

**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  
REPLY TO POSTAL SERVICE OPPOSITION TO  
PRODUCTION OF OIG REPORT  
(September 8, 2008)**

On September 4, 2008, the Postal Service filed an opposition to the Motion of the APWU to require the production of the report of the Office of Inspector General concerning the Bank of America NSA. In its opposition, the Postal Service argues alternatively that the OIG Report was such an integral part of the Postal Service's consideration of the NSA that it is entitled to assert the deliberative process privilege with regard to the report, and that the report is irrelevant. The Postal Service's opposition thus sufficiently rebuts its own argument that the report is irrelevant. We submit this Reply to make two other points: (1) The OIG does not have the statutory authority to assist the Board of Governors in making a decision whether or not to approve the Bank of America NSA, it is limited to the role of investigating fraud, waste and abuse; and (2) the Postal Service must produce the now admittedly relevant report for inspection by counsel for the parties, who are entitled to make their own inspection of the report and to present argument to the Commission about whether or not it should be placed into the record in this case.

## **The OIG Report Cannot Legally Be Treated As A Part of The USPS Deliberative Process**

The Postal Service asserts that “The memorandum was prepared at the request of the Chairman of the Board of Governors. ... The memorandum was intended to assist the Board in deciding how to act on the Commission’s Recommended Decision, in accordance with the Governors’ extant authority ... in connection with proceedings under chapter 36” of Title 39 of the U.S. Code. “...The memorandum is also protected by the deliberative process privilege.” USPS Response at 4. None of these contentions provides a basis for denying the parties’ counsel the right to examine the OIG Report.

We accept as fact the assertion that the Chairman of the Board of Governors asked the OIG to investigate the Bank of American NSA. Given the fact that that the Postal Service chose to use in the Bank of America NSA an outdated read/accept baseline that the Postal Service knew was outdated, it is not surprising that an OIG audit would be requested. But that does not provide any justification for a purported use of the OIG as a decision-making arm of the Postal Service Board of Governors. Such a use of the OIG, if it had occurred, would be entirely improper.

Common sense alone would require this conclusion. If the OIG were made a part of the decision-making process on the NSA, its intended role as impartial auditor would be hopelessly compromised. This is the teaching of the Court in Burlington Northern v. Office of Inspector General, 983 F.2d 631, 641-642 (5<sup>th</sup> Cir. 1993) (OIG subpoena intended to support an agency’s regulatory and compliance function, rather than the OIG’s investigation of fraud, waste and abuse, could not be enforced); see also Winters Ranch Partnership v. Viadero, 123 F.3d 327, 334 (5<sup>th</sup>

Cir. 1997)(“the agency head cannot convey to the IG any of the agency’s congressionally-delegated program operating responsibility”).

We submit that the Commission should not lightly accept the unverified allegation by the Postal Service that the OIG has abrogated its audit responsibility and permitted itself to be made a part of Postal Service management. The Commission should require the Postal Service to produce the OIG report under the previously-established protective conditions agreed to by counsel for the parties in this case.

**The Parties Are Entitled To Have Their Own Counsel Review The OIG Report Under Appropriate Protective Conditions**

It should go without saying that the parties other than the Postal Service are entitled to review relevant evidence and to make their own judgments about whether to urge the Commission to include that evidence in the record in this case. The Commission already has established a sealed record in this case accessible only to counsel. The OIG Report should be produced by the Postal Service for examination under the same conditions. If the parties conclude that it includes relevant non-privileged information the Commission needs to consider in this case, the parties will so inform the Commission in a manner that protects the confidential nature of the information unless and until the Commission orders its disclosure.

Respectfully submitted,

Darryl J. Anderson  
Jennifer L. Wood  
Counsel for American Postal Workers Union, AFL-CIO