

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

COMPLAINT OF GAMEFLY, INC.)
)
) Docket No. C2009-1

OPPOSITION OF THE UNITED STATES POSTAL SERVICE
TO MOTION TO COMPEL OF GAMEFLY, INC.
(GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h),
7-8, 14(e), 15, 16(f)-(g), 20-21, 28-29, 31, 41(c))
(August 31, 2009)

Pursuant to Rules 26 and 27 of the Commission's Rules of Practice and Procedure, the Postal Service hereby provides its response to the Motion to Compel of GameFly, Inc., filed on August 24, 2009, concerning the following discovery requests: GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h), 7-8, 14(e), 15, 16(f)-(g), 20-21, 28-29, 31, 41(c) These discovery requests were wholly or partially objected to by the Postal Service on August 10, 2009. For the reasons discussed herein, the Commission should deny the Motion to Compel in its entirety.

GameFly begins its motion with an extended discussion, one that would seem more appropriate to a motion for summary judgment, of the requirements of section 403(c), and the flaws it perceives in the Postal Service's position that GameFly return DVD mail is not entitled as a matter of law to processing that is equivalent to the processing received by Netflix return mail. Motion to Compel at 2-9. GameFly bases much of this discussion on self-serving interpretations of the information that has so far been produced in discovery, making unfounded

and ultimately flawed leaps of judgment regarding the legal import of information elicited in this case. While GameFly is of course free to make such assertions and arguments through its testimony and on brief, they are fundamentally beside the point here.¹ An ultimate legal determination of whether the Postal Service is unduly discriminating against GameFly in the processing of its return mail will result from consideration of the entire record, *after* the filing of GameFly's case-in-chief, the Postal Service's own case, and the filing of briefs.

GameFly's extended exegesis on these topics diverts attention from the issues raised by the Postal Service's objections. The real focus of the Commission's consideration of this motion to compel should be whether the objectionable discovery requests, which seek information and documents of, at best, highly questionable pertinence to the complaint, combined with the burdens that would be created, justify compelling the Postal Service to answer. In this regard, the outcome should be guided by the actual complaint, not the imagined context of the complaint that GameFly attempts to present as the foundation for its discovery, and whether the information sought by these requests would materially contribute to the record regarding the discrimination claim that GameFly has pressed, and the relief that it seeks.

Rules 26 and 27 permit discovery "[i]n the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence." Parties seeking discovery in Commission

¹ Needless to say, the Postal Service does not agree with GameFly's legal arguments, or with its interpretation of the information that has been exchanged so far pursuant to discovery. The Postal Service does not, however, address them in detail here, for the simple fact that a discovery dispute is not the place to argue the ultimate issues of fact or law.

proceedings increasingly interpret these provisions by focusing only on “reasonably calculated to lead to” as justifying a broad and detailed inquiry that has no practical or legal boundaries. They typically ignore the operative standard of admissibility embodied in the rules. Discovery should not be permitted if its sole purpose is to seek information that is inadmissible because it is not relevant to the allegations in the complaint in an evidentiary sense. In this regard, admissible relevance does not mean merely “related to” in a broad and unbounded sense, with at best a tangential relationship to the claims set forth by the complainant. Rather, admissibility should be guided by the actual terms of the complaint, based on whether the information solicited in a discovery request would materially contribute to the record by which the Commission will determine the ultimate factual and legal issues presented by that complaint.

Furthermore, parties seeking discovery almost always ignore the “limited” nature of discovery and the element of “expedition” the rules are also intended to promote. Both of these considerations are particularly relevant here: especially in the modern regulatory context created by the Postal Accountability and Enhancement Act (PAEA), in which complaints are likely to become much more common than under previous law, the complaint procedure should be administered with a view to economy and practicality. Both the Postal Service, which must operate a nationwide postal system, and the Commission, which must oversee a broad spectrum of Postal Service activities, cannot afford to let unbounded discovery in complaints, particularly individualized service complaints in which one mailer is seeking the processing accorded to another mailer,

overtake their other obligations, or squander scarce resources for no effective purpose. For this and future complaint proceedings, the Commission should apply practical and legal limits to the permissible scope of discovery to ensure that it does not become a pretext for far-ranging fishing expeditions.

Matters Unrelated to Return DVD Processing

As the Postal Service discussed in its Objection, this Complaint raises the following issue: whether the manual processing that Netflix return DVD mailers often receive, while paying one ounce letter rates, is unlawfully discriminatory relative to GameFly (currently a mailer of two-ounce flat shaped pieces), such that Postal Service field personnel should be directed to provide GameFly similar manual processing. This is the relief that GameFly states that it seeks. This is fundamentally an operational question, requiring a determination as to whether GameFly return mail is, from an operational, mail processing perspective, sufficiently similar to Netflix return mail, such that GameFly is entitled as a matter of law under section 403(c) to return DVD mail processing that is substantially identical to that of Netflix.

This allegation of undue discrimination should define the scope of discovery in this proceeding. Discovery should, in other words, be predicated on acquiring information that bears on the question of whether the Postal Service's processing of Netflix return DVD mail, relative to GameFly's return DVD mail, is unreasonably discriminatory, from an operational standpoint. The Postal Service has not objected to providing this information. GameFly, however, wishes to

engage in wide-ranging fishing expeditions that look at not only this operational question, but at all other aspects of the manner in which Netflix and the Postal Service may have interacted. The Postal Service has objected to discovery requests that inquire into subjects other than those related to the processing of Netflix return mail.

In this regard, GameFly's arguments in its motion to compel are revealing. GameFly argues that broad, irrelevant discovery should be permitted because it might uncover a "larger pattern of undue preferences" and "a desire to accommodate the desires of a large customer," and thus help determine whether the manual processing of Netflix mail is "driven solely or primarily by operational needs." Id. at 6, 9, 11-13. However, the proper boundaries of discovery inquiries into alleged discrimination should be established in the complaint, which is required to be expressed in specific terms, and not on a nebulous suspicion that the Postal Service is unfair to smaller mailers. In this case, GameFly has repeatedly described its allegations of discrimination as being based on the mail processing that is accorded to the return DVD mail of two named mailers, and has sought similar manual processing. The Postal Service's objections are simply aimed at maintaining the focus of the proceeding on that operational issue.

Moreover, seeking to determine whether a "pattern of preferential treatment" exists would not materially elucidate the operational issue that the Commission must determine here, which is whether one mailer—GameFly—is entitled to processing for its return DVD mail that is substantially similar to the

processing afforded another mailer—Netflix. This is fundamentally a determination based on Postal Service mail processing operations in the field. The manner in which other functional groups within the Postal Service may interact with Netflix, regarding issues such as the manner in which Netflix postage is paid, or its outbound mail is entered, simply has no bearing on determining whether field processing personnel should be required, as a matter of law, to treat GameFly return DVD mail the same as Netflix return DVD mail.

Certain other assertions need to be addressed concerning several of these discovery requests. Regarding **GFL/USPS-6**, GameFly contradicts itself by claiming it “does not seek information on ‘mundane, day-to-day topics’ concerning Netflix mail.” See id. at 13. If that is true, GameFly should withdraw this discovery request and submit one that is more narrowly tailored. As written, that request seeks “all written communications” between the Postal Service and Netflix, with respect to topics as varied as “rates,” “mail preparation requirements,” “standards for processing,” “terms of service,” and the Postal Service’s “actual performance in processing and delivering” inbound and outbound Netflix mail. This clearly inquires into the sundry topics about which any large mailer and the Postal Service may interact on a day-to-day basis. Such communications, completely unrelated to the discrimination claim being pressed here, simply have no relevance to the Commission’s ultimate disposition of this Complaint, and would be unduly burdensome for the Postal Service to have to produce.²

² GameFly claims that a burden cannot be undue if the party seeking the information “believes [the] information is relevant.” Motion to Compel at 13. This is a misstatement of the law. Even if

GameFly asserts that **GFL/USPS-7 and 8**, which seek a wide range of information concerning the establishment of Permit Reply Mail (PRM), are relevant because it “has been advised...that PRM was established in large part for the benefit of Netflix.” Id. at 14. However, GameFly does not allege that PRM, which is part of the DMM and generally available to any mailer who wishes to abide by its terms, unlawfully discriminates in favor of Netflix. Indeed, the notion that PRM may have “benefit[ed]” Netflix is a wholly unremarkable proposition, considering it was designed for mailers who expect to have a 100 percent return rate, including DVD mailers (of which Netflix was the first, and remains the largest). More to the point, however, PRM simply constitutes for mailers an additional postage payment option, and is therefore wholly unrelated to the determination that Postal Service field operations personnel may make to manually process a particular mailpiece. As such, PRM is a topic that is has no material relevance to the operational question of whether GameFly should receive manual processing of its return mail equivalent to that of Netflix.

With respect to **GLF/USPS-21**, GameFly mischaracterizes the Postal Service’s Objection by claiming it alleges that Netflix does not use Confirm. Id. at 17. However, as the Postal Service’s Objection clearly notes, Netflix does not use Confirm *on the return trip*. The Postal Service therefore continues to object to having to capture and provide Confirm data on Netflix outbound mail.³

the information sought in a discovery request may have some relevance to the issues presented in a proceeding (which this information does not), that discovery request may still be properly objected to on burden grounds if the burden of responding outweighs the likely benefit the information would have, in terms of its contribution to the record. This balancing test, embodied in the Rules of Practice, has been performed by the Commission numerous times in the past.

³ As discussed more fully below, the Postal Service does not retain the mammoth volume of Confirm data since its hardware is not scaled for that capability; but it can sample Confirm data in

Finally, with respect to **GFL/USPS-28 and 29**, GameFly’s blithe dismissal of the burden involved in requiring the Postal Service to conduct a “simple email” census (id. at 19) of its roughly 36,500 retail units concerning whether they have a mail slot dedicated to Netflix demonstrates an complete lack of perspective or understanding of how far its position ventures from practical reality. The lack of any awareness of this fact on the part of GameFly is certainly consistent with its earlier observation (id. at 13) that the production of anything that GameFly considers relevant is, as a matter of law, not unduly burdensome. However, the Commission must determine whether the burden of responding to this interrogatory by conducting this census outweighs the likely benefit the information would have, in terms of its contribution to the record and to the Commission’s ultimate consideration of the Complaint. Here, the burden of conducting such a census would be immense, and would dwarf any possible relevance that this information—which is, at best, tangentially related to the mail processing discrimination claim alleged by GameFly—would contribute to the record of this proceeding.⁴

near real time. Since Netflix does not use Confirm on its return leg, Netflix Confirm scans can shed no light on the comparative handling of GameFly return DVD mail compared to Netflix return DVD mail.

⁴ Challenges facing the Postal Service would include the fact that no email list for all facilities does or could exist. The Postal Service recently described the difficulty of a recent effort to conduct a census of approximately 3300 non-automated offices for information with similar complexity as the existence or not of Netflix slots: Within County versus Outside County revenue. *Response of the United States Postal Service to Chairman’s Information Request No. 1*, PRC Docket No. RM2009-7 (August 20, 2009). That attempt to derive a census of 3300 offices cost in excess of \$200,000 over a period of three months and still had an 11.4 percent non-response rate. This would require a census of ten times the number of facilities. Any attempted census would also be complicated by the fact that Headquarters would be asking about the existence of slots it had previously warned against dedicating to a single mailer.

Matters Relating to Other DVD Mailers

The Postal Service also objected to discovery requests concerning data relating to other DVD mailers. GameFly's argument here boils down to a position that these data are necessary in order to "provide a baseline from which to measure the degree of preference given to Netflix," and to "shed light" on the accuracy of the Postal Service's position that the field should not be required, as a matter of law, to accord processing treatment given Netflix to other DVD mailers. Id. at 9. GameFly claims that its Complaint "is based primarily on the preferential treatment given to Netflix and Blockbuster." Id. at 16. Yet, its Complaint is *entirely* about the manual processing accorded to Netflix and Blockbuster DVD mail, which GameFly claims is discriminatory, and it has itself stated that the remedy it seeks is to be accorded processing that is "substantially identical" to Netflix. See Joint Statement of Disputed and Undisputed Facts at ¶ 132.

As such, the Postal Service's view that discovery should be focused on Netflix, not other DVD mailers, certainly does not "fundamentally misconstrue[]" this Complaint, as GameFly incorrectly asserts (Motion to Compel at 16), but reflects the simple fact that the relevant issue presented here is whether *GameFly* is legally entitled, under section 403(c), to the same manual processing that is accorded to *Netflix*. The manner in which other DVD round trip mailers and the Postal Service may interact is completely extraneous to this determination: if Gamefly cannot meet its burdens of going forward and proof by

a comparison between Netflix and itself, examination of other DVD mailers can do nothing to improve GameFly's case.

GameFly also specifically argues that looking at the breakage rates experienced by other DVD mailers may be "illuminating." Id. at 16-17. Even if the Postal Service had such data, the arguments in support of this position do not justify compelling a response to these discovery requests. GameFly hyperbolically argues that the Postal Service has "suggest[ed] that the high breakage rates of GameFly DVD mailers in automated processing must be due to rough handling of the DVDs by GameFly employees or customers, or some other factor other than the automated letter processing of the DVDs by the Postal Service." Id. at 17.⁵ However, as discussed by the Postal Service in its response to GFL/USPS-48, the Postal Service does not dispute that automated processing may be a cause of catastrophic breakage of DVDs. The simple and unremarkable point the Postal Service was making in the statements cited by GameFly is that other factors may also play a role, which is substantiated in documentation that has been made available or provided in response to discovery requests. Nothing in the breakage rates of other DVD mailers will elucidate this issue, because it is inarguable that all DVD mailers experience breakage.

⁵ GameFly also alleges that discovery into the breakage rates of other DVD mailers is necessary so that GameFly can test "the validity of the Postal Service's claim that the high breakage rates of GameFly DVD mailers in automated letter processing must be due in substantial part to some physical difference between game DVDs and movie DVDs." Motion to Compel at 16-17. However, as the Postal Service has noted in response to GFL/USPS-45-47 (admittedly, filed after the deadline for GameFly to submit its Motion to Compel), the statements made by the Postal Service in the Joint Statement regarding game and movie DVDs were based on representations made by GameFly, which the Postal Service has not yet been able to substantiate. Thus, elucidation of this issue should come from GameFly, not from discovery directed to the Postal Service.

Furthermore, even if the breakage rates experienced by other DVD mailers are relevant to this proceeding, that justifies a ruling in favor of GameFly that is limited to the issue of the breakage rates experienced by other DVD mailers. It does not, for example, justify a ruling compelling that the Postal Service search for and produce “all written communications” it has had with another DVD company concerning the wide range of matters set forth in **GLF/USPS-15**, or **GFL/USPS-20(d)**.

Finally, with respect to **GFL/USPS-21**, GameFly’s only contention is that Confirm data for other DVD mailers “could provide evidence as to how these mailers are discriminated against vis-à-vis Netflix.” GameFly does not, however, explain why this is so. Confirm data cannot provide any basis for comparing the handling of Netflix return pieces to handling afforded either GameFly’s or another DVD mailer’s return pieces, since Netflix does not use Confirm on inbound volume. Furthermore, the Postal Service lacks the capacity to store Confirm scans, so they are retained only long enough to assure that customers have successfully harvested their own scan data. As such, Confirm cannot be used as a comparator for the past unless the customers themselves can provide authenticated data.

Conclusion

The Commission has the inherent authority to manage its dockets, in a way that ensures their expeditious conduct, taking into account the subject matter and the issues involved in each docket. Within the new regulatory structure, complaint cases play an important role, which will likely increase in the

future. Yet, largely for that reason, the acceptance of a complaint by the Commission should not become a license to conduct wide-ranging fishing expeditions into the entirety of Postal Service emails and other documentation that has but a tangential relationship to the claim or claims set forth in the complaint. Discovery in each complaint proceeding should instead focus fundamentally on the alleged wrong brought forward by the complainant, with reasonable limits on the scope and scale of discovery consistent with the interest of expedition that is proportional to the complaint, and that will materially inform the Commission's legal judgment and determination. Here, that determination is fundamentally one of mail processing operations, and whether GameFly is legally entitled to processing of its return DVD mail that is equivalent to that of Netflix. Because these discovery requests will not lead to evidence that will materially contribute to the record concerning this issue, the Commission should deny GameFly's motion to compel.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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