

ORDER NO. 92

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

Before Commissioners: Dan G. Blair, Chairman;
Mark Acton, Vice Chairman;
Ruth Y. Goldway;
Tony L. Hammond; and
Nanci E. Langley

Complaint of Capital One Services, Inc.

Docket No. C2008-3

ORDER DENYING MOTION OF UNITED STATES POSTAL SERVICE
TO DISMISS COMPLAINT AND NOTICE OF FORMAL PROCEEDINGS

(Issued August 1, 2008)

The Complaint of Capital One Services, Inc. Regarding Discrimination and Other Violations of Law by the United States Postal Service (Complaint) was filed on June 19, 2008. The Complaint asserts several claims concerning Capital One's unsuccessful attempts to enter into a negotiated service agreement similar to the agreement that the Postal Service recently commenced with Bank of America. In support of the Complaint, Capital One filed the Declaration of Ben Lamm, and correspondence between Capital One and the Postal Service dated May 15, 2008, May 27, 2008, May 30, 2008, and June 4, 2008.¹

¹ The May 30, 2008 correspondence includes a copy of a negotiated service agreement proffered by Capital One to the Postal Service.

The Answer of the United States Postal Service (Answer) in response to the Complaint was filed on July 21, 2008, together with a Motion of the United States Postal Service to Dismiss Complaint (Motion to Dismiss). On July 28, 2008, the Opposition of Capital One Services, Inc. to Motion to Dismiss of the United States Postal Service (Opposition to Dismiss) was filed in response to this motion.

The Commission finds that the Complaint raises material issues of fact and law, and shall begin proceedings to hear the issues involved. 39 U.S.C. 3662(b). The Motion to Dismiss does not persuade the Commission that Capital One should not be provided an opportunity to present evidence and argument in support of its Complaint, and thus, the Motion to Dismiss is denied.

I. THE CAPITAL ONE COMPLAINT

Capital One asserts that it has repeatedly approached the Postal Service in attempts to obtain a negotiated service agreement that is similar to the agreement that the Postal Service entered with Bank of America Corporation.² It alleges that the Postal Service refuses to enter into a similar agreement and insists that any agreement with Capital One would have to include mailer-specific baselines and reduced per-piece discounts.³ Complaint at 3. Capital One contends that because the Postal Service insists on an agreement incorporating mailer-specific baselines and reduced per-piece discounts, Capital One is not being offered an agreement on similar terms to Bank of America.

By denying Capital One a negotiated service agreement under the same terms, Capital One contends that (1) the Postal Service has unduly or unreasonably discriminated among users of the mails and granted an undue or unreasonable

² See PRC Op. MC2007-1. The Bank of America negotiated service agreement requires Bank of America to implement several advanced mailing practices and provides Bank of America discounts for proven performance improvements relative to six negotiated baselines.

³ Capital One argues that requiring Capital One to use mailer-specific baselines in place of the Bank of America baselines (which were developed from dated industry averages) radically alters the incentives (and implicitly the agreement) available to Capital One. Complaint at 16.

preference in violation of 39 U.S.C. 403(c); (2) the Postal Service has created a special classification not available on public and reasonable terms to similarly situated mailers, which creates unreasonable harm to the marketplace in violation of 39 U.S.C. 3622(c)(10); and (3) the Postal Service has violated Commission rules 3010.40 *et seq.* because the rules incorporate by reference the legal standards of 39 U.S.C. 3622(c)(10). *Id.* at 17-19.

Capital One contends the Postal Service should not be allowed to deny an agreement to Capital One on the same terms granted to Bank of America. Capital One also argues the Postal Service should not be allowed to contest whether the Bank of America agreement is a pay-for-performance agreement, arguing that this was fully litigated and resolved in Docket No. MC2007-1. *Id.* at 19-20.

Capital One requests relief in the form of a ruling that the Postal Service has violated 39 U.S.C. 403(c), 39 U.S.C. 3622(c)(10), and/or Commission rules 3010.40 *et seq.* It requests a ruling stating that Capital One is entitled to an agreement with the same substantive terms, or at a minimum, includes the same financial incentives offered to Bank of America. It requests any other relief deemed appropriate, including but not limited to the Commission ordering approval of a new product (agreement) substantively identical to the Bank of America agreement, without further need for negotiations between the Postal Service and Capital One. *Id.* at 22.

II. THE POSTAL SERVICE MOTION TO DISMISS

The Postal Service argues that the Complaint fails to establish that the Postal Service unduly discriminated against Capital One or otherwise violated title 39. Motion to Dismiss at 2-4. In support of this argument, the Postal Service asserts that it has long been established that functional equivalence does not mean identical, and that all agreements, including functionally equivalent agreements, are tailored to each partner's unique situation and to how the agreement then benefits the Postal Service. It quotes Commission holdings that a proposed functionally equivalent agreement must primarily rest on the same substantive functional elements as the identified baseline agreement,

and must provide a comparable benefit to the Postal Service.⁴ It argues that an analysis of functional elements would allow for a far wider range of functionally equivalent agreements than Capital One's argument allows. It concludes that the Postal Service's refusal to approve just one example of a functionally equivalent agreement as presented by Capital One does not constitute an undue or unreasonable preference or create a special classification not available on public and reasonable terms to similarly situated mailers.

The Postal Service further contends that the Complaint is premature because the parties never engaged in, or exhausted, reasonable efforts to negotiate a functionally equivalent agreement. *Id.* at 4-7. It asserts that the Postal Service was and remains prepared to continue negotiations with Capital One.

In response, Capital One contends that reference to its Complaint at 3 and 12-15, and the Opposition to Dismiss at 9-12, present ample indications that despite its extended good faith efforts to negotiate, additional discussions would be futile.

III. COMMISSION ANALYSIS

The Postal Service asserts that Capital One fails to establish undue discrimination. *Id.* at 2-4. Capital One discusses the importance of the opportunity to bring complaints under the Postal Accountability and Enhancement Act (PAEA) and suggests a standard for the legal sufficiency of complaints similar to the standard set forth in the Federal Rules of Civil Procedure. Opposition to Dismiss at 4-5. The Commission has previously applied a "colorable claim" standard. See PRC Order No. 1307 at 9. The Commission finds this an applicable standard to apply under section 3662. Under this standard, Capital One does not have to establish undue discrimination as argued in the Motion to Dismiss; it only has to establish a colorable claim raising material issues of fact or law for the Commission to initiate a proceeding.

⁴ *Id.* at 3. See also Docket No. MC2007-4, Order Regarding Limitation of Issues and Establishing Procedural Schedule, September 7, 2007, at 2 referencing Docket No. RM2003-5, PRC Order No. 1391, February 11, 2004, at 49-51.

Once a colorable claim is established, the complainant is provided an opportunity to develop its case, and the respondent is given an opportunity to refute the allegations.

Capital One contends that it has not been able to obtain a negotiated service agreement with the Postal Service on similar terms to the agreement that the Postal Service has with Bank of America. Complaint at 3, ¶ 6. The Postal Service appears to acknowledge that any agreement with Capital One must use mailer-specific baselines, and that the discounts will have to be reduced to reflect that Capital One was not the first adopter. See Complaint at 15, ¶ 42 and Answer at 7, ¶ 42. Capital One alleges this constitutes undue or unreasonable discrimination in violation of 39 U.S.C. 403(c).

The Postal Service argues that negotiations have not been given an opportunity to run their course. Motion to Dismiss at 4-7. Capital One contends that negotiations are at a standstill. Opposition to Dismiss at 9-12.

The Commission finds that this exchange raises issues of both law and fact relevant to whether or not the actions, or inactions, of the Postal Service rise to the level of undue or unreasonable discrimination among users of the mails, or to the granting of undue or unreasonable preferences to any such users in violation of 39 U.S.C. 403(c).

The pleadings raise several other mixed issues of law and fact. These include whether Capital One and Bank of America are “similarly situated,” what constitutes a “functionally equivalent” agreement in this situation, and what, if any, harm Capital One has or will incur.

Capital One contends that because the Postal Service only addresses one of the six claims presented by Capital One, the claims that were not addressed are properly before the Commission. *Id.* at 14-15. For example, Capital One raises claims concerning the factor of the PAEA that encourages special classifications, available on public and reasonable terms to similarly situated mailers, which do not cause unreasonable harm to the marketplace. See 39 U.S.C. 3622(c)(10). The Postal Service does not specifically address these claims other than offering a denial. Motion to Dismiss at 3. The Commission shall hear all issues presented by the Complaint.

IV. OPPORTUNITY FOR INTERVENTION

Any interested person may file a notice of intervention, consistent with the Commission's rules of practice, as a full or limited participant. See 39 CFR 3001.20 and 3001.20a. The notice of intervention shall be filed using the Internet (Filing Online) at the Commission's website (*www.prc.gov*), unless a waiver is obtained for hard copy filing. See 39 CFR 3001.9(a) and 3001.10(a). Notices of intervention are due no later than August 13, 2008.

V. DISCOVERY

Capital One, the Postal Service, and the Public Representative may begin discovery immediately. Discovery may begin upon intervention by others. See 39 CFR 3001.25-28.

VI. PREHEARING CONFERENCE

A prehearing conference is scheduled for August 14, 2008 at 2:30 PM in the Commission's hearing room. Capital One shall be prepared to discuss any additional time needed for discovery, and the time needed to prepare to present its case. In light of the representations made as to the potential for further negotiations (Motion to Dismiss at 6), the parties are encouraged to search for common ground and report on any progress during the prehearing conference.

VII. REPRESENTATION OF THE GENERAL PUBLIC

Pursuant to 39 U.S.C. 505, E. Rand Costich is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in the above-captioned docket.

It is Ordered:

1. The Commission finds that the Complaint of Capital One Services, Inc. Regarding Discrimination and Other Violations of Law by the United States Postal Service, filed June 19, 2008, raises material issues of fact or law and shall begin proceedings in this Complaint.
2. The Motion of the United States Postal Service to Dismiss Complaint, filed July 21, 2008, is denied.
3. The Commission will sit *en banc* in this proceeding.
4. The deadline for filing notices of intervention is August 13, 2008. Notices shall indicate whether the intervening party intends to participate in the hearing and the nature of that participation.
5. A prehearing conference will be held in the Commission's hearing room on August 14, 2008 at 2:30 PM.
6. The Commission appoints E. Rand Costich as Public Representative to represent the interests of the general public in this proceeding.
7. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Steven W. Williams
Secretary