

ORDER NO. 208

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

Before Commissioners:

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

Complaint of Capital One Services, Inc.

Docket No. C2008-3

ORDER ON CAPITAL ONE MOTION TO COMPEL
AND EXTENSION OF DEADLINES CERTIFIED TO THE COMMISSION
BY PRESIDING OFFICER'S RULING NO. C2008-3/38

(Issued April 29, 2009)

On April 29, 2009, the Presiding Officer certified a Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue (COS/USPS-DR-1-17, 19-21, 22), filed April 9, 2009 (Motion) to the full Commission for consideration. The Commission previously expressed its concern with the pace of bringing the complaint of Capital One Services, Inc. (Capital One) to an appropriate conclusion. The issues involved with this Motion will have a material impact on the ultimate termination of this proceeding and potentially may effect the due process afforded one or more parties in proceeding with this litigation. Thus, the Commission accepts the Presiding Officer's certification for consideration and disposition of this Motion.

I. CAPITAL ONE

Capital One seeks a ruling to compel the production of privilege logs related to documents that it contends are responsive to document requests COS/USPS-DR-1-17, 19-21 and 22. It also requests a 60-day extension to the discovery deadline and other applicable schedule dates recently established in POR No. C2008-3/37¹ to provide time to review the privilege logs and to undertake associated discovery. Finally, it seeks a ruling to compel production of certain non-privileged documents.²

Capital One states that the documents, and where applicable, related privilege logs, can be categorized into three groups. Motion at 4-7. The first group contains approximately 20,000 pages of “non-privileged” documents identified by electronic search of certain key Postal Service employee files. Capital One contends that the Postal Service has not produced these documents because it insists on a second opportunity to review the documents to see if privileges can be asserted. The second group contains approximately 12,000 pages of documents, also identified by electronic search of certain key Postal Service employee files, which the Postal Service contends are privileged. The Postal Service has not provided a privilege log for this set of documents. The third group of documents is associated with the deposition of Jessica Lowrance. The Postal Service has neither produced the non-privileged documents nor the privilege log for this set of documents, even though the Postal Service asserts that the privilege log associated with the files on Jessica Lowrance’s computer is complete.

¹ POR No. C2008-3/37, recently issued on March 30, 2009, established the procedural schedule for this docket.

² In support of Capital One’s Motion, APWU filed a Response of the American Postal Workers Union, AFL-CIO in Support of Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue, April 17, 2009. The response was accompanied by American Postal Workers Union, ALF-CIO Motion for Late Acceptance of Response of APWU in Support of Capital One’s Motion to Compel Submission of Postal Service Privilege Logs and to Continue, April 17, 2009. The motion for late acceptance is granted.

II. THE UNITED STATES POSTAL SERVICE

On April 16, 2009, the Postal Service filed a response in opposition to Capital One's Motion.³ The Postal Service notes that the established procedural schedule was based on a mutually agreed upon proposal by Capital One and the Postal Service. It argues that it fails "to see how this type of document discovery is an efficient means of producing record evidence that would materially elucidate the legal issues in this case" and opposes any further delay in schedule. *Id.* at 3.

III. COMMISSION ANALYSIS

The Commission appreciates that Capital One and the Postal Service have operated in a cooperative manner in trying to work informally through many unique electronic discovery issues in this docket. However, there is continuing concern that progress be made so that resolving this case in a timely manner is not in jeopardy. Neither party presents persuasive argument in the instant pleadings that would justify additional delay. Capital One is requesting at least a 60-day delay in a mutually agreed upon schedule that it co-signed a mere 13 days before filing its Motion. The Postal Service provides no indication for when it anticipates completing its tasks, or persuasive reasons for not producing either completed privilege logs or any of the material identified as non-privileged. Both parties have been working on these issues for about 8 months. It appears that an alternate approach is necessary to expedite the process.

The schedule for filing and receiving evidence and briefs established in POR No. C2008-3/37 is suspended. Discovery, except as related to materials already requested, but not yet provided, is concluded as scheduled on April 20, 2009.

Capital One and the Postal Service had been filing weekly status reports for a period of months. However, after a time, the reports ceased to convey substantive information on actual progress being made, and became somewhat repetitive. The

³ Response of the United States Postal Service in Opposition to Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue, April 16, 2009 (Response).

Postal Service is directed to resume filing status reports as discussed below until all privilege logs associated with this Motion are complete and filed. The intent of the status reports is to focus the attention of the Postal Service on timely completion of this phase of discovery, and to provide visibility to the Commission, Capital One, and other interested persons.

To make future status reports more informative, the Postal Service is directed to begin by estimating a completion date for each of the remaining privilege logs that are the subject of this Order. The promised completion date shall be used as a reference point in all future reports. The reports shall include information that will allow evaluation of the progress being made, including what remains to be completed and when it will be completed. Specifically, each report shall include, at a minimum, the specific tasks completed, the specific tasks that remain (including the percentage currently complete, workhours remaining, workhours assigned per day to each task, and a date certain for completion of each task), and Postal Service actions to assure successful and timely completion.

The Postal Service shall file with the Commission or make available to the requesting party, as applicable, the following by May 5, 2009:

1. First group of documents: All documents identified as containing non-privileged material shall be made available to the requesting party. A privilege log identifying portions of any specific documents in this group over which the Postal Service now asserts a privilege may be concomitantly filed with the Commission.
2. Second group of documents: The privilege log associated with this group shall be filed with the Commission in its current state, along with a full explanation of what remains to be completed with a date certain for final production.⁴ As responsive documents containing non-privileged information are identified, they shall be made available to the requesting party.

⁴ A reasonably swift completion of this task is assumed. Otherwise, a reasonable completion date may be addressed in a future ruling.

3. Third group of documents: The privilege log associated with this group that the Postal Service asserts it has recently completed shall be filed with the Commission. All non-privileged documents associated with the deposition of Jessica Lowrance shall be made available to the requesting party at this time. Beginning on May 7, 2009, and every 2 business days thereafter, the Postal Service shall file with the Commission a supplement to the privilege log associated with the second group of documents, until it is complete. Each supplement shall include a full explanation of what needs to be completed and the actions being taken to meet the completion date that it promises above.

Capital One shall file pleadings⁵ it may find necessary associated with the above materials pursuant to the following:

1. First group of documents: Follow-up discovery related to this group of documents and any motions associated with material identified in any privilege log that may be provided shall be filed by May 19, 2009.
2. Second group of documents: Motions associated with material identified in the first 450 pages of the privilege log due on May 5, 2009 shall be filed within 14 days of when the privilege log is filed with the Commission. Motions associated with the remaining material identified in the privilege log due on May 5, 2009 shall be filed within 21 days of when the privilege log is filed with the Commission. Motions associated with the material identified in any supplemental privilege log shall be filed by the later of May 28, 2009 or within 7 days of when the supplemental privilege log is filed with the Commission.
3. Third group of documents: Follow-up discovery related to documents provided by May 5, 2009 and any motions associated with material identified in this privilege log shall be filed within 21 days of when the material is filed with the Commission.

⁵ These deadlines are extended in recognition of the volume of materials to be provided to Capital One on May 5, 2009. To the extent Capital One can file any pleading before these deadlines it will facilitate timely resolution of any requests for relief.

The Postal Service shall file any answers to such motions discussed above, or make available the requested material and provide notice to the Commission of this action, within 7 business days of the filing of individual motions.

A ruling will be issued to reschedule the remainder of this proceeding after further progress has been made to complete the discovery process. Parties should anticipate that the time intervals between filing testimony, hearing dates, etc., will remain approximately the same.

It is Ordered:

1. The Commission accepts certification of the Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue (COS/USPS-DR-1-17, 19-21, 22), filed April 9, 2009.
2. The Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue (COS/USPS-DR-1-17, 19-21, 22), filed April 9, 2009, is granted, in part, consistent with the body of this ruling.
3. The American Postal Workers Union, AFL-CIO Motion for Late Acceptance of Response of APWU in Support of Capital One's Motion to Compel Submission of Postal Service Privilege Logs and to Continue, filed April 17, 2009, is granted.

By the Commission.

Judith M. Grady
Acting Secretary