

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

Complaint of Capital One
Services, Inc.

Docket No. C2008-3

RESPONSE OF AMERICAN POSTAL WORKERS UNION, AFL-CIO IN SUPPORT
OF APPLICATION OF CAPITAL ONE SERVICES, INC. FOR
AUTHORIZATION TO DEPOSE JESSICA DAUER LOWRANCE
(August 25, 2008)

Pursuant to Presiding Officer Ruling C2008-3/1, the American Postal Workers Union, AFL-CIO (APWU) hereby submits its Response in Support of Application of Capital One Services, Inc. for Authorization to Depose Jessica Dauer Lowrance.

Capital One's request to depose Ms. Lowrance is reasonable and necessary. Ms. Lowrance is the only person capable of testifying with first hand knowledge about certain discussions between the Postal Service and Capital One regarding an NSA functionally equivalent to the Bank of America NSA. This first hand knowledge is necessary for a complete understanding of the Postal Service's determination to refuse to Capital One a functionally equivalent NSA.

Under the Commission's rules,

[a]n authorization to take the deposition of a witness will be issued only if (1) the person whose deposition is to be taken would be unavailable at the hearing, **or** (2) the person is deemed necessary to perpetuate the testimony of the witness, **or** (3) the taking of the deposition is necessary to prevent undue and excessive expense to a participant and will not result in delay or undue burden to other participants.

Rule 33(a) (*emphasis added*). Rule 33 is very clear. The party wishing to depose an individual need satisfy **only one** of the above three criteria. In the instant case, all

three criteria have been satisfied in Capital One's Application for Authorization to Depose Jessica Lowrance. The Postal Service's Response does not challenge the validity of Capital One's assertions in support of its request under Rule 33. Instead, the Postal Service confirms the need for the timely deposition of Ms. Lowrance. Upon the Postal Service's own admission, Ms. Lowrance "will no longer be able to testify in a hearing or deposition on behalf of the Postal Service" after August 29, 2008. (USPS Response page 1). Any burden the Postal Service may face in preparing Ms. Lowrance for the deposition was created by its own failure to disclose Ms. Lowrance's imminent departure from the Postal Service. Therefore, the Commission, in accordance with its own rules of practice, must grant Capital One's application.

The Postal Service, moreover, should not be able to shield relevant and discoverable information with questionable assertions regarding a requested witness's importance. (USPS Response page 2-3). The Postal Service can not step into the shoes of the Complainant and determine who is or is not a "key and essential witness in this proceeding" for the Complainant. That is a determination to be made solely by Capital One as part of its litigation strategy. And it is clear from Capital One's Complaint, that Ms. Lowrance may possess information that is necessary for a proper and thorough adjudication of this Complaint.¹

In addition, the Rules of Practice regarding depositions were created under the Postal Reorganization Act, which called for an involved rate setting process wherein the Postal Service produced a host of knowledgeable witnesses with opportunities for interrogatories and oral cross examination. This, at least arguably, reduced the need for separate depositions. Now, however, with the passage of the

¹ Complaint of Capital One, ¶¶ 30-32.

Postal Accountability and Enhancement Act (PAEA), the Postal Service and the Commission operate under a new regulatory regime with an increased emphasis on the complaint process rather than the formal rate setting process. The Postal Service does not have to routinely produce knowledgeable witnesses for discovery, and seems loathe to do so unless compelled. This was made clear in MC2007-1, wherein the APWU sought to depose Walter O'Tormey, Vice President, Engineering, of the United States Postal Service on improvements in letter mail processing read and accept rates since 1999.² The Postal Service opposed this Motion and offered to produce Brent Raney, Manager, Technology Development/Apps, Engineering, during hearings on the Postal Service's direct case "for cross examination concerning improvements in letter mail read/accept rates since 1999."³ Ultimately, the Commission denied the APWU's request to depose either Mr. Raney or Mr. O'Tormey. Mr. Raney testified at the hearing, which proved to be a poor substitute for the deposition of Mr. O'Tormey. As a result, it is possible that the Postal Service was able to prevent the disclosure and consideration of relevant and useful information.

Likewise, in the current case the Postal Service offers to respond to Interrogatories propounded to Mr. Lowrance by August 29, 2008, coincidentally Ms. Lowrance's last day of employment with the Postal Service. This is not an adequate substitute for the discovery available in an oral deposition. There will be no

² Motion of American Postal Workers Union, AFL-CIO for Issuance of a Subpoena to Compel Testimony and the Production of Documents by Walter O'Tormey, Page 2 (April 25, 2007).

³ Response of USPS in Opposition to Motion of APWU for Issuance of a Subpoena to Compel Testimony and the Production of Documents by Walter O'Tormey, Page 2 (May 1, 2007).

opportunity to ask follow-up interrogatories or conduct oral cross examination on the responses at a hearing, if one is determined later to be necessary. Interrogatories can be helpful, but without the opportunity to ask follow up questions, either in writing or orally, their usefulness as a tool for the discovery of pertinent information is greatly diminished.

The PAEA encourages transparency and openness in Postal Service operations. With the increased importance of the complaint process, tools such as depositions are vital. The Commission should not limit the availability of depositions, when it is clear that the PAEA provides the Commission with more authority to compel the Postal Service to produce witnesses and information. See 39 U.S.C. § 504(e). Reasonable requests for depositions made in accordance with Commission rules, like the request by Capital One, should be routinely granted.

For the foregoing reasons, the Commission should grant Capital One's application for authorization to depose Ms. Lowrance. In addition, given Ms. Lowrance's imminent departure from the Postal Service, the Commission should grant Capital One's Emergency Motion to Amend Date of Requested Deposition to August 27, 2008.⁴

Respectfully submitted,

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⁴ The question whether Ms. Lowrance could be compelled to testify in this proceeding after leaving her employment with the Postal Service is beyond the scope of this response.