

PRESIDING OFFICER'S
RULING NO. C2009-1/32

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
ON POSTAL SERVICE'S MOTION FOR
RECONSIDERATION OR CLARIFICATION

(Issued July 27, 2010)

I. INTRODUCTION

Presiding Officer's Ruling C2009-1/31 established procedures to be followed during the July 28, 2010 hearing for cross-examination on GameFly's institutional discovery responses.¹ That ruling announced that the two individuals identified by GameFly to respond to appropriate follow-up questions on the discovery responses, David Hodess and Sander Glick, would sit as a panel. On July 26, 2010, the Postal Service filed a motion for reconsideration of the determination that the two witnesses would be sworn in together and testify as a panel, or for clarifications given an alleged "lack of justification for this unprecedented method of cross-examination and the likely prejudice that would result" from it.²

¹ P.O. Ruling C2009-1/31, issued July 23, 2010.

² Motion of the United States Postal Service for Reconsideration or Clarification of Presiding Officer's Ruling on Procedures for Oral Cross-Examination of GameFly's Institutional Witnesses, July 26, 2010, at 4 (Motion).

II. THE POSTAL SERVICE'S MOTION

The Postal Service's Motion takes exception to the procedure of a "panel" cross-examination in the adjudicative context of a complaint case because it departs from conventional procedures designed to provide customary assurances of the witness' "inability to consult with others before answering." *Id.* at 2. It is this safeguard which serves to promote the "conditions which encourage truthfulness." *Id.* The Postal Service requests that "the Commission impose safeguards to prevent Mr. Hodess from consulting with Mr. Glick before responding to cross-examination" and to prevent serious risks of resulting prejudice. *Id.* at 4. It also requests that GameFly "identify any response to discovery requests for which Mr. Hodess lacks competency or knowledge to face cross-examination...." *Id.*³

III. ANALYSIS

The Postal Service is correct that conducting the hearing by swearing in two witnesses at once is not routine in adjudicative cases. This procedure was chosen to assure that a GameFly witness was available to answer appropriate Postal Service questions. The Postal Service waited until the day of the hearing to receive GameFly's evidence to file its motion to seek to cross-examine an institutional witness. Nonetheless, the Postal Service was provided the opportunity to conduct further oral cross-examination under a set of customized conditions to better permit the Commission to ascertain the truth as to several identified issues.⁴

The Postal Service never identified any specific individual as the witness it sought to examine. It left to GameFly selection of the witness or witnesses who were most knowledgeable on noticed issues.⁵ On July 13, 2010, GameFly identified two

³ Postal Service alternatively seeks "similar treatment for Postal Service witnesses." *Id.*

⁴ See P.O. Ruling C2009-1/24, July 6, 2010, at 12-16.

⁵ See *generally* United States Postal Service Notice of Intent to Conduct Oral Cross-Examination, July 12, 2010 (Notice).

institutional witnesses that it intends to present for cross-examination.⁶ GameFly identified David Hodess, President and CEO of GameFly, and Sander Glick, Vice President of SLS Consulting, as knowledgeable institutional witnesses.

P.O. Ruling C2009-1/31 properly sought to ensure that the record would be developed efficiently during the hearing scheduled on July 28, 2010. It notified the parties and participants that during the hearing certain special procedures would be followed during cross-examination of GameFly's institutional witnesses. Aside from reserving an *in camera* session for the end of the hearing, that ruling stated that:

[I]t is unclear which of the two witnesses will best be able to answer questions on permissible topics, particularly since the Postal Service did not identify the lines of questioning it plans to pursue in any detail. To expeditiously attain answers and reduce the risk of misdirected questions between witnesses, the two GameFly witnesses will sit as a panel, and respond to permissible questions by the Postal Service.

P.O. Ruling C2009-1/31 at 2.

The procedure whereby the two GameFly witnesses are sworn in together reduces the risk of misdirected questions between witnesses and thereby should expedite the hearing process. It will assure that one witness cannot redirect questions to a witness that already has appeared and been excused.⁷ It also expands the options available to the Postal Service for structuring cross-examination in an efficient and constructive manner. For example, the Postal Service could elect to conduct all of its cross-examination of Witness Hodess followed by all of its cross-examination of Witness Glick. Alternatively, it could structure its cross-examination by topic, cross-examining either witness first, followed by cross-examination of the other witness, before moving

⁶ GameFly, Inc., Notice Concerning Institutional Witnesses and Hearing Dates, July 13, 2010.

⁷ In light of the lack of specificity in the Postal Service Notice, it would be impossible to expect the GameFly witnesses to predict the course of cross-examination, and identify in advance what questions, if any, each may be unable to answer.

on to another topic.⁸ A number of permutations and combinations are possible. By directing that the witnesses sit as a panel, efficient cross-examination of the two GameFly witnesses is facilitated under the particular circumstances presented at this stage of this proceeding.

The Postal Service indicates a current desire to direct questions only to witness Hodess. Motion at 4. Nothing in P.O. Ruling C2009-1/31 alters the prerogatives of cross-examining counsel or prevents the Postal Service from following that strategy. Indeed, that ruling clearly states that “[t]he Postal Service may direct its questions to either, or both, witnesses as appropriate, and choose the order in which witnesses are questioned.”⁹

The Postal Service seeks clarification of one additional issue. Once a question is posed to any witness appearing before the Commission, there should be no action or omission by any other witness or any person, including counsel, that is intended or likely to coach the witness or to influence the witness to shade or distort the response rather than provide a complete, unfettered, and truthful answer. That standard continues to apply.

⁸ In that regard, the order of cross-examination by the Postal Service could be varied from topic to topic.

⁹ P.O. Ruling C2009-1/31 at 2.

RULING

The ordered procedures described in P.O. Ruling C2009-1/31 are affirmed for the hearing on July 28, 2010, as clarified in the body of this Ruling.

Dan G. Blair
Presiding Officer