

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

**Complaint of Capital One
Services, Inc.**

Docket No. C2008-3

**AMERICAN POSTAL WORKERS UNION, AFL-CIO
REQUEST FOR ORDER CONCERNING
UNITED STATES POSTAL SERVICE DOCUMENTS
(September 3, 2008)**

In Presiding Officer Ruling C2008-3/7, the Presiding Officer charged the Postal Service with the “responsibility for assuring that none of the documents which might be covered by the initial 17 documents requests submitted by Capital One are destroyed or lost as a result of the separation of Ms. Lowrance from the Postal Service.” The Postal Service has had considerable trouble understanding and complying with the Commission’s Rulings. In fact, numerous documents covered by Cap One’s initial document requests, and ordered to be produced under repeated Rulings by the Commission, have never been produced. Notably, the Postal Service has produced no e-mail documents, even though it was required by the Commission’s Rulings to do so.

The Postal Service’s failure to comply with the Commission’s Rulings requiring the production of documents raises the question whether the documents in question include important evidence that will be lost due to the Postal Service’s noncompliance. This concern has been heightened by the deposition of Ms. Lowrance, who stated that her Postal Service computer was scheduled to be

completely erased by the Postal Service Information Technology (IT) Department. When she was asked to inform the IT Department that they could not erase it until the Commission's Ruling was complied with, both she and Postal Service counsel expressed an inability to stop the IT Department from erasing the computer's memory.

An additional reason for concern is that Ms. Lowrance repeatedly deferred in her testimony to the greater knowledge of Michael Plunkett, to whom she reported when she served as Acting Manager of Pricing Strategy. Mr. Plunkett reportedly has now been sent to college at Postal Service expense. This raises the question whether Mr. Plunkett's computer, too, may have been, or may still be, scrubbed of important e-mails and documents. Ms. Lowrance also repeatedly deferred to a third postal official, Virginia Mayes, who according to Ms. Lowrance played a key role in the Bank of America NSA. Ms. Mayes' status and future plans are not known to the APWU; but we must be concerned that evidence related to her work could be destroyed by the Postal Service.

Under these circumstances, particularly given Postal Service counsel's professed inability to deter the IT Department from destroying evidence, it is critically important that the Commission issue a ruling requiring the Postal Service to protect and preserve all documents, including all e-mails and all electronically transmitted or stored documents that relate in any way to the Bank of America NSA or the complaint by Cap One in this case.

In making this request, we observe that we are asking only that counsel for the Postal Service comply with what has become a well-understood and standard

obligation of counsel, to ensure that his client is aware of their obligation to preserve evidence that might be lost or destroyed due to routine destruction of documents or computer files. It is now commonly accepted that counsel must issue a “litigation hold” notice to his clients at the outset of litigation or whenever litigation is reasonably anticipated. *Zublake v. UBS Warburg LLC (“Zublake IV”)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). “The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” *Id.* at 216 quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir.2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). See also *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir.2001) (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”) (citing *Kronisch*, 150 F.3d at 126).

Once a “litigation hold” is in place, a party and its counsel must make certain that all sources of potentially relevant information are identified and placed “on hold,” to the extent required in *Zubulake IV*. *Zublake v. UBS Warburg LLC (“Zublake V”)*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). To do this, counsel must become fully familiar with his client's document retention policies, as well as the client's data retention architecture. *Zublake v. UBS Warburg LLC (“Zublake I”)*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (“[i]t is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data”). This will invariably involve speaking with information technology personnel, who can explain system-

wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information. *Zubulake IV*, 220 F.R.D. at 218.

Given the departure of Ms. Lowrance, the absence of Mr. Plunkett, the uncertain future of Ms. Mayes, and the importance of documentary evidence, the APWU respectfully requests that the Commission issue an order covering documents responsive to Capital One Services, Inc.'s Document Requests COS/USPS-DR-1-21 that may be in the possession or control of the Postal Service or of one of the several Postal Service employees mentioned by Ms. Lowrance in her deposition. Not now knowing what may transpire at the Postal Service, we respectfully request an Order requiring the Postal Service to preserve all documents related to the current Complaint, whether considered relevant or not by the Postal Service.

This Order should, of course, cover **all** documents, whether stored in hard copy or electronically, such as electronic communications (e-mails) or other electronically transmitted documents.

Respectfully submitted,

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