

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
GRANTING GAMEFLY'S MOTION TO COMPEL
RESPONSES TO DISCOVERY REQUESTS GFL/USPS-79 AND 80

(Issued October 1, 2009)

On September 17, 2009, GameFly, Inc. (GameFly) filed a motion seeking a ruling to compel the Postal Service to provide responses to two discovery requests.¹ The discovery requests were submitted to the Postal Service on August 28, 2009. The Postal Service filed its initial objections on September 8, 2009.²

On September 24, 2009, the Postal Service filed a response asserting that the Commission should deny GameFly's Motion to Compel.³ It primarily reinforces its objections on the grounds of relevance, undue burden, and that the questions are procedurally improper. See Response at 1.

This disputed discovery concerns two follow-up requests on examples that pertain to an earlier, disputed request, GFL/USPS 28. Request 28 sought data on the percentage of Postal Service retail facilities with dedicated mail slots. P.O. Ruling C2009-1/5, issued September 28, 2009, held that the data could lead to admissible

¹ Motion of GameFly, Inc., to Compel the Postal Service to Answer Discovery Requests GFL/USPS-79 and -80, September 17, 2009 (Motion to Compel).

² Objection of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-79-80), September 8, 2009 (Objections).

³ Response of the United States Postal Service to Motion of GameFly, Inc. to Compel the Postal Service to Answer Discovery Requests of GFL/USPS-79-80, at 4, September 24, 2009 (Response).

evidence, but it limited the information GameFly could compel the Postal Service to collect in view of the burden.⁴ GameFly asserts that the Postal Service has engaged in a pattern of discrimination in favor of Netflix, at the expense of smaller DVD rental companies, and that the preferences include Netflix-only drop slots in the lobbies of many retail offices. Motion at 1-2.

The Postal Service submits that it is procedurally improper for an adverse party to demand it to authenticate photographs that were not taken by a postal employee. Response at 1. It reasons that the onus resides with the party offering a photograph into evidence to establish the foundation for its admissibility. Here, this could be established through a declaration of the photographer who that party typically knows or could ascertain. *Id.* It further takes exception to any inference being drawn from the specific photographs to suggest a more widespread practice, or to any common variance from policies that expressly proscribe vendor-specific dedicated drop slots. It clarifies that any inference only could be based upon conjecture.

The Postal Service maintains that the interrogatories are not reasonably calculated to lead to the discovery of admissible evidence that pertains to the treatment of Netflix return mail. *Id.* at 3. It asserts that “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.”⁵ Response at 3. It urges that this request falls outside matters that address the comparisons of the processing of Netflix’s return mail with that of GameFly’s return mail pieces. *Id.* at 4. The Postal Service includes by reference its burden objections to GFL/USPS-28-29, and asserts that delving into details behind the particular photographs of random postal facilities would not elucidate any of the key issues in this case. *Id.* at 5.

⁴ See P.O. Ruling C2009-1/5 at 17-18.

⁵ The Postal Service cites P.O. Ruling No. R2005-1/77 at 2, to support the point that discovery under applicable rules is properly limited to the derivation of information germane to a proceeding, in an evidentiary sense. *Id.* at 3. n.2.

Information responsive to these two requests is not unlikely to lead to admissible evidence. In effect, GameFly asserts that the alleged practice of relying upon dedicated drop slots, contrary to policy directives, complements other examples of preferential processing beyond the depicted slot designation.⁶ Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense, including the existence, description, and nature, of any documents that concern discoverable matter. See P.O. Ruling C2009-1/5, at 4. For the reasons detailed below, the Motion to Compel is granted.

The Postal Service, in the context of the earlier related request GFL/USPS 28, was obliged to meet certain duties tailored narrowly. For the present Motion to Compel, the Postal Service states that "it is plausible that there are some facilities among the Postal Service's ...35,000 Post Offices that may have mail slots that have been improperly designated as being solely for Netflix mail."⁷ Relying on the reasoning of request 28, however, there is no basis for a ruling that sustains the Postal Service's relevance and burden objections for requests 79 and 80 either. See P.O. Ruling C2009-1/5 at 17-19.

⁶ GameFly seeks to explore if "*other* kinds of preferential treatment received by Netflix...may shed light on whether the...manual processing given to Netflix reply mailers is required by...operation need" or tends to show "a broader pattern of preferential treatment." See Motion of GameFly, Inc., to Compel Responses to Discovery Requests GFL/USPS-3(e), 4(e), 6(a)-(e), (g)-(h), 7, 8, 14(e), 15, 16(f), (g), 20(a)-(d), 21, 28, 29, 31, 40 and 41(c), at 9, August 24, 2009.

⁷ Response at 2.

The requests concern only the lobbies of the Susanville, and Alturas, California, post offices.⁸ Therefore, Postal Service's burden claims are unpersuasive. So are its suggestions that it would face relative hardship in identifying the source or its origination in order to authenticate the photographs. The real issue is simpler. The key question is whether the photograph is sufficiently reliable to fairly reflect the scene in question, which is allegedly depicted.⁹

If there are any grounds to believe the depiction does not or could not represent what it appears to represent, the Postal Service can identify such grounds in its response.¹⁰ It will have an opportunity to further respond to any contentions or inferences related to its answer and to place all facts in their proper context.

⁸ GFL/USPS-79 concerns a photograph of the public mail drop slots in the lobby of the Susanville, California post office. Its subparts request the Postal Service to confirm that (a) the picture shown is a true and accurate photograph of the described public mail drop slots; (b) one of the four mail drop slots in the lobby is marked "NETFLIX ONLY;" (c) that Netflix is the only DVD rental company with a mail drop slot reserved for its return mail in that lobby; (d) that Netflix is the only private company of any kind with a mail drop slot reserved there for its return mail; (e) when was that location's mail drop slot first reserved for "NETFLIX ONLY;" (f) the organization that devised the idea of reserving the drop slot for "NETFLIX ONLY;" (g) the organization that created the red "NETFLIX ONLY" sign there; (h) documents relating to the creation of that drop slot; and (i) others relating to consideration, if any, by the Susanville post office or supervising entity on establishing a drop slot there for the reply mailers of other DVD rental companies. The subparts of GFL/USPS-80, as to mail drop slots in the lobby of the Alturas, California post office are fairly similar.

⁹ See, e.g., *Rogers v. Ingersoll-Rand Co.*, 971 F.Supp. 4,14 (D.D.C. 1997), citing *Simms v. Dixon*, 291 A.2d 184, 186 (D.C. App. 1972) (so long as the scenes...depicted accurately represent what they are alleged to portray, there is no requirement that the individual who actually took the pictures testify at trial to lay a proper foundation). Moreover, here, it is clear that these scenes purport to reflect a couple of local situations, other than events that gave rise to the present complaint.

¹⁰ Common authenticity objections to photographs, like ones raising risks of manipulations via Photoshop to shade the facts, cannot be maintained seriously here. It can be readily verified that either each photograph shows the drop slots properly or improperly. Accordingly, authenticity in this context appears to be an issue more akin to a proper request for admission. Indeed, the Postal Service all but concedes this, since it "acknowledges that these photographs appear to be accurate." Response at 2.

RULING

The Motion of GameFly, Inc. to Compel Responses to Discovery Requests
GFL/USPS-79-80, filed September 17, 2009, is granted.

Dan G. Blair
Presiding Officer