

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**SUPPLEMENTAL MOTION OF CAPITAL ONE SERVICES, INC. FOR
SANCTIONS AGAINST THE UNITED STATES POSTAL SERVICE**

(September 3, 2008)

Capital One Services, Inc. (Capital One) hereby supplements its Motion for Sanctions under Rule 25(c). That Motion was filed at 8:00 AM on August 28, 2008, after the first day of the deposition of Jessica D. Lowrance. This supplement sets forth additional grounds for sanctions arising from the Postal Service's actions on August 28-29, 2008, from 9:30 AM to 2:00 AM.

Although the parties convened at 9:30 AM on August 28, 2008, for the second day of the Lowrance deposition, the Postal Service announced that it would not produce any documents for the deposition at that time, despite the Presiding Officer's repeated rulings that the Postal Service should provide the documents.¹ The parties had requested two documents in particular about which

¹ Capital One's Motion for Sanctions under Rule 25(c) and Fourth Emergency Motion to Clarify Ruling (August 28, 2008) indicated that the Postal Service may have interpreted the ruling to produce documents from Ms. Lowrance's "offices" as only those few documents in her "cubby hole" where she was assigned temporarily upon her return from maternity leave. At the time

Ms. Lowrance had testified the previous day, and which counsel for the Postal Service had at first agreed to produce.² After Postal Service counsel received the Presiding Officer Ruling C2008-3/7 around 10:30 AM, Capital One and the other parties expected that the Postal Service would finally produce the documents.³

The parties and Ms. Lowrance sat in the conference room until after 3:30 PM⁴ when the Postal Service announced that it would not release the specified documents after all. This forced the parties to prepare and file a Joint Emergency Motion, just before the Commission's close of business at 4:17 PM. At 5:30 PM, Presiding Officer Ruling C2008-3/10 directed the Postal Service to produce the documents for the deposition, but the Postal Service continued to refuse to produce the documents, which were sitting in a file on top of the conference room table. The Postal Service then threatened that it would ask the Presiding Officer to certify Ruling C2008-3/10 to the entire Commission. Capital One understood that if the Ruling were certified to the entire Commission, and

we prepared those motions, we were incredulous that counsel could in good faith assert such an interpretation of "offices". We subsequently confirmed that, in fact, "offices" had been narrowly interpreted as the "cubby hole," and that numerous responsive documents had not been produced on the grounds that they were in hard copies located in Ms. Lowrance's previous office as well as in the form of hundreds of electronic documents on her hard drive.

² At some point in the late afternoon, the Postal Service provided approximately ten pages of handwritten notes, many of which were copies of the 20 pages provided the day before. During a break, Ms. Lowrance described these documents as "junk".

³ Each person in the deposition room signed two certifications to abide by stringent protective conditions, one for each day of the deposition. Even with these protections, which to counsel to the Postal Service had agreed on the first day, the Postal Service refused to provide the documents until 10:30 PM.

⁴ Because the transcript of the second day of the deposition is unavailable, several of the times and numbers in this pleading are approximate.

motions and responses had to be filed in an appeal, it was likely that Ms. Lowrance would leave the Postal Service before the Commission could issue its decision. Her departure would then make it impossible for Capital One to complete the remaining three hours of the deposition. From 6:00 PM to 10:00 PM, the Postal Service continued to take the position that it would rather appeal the Presiding Officer's Ruling than produce the documents. Counsel for Capital One asserted that the Postal Service was required to comply with the Presiding Officer's Rulings, and finally, around 10:00 PM, she suggested that the Postal Service go ahead and prepare its request for certification. Within five minutes, counsel for the Postal Service produced both documents.⁵

These documents consisted of 16 pages of materials with numbers, tables, and graphs, which required careful analysis in order to formulate deposition questions. It was almost impossible for counsel for to prepare adequately from 10:30 – 11:30 PM, the 14th hour of the deposition. Moreover, the witness had been present since 9:30 AM and was understandably tired. Although she acknowledged personal knowledge of the documents, she repeatedly referred questions to Michael Plunkett, from Manager of Pricing Strategy and Acting Vice President of Pricing, who had been her immediate supervisor and had helped prepare the documents. She also repeatedly referred questions to Virginia Mayes, another Postal Service employee, who had

⁵ Had counsel for Capital One known that it would take the Postal Services over 12 hours to produce the documents, it would not have wasted time sitting in the conference room waiting for the documents. But throughout the day, the Postal Service seemed to be "just about" to produce the documents or to work out a "compromise".

participated in drafting and reviewing the documents. Thus, the Postal Service's delay tactics successfully deprived Capital One of its one opportunity to obtain adequate and complete responses from Ms. Lowrance about key documents.⁶

The outrageous behavior of the Postal Service in disregarding the Rulings of the Presiding Officer, disrupting the deposition, and employing delay tactics to avoid releasing documents made a mockery of the Commission's due process efforts. No one could contend that Capital One could effectively depose Ms. Lowrance from 11:30 PM – 1:30 AM after waiting upon the Postal Service for 14 hours.

For the reasons detailed in both its Motion for Sanctions of August 28, 2008, and in this Supplemental Motion, Capital One renews its request for sanctions under Rule 25(c), which provides the Commission full authority to "make such order as are just." In addition to its request for attorneys fees and costs, Capital One requests that the Commission grant the Applications for Depositions of Michael Plunkett and Virginia Mayes, to be filed shortly, as a partial remedy for the Postal Service's disruption of the Lowrance deposition.

Capital One also requests that the Commission apply that portion of Rule 25(c) that states:

⁶ Even after the witness was excused at 1:30 AM, counsel for the Postal Service insisted that the parties stay until 2:00 AM to discuss procedural matters and then collected all copies of the disputed documents, which had been marked as exhibits, and left with them without providing copies to the court reporter to be included in the sealed transcript.

If a participant ... fails to obey an order of ... the presiding officer to provide or permit discovery ... the Commission or presiding officer may make such orders in regard to the failure as are just, and among others, may direct that the matters regarding which the order was made or any other designated facts ***shall be taken to be established for the purposes of the proceeding in accordance with the claims of the participants obtaining the order....***

In accordance with this portion of Rule 25(c), Capital One respectfully requests that the Commission find that the Postal Service has forfeited its right to assert any objection or claim of privilege or exemption with respect to the disputed documents, marked as JDL Deposition Exhibits 2 – end,⁷ and admit them immediately into evidence.

Respectfully submitted,

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⁷ Because the deposition transcript is unavailable and the Postal Service did not leave copies of the last two exhibits with the court reporter, Capital One is not certain about the final exhibit number. Capital One's request extends to all documents produced by the Postal Service at the deposition of Ms. Lowrance, only half of which were provided under seal.