

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

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Complaint of Capital One  
Services, Inc.

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Docket No. C2008-3

**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  
(August 28, 2008)**

**I. An Order Requiring the Production of Documents is Necessary**

**a. Electronic Mail and Electronically Transmitted Documents**

As we understand Ms. Lowrance's testimony in her deposition on August 27, 2008,<sup>1</sup> she has access to numerous electronic communications (e-mail) that the Postal Service apparently did not understand to be covered by the document requests of Capital One Services, Inc. (Cap One) in COS/USPS-1-17, even though they relate to issues in the Cap One Complaint within the meaning of the Commission's Ruling No. C2008-3/3 (see p. 2). These e-mails and electronically-transmitted documents may reside on the Postal Service laptop used by Ms. Lowrance or on a shared computer drive. In either event, they are within the meaning of Cap One's request and of the Commission's Order. We respectfully request that the Commission issue a specific Order requiring the Postal Service to produce for inspection on Thursday, August 28, 2008, all non-privileged e-mail communications and electronically-transmitted documents written by or seen by Ms. Lowrance "relating to the issues in

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<sup>1</sup> Daily copy of the transcript is not available.

the Capital One Complaint.” Id. We further request that the Commission’s Order specifically require that all e-mails and electronically transmitted documents “relating to the issues in the Capital One Complaint” as to which the Postal Service claims a privilege or exemption be produced, as previously required by the Commission’s Ruling No. C2008-3/3, and listed in the Postal Service’s privilege log in accordance with the Commission’s Ruling. Id. at 4.

As further discussed below, we also request that the Commission rule that the Postal Service must produce these documents on Thursday, August 28, 2008, for use in Ms. Lowrance’s continuing deposition on Friday, August 29, 2008.

**b. Documents Used or Reviewed By Ms. Lowrance And Documents Previously In Ms. Lowrance’s Possession**

As we understand Ms. Lowrance’s testimony at her deposition, there are a significant number of documents in addition to e-mails and electronic communications that the Postal Service has not produced for her deposition that are covered by the document requests of Cap One in COS/USPS-1-17 and Commission’s Ruling No. C2008-3/3.<sup>2</sup> Ms. Lowrance testified that she served as Acting Manager of Pricing Strategy. In that capacity, Ms. Lowrance directed a staff of several professionals and reported directly to a Postal Service Vice President. In her capacity of Acting Manager of Pricing Strategy, Ms. Lowrance worked on financing requirements for the Bank of America NSA with managers from the Postal Service Finance Group; she worked on operational requirements with other officials; and she worked with the Postal Service

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<sup>2</sup> At the beginning of Ms. Lowrance’s deposition, the Postal Service produced 41 documents that it contended responded fully to Ruling No. C2008-3/3. Of these, one-half were not provided to counsel for the parties because they are deemed privileged by the Postal Service. As explained above, these documents did not include any e-mail or electronically-transmitted messages.

witness in preparing the Postal Service's case to be presented to the Commission on the Bank of America NSA.

In November or December of 2007, Ms. Lowrance stopped serving as Acting Manager of Pricing Strategy. She also went on maternity leave for some time since her service as Acting Manager. Upon her return, she was not assigned to the office she occupied as Acting Manager, but was instead assigned to a "cubicle." As we understand her testimony, she therefore does not have in her immediate work area many documents that are within the document requests of Cap One in COS/USPS-1-17 and Commission's Ruling No. C2008-3/3. It is also our understanding that the Postal Service deemed these documents not to be within the Commission's Ruling and did not produce them despite the fact that they are readily available and highly relevant to Ms. Lowrance's service as Acting Manager of Pricing Strategy.

We respectfully request that the Commission issue an Order requiring the Postal Service to produce documents, wherever located and regardless of whether they are within Ms. Lowrance's immediate possession, that Ms. Lowrance produced, handled, transmitted, used or reviewed as part of her work in the office of Pricing Strategy and that "relate to the issues in the Capital One Complaint."

As further discussed below, we also request that the Commission rule that the Postal Service must produce these documents on Thursday, August 28, 2008, for use in Ms. Lowrance's continuing deposition on Friday, August 29, 2008.

**c. The OIG Report On Read/Accept Rates Related To The Bank Of America NSA Is Highly Relevant, Is Not Part Of The Deliberative Process, And Must Be Produced By The Postal Service.**

**1) The OIG report is highly relevant.**

In this proceeding, Cap One is demanding the right to enter a Negotiated Service Agreement that is equivalent to the Bank of America NSA. Intervener APWU opposed the Bank of America NSA on the ground that the read/accept rate baseline data used in that case are outdated and are not the best data available for measuring improvements in read/accept rates. At this point in this proceeding, we have taken no position regarding the contention of Cap One that it is entitled to an NSA equivalent to the Bank of America NSA. The existence of alternative baseline data to serve as the basis for a proposed NSA for Cap One is highly relevant to the question whether Cap One should be permitted to enter an NSA equivalent to the Bank of America NSA.

Ms. Lowrance testified that, in her capacity as Acting Manager of Pricing Strategy, she participated in numerous discussions about whether there would be Functional Equivalent NSAs after the Bank of America NSA was issued. In discussions with the Vice President to whom she reported, it was agreed between the two of them that NSAs similar to the Bank of America NSA should be based on customer specific data, and that customer specific data should be collected for use in negotiations with other mailers seeking NSAs similar to the Bank of America NSA.

The validity of Ms. Lowrance's view that customer specific data should serve as the basis for future NSA's, presumably including any proposed Cap One NSA, depends heavily on the availability of alternative data that might provide a useful baseline. This is an issue that bears directly on the interest of the APWU in this matter. If discovery establishes that there are no better baseline data for use in a proposed Cap One NSA than were used in the Bank of America NSA, it is very possible that the APWU will oppose the Cap One position in this case and support the

right of the Postal Service to deny Cap One a functionally equivalent NSA. This is an issue that has been broached in Ms. Lowrance's testimony and that must be the subject of further inquiry.

Ms. Lowrance testified that the Office of Inspector General (OIG) has performed an analysis of read/accept rates related to the Bank of America NSA. That analysis is based on information collected by the OIG from postal officials. We respectfully request that the Postal Service be ordered to produce the OIG report on read/accept rates related to the Bank of America NSA for use in the further deposition of Ms. Lowrance. As further discussed below, we request that the Commission rule that the Postal Service must produce the report on Thursday, August 28, 2008, for use in Ms. Lowrance's continuing deposition on Friday, August 29, 2008.

**1) The Deliberative Process Privilege has no application to the OIG report.**

Throughout Ms. Lowrance's deposition, counsel for the Postal Service asserted the deliberative process privilege as a basis for refusing to provide information to the other parties. That privilege, however, has no application to the report of the OIG on read/accept data related to the Bank of America NSA. A definitive discussion of this privilege is provided by an en banc decision of the U. S. Court of Appeals for the D.C. Circuit. As the Court explained,

In order for a written document to be covered by this traditional evidentiary privilege, and hence shielded from disclosure by Exemption 5 of the Act, at least two prerequisites must be met. First, the document must be "*pre-decisional*." The privilege protects only communications between subordinates and superiors that are actually *antecedent to the adoption of an agency policy*. Communications that occur after a policy has already been settled upon ... are not privileged.

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... [T]he second prerequisite to privileged status is that the communication must be “deliberative”, that is it must actually be related to the process by which policies are formulated.

Jordan v. United States Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978)(italics original)(citing NLRB v. Sears Roebuck & Company, 421 U.S. 132, 153, 523 S.Ct.1504, 1517 ((1975).

Inasmuch as the OIG’s report on read/accept rates is not “between subordinates and superiors,” is not antecedent to the decision of the Postal Service to enter the Bank of America NSA, and is not related to the deliberative process by which the decision was made to enter the Bank of America NSA, the deliberative process privilege provides no basis for the Postal Service’s failure to produce the report. The report should have been produced in response to the document requests of Cap One in COS/USPS-1-17 and the Commission’s Ruling No. C2008-3/3. As further discussed below, we request that the Commission rule that the Postal Service must produce the OIG’s report on Thursday, August 28, 2008, for use in Ms. Lowrance’s continuing deposition on Friday, August 29, 2008.

## **II. MS. LOWRANCE’S DEPOSITION SHOULD BE COMPLETED ON FRIDAY**

Despite the clarity of Cap One’s production request and of the Commission’s Ruling on that request, the Postal Service utterly failed to comply with the Commission’s rulings, thus failing to bring to Ms. Lowrance’s deposition numerous highly-relevant documents it was obligated by the Commission’s Ruling to produce at the deposition. Furthermore, Ms. Lowrance’s testimony thus far has revealed that she is privy to a large number of relevant documents, and that Ms. Lowrance’s service as Acting Manager of Pricing Strategy makes her a very valuable source of

relevant information related to Cap One's claim of right to be accorded an NSA functionally equivalent to the Bank of America NSA.

The most orderly and most efficient way to proceed in light of these facts would be for the Commission to require the Postal Service to produce the missing documents at the Commission's offices by 4 p.m. on Thursday, August 28, 2008, for inspection and copying by the other parties. The other parties should then be given overnight to review those documents and to prepare deposition questions for Ms. Lowrance to be asked on Friday, August 29, 2008, Ms. Lowrance's last scheduled day of work for the Postal Service. Because the Cap One has used four of its seven hours of deposition time thus far, and the APWU is requesting below that it be allowed one hour of deposition time, the parties should be able to complete Ms. Lowrance's deposition on August 29, 2008.

**III. THE APWU RESPECTFULLY REQUESTS ONE HOUR OF DEPOSITION TIME TO DEPOSE MS. LOWRANCE.**

As an intervener in this proceeding under Rule 20, the APWU is entitled to participate as a party in the deposition of Ms. Lowrance. Inasmuch as the interests of the APWU are different from the interests of Cap One, it is appropriate and reasonable for the Commission to permit the APWU to question Ms. Lowrance at the scheduled deposition. Given that Ms. Lowrance is leaving her postal employment, this deposition is likely to be the only opportunity for the APWU to direct discovery questions to Ms. Lowrance. Accordingly, the APWU respectfully requests that the Commission issue an order permitting the APWU to ask questions of Ms. Lowrance for a period of time not to exceed one hour following the completion of Cap One's seven-hour period.

Respectfully submitted,

Darryl J. Anderson  
Jennifer L. Wood  
Counsel for American Postal Workers Union, AFL-CIO