

PUBLIC (REDACTED) VERSION

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

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

**MOTION OF GAMEFLY, INC.,
TO COMPEL THE POSTAL SERVICE TO ANSWER
DISCOVERY REQUESTS GFL/USPS-84, 85, 99, 100,
109, 117, 122, 151 AND 152(d)
(October 13, 2009)**

Pursuant to Rule 3001.26(d) and 3001.27(d) of the Commission’s Rules of Practice, GameFly, Inc. (“GameFly”) respectfully moves to compel the United States Postal Service to answer discovery requests GFL/USPS-84, 85, 99, 100, 109, 117, 122, 151 and 152(d). GameFly filed these discovery requests on September 18, 2009. The Postal Service objected to these questions, as well as to GFL/USPS-92, 93 and 98, on September 28, 2009.

On September 28, 2009 and October 1, 2009, the Presiding Officer issued rulings addressing previous motions to compel filed by GameFly. Pursuant to those rulings, the Postal Service has withdrawn its objection to GFL/USPS-98, and GameFly has withdrawn interrogatories GFL/USPS-92 and 93.

The Postal Service’s remaining objections should be overruled. Many of the objections have been implicitly rejected by the Commission in Presiding

Officer's Ruling Nos. C2009-1/5 and C2009-1/6.¹ In any event, the Postal Service's objections of undue burden and relevance would be without merit even if the Postal Service's grounds for objection were matters of first impression in this case. The disputed requests seek narrowly drawn information from specific individuals about specific instances of preferences given to Netflix. And the requests are reasonably calculated to lead to the discovery of admissible evidence.

ANALYSIS OF INDIVIDUAL OBJECTIONS

A. GFL/USPS-84, 85, and 152(d)

The Postal Service objects to these requests, which inquire into the level of knowledge of certain Postal Service employees concerning the manual processing received by Netflix, on the grounds of relevance. The "level of detail" of the requests, the Postal Service contends, "adds nothing material to the record." While conceding that "senior management has been generally aware of the manual processing of Netflix return pieces during [the time period of the requests]," the Postal Service is unwilling to answer these requests. Objections at 1.

¹ Presiding Officer's Ruling Granting, In Part, GameFly's Motion 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) (September 28, 2009) ("POR-5"); Presiding Officer's Ruling Granting GameFly's Motion to Compel Responses to Discovery Requests GFL/USPS-79 and 80 (October 1, 2009) ("POR-6").

In the context of this case, however, the Postal Service’s generalized admission that “senior management” was “generally aware” that Netflix pieces received manual processing does not begin to avoid the need for more specific discovery. As the Commission is aware, the Postal Service has contended repeatedly in this case that headquarters has established no official policy regarding the granting of preferences, including manual processing, to Netflix mail that any decisions to give custom manual processing to Netflix mail are made at the local level; and that these local decisions are required by operational needs. See, e.g., Response to GFL/USPS-23(d). As long as the Postal Service continues to assert these defenses, GameFly is entitled to pursue discovery regarding the specific knowledge of the listed senior officials concerning what appears to have been a *de facto* policy of allowing field employees to grant preferential treatment to Netflix—as well as the actual reasons for that *de facto* policy—at level of detail and specificity sufficient to enable GameFly (and the Commission) to respond intelligently to the Postal Service’s claim that its preferential treatment of Netflix mail has a rational basis sufficient to pass muster under 39 U.S.C. § 403(c).

B. GFL/USPS- 99, 100, 109, 117, 129, and 151

The Postal Service’s objections to these requests are premised on the theory that the requests are improper because they are “unrelated to the manual processing of Netflix DVD return mailers.” Objections at 2. As the Presiding Officer has noted in his previous rulings, however, preferences for Netflix beyond the manual processing of inbound Netflix mailers are permissible subjects of

inquiry in this proceeding. In POR-5, for instance, the Presiding Officer granted GameFly's motion to compel in the face of a similar objection by the Postal Service. POR-5 at 6-7; POR-6. Whereas the Postal Service sought to limit discovery to information about the manual processing of inbound Netflix mail,² GameFly argued that "discovery on related preferential treatment of Netflix beyond manual mail processing is calculated to lead to the discovery of admissible evidence that would refute the Postal Service's defense that any discrimination shown as to manual mail processing persists solely to meet operational needs." POR-5 at 6 (citing GameFly Motion to Compel of August 24, 2009 at 13). The Presiding Officer agreed with GameFly, explaining that "GameFly must be allowed to inspect the written communications on most of [the subjects of GameFly's requests]," which included information about the rates, classifications, mail preparation requirements, standards of processing, terms of service, breakage and loss, and actual Postal Service performance with respect to Netflix DVDs. See POR-5 at 6; GFL/USPS-6(a)-(e) and (g)-(h). The principle that GameFly may inquire about subjects other than the manual processing of inbound mail, therefore, is well established. See also POR-6 at 3, fn.6 (granting GameFly's Motion to Compel while citing GameFly's desire "to explore 'other kinds of preferential treatment received by Netflix'" to elucidate whether these preferences show "a broader pattern of preferential treatment" (quoting GameFly Motion to Compel of August 24, 2009 at 9)).

² Objections and Partial Objections of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h), 7-8, 14(e), 15, 16(e)-(g), 20-21, 28-29, 31, 40, 41(c) and 51(c)) at 3-4 (August 10, 2009).

The Postal Service's current objections should be overruled on the same grounds.³ With respect to the specific requests at issue here, each request relates to a specific preference granted Netflix by the Postal Service. As such, these request are narrowly tailored to gather information relevant to the Postal Service's pattern and practice of granting undue preferences to Netflix.

Although the Postal Service characterizes GFL/USPS-99 and 100 as asking for "details concerning the organization of the Business Mail Acceptance function at Headquarters," these questions actually concern a single specific feature of that organization—the apparent fact that one manager in that organization is responsible only for Netflix mail, a privilege that no other customer of the Postal Service appears to enjoy. This arrangement appears to be an example of a preference granted to Netflix unrelated to the operational needs of the Postal Service. GameFly is entitled to explore the appearance of undue preference this arrangement creates.

This request is analogous to GFL/USPS-8, which asked the Postal Service to produce documents relating to communications with Netflix about the establishment of Permit Reply Mail, and concerning which the Presiding Officer granted GameFly's Motion to Compel in POR-5. In both cases, GameFly asks not about the service given to Netflix in general, but about how the service was designed (in the case of GFL-USPS-8) or applied (in the case of GFL/USPS-99

³ Of note, the Postal Service incorporates the arguments it put forth with respect to that previous objection in the objections at issue here. See Objections at 2, referencing prior objections and responses to GameFly motions to compel filed on August 10, 2009, August 31, 2009, and September 24, 2009.

and 100) to specifically benefit Netflix in ways generally unavailable to other DVD mailers. These requests go to the heart of GameFly's complaint by inquiring about the preferential treatment given to Netflix.

The Postal Service similarly mischaracterizes GFL/USPS-109, describing it as asking "for information concerning the payment of postage by Netflix." This request actually concerns a specific preference for Netflix—**[BEGIN PROTECTED MATERIAL]** **[END PROTECTED MATERIAL]**—that appears to be unrelated to the Postal Service's operational needs. Likewise, GFL/USPS-151 concerns possible evidence of the misuse of **[BEGIN PROTECTED MATERIAL]** **[END PROTECTED MATERIAL]** by Netflix with Postal Service approval.

Similarly, GFL/USPS-117 asks about an apparent preference related to **[BEGIN PROTECTED MATERIAL]** **[END PROTECTED MATERIAL]**. And finally, GFL/USPS-129 specifically inquires about manual processing and preferred handling of Netflix mail. As these requests all relate to specific preferences granted Netflix, they are relevant to determining the validity of the Postal Service's defense that any preferences granted Netflix have been justified by the Postal Service's operational needs, rather than multiple manifestations of a pattern of preferences for the same large customer.

C. GFL/USPS-122

The Postal Service claims that these requests call for it to speculate about Netflix's motives for not modifying its DVD mailer. The Postal Service contends not only that it cannot determine Netflix's motives, but that those motives are irrelevant to the question of whether the Postal Service illegally discriminated against GameFly. Objections at 3. Once again, the Postal Service misses the import of these interrogatories.

These requests ask not about Netflix's motives, but about the Postal Service's knowledge and beliefs regarding those motives. They are reasonably calculated to lead to the discovery of admissible evidence. Evidence that Postal Service employees believed Netflix declined to modify its mailer to ensure that it would continue to receive manual processing could lead to admissible evidence regarding the factual bases for that belief, the extent of the preference received by Netflix, the costs that Netflix avoids through manual processing, the costs that the Postal Service incurs in providing manual processing, the Postal Service's asserted operational justifications (if any) for the manual processing, and the difficulties Netflix would face if it did not receive manual processing. These facts would be relevant to the nature and extent of the discrimination, the existence (or absence) of any rational justification for the discrimination, and the appropriate remedies for the Commission to impose if the Commission finds that the discrimination is undue.

The Postal Service also objects to these requests on grounds of undue burden, claiming that "they would require the Postal Service to determine

whether any of its employees in various Headquarters functions ever at one time speculated as to what Netflix's motivations are concerning its decision not to modify its mailpiece." Objections at 3-4. The Postal Service overstates the burden of answering this request. The request asks for the opinions of officials in specified Postal Service functional groups—Operations, Engineering, Pricing, and Finance. The requests do not specify individuals within these groups as GameFly does not know who in these groups would be most knowledgeable about Netflix's decision not to modify its mailpiece design. The Postal Service, however, is in the position to know who worked with Netflix on this issue and who is likely to have an opinion on why Netflix failed to change its mailpiece. There is little burden to the Postal Service in identifying these people and asking if they believe that "one reason for Netflix's failure to modify its mailpiece to improve its processing characteristics is Netflix's desire to discourage the Postal Service from processing a greater percentage of Netflix mailers on automated letter processing equipment." GFL/USPS-122 is a narrowly targeted interrogatory that asks for limited information, and as such does not represent an undue burden to the Postal Service.

CONCLUSION

GameFly discovery requests GFL/USPS- GFL/USPS-84, 85, 99, 100, 109, 117, 122, 151 and 152(d) are reasonably calculated to lead to the discovery of admissible evidence and not unduly burdensome. Consequently, the Postal Service should be compelled to answer the questions.

Respectfully submitted,

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APPENDIX

Requests in Dispute

[END PROTECTED MATERIAL]