evidentiary record.

(2) APWU has failed to justify departure from the general rule that the producing party, not the questioning party, has the right to choose its own witnesses. This longstanding policy services important public interests by minimizing disruption to the Postal Service’s business operations, and by assigning the choice of witness to the party whose interests will be prejudiced most directly if the witness performs ineffectively.

These policy grounds apply here. Mr. O’Tormey is a senior officer of the Postal Service. His duties include overseeing all engineering activities. It would both inconvenient and a substantial diversion from Mr. O’Tormey’s regular responsibilities to make time for him to prepare for and attend a deposition on

relatively narrow issues arising in the course of this NSA docket, particularly given that the scope of this case is narrowly confined to a negotiated service agreement with Bank of America. Further, the Postal Service, and not APWU, is in a better position to determine who within the Postal Service would be best suited to testify to matters of interest to APWU. The Postal Service believes that Mr. Raney is knowledgeable about the subject of APWU's inquiry. Finally, and in any event, the Postal Service, as the co-proponent of a proposed rate and classification change, bears the burden of persuasion in this case. For all of these reasons, the Commission should adhere to its normal policy of allowing a party to determine the most appropriate personnel to testify on behalf of that party.

(3) APWU has failed to justify the issuance of any subpoena in this case. Prior to the enactment of the Postal Accountability and Enhancement Act ("PAEA"), the Commission had no subpoena authority in rate cases. It would be premature to conclude that enactment of PAEA warrants a different outcome. While Section 602 of PAEA, 39 U.S.C. § 504(f)(2), establishes a process for the issuance of subpoenas, the Commission has yet to implement that section through rulemaking. Section 602 of PAEA provides for the issuance of subpoenas:

(2) The Chairman of the Commission...may...

(A) issue subpoenas requiring the attendance and presentation of testimony by, or the production of documentary or other evidence in the possession of, any covered person;

This section, however, has not been implemented under the Commission's rulemaking authority, which indicates the Commission may:

adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title;

Before the APWU can avail itself of a motion for issuance of a subpoena, the remedy should be implemented through the Commission's Rules. The Commission has not issued rules of practice relating to the use of subpoenas. It is unclear, therefore, whether a motion is required to issue a subpoena, or whether one might be issued through some other mechanism, as is done in some other venues. Additionally, it would be appropriate for the Postal Service and other interested persons to submit comments on any new rules issued under the statute regarding the definition of a "covered person." Moreover, the requested materials contain, in part, privileged information. While the Commission has rules that deal with provision of such information in discovery, these have not been developed in the context of subpoena requests. In sum, since the Commission has not promulgated rules relating to subpoenas, there is no established mechanism for Postal Service input in this instance.

For all of these reasons, the Motion for issuance of a subpoena should be denied.

UNITED STATES POSTAL SERVICE

By its attorneys:

Anthony F. Alverno
Chief Counsel, Customer
Programs

Frank R. Heselton
Matthew J. Connolly

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-8582; Fax -5418