

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
REGARDING ORAL CROSS-EXAMINATION
OF GAMEFLY INSTITUTIONAL WITNESSES

(Issued July 20, 2010)

On July 6, 2010, the Postal Service was directed to file a notice of intent to conduct cross-examination of the institutional witness that GameFly was ordered to present at the hearing currently scheduled for July 28, 2010.¹ The Postal Service filed its notice of intent to conduct oral cross-examination on July 12, 2010.² On July 19, 2010, GameFly filed a response to the Postal Service's Notice as permitted by ordering paragraph 3 of P.O. Ruling C2009-1/24.³

Issues presented. GameFly's Response challenges the adequacy of the Postal Service's Notice. Response at 1. Notwithstanding these alleged deficiencies, GameFly states that its institutional witnesses will attempt to answer questions posed by the Postal Service with respect to topics (1) through (4) contained in the Postal Service's

¹ P.O. Ruling C2009-1/24. On July 13, 2010, GameFly identified two institutional witnesses that it intends to present for cross-examination. GameFly, Inc., Notice Concerning Institutional Witnesses and Hearing Dates, July 13, 2010.

² United States Postal Service Notice of Intent to Conduct Oral Cross-Examination, July 12, 2010 (Notice).

³ Response of GameFly, Inc., to Postal Service Notice of Intent to Conduct Oral Cross-Examination, July 19, 2010 (Response).

Notice, but that the Postal Service should not be surprised if its witnesses are unable to anticipate and prepare for every possible line of questioning. *Id.* at 2. GameFly also requests the Presiding Officer to disallow reliance by the Postal Service on topic (5) in the Notice because it is “so broad and content-free as to be meaningless.” *Id.* at 1. Topic (5), in its entirety, covers “[a]ll other topics raised in GameFly’s responses to discovery.” Notice at 4.

Discussion. One of the purposes behind P.O. Ruling C2009-1/24 was to attempt to ensure an orderly presentation of GameFly’s institutional witness that would produce a hearing record that would facilitate a prompt and fair resolution of the issues presented by the parties. GameFly has questioned the adequacy of the Postal Service’s Notice, but, with one exception and one qualification, is prepared to proceed with the presentation of its institutional witnesses. The one exception involves Postal Service cross-examination topic (5). GameFly’s one qualification involves the potential limitation on the ability of GameFly’s institutional witnesses to respond to lines of cross-examination which, because of the alleged “catch-all boilerplate” nature of the Postal Service’s Notice, the witnesses may be unable to anticipate and prepare for.

GameFly is correct that topic (5) is so general as to be meaningless. Topic (5) encompasses topics (1) through (4) and any other conceivable subject matter that might arguably be raised by GameFly’s discovery responses.⁴ An open-ended topic of this nature can hardly be expected to foster an orderly presentation of GameFly’s institutional witnesses. Because this topic is overly broad and ambiguous, the Postal Service will not be allowed to rely on topic (5) when it conducts cross-examination of GameFly’s institutional witnesses.

GameFly’s assertion that the generality of topics (1) through (4) of the Postal Service’s Notice may be so broad as to limit the ability of its witnesses to prepare for cross-examination and be ready to provide detailed responses to all possible questions

⁴ This topic could, for example, be interpreted to include areas that P.O. Ruling C2009-1/24 has already excluded from the July 28, 2010 hearing, such as legal conclusions in the Memorandum of GameFly, Inc., Summarizing Documentary Evidence, April 12, 2010.

appears justified. Nevertheless, the institutional witnesses will be expected to be fully responsive to the Postal Service's questions.

Should the Postal Service have any reservations about the ability of GameFly's institutional witnesses to respond with sufficient detail to the Postal Service's lines of cross-examination, it can ameliorate its concerns by supplementing its Notice. Any such supplementation shall be filed by Friday, July 23, 2010. In deciding whether to file such a supplement, the Postal Service should be aware that the Presiding Officer does not intend to recall either of GameFly's institutional witnesses or to direct that they supplement their answers following the July 28, 2010 hearing in order to provide information that they could not, on the basis of the very general Postal Service Notice, have been expected to anticipate.

Finally, as clearly provided by P.O. Ruling C2009-1/24 at 9, the purpose of the July 28, 2010 hearing is to provide the Postal Service with the opportunity to conduct oral cross-examination "for clarifying written cross-examination and for testing assumptions, conclusions or other opinion evidence" as provided in rules 30(e)(2) and (3) of the rules of practice. Accordingly, the Postal Service must tie its cross-examination to GameFly's discovery responses as provided in P.O. Ruling C2009-1/24.

RULING

1. The Postal Service shall not be permitted to rely upon topic (5) set forth in its July 12, 2010 notice of intent to conduct oral cross-examination during cross-examination of GameFly's institutional witnesses at the hearing scheduled for July 28, 2010.
2. The Postal Service shall be permitted to supplement its notice of intent to conduct oral cross-examination on before July 23, 2010.

Dan G. Blair
Presiding Officer