

PRESIDING OFFICER'S
RULING NO. C2009-1/15

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING ON
MOTION OF GAMEFLY, INC. TO SCHEDULE
STATUS CONFERENCE

(Issued January 13, 2010)

I. INTRODUCTION

GameFly, Inc. (GameFly) filed a motion to schedule a status conference and to impose sanctions on the Postal Service for undue delays and deficiencies in discovery.¹ The Postal Service filed a reply requesting that the Commission deny GameFly's Motion and its requests for sanctions and other relief.²

Both parties recount certain parts of the procedural history that have raised impediments to the timely completion of discovery. Although the parties have devoted considerable resources to discovery, thereby enhancing the record, there appears to be no definitive end to discovery on the horizon. The parties also fault one another for causing an effective halt to the progress of this case.

¹ Motion of GameFly, Inc., to Schedule Status Conference, December 14, 2009 (Motion).

² Reply of the United States Postal Service in Opposition to Motion of GameFly, Inc., to Schedule Status Conference, December 22, 2009 (Reply); see *also* Conditional Motion of the United States Postal Service for Late Acceptance of Its Reply in Opposition to Motion of GameFly, Inc., to Schedule Status Conference, December 22, 2009. The latter motion for late acceptance is granted as this one day delay has not prejudiced any party.

As long as the parties are working cooperatively, it is appropriate for a presiding officer to allow the discovery phase of litigation to proceed without intervention. Notwithstanding this practice, a presiding officer has an obligation to ensure that the Commission's processes are not abused and that a prompt and efficient resolution of issues occurs. Because the level of measurable progress has been declining sharply, GameFly suggests sanctions against the Postal Service should be addressed at a status conference to ensure that discovery will soon be completed.

By all accounts, the parties were cooperating together until recently. GameFly is correct that when cooperation breaks down, or when its opponent disobeys the authority of binding discovery rulings, more oversight for compliance may be necessary. The Postal Service, however, also is correct that demands for voluminous discovery, when untempered by any genuine need to concentrate on the facts central to the case, will inevitably cause delays in responding to requests, particularly given the Postal Service's propensity to reasonably allocate its resources between core and peripheral matters of compliance. On balance, the Commission has an overarching interest in moving discovery forward at a more rapid pace to efficiently and fairly conclude the discovery phase of this complaint case.

On January 7, 2010, the Commission issued an order that establishes target dates for applying the criteria for unsealing documents previously made available only to counsel. Order No. 381.³ That Order will permit more informed consultations between GameFly's outside counsel and its executive management to enable GameFly to better clarify its focus on material questions of fact that affect its case-in-chief. At the same time, this ruling directs the Postal Service to clarify the record further as to the nature of any impediments it faces in providing timely completed responses.

While the Postal Service practically concedes that its responses on several cited items have been delayed or deficient in certain respects, GameFly has failed to support its contentions adequately to justify all-encompassing sanctions for every request noted.

³ Order Affirming Presiding Officer's Ruling C2009-1/12, January 7, 2010 (Order No. 381).

This ruling directs the parties to provide information to discovery issues that remain unsettled. Once the parties have met their duties hereunder, a status conference may be more meaningful.

II. THE PARTIES' CONTENTIONS

Citing rules 3001.24 and 3001.25(c), GameFly requests that the Commission "schedule an on-the-record hearing to consider appropriate remedies for the Postal Service's failure to respond fully to numerous GameFly discovery requests, many of which have been outstanding for months." Motion at 1. GameFly supports its Motion with 10 points.

- (1) The Postal Service has been notorious in recent years for its tardiness in responding to discovery in rate and classification cases. *Id.* at 1.
- (2) The response deadlines for nine GameFly discovery requests (11, 148, 149, 155, 156 and 221 through 224) have passed without any answer or objection from the Postal Service. *Id.* at 2.⁴
- (3) Other GameFly discovery requests have received answers from the Postal Service that are, by its own admission, grossly incomplete. *Id.* at 2.
- (4) The Postal Service has repeatedly failed to comply with rulings of the Presiding Officer compelling responses to specific discovery requests over the Postal Service's objections. *Id.* at 3.
- (5) Presiding Officer's Ruling No. C2009-1/5 ordered the Postal Service to answer all or part of GameFly discovery requests 3(e), 16(e) and (g), and 28. Pursuant to rules 3001.26(e) and 3001.27(e), the compelled responses were due within 7 days of the ruling, or by October 5, 2009. *Id.*
- (6) Presiding Officer's Ruling No. C2009-1/10, issued on November 4, 2009, directed the Postal Service to respond to all or parts of GameFly discovery requests GFL/USPS-84, 85, 99, 100, 117, 122(i) and (j) and 129. *Id.* "A month after the deadline for compelled production, the Postal Service has failed to produce any of these compelled answers." *Id.* at 4.

⁴ GameFly elaborates on a score of examples in its Attachment A that specifies alleged outright failures to respond, apart from an array of incomplete answers not identified by number.

- (7) Absent Commission intervention, there is no reason to believe that the outstanding discovery responses will be filed in the foreseeable future. *Id.*
- (8) Before filing this motion, GameFly made several attempts to determine from the Postal Service when it expected to answer the remainder of the outstanding discovery requests, but these requests for clarification have been rebuffed. *Id.* at 5.⁵
- (9) GameFly is not insensitive to the various demands on the resources of the Postal Service, and has refrained until now from making a serious issue of the Postal Service's chronic delays in discovery. *Id.*
- (10) Under the circumstances, it is time for the Commission to intervene to enforce its discovery rules and discovery-related Presiding Officer's rulings in this case. *Id.* at 6.

Citing its opponent's "failure to obey discovery orders" and that "continued delay is seriously prejudicial to the company," GameFly essentially asserts that harsh measures are needed to encourage those charged with funding and allocating personnel to take action to resolve understaffing. *Id.* at 6. GameFly proposes to discuss certain remedies for Postal Service failure to respond in a timely fashion to its discovery requests, including (a) preclusion of Postal Service claims or defenses relating to the delinquent discovery responses pursuant to 39 CFR 3001.25(c); (b) allowing GameFly to file its direct case before the completion of discovery, with the right to supplement that case after GameFly's remaining discovery requests are answered; (c) prescription of temporary rates pursuant to 39 U.S.C. 3662(c); and (d) an award of damages or refunds pursuant to 39 U.S.C. 3662(c) upon the issuance of the Commission's final decision. *Id.* at 6-7.

The Postal Service contends the Motion lacks merit for several reasons, as follows:

⁵ It also claims that "Postal Service counsel have refused to commit to any delivery schedule for most of the outstanding answers." *Id.*

[T]he Postal Service respectfully requests that the Commission deny the Motion because 1) the Postal Service continues work on outstanding matters; 2) GameFly repeatedly misstates and mischaracterizes Postal Service responses and responsiveness, when the vast majority of GameFly's excessive discovery requests have drawn the full responses warranted; 3) a status conference could not alter the pace of diligent work on outstanding matters (other than to slow it down) and would accordingly waste Commission and Postal Service resources; and 4) the remedies outlined by GameFly for discussion lack solid legal foundations.

Reply at 1. It also asserts that it has cooperated in responding to nearly all discovery, and that GameFly has caused difficulties during discovery by reliance on an excessive number of discovery requests and subparts. See *id.* at 2-4. The allegedly undue burden on the Postal Service is described as follows:

GameFly has filed more than hundred interrogatories (including parts and subparts)—almost thirty times the number of interrogatories allowed by the Federal Rules of Civil Procedure. Especially when viewed in the context of the Postal Service's current financial condition, it is unreasonable to demand that the Postal Service perform above the standard recognized by the Federal Rules of Civil Procedure and applied to more robustly staffed private law firms and the Department of Justice.

Id. at 5.

The Postal Service addresses the litany of unmet requests in GameFly's Attachment A with an Appendix of its own. *Id.* at 6, n.6 (countering some of the particularized deficiencies alleged in GameFly's Attachment). The Postal Service submits that it has responded or made extensive progress in responding to the outstanding discovery requests such that a status conference could only cause more delay. *Id.* It explains that discussions among the parties are still continuing on approaches for narrowing requests for email to make responses manageable. *Id.* at 6, n.7. It disputes whether there is any legal basis for the relief requested since, "[s]ection 3662(c) does not address issues related to discovery, or authorize the prescription of

temporary rates or an award of damages or refunds.” *Id.* at 7. It also claims the case authority cited by GameFly is inapplicable as allegations of Postal Service misconduct have not been supported, or shown to be egregious. *Id.* at 8-9.

III. ANALYSIS

The Commission may enforce discovery orders and directives using any reasonable measures consistent with applicable law. See 39 U.S.C. 503 and 3662.⁶ The Postal Service’s rationalization in favor of a stringently limited set of powers and practices to enforce its discovery duties is unsound and at odds with the prevailing statutes. See, e.g., 39 U.S.C. 3664. The Postal Service is also estopped under the law of the case from contradicting its earlier assertion of the Commission’s broad enforcement discretion and authority in discovery. In previous pleadings it successfully

⁶See also 39 U.S.C. 3664 and 504(f). Routine discovery rulings of the presiding officer may be effectively enforced without delegation to the courts. Measures at the Commission’s disposal include evidentiary sanctions, shifting burdens of proof, and other sanctions. Measures must be proportionate to the failure to act in compliance with discovery requirements.

argued that the Commission's broad discretion allowed it to revive privilege claims for three documents.⁷

GameFly claims in its Motion that the Postal Service has engaged in repeated abuses of the discovery process in this case, including its failure to produce timely responses to numerous requests, its delayed compliance with certain rulings compelling responses, and its unwillingness to adequately address electronic document searches using Boolean inquiries.

Accordingly, GameFly seeks a ruling from the Presiding Officer for sanctions, such as ones that preclude the Postal Service from offering any evidence relating to the topics specified in GameFly's unsatisfied discovery requests. Motion at 7. Alternatively, GameFly seeks fines, extended discovery privileges, postage credits, temporary rebates, pre-judgment interests, or other sanctions for the Postal Service's failure to comply with one or more of the rulings that compel answers or production of documents. *Id.*

Both parties have previously cited *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118 (D.D.C. 2005) (*Tri-State*) on the law governing discovery practice and the deliberative process privilege. See Order No. 381, January 7, 2010, at 17. That case also discusses the proper standard for sanctions under Fed. R. Civ. P. rule 37, as follows:

⁷ See P.O. Ruling C-2009-1/8, October 13, 2009. Notably, the Postal Service's previous contentions were based upon assertions that support the Commission's plenary authority to enforce discovery rulings not inconsistent with its rules of practice. It urged that:

[L]ike any agency that provides for administrative discovery procedures in its Rules of Practice, the Commission has broad authority to issue orders interpreting and applying its discovery rules in the manner it views as appropriate. See, e.g., 2 Admin. L. & Prac. § 5.40 (2d ed.) (noting that, "In general, the conduct and extent of discovery is left to the sound discretion of the agency...."). The task for a court, reviewing an agency discovery ruling, is simply to ensure that those rulings comport with an agency's regulations, and with due process. See, e.g., *Port Authority of New York and New Jersey v. Department of Transport.*, 479 F.3d 21, 37 (D.C. Cir. 2007) ("We review agency rulings on discovery with "extreme deference.") (internal citations omitted)

Under rule 37, the court has the authority to award sanctions, but it must always be mindful that any sanctions it awards must be in proportion to the wrongs done. This Circuit has stated:

The central requirement of rule 37 is that “any sanction must be ‘just,’ ” which requires in cases involving severe sanctions that the district court consider whether lesser sanctions would be more appropriate for the particular violation. The choice of sanction should be guided by the ‘concept of proportionality’ between offense and sanction.

Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C.Cir.1996)
(internal citations omitted).

Tri-State at 130-31. This interpretation of the proper standard is applicable in complaint cases before the Commission under 39 U.S.C. 3662. The antecedents for sanctions most commonly arise due to a failure to comply with rulings or orders, and rarely arise from mere modest delays.⁸

Here, there is less of a foundation for treating GameFly’s concerns as to delays in responding to relatively recent discovery requests with the same gravity as the Postal Service’s alleged disobedience to previous binding rulings. Certain requests have been satisfied without explicit answers by acquiescence to presumptions. Potential presumptions raised by earlier rulings may be deemed to have matured into presumptions that are irrebuttable by the Postal Service, particularly on certain specific issues raised under discovery requests GFL/USPS 28, 84, and 85.⁹ See Reply,

⁸ See Fed. R. Civ. P. rule 37(b). On occasion, unjustifiable delays by a party may manifest a pattern of obstructing conduct during discovery which can amount to an abuse of process. The Commission may impose sanctions to discourage a pattern of delay during discovery that appears excessive, egregious, or deliberate. The Commission also may treat as contempt the failure to obey a ruling to provide or permit discovery, particularly when a party declines to seek timely reconsideration with just cause.

⁹ As to request 28, the Postal Service concedes the presumption that some facilities among the Postal Service’s 35,000 post offices have mail slots that have been designated as being solely for Netflix mail. As to requests 84 and 85, it is also now established that (a) the majority of Netflix inbound mailpieces are culled from the automation mailstream and manually processed, and (b) that some areas and districts had standard operating procedures to cull Netflix inbound DVDs for manual processing.

Appendix, at 1 (e.g., for GFL/USPS 84, “[t]he Postal Service chooses not rebut the presumptions described in Presiding Officer’s Ruling No. C2009-1/10.”).

Certain other points raised by GameFly on other discovery requests are not dispensed with so easily. See Reply, Appendix, at 2. However, some of the better reasoned interpretations of rule 37(c) also caution against unduly broad blanket orders to remedy patterns of alleged misconduct for abuse of process.¹⁰

IV. NEXT STEPS

At this juncture, it does not appear that discovery issues are sufficiently well clarified to make oral discussion of potential sanctions at a status conference an appropriate next step. Therefore, both litigants will be asked to provide additional pleadings to supplement the record with further explanations as described below.

By February 8, 2010, the Postal Service shall file a status memorandum on all discovery requests identified by the Motion, including all subparts that it allegedly has not objected to or answered. This submission shall identify each one of such pending discovery requests at issue by number and provide a request-specific explanation that (a) describes succinctly what has been done to date to complete its answer; (b) clarifies what needs to be done to complete its answer; (c) identifies the earliest date by which that could be done; and (d) confirms the date it will commit to have completed its answer or response.

If the Postal Service cannot provide a definitive answer to question (c) for any outstanding request it should explain why it is unable to do so. During this timeframe, the Postal Service should attempt to reduce the number of open discovery requests or subparts by providing responsive answers or negotiating a mutually satisfactory

¹⁰ Assertions of excessive delay are best viewed along with the actual scope, depth, and breadth of GameFly’s discovery to ascertain the unreasonableness of each delay in context. Also, enforcement jurisdiction may be exercised with a modicum of reserve when the series of alleged deficiencies amount to little more than an excusable delay. It also makes little sense to take official notice here of any alleged sandbagging in unrelated proceedings. Yet, for every wrong that is plainly established in the present case, there should be an appropriate prospective remedy. Accordingly, the requested sanctions that are being denied may be reevaluated again on a more complete record soon.

stipulation. See *also* Fed. R. Civ. P. rule 26(e)(1). The Postal Service should make every reasonable effort to provide responsive answers and narrow areas of controversy by February 8, 2010. GameFly notes that neither responses nor objections have been filed concerning GFL/USPS 11, 148, 149, 155, 156, and 221-224. Total silence is hard to justify, and responses or objections to these discovery requests should be an immediate priority.

The Presiding Officer will then review the Postal Service's submission on unsettled points and render a determination on the proper measures in view of any fully explained, potential hardships; or, if needed, schedule a conference limited to addressing any lingering and genuine uncertainties over discovery duties, and potential sanctions for unwarranted failures to provide responses.

To ensure the case proceeds apace, GameFly also shall file a statement on February 8, 2010 that addresses the earliest reasonable time for closing discovery. In this context, the phrase "closing discovery" is intended to denote ending the phase of discovery in this case when requests to the Postal Service on new topics or for new information or materials is permitted. It is not intended to signify the foreclosure of follow up questions to recent or pending answers.

Additionally, GameFly is requested to estimate when it expects to be able to present its direct case, and identify those particular outstanding discovery requests that are most central to its ability to prosecute its claims.

RULING

1. The Motion of GameFly, Inc. to Schedule a Status Conference is taken under advisement. Any additional or alternative relief originally requested is denied without prejudice.
2. The Postal Service is to file a status memorandum by February 8, 2010, as described in the body of this ruling.
3. GameFly is to file a statement by February 8, 2010, explaining when it expects to close discovery, as described in the body of this ruling.

Dan G. Blair
Presiding Officer