

PRESIDING OFFICER'S
RULING NO. C2009-1/10

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
GRANTING, IN PART, GAMEFLY'S MOTION TO COMPEL
RESPONSES TO DISCOVERY REQUESTS
GFL/USPS-84, 85, 99, 100, 109, 151 AND 152(d);
AND 117, 122 AND 129 FILED UNDER SEAL

(Issued November 4, 2009)

I. BACKGROUND

On October 13, 2009, GameFly, Inc. (GameFly) filed a motion seeking a ruling to compel the Postal Service to provide responses to certain discovery requests.¹ The discovery requests were submitted to the Postal Service on September 18, 2009,² and many of the requests in dispute were filed under seal.

On October 20, 2009, the Postal Service filed a partial opposition asserting that the Commission should deny GameFly's Motion to Compel, while withdrawing its objections to GFL/USPS-109 and 151.³ GameFly's Motion to Compel and the Postal Service's Opposition pertain to the Postal Service's objections to discovery requests

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 (Motion to Compel).

² Third Discovery Requests of GameFly, Inc., to the United States Postal Service (GFL/USPS-84-102, September 18, 2009).

³ Partial Opposition of the United States Postal Service to Motion to Compel of GameFly, Inc. (GFL/USPS-84, 85, 99, 100, 109, 117, 122(e)-(j), 129, 151, and 152(d), October 20, 2009 (Opposition).

filed on September 28, 2009.⁴ The Postal Service primarily urges that the motion to compel be denied on grounds of relevance and burden. See Opposition at 1 *et seq.*

The present motion was filed before P.O. Ruling C2009-1/5 was issued.⁵ This ruling will apply the proper standard of discovery identified in that ruling and further refine the scope of legitimate discovery.⁶

II. GAMEFLY'S MOTION AND THE POSTAL SERVICE'S OPPOSITION

GameFly asserts that the Postal Service's objections lack merit. It posits that even if these issues were matters of first impression, there would be no basis for the objections on burden and relevance. Motion to Compel at 2. It asserts, however, that the Postal Service's objections are particularly untenable in light of the two previous rulings on motions to compel. *Id.* It submits that the requests are reasonably calculated to lead to the discovery of admissible evidence, as they seek information "from specific individuals about specific instances of preference given to Netflix." *Id.*

With certain exceptions, GameFly generally asserts that its claims based on undue discrimination and unfair preferences completely justify discovery requests that concern the customized treatment that the Postal Service offers Netflix. GameFly further urges that information about the extent of *other* kinds of preferential treatment received by Netflix may very well shed light on whether the disproportionate degree of manual culling and manual processing given to Netflix reply mailers is required by Postal Service operation needs—or is one instance of a broader pattern of preferential treatment." *Id.* at 4.

⁴ Objections of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-84-85, 92-93, 98-100, 109, 117, 122(e)-(j), 129, 151, 152(d), September 28, 2009 (Objections). This filing was submitted with unredacted portions filed under seal.

⁵ See P.O. Ruling C2009-1/5, September 28, 2009.

⁶ The Commission appreciates that the parties have made some effort to infer the proper scope of discovery from earlier rulings and to narrow the remaining issues in dispute. GameFly withdrew interrogatories GFL/USPS-92-93 following P.O. Ruling C2009-1/5 and P.O. Ruling C2009-1/6, and the Postal Service withdrew its objections to GFL/USPS-98.

The Postal Service maintains that each of the disputed requests is objectionable as a matter of law because they require excessive detail that is of tenuous relevance, and are simply unwarranted due to the unjustifiable burden. It asserts that responses must not be compelled if the information sought is either irrelevant or unduly burdensome to produce.

III. ANALYSIS AS TO SPECIFIC REQUESTS

As specified in the ruling on the initial motion to compel, P.O. Ruling C2009-1/5, the parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, and nature of any documents that concern discoverable matter. Relevant information need not be admissible if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. For the reasons detailed below, the Motion to Compel is granted in part, and denied in part.

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

The requests state, in relevant part, the following:

GFL/USPS-84. Please confirm that the following individuals have personally been aware since at least 2005 that the majority of Netflix inbound mailpieces are culled from the automation mailstream and manually processed. If not confirmed, please provide the date when each first became aware of this.

GFL/USPS-85. Please confirm that the following individuals have personally been aware since at least 2005 that some Areas and Districts had Standard Operating Procedures in place instructing employees to cull Netflix inbound mailpieces from the automation mailstream and manually process them. If not confirmed, please provide the date when each first became aware of this.

GFL/USPS-152. Please refer to [specified documents and language] (d) Please confirm that the following individuals have personally been aware since at least 2005 that Netflix has been actively "lobbying" field personnel to adopt the processes specified [in certain material marked confidential].

These requests inquire into the level of knowledge of certain decision-makers of the Postal Service concerning the manual processing received by Netflix.⁷ The requests are related in other respects also. The parties both refer to the content of earlier discovery responses under GFL/USPS-23 as a point of departure for analysis.⁸

GameFly seeks information to test the Postal Service's allegations that it had no official policy that concerned granting manual processing to Netflix as well as the defenses that "any decision to give custom manual processing to Netflix mail are made at the local level; and that these local decisions are required by operational needs." Motion to Compel at 3. It maintains that it is entitled to explore "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 a level of detail and specificity sufficient" to discern whether the Postal Service's conduct is unreasonably discriminatory. *Id.* GameFly

⁷ The officials are the Postmaster General; the Deputy Postmaster General; the Senior Vice President, Operations; the previous Senior Vice President, Operations; the General Counsel; the Senior Vice President, Customer Relations; the Acting Senior Vice President, Strategy and Transition; the previous Senior Vice President, Strategy and Transition; the Vice President, Pricing; the Acting Vice President, Engineering; and all Vice Presidents, Area Operations.

⁸ GFL/USPS-23. This question refers to the last sentence of the first complete paragraph on page 23 of the Postal Service's Answer filed on May 26, 2009, which states that "Official policy is not to handle such inbound pieces [i.e., letter size DVD mailpieces] manually, although some of it is handled that way as previously explained."

* * *

(c) When did Postal Service headquarters first become aware that, notwithstanding the "official policy," inbound letter-rated DVD mailers continue to be processed manually?

(d) What steps, if any, has the Postal Service taken since then to bring actual operating practices in the field into compliance with the referenced "official policy"?

* * *

The Postal Service responded that "(c) Postal Service Headquarters has been aware since at least 2003 that inbound DVD mailers for Netflix were being processed manually; and (d) [n]o steps have been taken with respect to return DVD mail, because no official policy exists. Headquarters has instead allowed field officials to determine the most efficient method (automated versus manual) for handling these pieces." Responses of the United States Postal Service to Discovery Requests of Gamefly, Inc. (GFL/USPS-1-6, 10, 12-14, 17-20(a)-(c), 22-28, 30, 34-37, 39, 41-44, 48-51(a)-(b), 52-57, 59-62, 64), August 14, 2009, at 24.

contends that the Postal Service's objection as to relevance is misguided. GameFly asserts that its requests are likely to lead to admissible evidence of disparities in treatment of DVD rental companies.

The Postal Service urges that the level of detail sought in these discovery requests requiring the Postal Service to determine if and when individual members of senior management gained personal knowledge of such processing, is simply irrelevant, and adds nothing material to the record. Objections at 1. It asserts that its response to GFL/USPS 23 already amply "precludes the Postal Service from arguing that the field has been acting in a manner unbeknownst to Headquarters." Opposition at 3. Any determination as to a reasonable basis for according different treatment on return mail "is in no way dependant 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." *Id.* at 2.

The present requests seek to verify when the Postmaster General and certain other senior officers of the Postal Service became aware that (a) the majority of Netflix inbound mailpieces are culled from the automation mailstream and manually processed; (b) that some areas and districts had standard operating procedures to cull Netflix inbound DVDs for manual processing; and (c) that Netflix had been lobbying field personnel to facilitate processing in certain ways. There could be a considerable burden in responding, but some likelihood the information sought will lead to admissible evidence.⁹

This ruling will set three rebuttable presumptions to the effect that senior management of the Postal Service was aware that (a) a significant portion of the return

⁹ On the continuum of fairness, the duration of any different treatment may be material. This would weigh in GameFly's favor. Yet, other materials made available in discovery likely provide most of the data required to plainly ascertain or infer how long at least some officers were aware of the circumstances. The Postal Services reconfirms, for instance, that earlier responses acknowledge that "senior management has been aware...of the manual culling of Netflix return pieces during the time period relevant to this complaint...." Opposition at 2-3.

DVD mailpieces of Netflix was culled manually and condoned this conduct; (b) that some of the areas and districts had such standard operating procedures in place and condoned them; and (c) that Netflix has been actively “lobbying” field personnel to an appreciable degree.¹⁰ The force of each of these presumptions may be surmounted by the Postal Service, if it claims that these propositions are unreasonable statements of the situation, and it instead responds to the discovery requests promptly by, among other things, identifying when the specified senior managers became aware of such information.¹¹

With these presumptions established, the requested discovery does not appear reasonably calculated to lead to the discovery of admissible evidence that is not cumulative, such that it warrants the broad burden on the Postal Service’s management.

B. GFL/USPS-99 and 100

GFL/USPS-99. Please confirm the following statements. Explain fully any failure to confirm:

- (a) The Postal Service Intranet (“blue”) website includes a page of contact information for Business Mail Acceptance (“BMA”) managers.
- (b) The listing identifies the subject matter responsibilities of each BMA manager.
- (c) One manager is identified as having responsibility for “Netflix.”
- (d) The manager identified as having responsibility for “Netflix” is Michael Ohora.
- (e) The listings of BMA managers identify no other individual Postal Service customer as the responsibility of any BMA manager.

GFL/USPS-100. Please explain why the Postal Service assigns an individual Business Mail Acceptance (“BMA”) manager to Netflix, but to no other customer of the Postal Service.

¹⁰ Compare Answer of the United States Postal Service, May 26, 2009, at ¶ 37 (Answer); see also Joint Statement of Undisputed and Disputed Facts, July 20, 2009, at ¶¶ 88 and 90. The restricted portion of GFL/USPS 152 is hereby unsealed.

¹¹ The Postal Service is obliged to provide any evidence upon which it may rely to refute a presumption within the next two weeks to avoid the risk of any surprise.

Requests GFL/USPS-99 and 100 ask for information that concerns the business mail acceptance function at headquarters because it allegedly appears that there is a uniquely dedicated manager responsible for Netflix mail.

GameFly maintains that “each [disputed] request relates to a specific preference granted Netflix by the Postal Service.” Motion to Compel at 5. GFL/USPS-99 and 100 concern why one manager “is responsible only for Netflix mail, a privilege that no other customer of the Postal Service appears to enjoy.” *Id.* GameFly asserts that it is entitled to discovery on topics beyond the manual processing of inbound Netflix mail, especially when the information is likely to lead to admissible evidence that pertains to the Postal Service’s professed operational needs justification. *Id.* at 4. Once again, GameFly asserts that its claims based on undue discrimination and unfair preferences completely justify its discovery requests that pertain to the customized treatment that the Postal Service offers Netflix. GameFly likens these requests to GFL/USPS-8 on the communications between the Postal Service and Netflix on postal reply mail.¹²

The Postal Service observes that the Presiding Officer did not permit unbridled exploration into every conceivable preference, but took a more nuanced approach 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. Opposition at 4, *citing* P.O. Ruling C2009-1/5 at 6. It asserts that the business mail acceptance (BMA) website indicates that the employee is responsible for more than simply Netflix. *Id.* It adds that an internal website that “directs 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 to the entry of its outbound mail.” *Id.* It maintains that these questions “simply lack any material connection to this proceeding.” *Id.* at 5.

¹² *Id.* See P.O. Ruling C2009-1/5 at 8-9. GameFly seeks to test if field personnel give disproportionately manual processing to Netflix reply mailers not to cater to a larger customer, but to meet the Postal Service’s own operational needs, since the Postal Service maintains that field officials have discretion to determine the most efficient processing approach. See, e.g., Response GFL/USPS-23(d) and 25 (footnote omitted); see also Answer at ¶ 35.

Under requests GFL/USPS-99 and 100, GameFly reasonably extends the scope of GFL/USPS-8, particularly on issues as to the alleged discrimination for preferential treatment accorded to Netflix.¹³ GameFly has attained some evidence of its point from the website already, but should be permitted to test this alleged difference through discovery. It has sought information on the alleged nexus between the (1) single BMA point-of-contact protocols and either (2) unfair preferential treatment beyond inbound mail or double standards in processing or differentials in breakage rates. Therefore, such discovery appears reasonably calculated to be likely to lead to the discovery of admissible evidence.

C. GFL/USPS-117

This material has been provided under seal in Attachment A to this Ruling.

D. GFL/USPS-122

This material has been provided under seal in Attachment A to this Ruling.

E. GFL/USPS-129

This material has been provided under seal in Attachment A to this Ruling.

¹³ See *also* P.O. Ruling C2009-1/5 at 9.

RULING

The 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), filed September 18, 2009, is granted, in part, and denied, in part, in accordance with the discussion in the body of this ruling.

Dan G. Blair
Presiding Officer