

RULING NO. C2008-3/15

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Complaint of Capital One Services, Inc.

Docket No. C2008-3

PRESIDING OFFICER'S RULING GRANTING, IN PART,  
MOTION OF CAPITAL ONE SERVICES, INC. TO STRIKE

(Issued September 9, 2008)

Capital One Services, Inc. (Capital One) filed a complaint contending the Postal Service improperly denied it a negotiated service agreement functionally equivalent to the negotiated service agreement between the Postal Service and Bank of America.<sup>1</sup> The Postal Service filed its answer on July 21, 2008.<sup>2</sup> A Motion of Capital One Services, Inc. to Strike a Portion of the Postal Service's Answer and for Clarification of Procedures (Motion) was filed on August 19, 2008. The Postal Service filed a response in opposition to the Motion on August 26, 2008.<sup>3</sup>

This ruling grants, in part, the relief sought by Capital One.

The Motion can be conveniently divided into two parts: a request that the Commission strike a portion of the Postal Service answer; and a request that special rules be employed in this proceeding. These parts will be addressed separately.

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<sup>1</sup> Complaint of Capital One Services, Inc. Regarding Discrimination and Other Violations of Law by the United States Postal Service, June 19, 2008 (Complaint).

<sup>2</sup> Answer of the United States Postal Service, July 21, 2008 (Answer).

<sup>3</sup> Response of United States Postal Service to Motion of Capital One Services, Inc. to Strike a Portion of the Postal Service's Answer and for Clarification of Procedures, August 26, 2008 (Response).

*Motion to strike.* Capital One contends that the following statement should be stricken from the Postal Service Answer:

To the extent this Answer fails to address with sufficient specificity any allegation in the Complaint, the Postal Service denies such allegations.

Answer at 14.

Capital One contends that this statement is inconsistent with rule 84(a), which requires specific admission, denial, or explanation of each fact alleged in a complaint. It points out that the rule provides that each fact not specifically answered shall be deemed admitted. Capital One argues that the general denial included in the Postal Service answer frustrates the purpose of rule 84 which it suggests is “to define and narrow the issues in contention and thus set the parameters of subsequent discovery.”

Motion at 3.

The Postal Service Response contends the “offending language” has been commonly used in past complaint cases and that striking it would have the effect of altering the Postal Service answer. It argues that motions to strike are requests for extraordinary relief and that Capital One has not justified extraordinary relief in this instance. The Postal Service suggests that, should any relief be deemed warranted, a more appropriate course would be to direct the Postal Service to amend its Answer. Response at 3, n.3.

Capital One has correctly described the purpose and requirements of rule 84(a). The Postal Service shall file an amended answer within 7 days that removes the statement of general denial identified by Capital One. In its amended answer, it should address any alleged fact in the Complaint it failed to address in its initial Answer, providing an appropriate specific admission, denial, or explanation.

*Request for special rules.* Under the rubric of seeking clarification, Capital One suggests four special rules be made applicable in this case. It justifies these suggestions, in part, by claiming the Postal Service answer fails to respond to rule 84(b) and (c). Motion at 6. Those rules require the Postal Service to include in its answer

statements indicating its position on the specific relief requested in the complaint and, if applicable, on allegations that rates are not in accord with the policies of the Act. Capital One explains why each of the four rules it suggests will foster orderly and expeditious resolution of its Complaint.

As a preliminary matter the suggestion that the Postal Service fails to respond to rule 84(b) and (c) does not seem well taken. Rule 84(b) was written to apply to complaints under the Postal Reorganization Act that the Postal Service “is charging rates which do not conform with the policies set out in the title . . . .” See former U.S.C. 3662. The current 39 U.S.C. 3662 authorizes complaints for a variety of reasons including violation of 39 U.S.C. 403(c) and 3622(c)(10).

Rule 84(c) requires the Postal Service to provide its position on the relief requested in a complaint. The Postal Service accompanied its answer with a Motion of the United States Postal Service to Dismiss Complaint that provides the information required by rule 84(b) and (c). The Postal Service specifically incorporated this filing in its Answer at 1.

Notwithstanding that the Postal Service Answer is not flawed in these respects, each of the four proposals made by Capital One has been considered. Capital One suggests that the Commission require “initial disclosures” at the outset of this and subsequent complaint cases. It contends that requiring all parties to provide any information on individuals likely to have discoverable information, and a copy or description of all documents that parties might use to support claims or defenses will help to focus discovery and expedite the process. It notes that the Federal Rules of Civil Procedure and the rules of a number of Federal administrative agencies contain such requirements.

Capital One suggests that requests for admission should be expanded. Current rule 28 allows requests for admission of relevant, unprivileged facts. Capital One suggests that it should be permissible to file requests for admission that address questions of fact, the application of law to fact, or opinions about either. This broader rule for admissions is currently part of the Federal rules of civil procedure.

The third Capital One suggestion focuses on discovery responses. It suggests that when a party claims privilege and objects to a discovery request, it should be required to provide a privilege log. Capital One contends that current Commission rules require parties objecting to discovery to assert the reasons for the claim with particularity in order to avoid sweeping generalized objections. Nonetheless, past Commission practice has not required privilege logs providing detailed justification for withholding specific documents and/or types of information until and unless a motion to compel is filed.

Finally, Capital One requests that responses to every discovery request be certified as accurate by the individual who provides the response, and that attorneys interposing objections should sign those objections.

Current Commission rules provide that answers to discovery requests should include the identity of the individual responding; however, a practice has developed of allowing “institutional responses” to questions beyond the knowledge of a single individual, or for which the organization as an entity takes responsibility. Parties have been free to request the production of a witness when necessary to further explore institutional responses. Additionally, current Commission rules require the individual submitting a pleading to the Commission to identify themselves.<sup>4</sup>

Each of Capital One’s suggestions deal with an aspect of discovery practice. Taken together, they would significantly alter past Commission practice. The Postal Service contends that as the Commission is in the process of modernizing its complaint rules to reflect its new responsibilities. It suggests that major changes in the rules governing litigation of complaints, such as the ones proposed here by Capital One, should be reviewed in the rulemaking dockets established for revising the Commission’s complaint rules. Therefore, it opposes each of these changes.

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<sup>4</sup> Thus, when an attorney submits an interrogatory response, the Commission relies on the attorney to assure the response is accurate to the best of his or her ability. *See, for example*, Response of the United States Postal Service to Interrogatory of Public Representative (PR/USPS-10), filed September 8, 2008, by Elizabeth Reed.

The rules Capital One suggests shall not be applied in this case. There may well be some theoretical merit in each of these suggestions; however, at this stage of the proceeding, it seems wisest to continue to utilize the procedural rules that have enabled the Commission to successfully evaluate past complaints promptly, while affording all parties appropriate due process. The Postal Service argues that adding the new rules suggested by Capital One would be likely to expand the scope of discovery and lengthen the proceedings unnecessarily. Certainly the sweeping nature of suggestions 1 and 2 would expand discovery beyond past Commission practice. While this might result in reduced hearing time, such a result can not be predicted with confidence.

The Commission is reviewing all of its rules, including the rules of practice and procedure found at 39 CFR 3001. The Commission plans to propose modifications of those rules, and seek suggestions from all interested parties on how these rules can be improved and made more appropriate for the Commission's revised responsibilities. The pros and cons of the Capital One suggestions can be explored more thoroughly in that context.

#### RULING

The Postal Service should revise its Answer to the Capital One Complaint by September 16, 2008, as discussed in the body of this Ruling.

Dan G. Blair  
Presiding Officer