

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**REPLY OF UNITED STATES POSTAL SERVICE TO
AMERICAN POSTAL WORKERS UNION, AFL-CIO
'REQUEST FOR ORDER CONCERNING ... DOCUMENTS'
(September 10, 2008)**

On September 3, 2008, the American Postal Workers Union, AFL-CIO, filed a pleading seeking an Order regarding documents that were discussed among counsel at and during the deposition of former Postal Service employee Jessica Dauer Lowrance on August 27-29, 2003.¹

² This pleading makes various unsubstantiated factual allegations and seeks relief unsupported by any Rule of Practice, Presiding Officer Ruling, or other legal or precedential support.³

Notwithstanding the absence of support for APWU's "Request", the Postal Service recognizes that APWU's pleading stems from a description by Ms. Lowrance of standard Postal Service procedures applied to an employee's personal computer when employment terminates, and her statement that she does not have personal knowledge of how to stop that process. Since the gravamen of APWU's concern appears to be the perception that this standard procedure now threatens the preservation of ESI potentially pertinent to this proceeding, the Postal Service uses this opportunity to explain why no threat exists that the Presiding Officer's attention or directive could affect.

The Postal Service is quite aware of the need to protect and preserve ESI, particularly with respect to Ms. Lowrance's former computer and as may be more broadly applicable in this proceeding. The unusual circumstances of Ms. Lowrance's deposition precluded effective communication between counsel present for the deposition and others (both clients and

¹ *American Postal Workers Union, AFL-CIO Request for Order Concerning United States Postal Service Documents* (September 3, 2008) (APWU pleading).

² The deposition of Ms. Lowrance entailed a multitude of unusual circumstances that are most recently summarized in *United States Postal Service Answer in Opposition to American Postal Workers Union, AFL-CIO Motion for Sanctions Under Rule 25(C) Against the United States Postal Service* (September 9, 2008).

³ The APWU pleading does cite (and mis-cite) to several of the seminal federal cases regarding obligations to preserve or produce electronically stored information (ESI) in discovery but fails to identify any legal basis for the specific relief its "Request" makes.

counsel) then available at the Postal Service.⁴ Moreover, the tedious and expensive privilege review process, and generation of additional privilege review logs the Postal Service must undertake if it is to avoid waiver of various privileges affecting the production of potentially responsive documents,⁵ is well under way.

Postal Service counsel took physical custody of Ms. Lowrance's laptop, thus preempting any possible application of the standard operating procedure, which entails a re-flash (or ghost) of its hard drive for some other employee's use. It has now been submitted for creation of a forensic image of its hard drive with chain of custody stemming from co-counsel in this case.⁶ Analysis of metadata in that image will show that no email or "My Documents" data from Ms. Lowrance's computer have been compromised.

The APWU pleading extends its "Request" from its misapprehension regarding the handling of Ms. Lowrance's computer to that of Mr. Plunkett, who is now on academic leave, and then to another Postal Service employee discussed in the deposition, Ms. Virginia Mayes.⁷ Mr. Plunkett's former computer was re-imaged contemporaneously with his May, 2008, departure prior to the filing of Capital One's complaint.⁸ Ms. Mayes retains and continues to use her computer. Both Mr. Plunkett and Ms. Mayes have spent many years working on matters that come before the Commission.⁹ As such, they have always been aware of the need to retain documents. Indeed, postal economists – jobs that use data from myriad sources to analyze past practice or project future developments – prefer to retain everything rather than delete anything.

⁴ See section III of *United States Postal Service Answer in Opposition to American Postal Workers Union, AFL-CIO Motion for Sanctions Under Rule 25(C) Against the United States Postal Service* (September 9, 2008), *supra*, n.2. Discussion surrounding footnote 9 (on unnumbered p. 10 (of 18)) explains Postal Service counsel's exceptional efforts to satisfy all interested participants in the ongoing deposition while also accommodating – without taking legal issue with – the Presiding Officer's issuance of Ruling 10 (POR No. C2008-3/10).

⁵ See, e.g., *United States v. General Maritime Mgmt.*, 2008 WL 2810594 (S.D.Tex. July 21, 2008) (voluntary production of documents on a computer hard drive waived the attorney-client privilege for all documents in subsequent image of that hard drive).

⁶ Counsel has yet to receive the image. As Ms. Lowrance explained repeatedly in her deposition (e.g., Tr.2/399-400 (to the best of her ability all NSA related email had been preserved); Tr. 2/433 (saved email could be used to identify who was involved in a matter), she stored content regarding NSAs in email folders. All her email content was accordingly copied to media by counsel, thence rendered into image files that are now undergoing a privilege review, prior to surrendering the laptop for creation of the hard drive's image.

⁷ APWU pleading at 2-4.

⁸ Postal Service personnel continue to investigate undersigned counsel's expectations that: 1) Mr. Plunkett's email (pst files) should be available (see n.11, *infra*); and that 2) his "My Documents" information is not available.

⁹ Their respective histories as witnesses before the Commission can be examined on the Commission's website, www.prc.gov.

The Commission has been responsive to burden and scope issues in traditional rate and classification cases. The ever increasing reliance upon ESI for ongoing Postal Service operations and planning means that vast amounts of both traditional hard copy and ESI exist which bear upon the Bank of America NSA and Capital One's interest in a functionally equivalent agreement. The Postal Service has made every effort to accommodate the Commission's and participants' interests in this docket, yet it remains sensitive to the fact that extended forays into ESI can easily cost millions of dollars just for the privilege review. In the limited time available to prepare for the deposition, for example, postal counsel worked rapidly to identify and copy those documents immediately available to the deponent that addressed issues pertinent to the deposition's stated purposes.¹⁰ So, while the privilege review of very extensive email ESI Ms. Lowrance carefully maintained is now being undertaken, the Postal Service does not have the unlimited resources all participants would wish it to have. The Postal Service will accordingly interject and document burden and scope issues as they arise. It will also maintain its efficient focus on key documents at the heart of existing controversy.

The Presiding Officer and Commission can remain confident that the Postal Service recognizes and acts upon its obligations to retain information that could be discoverable in this and other litigation. Such retention should include email that once appeared on the computer used by Mr. Plunkett,¹¹ as well as ESI of Ms. Mayes. Litigation holds have been issued and are the subject of ongoing discussion regarding the requisite scope and methods.

The APWU pleading cites to no authority by which the Presiding Officer or Commission can act upon what is styled as a "Request". As such, the Postal Service asks that, to any extent that the APWU pleading is construed as a motion seeking a ruling or other PRC response, it should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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¹⁰ See the materials cited in n.4, *supra*.

¹¹ A contractor's remediation failure has caused a delay in the availability of certain information, including Mr. Plunkett's email, for privilege review. It has been retained, but the repository is now being rebuilt and re-indexed by that same contractor and should be available to counsel beginning in October of this year.