

confirmation of the precise date in which they became aware; GFL/USPS-152(d) asks for similar information regarding knowledge by those officials of contacts between Postal Service field personnel and representatives of Netflix. GameFly alleges that this information is necessary for it 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 USC 403(c).”

GameFly Motion at 3.

This is simply not the case. GameFly alleges that that the Postal Service does not have a reasonable basis for according different treatment to GameFly return mail relative to Netflix return mail. Meanwhile, the Postal Service’s position in this proceeding is that field personnel are not required, as a matter of law, to process GameFly return mail in the same manner as Netflix return mail (at the same time, nothing prevents them from according GameFly return mail such treatment if they consider it to be appropriate). The determination as to which party is correct is in no way dependent on the precise date in which individual members of senior management at Headquarters became aware of the processing accorded to Netflix in the field, or the precise date in which they became aware of Netflix contacts with field personnel. It is wholly unnecessary to determine, for examine, exactly when the Vice President of Pricing, or the General Counsel, or the Senior Vice President of Customer Relations, acquired personal knowledge of these matters.

Rather, the Postal Service’s previous response to this line of inquiry, acknowledging that senior management has been aware, as a general matter, of

the manual culling of Netflix return pieces during the time period relevant to this complaint, is more than sufficient for GameFly's preparation of its case, and for the Commission's ultimate disposition of this case. See Response of the United States Postal Service to GFL/USPS-23(c). For instance, such a response precludes the Postal Service from arguing that the field has been acting in a manner unbeknownst to Headquarters. Taking this line of inquiry further, to the extreme level of detail sought in these interrogatories, simply serves no relevant and material purpose.

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

The Postal Service objected to these discovery requests on relevance grounds, due to the fact that they inquire into matters unrelated to the manual processing of Netflix DVD return mailers, consistent with prior Postal Service views regarding the proper scope of discovery in this proceeding. Roughly 30 minutes after the Postal Service filed its objection, the Presiding Officer issued Presiding Officer's Ruling (POR) No. 5, which ruled on a prior Motion to Compel of GameFly. GameFly alleges that this Ruling undercuts the viability of the Postal Service's objections to these discovery requests; specifically, it asserts that the Presiding Officer established that "preferences for Netflix beyond the manual processing of inbound Netflix mailers are permissible subjects of inquiry in this proceeding." GameFly Motion at 3-4.

However, POR No. 5 is not as broad as GameFly claims, and does not authorize unbridled discovery into any instance which GameFly alleges constitutes the granting of an undue preference to Netflix. Rather, the Presiding

Officer took a more nuanced approach, for example by recognizing that inquiries into such matters have to be of “sufficient particularity” in terms of the scope of the request and the timeframe pertaining to the request. See POR No. 5 at 6. The Presiding Officer also recognized that details concerning outbound disc mail are of much more tenuous relevance to this case than information regarding inbound disc mail. See id. at 14-16.

The Postal Service withdraws its objection to GFL/USPS-109 and GFL/USPS-151, with the exception of GFL/USPS-109(e). While the Postal Service will provide an answer to this subpart with respect to those large DVD mailers relevant to this case (Netflix and Blockbuster), and any others whose information is reasonably at hand, it objects to having to expend resources to investigate whether any of the myriad other small DVD mailers (some of whom are no longer in business) were also accorded this payment option. See POR No. 5 at 10, 12 (noting that information requested regarding other DVD mailers should “precisely relate” to the return mail of clearly identified mailers). Such a response will be more than sufficient for purposes of this case.

The Postal Service maintains its objection to the other interrogatories. First, GFL/USPS-99 and 100 ask for details concerning the organization of the Business Mail Acceptance function at Headquarters; GameFly asserts that “one manager in that organization is responsible only for Netflix mail,” and claims that this fact is further evidence of preferential treatment given to Netflix. GameFly Motion at 5-6. However, as the BMA website indicates, that employee is responsible for more than simply Netflix. Furthermore, the fact that the Postal

Service may, on its internal website, direct employees to funnel Business Mail entry inquiries concerning Netflix to a single person is in no way indicative of whether Netflix is being given any sort of actual preference with respect to the entry of its outbound mail. As such, these questions simply lack any material connection to this proceeding.

Second, GFL/USPS-117 is objectionable because it would require the Postal Service to determine the specific circumstances involving the entry of Netflix outbound mail at a single postal facility nearly seven years ago. This level of detail is simply not relevant and material to this proceeding, and, as noted above, nothing in POR No. 5 indicates to the contrary.

Similarly, GFL/USPS-129 requests the Postal Service to investigate the specifics of how Netflix enters outbound mail at a specific postal facility. As with GFL/USPS-117, such extensive details, concerning a timeframe prior to that in GFL/USPS-6, are not materially relevant to this proceeding. In addition, subparts (c) and (d) are objectionable to the extent they relate to outbound mail. See, e.g., POR No. 5 at 14-15. To the extent that they refer to return mail, they seem to be redundant with GFL/USPS-211, for which the Postal Service will provide a response.

GFL/USPS-122(e)-(j)

The Postal Service objected to interrogatories GFL/USPS-122(e)-(j), which ask about the beliefs of Postal Service employees in various functions regarding why Netflix has determined to leave the design of its mailpiece largely unchanged, primarily on the grounds of relevance, in that the speculation called

for in those interrogatories would not provide a material contribution to the record of this proceeding.¹ GameFly alleges that these interrogatories are relevant because they “ask about not about Netflix’s motives, but about the Postal Service’s knowledge and beliefs regarding those motives.” GameFly Motion at 7.

However, this assertion underscores the Postal Service’s objection that these interrogatories ask for information that is inherently speculative, and thus irrelevant and immaterial. See, e.g., POR No. R2006/1-65 at 11 (September 14, 2006) (noting that interrogatories that call for “speculative answers” are not proper under the Commission’s discovery rules); POR No. C2001-3/3 at 14 (November 14, 2001) (noting that “speculation” does not “advance the record”). Seeking to determine what Postal Service employees “believe” to be Netflix’s motivations for keeping its mailpiece design largely unchanged is only potentially relevant if there is some factual foundation underlying those beliefs. Such a foundation does not exist for the simple fact that Postal Service employees are not privy to the inner motivations of Netflix.

GameFly also alleges that such speculation on the part of the Postal Service “could lead to admissible evidence regarding the factual basis for that belief,” as well as further evidence regarding a wide variety of matters concerning the manual processing of Netflix return mail. GameFly Motion at 7. However, GameFly has already asked extensive discovery requests that seek factual

¹ The Postal Service also objected to these interrogatories on the grounds of burden. GameFly has clarified that its request is not directed at all employees in these various functions, but only to those who “would be most knowledgeable about Netflix’s decision not to modify its mailpiece design.” GameFly Motion at 8. With this clarification, the Postal Service no longer maintains its burden objection.

materials regarding the manual culling of Netflix return pieces, for which the Postal Service has produced extensive documentation. As such, the only additional information that these interrogatories would adduce would be speculation on the part of postal employees.

Finally, the clear focus of this question—discerning the reasons why *Netflix* has not modified its mailpiece design—is fundamentally irrelevant to this processing. The question before the Commission is whether the *Postal Service* does, or does not, have a reasonable justification in providing Netflix with manual culling, while not necessarily according the same treatment to GameFly mail, under section 403(c). This question does not turn on what may or may not have motivated Netflix.

Respectfully submitted,

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