

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO CAPITAL ONE
SERVICES, INC. SUPPLEMENTAL MOTION FOR SANCTIONS AGAINST THE
UNITED STATES POSTAL SERVICE**
(September 10, 2008)

On September 3, 2008, Capital One Services, Inc. (Capital One) filed a “Supplemental Motion of Capital One Services, Inc. for Sanctions Against the United States Postal Service” (supplemental motion). The supplemental motion consists of unsubstantiated and unsupported characterizations concerning the representation of the United States Postal Service by its counsel (“counsel”) at a last-minute deposition of now-former Postal Service employee Jessica Dauer Lowrance.¹ The deposition was held at the Commission on August 27-29, 2008, after notice to the Postal Service mere hours before it began. The deposition was based on an Application filed by Capital One on August 21, 2008, then supported by an emergency motion on August 25, and

¹ As the transcript of the deposition substantiates, Ms. Lowrance was but one of several postal officials involved in a large, cross-functional team who worked on negotiated service agreements (NSAs). Members of this team dealt with the regulatory, financial and operational issues necessary to a special agreement with a single mailer that enters mail in volumes measured by the hundreds of million annual pieces.

granted by the Presiding Officer on August 26, 2008, approximately four hours before close of business on the day before the deposition's commencement.²

Capital One succeeded in making this matter an emergency by exaggerating the importance of one employee's role, sought relief citing the need to explore a limited range of issues before the deponent's voluntary departure from Postal Service employment, and then improperly expanded the deposition to encompass the full range of discovery issues already being explored through other discovery methods traditionally employed in practice before the Commission. In the face of this unprecedented motions practice, in which APWU joined, and manifest violations of the Postal Service's due process rights, Capital One now also seeks sanctions for the advocacy of the Postal Service's interests by its counsels. Capital One's supplemental motion is deeply flawed, and seeks inapplicable and inappropriate remedies, and thus, should be denied in its entirety.

I. Legal Basis

As a preliminary matter, Capital One's supplemental motion has no legal basis in the Commission's rules. The Commission has reserved to itself the authority to issue sanctions for failure to obey an order of the Commission or the Presiding Officer "to provide or permit discovery pursuant to §§ 3001.26 to 3001.28." 39 C.F.R. § 3001.25(c). Depositions, however, are authorized under Rule 33, which is not governed

² Effective preparation for the deposition was thus precluded entirely. Notwithstanding, as described below, the Postal Service attempted substantive preparation that also extended to collection of those documents immediately available to the deponent.

by Rules 26-28.³ Consequently, the Commission has *not* subjected deposition procedures to sanctions under Rule 25(c). Capital One's supplemental motion completely fails to acknowledge or even address this critical distinction. This failure is fatal to Capital One's request for relief under the current rules. Capital One's supplemental motion should be denied.

Examination of Capital One's specific allegations leads to the same result. Accordingly, the Postal Service offers a detailed reply to the allegations raised in Capital One's supplemental motion, below.

II. Background

Before addressing the allegations in Capital One's supplementary motion, it is important to present a brief recap of the context and series of events before and during the August 27-29 deposition. The Postal Service hereby incorporates by reference the material under "II. Background" in its "Answer in Opposition to American Postal Workers Union, AFL-CIO Motion for Sanctions Under Rule 25(c) Against the Postal Service", filed September 3, 2008, beginning with "First, it is crucial..." and continuing to just before the last paragraph of Section II, ending "on the procedures to be followed".

The context in which the deposition arose and was conducted, the very short lead times involved in the deposition, and the procedural uncertainties associated with

³ Indeed, the manner by which Rules 26-28 might be incorporated into deposition procedures under Rule 33, particularly given the unprecedented and emergency nature of the immediate circumstances, raises a range of due process questions that should be addressed carefully, a necessity that neither APWU nor Complainant appear to recognize. Moreover, these issues may be further informed by the pending complaint rulemaking proceeding in Docket No. RM2008-3.

it, lead the Postal Service to review and comment below on the major events of the August 28 and 29 deposition in response to Capital One's supplementary motion.

III. The August 28 and 29 Deposition

The Postal Service hereby incorporates by reference the material under "III. The August 28 and 29 Deposition" in its "Answer in Opposition to American Postal Workers Union, AFL-CIO Motion for Sanctions Under Rule 25(c) Against the Postal Service", filed September 3, 2008.

IV. Capital One Supplemental Motion

Capital One bases its supplemental motion on unsubstantiated and unsupported characterizations of Postal Service counsels' representation in the August 28 and 29 portion of the deposition. Contrary to Capital One's assertions, the Postal Service provided the requested documents as soon as possible, in substantial compliance with P.O. Ruling No. C2008-3/3, as clarified by P.O. Ruling No. C2008-3/7, except for two contested documents, as indicated in Section III above. These two documents were not supplied at that time, since the Postal Service reasonably interpreted the rulings to incorporate the conclusion that documents for which privilege was claimed might not be produced at the deposition, in accordance with the terms of the ruling. Counsel for Capital One and APWU began examining Ms. Lowrance at Tr. 2/264, shortly after 2:00 p.m. The description of the deposition provided in Section III above, grounded in cites to the transcript, and nearly 200 pages of transcript containing Ms. Lowrance's examination by counsels for APWU and Capital One, effectively rebut the

unsubstantiated description of the events and progress of the deposition contained in Capital One's supplemental motion on pages one through four.

Two allegations in Capital One's supplemental motion are particularly misleading, and deserve particular refutation.

First, Capital One indicates:

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 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. Supplemental Motion at 2.

A standard dictionary definition of the word "threatened" is "to express a threat against".

A standard dictionary definition of the word "threat" is "an expression of an intention to inflict pain, injury, evil, or punishment". The words used by counsel for the Postal Service do not indicate a threat at all, but express the desire to achieve a cooperative solution to resolve the contention around provision of two documents that would permit the deposition to move forward on the two documents, while protecting as much of their content from disclosure as possible:

The Postal Service has reviewed the presiding officer's ruling, C2008-3/10, and the Postal Service observes that it has under the rules the right to appeal this ruling to the full Commission. The Postal Service recognizes, however, that exercising this appeal is in the nature of a nuclear option in the sense that it would prevent this deposition from moving forward, and the Postal Service desires to finish and complete the deposition today. The Postal Service is willing to do the following.... Tr. 2/339

Counsel then described with particularity the subject matter of the two documents, and counsel for Capital One undertook to check with client representatives to determine their particular interests in the documents. The deposition proceeded, with counsel for

Capital One utilizing a series of short breaks to contact client representatives concerning the two documents. When counsel for Capital One indicated that she could not obtain client approval, counsel promptly weighed the options, and chose to provide the documents. This procedure to resolve the conflict concerning provision of the documents did not prevent the deposition from continuing, and consumed time during a series of welcomed short breaks.

The second allegation by Capital One deserving particular refutation is that Ms. Lowrance acknowledged that she had “personal knowledge” of the two contested documents:

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 participated in drafting and reviewing the documents. Supplemental Motion at 3.

Standard dictionary definitions of “personal” are “of or pertaining to a particular person, private, one’s own” and “done, made, or performed in one person”. The transcript of Ms. Lowrance’s examination on the two contested documents indicates that she had no personal knowledge of the documents whatsoever. Regarding the Postmaster General’s Memorandum to the Board of Governors, Exhibit 15, Ms. Lowrance indicated: “I know that there were multiple groups with inputs into it. I don't know who physically wrote it.” Tr.2/403 at 19; “I don't know. I didn't author this section”. Tr. 2/408 at 1-2. Regarding the PowerPoint presentation to the Board of Governors, Exhibit 16, Ms. Lowrance indicated: “I wasn't the author of this. I'm not familiar with this slide.” Tr. 2/430 at 20-21; “Most likely. Again, I'm not the author.” Tr. 2/421 at 18; “I'm not in

Finance. I would not know that answer.” Tr. 2/426 at 17-18; “You would have to ask Ginny.” Tr. 2/427 at 25; “I don't know. Again, I didn't do it.” Tr. 2/433 at 5; “I'm not the author of this.” Tr. 2/435 at 11; “Again, I didn't write this so I don't know.” Tr. 2/435 at 18; “No. Again, I just was given the presentation....” Tr. 2/437 at 9-10; “I didn't write this.” Tr. 2/439 at 21; “I didn't say it, but yes.” Tr. 2/442 at 5; “Again, I'm not the author, but” Tr. 2/443 at 18; “I'm not the author of this. I don't know what that's referring to.” Tr. 453 at 7-8; “Again, I don't know why they don't match. I didn't write this. I mean, I'm reading it just as you are.” Tr. 2/453 at 21-23. The transcript clearly indicates the lack of Ms. Lowrance’s personal knowledge of the two contested documents. As a result, she was unable to answer a large number of questions regarding these documents, requiring her to reference other personnel of the Postal Service as sources of information on the documents. Capital One’s pursuit of answers on these documents with a witness who obviously had no personal knowledge of them contributed substantially to the length of the deposition. Information on these documents should have been obtained through other means of discovery, rather than by deposition of a person with no personal knowledge of them.

Both APWU’s and Capital One’s counsels used most of their allotted times under the procedures established for the deposition, and their questioning was interrupted by counsel only several times during almost five hours of questioning. There was nothing improper about behavior of counsel for the Postal Service during this deposition and, on this ground alone, the relief requested in the motion should be denied.

V. Relief

The Postal Service hereby incorporates by reference the material under “VIII. Relief” in its “Answer in Opposition to Capital One Services, Inc. Motion for Sanctions Under Rule 25(c) Against the Postal Service”, filed September 4, 2008.

VI. Summary

As explained above, Capital One’s supplemental motion is legally defective and is misleading. It would be inappropriate and unauthorized to apply the requested sanctions in connection with Rule 33 depositions. Moreover, the allegations presented in the motion lack substance, misstate key facts, and mischaracterize events. Further, Capital One is not entitled to any of the punitive and equitable relief it seeks. The Postal Service here provides a detailed review of the August 28-29 deposition, demonstrating sound legal reasoning and appropriate responses to presiding officer rulings that support the good-faith positions taken by Postal Service counsel. The extreme measure of issuing any sanctions against the Postal Service, not only would be manifestly unjust under these circumstances, it would seriously chill appropriate advocacy by members of the postal bar and would leave the Presiding Officer and Commission without the benefits of a full and fair argument mounted by participants. APWU’s motion for sanctions against the Postal Service should accordingly be rejected completely, with prejudice.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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