

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rate and Service Changes to Implement)
Baseline Negotiated Service Agreement) Docket No. MC2007-1
With Bank of America Corporation)

**OPPOSITION OF BANK OF AMERICA CORP. TO
MOTION OF APWU FOR LEAVE TO FILE REPLY
TO USPS OPPOSITION TO APWU MOTION TO COMPEL
(July 2, 2007)**

Bank of America Corporation (“BAC”) hereby replies in opposition to the June 26 motion of American Postal Workers Union, AFL-CIO (“APWU”), for leave to reply to the Postal Service’s June 22 opposition to APWU’s June 15 motion to compel production of certain documents and information. The motion should be denied, and the reply proffered by APWU should be excluded from the record.

BAC has refrained until now from commenting on the barrage of interrogatories, document requests, motions to compel, motions for subpoenas, deposition notices, motions to stay or delay proceedings, and similar pleadings belatedly filed by APWU against the Postal Service during the past two months. But the delay produced by APWU’s open-ended discovery tactics is increasingly prejudicial to BAC’s interest in a timely conclusion to this proceeding.

As explained in Section I, APWU’s latest requests are untimely by any measure. APWU’s “motion to compel” is in fact is a set of new discovery requests, filed more than two months after the April 6 discovery cutoff agreed to by the parties, and more than three weeks after the Postal Service answered the last of APWU’s outstanding

discovery requests. Indeed, APWU's June 15 "motion" even postdates the end of the *hearing* on the direct testimony to which the discovery requests are ostensibly addressed. Because no other participant has proposed to file its own direct testimony, the last of these missed deadlines means that APWU has no procedural basis under Rule 25(a) for introducing any further answers by the Postal Service into evidence.

As explained in Section II, APWU's latest discovery requests are also not reasonably calculated to lead to the production of admissible evidence. The proposition that APWU seeks to prove through its untimely discovery requests—that the current accept rate of BAC mail is higher than 96.8 or 96.9 percent—would not warrant rejection or modification of the proposed NSA terms *even if credited by the Commission*.

I. THE DISCOVERY REQUESTS AT ISSUE ARE UNTIMELY.

The Commission's procedural rules strike a balance between the interests of discovery and finality. While Rules 25 through 28 confer broad discovery rights, the time for exercising those rights is limited. "Generally, discovery against a participant will be scheduled to end prior to the receipt into evidence of that participant's direct case." Rule 25(a).¹ Moreover, follow-up discovery requests filed after the "initial discovery period ends . . . must be filed within seven days of receipt of the answer to the previous interrogatory unless extraordinary circumstances are shown." Rule 26(a).

¹ Although Rule 25(a) establishes an exception to this deadline for omnibus rate cases and other cases for preparing rebuttal (third-round testimony) against the direct testimony (i.e., second-round testimony) of other participants, that exception is inapplicable in this case. Neither the OCA nor any intervenor has sought to file direct testimony of its own; hence, there will be no rebuttal testimony.

Development by a participant of “new lines of potential probative inquiry” during the pendency of a case does not create an exception to these rules. Docket No. R97-1, Order No. 1207 (Feb. 9, 1998) at 7. “It is simply not possible to continue to explore all potential areas where adjustments of Postal Service data might be justified. Thus, procedural schedules must be established and adhered to.” *Id.*

Strict adherence to discovery cutoffs is especially crucial in NSA cases, because of the limited scope and scale of individual NSAs, and the disproportionate impact of procedural delay on the individual mailer that is the Postal Service’s co-proponent. The Commission’s rules entitle baseline NSA proposals to the “maximum expedition consistent with procedural fairness.” Rule 195(a) and (b).

Consistent with these policies, the participants (including APWU) “unanimously agreed” during the March 14 settlement conference that initial discovery would end in three weeks—i.e., on April 6—“at which time the period of discovery would be closed, subject to the timely receipt of Postal Service responses to written discovery, and the participants’ right to conduct follow-up discovery on the responses received.” Report of the Settlement Coordinator on March 14, 2007, Settlement Conference (filed March 16, 2007) at 2. Since then, however, APWU has honored the discovery cutoff largely in the breach.

APWU did not file its first discovery requests until March 27, 2007—seven weeks after the start of the discovery period, and only ten days before its agreed-upon cutoff. All of those discovery requests have been answered, and the answers have been incorporated into the June 14 hearing transcript and admitted into evidence. See Tr. 2/40 (answer to APWU-T1-2); Tr. 2/41 (answer to APWU-T1-3); Tr. 3/544-613

(proprietary documents responsive to APWU-T-1). *APWU filed no other discovery requests before the April 6 discovery cutoff.*

APWU's back-door campaign to reopen discovery began on April 24, 18 days later. Seizing upon a backlog in the Postal Service's discovery responses, APWU moved not only to compel production of answers to its outstanding discovery requests² and to stay the proceedings until the Postal Service produced the answers,³ but also to obtain through subpoena a laundry list of *additional* Postal Service documents, and the deposition of Walter O'Tormey, the Postal Service's Vice President, Engineering.⁴ APWU offered no explanation for its failure to submit the latter requests before the end of the discovery period, even though APWU clearly was aware of the existence of the additional classes of documents that it belatedly sought from the Postal Service and the identity and responsibilities of Mr. O'Tormey.

To avoid any possible claim of procedural unfairness, however, the Postal Service, with the concurrence of BAC: (1) agreed to a postponement of the hearing on the parties' direct testimony from May 8 to June 14; (2) agreed to answer a set of requests for admissions propounded by APWU on April 30; and (3) volunteered to produce Brent Raney, Manager, Technology Development/Apps, Engineering—and a direct report to Mr. O'Tormey—as an additional witness during the June 14 hearing. Between May 1 and June 14, the Postal Service responded to *all* of the outstanding APWU discovery requests. The Postal Service answered APWU-T1-1 through 3—the

² Motion of APWU to Compel USPS to Answer Interrogatory APWU/USPS-T1-1 (filed April 24, 2007)

³ Motion of APWU to Stay Proceedings (filed April 24, 2007).

⁴ Motion of APWU For Issuance of Subpoena To Compel Testimony And The Production Of Documents By Walter O'Tormey (filed April 25, 2007).

only discovery requests actually filed by APWU before the April 6 discovery cutoff—between May 1 and May 22, or at least three weeks before hearing.

APWU did not file any follow-up discovery requests in response to these answers. At the June 14 hearing, APWU counsel spent only a total of about 30-40 minutes cross-examining Mr. Raney. APWU's questions covered few of the matters that APWU now asserts require additional discovery.⁵

APWU's June 15 motion to compel mentions none of these facts. Instead, APWU tries to change the subject—criticizing Mr. Raney for failing to answer questions that APWU had not asked, and criticizing the Postal Service for failing to produce documents that APWU had not requested, or which the Postal Service has already produced, or both.

(1) APWU now asks for “all periodic or special studies, documents or reports issued, produced or used by the Postal Service since 1999, including reports to the Board of Governors, that concern the efficacy of the Wide Field of View Camera installed on postal mail processing equipment during 2003 and 2004.” Motion to Compel (June 15, 2007), item 1. The Postal Service, however, has already searched for documents on the efficacy of the camera in response to APWU-T1-1(a), and produced in early May the documents that were thereby obtained. See Tr. 2/407-425; Tr. 3/544-613 (proprietary documents); Presiding Officer's Ruling No. MC2007-1/6 (May 11, 2007) at 1 nn. 2-3 (denying APWU motion to compel production of additional material). On June 28, in response to APWU's current document request (which is

⁵ See Tr. 2/443-461; Tr. 3/511, line 2 (noting time of 2:10 pm); *id.* at 515 (beginning of APWU cross-examination of Mr. Raney); *id.* at 526 (end of APWU cross-examination of Mr. Raney); *id.* at 527, line 8 (noting time of 2:33 pm).

broader than APWU-T1-1(a)), the Postal Service voluntarily produced additional documents⁶ even though the Postal Service's duty to update its responses ended at the conclusion of the June 14 hearing. See Rule 26(f). No more is required.

(2) APWU also asks for "all periodic or special studies, documents or reports issued, produced or used by the Postal Service since 1999 that concern read/accept rates of the type used or referred to by the USPS and BAC in their proposed Negotiated Service Agreement submitted by the Postal Regulatory Commission in Case No. MC2007-1." Motion to Compel (June 15, 2007), item 2. APWU, however, filed no such document request during either the original or the extended discovery period:

- APWU/USPS-T1-1(a) was more narrowly drawn. As noted above, the Postal Service has searched for documents responsive to it, and produced them.
- APWU/USPS-ST3-3(d) asked for a single "Sort Plan Area Summary" End-of-Run report. After the Postal Service objected, the request was narrowed to (1) a "listing [of] the nature and type of data, and the relationships among the data elements in a typical end-of-run report without providing an actual report," and (2) the availability of Mr. Raney during the June 14 hearing to answer follow-up questions under oath. Presiding Officer's Ruling No. MC2007-1/8 at 2. The Postal Service provided both the listing and the witness. See Tr. 2/398-400, 504-06 (answer of USPS witness Raney to APWU/USPS-ST3-3). At the June 14 hearing, APWU counsel asked Mr. Raney a few questions about the uses made of end-of-run reports, but nothing about the data contained in them. Tr. 3/524-26 (proprietary).

⁶ See Notice of USPS Of Filing Of Library Reference USPS-LR-4/MC2007-1 (filed June 28, 2007).

- APWU's remaining discovery requests asked the Postal Service for narrative responses, not documents. See Tr. 2/394-406.

(3) APWU further asks that the Postal Service be compelled to "identify a USPS official, or if necessary more than one official, who is familiar with (1) the existence and contents of USPS studies, documents, or reports that concern read/accept rates at the national, regional, and local levels in operations that process the type of mail that is mailed by BAC and is at issue in this case; and (2) read/accept rates on postal automation used to process the type of mail that is mailed by BAC and that is at issue in this case." Motion to Compel (June 15, 2007), item 2. APWU's apparent theory is that USPS witness Raney was unqualified to testify on the subjects for which he was designated. See APWU Reply (June 26, 2007) at 4. Mr. Raney's testimony refutes this claim. It demonstrates, *inter alia*, his knowledge of:

- How mail is sorted with current automated technology. Tr. 2/398.
- The kinds of machines used for each sorting operation. Tr. 2/401-02
- The information contained in end-of-run reports, and the primary uses made by the Postal Service of that information. Tr. 2/398-99, 406, 452-456.
- The current range of accept rates for achieved by the Postal Service pre-barcode letter mail on a delivery barcode sorter. Tr. 2/403, 456-461.
- The studies and reports made by the Postal Service in connection with the Wide Field of View camera acquisition, and the subsequent performance of the equipment. Tr. 2/407-425, 428-432, 434-441.
- The analyses and reports customarily performed in connection with major capital investments in new mail sorting equipment. Tr. 2/433-441.

APWU's claim that Mr. Raney "does not know whether" the accept rate data collected by the Postal Service "has been aggregated in a manner that would show actual current read rates" (APWU Reply (June 26, 2007) at 4) is a mischaracterization of his actual testimony, which makes clear that Mr. Raney is familiar with the uses to which the Postal Service puts such data. See 3 Tr. 524-26 (proprietary transcript). In any event, APWU never asked the Postal Service to produce such aggregate data. Rather, APWU asked only for a *single* "'Sort Plan Area Summary' End-of-Run Report"; and ultimately narrowed its request to a *definition* of the data fields contained in such a report. See Presiding Officer's Ruling No. MC2007-1/8 (June 12, 2007).⁷

At bottom, APWU's real grievance is that it failed to ask the right questions, or failed to ask them in time. That, however, is not a legitimate ground for jettisoning the agreed-up deadlines for discovery.

II. THE DISCOVERY REQUESTS ARE NOT REASONABLY CALCULATED TO LEAD TO THE PRODUCTION OF ADMISSIBLE EVIDENCE AT TRIAL.

APWU's untimely request for further discovery should be denied for the further reason that the results of such discovery could not be admitted into evidence, and would be immaterial to the proper outcome if admitted.

⁷ APWU further criticizes Mr. Raney for failing to "know whether the Board of Governors has received follow-up reports on the efficiency of the WFOV camera." APWU Motion (May 26, 2007) at 4. This subject, however, is far afield from the subjects on which Mr. Raney was offered: automated mail processing operations and end-of-run data. In any event, the Postal Service conducted a reasonable search for the WFOV reports received by the Governors, and has produced all such documents located through the search. See pp. 4-6, *supra*.

As noted above, the direct testimony of BAC and the Postal Service was offered for cross-examination and admitted into evidence during the hearing on June 14, 2007. No other participant requested leave to submit responsive testimony by June 20, the deadline established by the Commission for filing such a request. Presiding Officer's Ruling No. MC2007-1/10 (June 18, 2007). Under the circumstances, there is no procedural vehicle for entering any additional discovery responses into evidence (short of recalling the NSA proponents' witnesses for another round of hearings). Accordingly, APWU's current discovery requests are not "reasonably calculated to lead to admissible evidence" in the most literal sense of the phrase. See Presiding Officer's Ruling No. R2001-1/44 (Jan. 31, 2002) at 2-3.

Moreover, APWU has failed to identify any scenario in which the facts that it seeks to establish through further discovery would have any material effect on the outcome of the case *even if accepted as true by the Commission*. Modification of the proposed NSA would still be unwarranted *even if* APWU somehow managed to establish that the existing read/accept rate for BAC mail is higher than 96.8 percent, or even 99 percent. *Cf.* APWU Reply (June 26, 2007) at 2.⁸

First, APWU does not (and cannot) dispute that the contribution from an NSA must be evaluated for the NSA as a whole. The Commission has held repeatedly that the contribution from an NSA must be assessed for the NSA as a whole, not from any

⁸ At the risk of belaboring the obvious, the evidence cited by APWU does not begin to establish that appropriate the baseline read-accept rate for the BAC NSA is 99 percent. See Tr. 2/140-42 (USPS response to OCA/USPS-T1-35).

component of the NSA in isolation.⁹ The proposed NSA, taken as a whole, would still be likely to increase the contribution to the Postal Service's institutional costs. No participant has disputed that the other discount provisions of the NSA are likely to be profitable for the Postal Service.¹⁰ Moreover, the NSA commits BAC to a variety of actions that are likely to provide the Postal Service with direct and immediate financial benefits, but for which BAC will receive no rate discounts at all. These commitments include (1) operational changes that will have the additional effect of reducing the volume of PKR ("personal knowledge required") mail entered by BAC, and (2) placing Four-State Barcodes on the Business Reply Mail, Courtesy Reply Mail, and Qualified Business Reply Mail envelopes sent by BAC to its customers.¹¹ No participant has submitted, or will submit, evidence challenging these facts.

Second, even if the NSA were somehow as unprofitable as APWU contends, no participant has explained how this outcome could require any other mailer to pay higher rates as a result of the assumed loss in contribution. Under PAEA, which almost certainly will be implemented by the time that the financial effect of the instant NSA is known, rate ceilings will be based on the CPI, not on overall USPS revenue requirements. Hence, any revenue shortfall from an NSA with needlessly deep or

⁹ See MC2002-2 Op. & Rec. Decis. at ¶¶ 3058, 8006, 8010); Order No. 1391, *Negotiated Service Agreements*, 69 Fed. Reg. 7574, 7577-78, 7580 (2004); MC2004-4 Op. & Rec. Decis. at 52.

¹⁰ See Ayub Direct (USPS-T-1) at 13-14 & App. A; Jones Direct (BAC-T-1) at 16-18; Tr. 2/131-33 (Ayub).

¹¹ See Tr. 2/73, 237, 351, 382, 386-88 (USPS witness Ayub); Tr. 2/468, 479-81, 495-99 (BAC witness Jones); Comments of BAC In Response to NOI #1 (filed Apr. 17, 2007) at 14-17.

excessive discounts would be borne by the Postal Service, not by mailers.¹² No participant has seriously disputed this fact.

Third, 39 U.S.C. § 3622(c)(10)(A)(ii), enacted last year by the Postal Accountability and Enhancement Act, explicitly provides that an NSA need *not* be contribution-positive if the NSA will “enhance the performance of mail preparation, processing, transportation, or other functions.” There is no dispute on the record that the proposed NSA will “enhance the performance of mail preparation” and “processing.” Moreover, there is no dispute that BAC’s commitment to serve as a very large scale pilot test for the Postal Service’s new Intelligent Mail technology and related innovations is of very great value for the Postal Service’s efforts to “enhance the performance” of these functions.¹³ The Commission is expected to implement Section 3622(c) within the next few months—only a few months after the likely implementation date of the rate and classifications changes proposed in this case, and long before the first annual report of the financial effect of the NSA.

These facts, which are essentially undisputed, would warrant denial of the latest APWU discovery requests on the independent ground that they would not warrant a different outcome on the ultimate merits of the NSA proposal—even (contrary to fact) if there remained a procedural opening for admitting the discovery responses into evidence. Perhaps APWU continues to pursue discovery in this case not out of concern about the NSA as such, but to advance APWU’s interests in its perennial disputes with

¹² See Response of BAC to NOI #1 (April 17, 2007); Response of BAC to Reply Comments of APWU (May 3, 2007).

¹³ See, e.g., Jones Direct (BAC-T-1) at 11-12; Comments Of BAC In Response To NOI #1 (filed Apr. 17, 2007) at 17-18.

the Postal Service and presort mailers in omnibus rate cases over the proper level of worksharing discounts. To hijack this case for such purposes, however, is a misuse of the NSA rules, and grossly unfair to individual NSA co-proponents such as BAC. If APWU wishes to litigate pricing and costing issues of general applicability, it should do so in a proceeding of general applicability.

CONCLUSION

For the foregoing reasons, APWU's June 26 motion for leave to file a reply to the Postal Service's June 22 opposition to APWU's June 15 Motion to Compel should be denied.

Respectfully submitted,

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