

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

COMPLAINT OF GAMEFLY, INC.

)
)
)

Docket No. C2009-1

RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO MOTION OF GAMEFLY, INC., TO COMPEL THE POSTAL SERVICE
TO ANSWER DISCOVERY REQUESTS GFL/USPS-79-80
(September 24, 2009)

Pursuant to Rules 26 and 27 of the Commission's Rules of Practice and Procedure, the United States Postal Service hereby provides its response to GameFly's Motion to Compel regarding the following discovery requests, which were filed on August 28, 2009: GFL/USPS-79-80. The Postal Service filed a timely objection on September 8, 2009, on the grounds of relevance, undue burden, and that the questions are procedurally improper.

As an initial matter, the Postal Service maintains that it is procedurally improper for an adverse party to ask the Postal Service to authenticate photographs that were not taken by any postal employee. In this case, in particular, it seems that the most logical step would be for the unnamed individual in California who sent these photographs to GameFly to submit a declaration attesting to the accuracy of these photographs, to the extent that GameFly wishes to actually submit these photographs into evidence. The submission of such a declaration would not require the individual to actually appear in

person before the Commission; as such, the costs of GameFly authenticating the photographs in this manner are minimal.¹

Nevertheless, the Postal Service acknowledges that these photographs appear to be accurate, and it is plausible that there are some facilities among the Postal Service's network of approximately 35,000 Post Offices that may have mail slots that have been improperly designated as being solely for Netflix mail. The Postal Service will admit to the possibility that, on occasion, any one of its 35,000 Post Offices could have some feature that is contrary to stated Headquarters policies, or may have certain displays that might violate regulations pertaining to unauthorized signage. Such is the nature of maintaining a large, nationwide retail network responsible for providing mail service to all corners of the country, and every instance in which a local violation of postal policy may occur does not amount to or imply any violation of section 403(c). It is inevitable that some rules and policies are violated from time-to-time, and the Postal Service does the best it can to enforce its rules and policies when these issues come to light. Thus, if warranted, the Postal Service will take corrective action regarding these offices' apparent violation of Headquarters policy, by dealing with these two offices in the usual manner. The Postal Service is also committed to reissuing the 2007 *Retail Digest* standards regarding mailer-specific mail drop slots.

However, as the Postal Service stated in its objection, occasional photographic evidence of Netflix mail drops that may once have been or are now in existence, in violation of postal policy, does not address the key issues related to the alleged undue

¹ The Postal Service respectfully submits that even if the Commission were to order the Postal Service to authenticate these two photographs in some way, in response to GFL/USPS-79(a) and 80(a), there is, for the reasons discussed elsewhere in this pleading, no reason why the Postal Service should also be compelled to provide the extensive further details sought by GameFly in the remaining subparts of these interrogatories concerning the mail slots at these two offices.

discrimination in mail processing that GameFly asserts is provided to Netflix return mail, as compared to GameFly's return mail. Again, if the existence of these mail drop slots are substantiated, and found to be in violation of postal policy, the Postal Service will take corrective action. As such, questions regarding these slots, including who placed or designed the slots in each facility, when they were installed, and requests for all documents that might exist that relate in any way to these mail drops go far afield from the key issues in this case. These interrogatories are not *reasonably calculated* to lead to the discovery of material, relevant, and admissible evidence regarding whether the Postal Service is violating section 403(c) with respect to Netflix return mail (as compared to GameFly return mail).²

² GameFly has previously argued that the Postal Service's position regarding the proper scope of discovery in this proceeding "would be an unprecedented restriction on the broad scope of discovery allowed in Commission proceedings since 1971," and would serve to "choke off discovery in complaint cases." Response of GameFly, Inc., to Opposition of the United States Postal Service to Motion to Compel at 1-2, 8 (September 3, 2009). However, GameFly's assertions about the nature and effect of the Postal Service's views regarding discovery are patently misleading. The Postal Service has simply argued, in its Opposition to GameFly's previous motion to compel regarding several interrogatories, that the scope of discovery in this complaint proceeding should be limited to the derivation of information that has a material bearing on the Commission's ultimate disposition of the legal issues that have been presented by a complainant. Postal Service Opposition at 2-3 (stating that Commission should rule on GameFly's motion to compel based on "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"). The Commission has long recognized that discovery under its rules is properly limited to the derivation of information germane to a proceeding, in that it will provide a material contribution to the evidentiary record. See, e.g., Presiding Officer's Ruling No. R2005-1/77 at 2 (noting that discovery should be limited to information that constitutes "relevant and material evidence"); Presiding Officer's Ruling No. R2001-1/28 at 5 (noting that an interrogatory should lead to the production of "relevant and material evidence" in the proceeding at hand).

Just as rate case discovery under prior law was properly limited to matters having a material bearing on the Commission's recommendation of rates under the criteria of former section 3622, so should complaint case discovery under the PAEA be limited to the derivation of information that is materially relevant to the Commission's disposition of the legal claim being advanced by the complainant. Despite GameFly's attempt to cloud the issue, the Postal Service's position is thus in no way inconsistent with the Commission's rules, Commission precedent, or, for that matter, prior Postal Service statements concerning the scope of discovery in complaint cases under the PAEA. Consistent with the Commission's long-standing approach to discovery, the acceptance of a complaint by the Commission should not become a license for a party to conduct wide-ranging inquiries into matters that are, at best, wholly tangential to the Commission's disposition of the complaint. Reading the discovery rules to the contrary would be a waste of both the Postal Service's and the Commission's resources, for no material benefit. Here, GameFly is asserting that the manual processing of Netflix return pieces is unreasonably discriminatory compared to GameFly, such that it deserves substantially similar processing. As such,

Furthermore, as the Postal Service indicated in its objection (at page 2), were the Postal Service to respond affirmatively to this line of inquiry, it would open the door to further and further exploration of this irrelevant issue, thus imposing an undue burden on the Postal Service. The Postal Service cited undue burden in its objections to GFL/USPS-28-29 because it contends that performing a nationwide survey of Post Offices would be unreasonable, inefficient and costly.³ The type of inquiry posed by GameFly in the instant discovery requests would also pose an undue burden as well. Exploring various details related to two particular mail drop slots (again, which might be concluded to be in violation of postal policy), and placing these trivial details on the record in this case, which GameFly may then use as a license to make unsupported allegations that the existence of these slots is widespread (as it does in its Motion to Compel at page 13) may in turn require a further examination by the Postal Service of other offices that do not have Netflix-specific mail drop slots (in order to rebut such allegations). Such an inquiry could theoretically examine which offices: 1) do not have Netflix mail drops (and current photographic evidence of this); 2) never had Netflix mail drops; 3) never considered Netflix mail drops; and 4) have documents stating to the

discovery should be focused on matters that address the question of whether the processing of Netflix return mail, *compared to GameFly return mail*, is unreasonably discriminatory under section 403(c). See, e.g., Postal Service Opposition at 4-5. Other matters concerning Netflix that are unrelated to the operational processing of its return mailers, or matters concerning the respective treatment of Netflix compared to DVD companies other than GameFly, are simply not relevant to GameFly's claim, and would not materially contribute to Commission's disposition of this complaint. Similarly, with regard to these interrogatories in particular, the fact that a few Post Offices may have violated Headquarters policy with respect to unauthorized signage is irrelevant to section 403(c) claim being advanced here by GameFly. Recognition of the instant complaint's relevant and material reach does not "choke off discovery," as GameFly has asserted, but simply ensures that discovery is properly and manageably focused on that which is truly necessary for GameFly to make its case, and for the Commission to render its decision. And, in particular, considering the number of interrogatories that have been submitted by Gamefly which have not been objected to, and the amount of documentation that has been produced in response to those interrogatories, there is simply no basis to argue that the Postal Service is attempting to "choke off" discovery in this case.

³ USPS Objections and Partial Objections (August 10, 2009) at 7-8.

effect that such mail drops are in violation of postal policy and should never be installed. Yet, all these details would simply be irrelevant. Responding to these questions would simply open the door to both parties exploring more and more details regarding what mail slots may or may not exist in the Postal Service's 35,000 Post Offices nationwide. But ultimately, the Postal Service's policy on these mail drops is clear, and delving into details behind particular photographs of random postal facilities would not elucidate any of the key issues in this case. Engaging in this type of "battle of the photographs" is clearly not the best means of avoiding unnecessary and undue burden, and would not assist the Commission in conducting this proceeding in an efficient manner.

GameFly points out in its Motion to Compel that, "GameFly would gain nothing by having the Postal Service authenticate photographs of Post Office lobbies that lack such drops." GFL Motion to Compel at 13. Of course, this argument fails to recognize that, if such slots are made an issue of contention in this case, *the Postal Service* would benefit from authenticating thousands of photographs from offices that lack Netflix-specific mail drops. However, the expense of undertaking this effort would pose an undue burden on the Postal Service, and ultimately this line of inquiry would not produce any material, relevant evidence. Therefore, for the aforementioned reasons, the Postal Service respectfully urges the Commission not to tread down this path, and to deny GameFly's Motion to Compel.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.

Chief Counsel, Pricing and Product Support

Kenneth N. Hollies

Elizabeth A. Reed

Keith E. Weidner

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-6252, Fax -6187