

PUBLIC (REDACTED) VERSION

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF GAMEFLY, INC.)
)
) Docket No. C2009-1

**MOTION OF GAMEFLY, INC.,
TO COMPEL THE POSTAL SERVICE TO ANSWER
GAMEFLY DISCOVERY REQUESTS
GFL/USPS-225 to 233, 235
(September 14, 2010)**

Pursuant to Rule 3001.26(d) and 3001.27(d) of the Commission’s Rules of Practice, GameFly, Inc. (“GameFly”) respectfully moves to compel the United States Postal Service to provide complete and responsive answers to GameFly discovery requests GFL/USPS-225 through 233 and 235. These requests ask the Postal Service to provide updated responses to certain previous GameFly information requests that have become newly relevant in light of the testimony of USPS witnesses Nicholas F. Barranca (USPS-T-1), Larry J. Belair (USPS-T-2), Troy R. Seanor (USPS-T-3), and Robert Lundahl (USPS-T-4). The questions are reproduced in Appendix A, *infra*.

The Postal Service filed a blanket objection to all of the requests on August 26. While conceding that “it has a continuing obligation to produce newly discovered documents responsive to GameFly discovery requests,” the Postal Service nonetheless asserts that that the requests are “duplicative and undue

burdensome” to the extent that they would require the Postal Service to conduct “new and extensive searches of Postal Service documents.” See Appendix B, *infra*.

These objections are without merit. We discuss GFL/USPS-235 in Section I, and the remaining document requests in Section II.

I. THE POSTAL SERVICE SHOULD BE COMPELLED TO PRODUCE THE DOCUMENTS RESPONSIVE TO GFL/USPS-235.

This request seeks updates to the Postal Service’s production of the weekly reports that Netflix provides to the Postal Service. **[BEGIN NETFLIX PROPRIETARY INFORMATION]**

[END NETFLIX PROPRIETARY

INFORMATION]

In response to earlier discovery requests by GameFly, the Postal Service produced the reports for the period ending around June 2009. The testimony of Postal Service witnesses Lundahl, Belair and Seanor, however, has placed more recent Netflix reports directly at issue.

Mr. Lundahl asserts in his testimony (USPS-T-4) that certain changes in DVD design, manufacturing, packaging and handling would enable GameFly to avoid DVD breakage from automated letter processing. His testimony relies entirely on studies and analyses that he and his employer, Advanced Technology and Research Corporation (“ATR”), performed for Netflix. According to Mr. Lundahl, “Netflix has studied DVDs, and their structure and composition, so that it can mail DVDs engineered to minimize risk of breakage or damage on a round trip, or sequence of round trips, through the mail.” USPS-T-4 at 2. *See also id.* at 5 (“Understanding these fatigue related failures led to several recommendations for Netflix to increase the fatigue life of their standard definition DVDs and effectively increase their productive life”). On the theory that Netflix has implemented these mitigation measures and GameFly has not, Mr. Lundahl concludes, “GameFly is not similarly situated to Netflix, and likely also other DVD mailers, with respect to the DVDs its mails,” and “GameFly DVDs face a much greater risk of damage than DVDs mailed by other DVD round trip mailers.” *Id.* at 2.

Mr. Lundahl's testimony raises an obvious question: in the weeks or months since Mr. Lundahl or ATR made these recommendations to Netflix, has Netflix stopped demanding manual processing from the Postal Service? If the techniques touted by Mr. Lundahl for enabling DVDs to withstand the stresses of automated letter processing were as effective as he claims in his testimony, one would expect Netflix to have become far less preoccupied with the amount of automated letter processing that its DVD mailers receive from the Postal Service.

[BEGIN NETFLIX PROPRIETARY]

[END

NETFLIX PROPRIETARY] Mr. Lundahl professes not to know the extent to which Netflix has adopted his recommendations:

ATR was not involved in the actual implementation of any remedial actions. ATR does not know what remedial actions have ever been implemented by Netflix.

Response of USPS witness Lundahl to GFL/USPS-T4-16 (filed August 18, 2010). Hence, the requested documents may fill a gap in the record that would otherwise exist.

The weekly reports are also relevant to the testimony of USPS witnesses Belair and Seanor, who claim that local managers do not factor the potential for DVD damage into processing decisions "for the simple reason that their actions

cannot have much impact upon breakage, which occurs regardless of how DVDs are processed and which is usually not visible from the outside of the mailpiece. Managers' primary focus is on efficient clearance of all available mail in the current processing window." USPS-T-2 (Belair) at 15; see *a/so* USPS-T-3 (Seanor) at 7, 16, 20-21. **[BEGIN NETFLIX PROPRIETARY]**

[END NETFLIX PROPRIETARY]

The Postal Service has not established any legitimate objection to this request on grounds of undue burden. The documents at issue are neither obscure nor poorly defined. **[BEGIN NETFLIX PROPRIETARY INFORMATION]**

[END NETFLIX PROPRIETARY INFORMATION] Moreover, the discovery request is limited in time to those reports received by the Postal Service since the end date of the reports previously produced.

II. THE POSTAL SERVICE SHOULD BE COMPELLED TO ANSWER THE REMAINING DISCOVERY REQUESTS AT ISSUE OR BE ESTOPPED FROM RELYING ON ANY DOCUMENTS OR INFORMATION NOT PRODUCED.

The remaining discovery requests at issue seek updated information on the following questions:

- The extent to which decisions to process Netflix DVDs manually in fact promote the overall efficiency of Postal Service mail processing operations (GFL/USPS-225).
- The extent to which local officials have discretion whether to process Netflix DVD return mailers on automated letter processing equipment or manually (GFL/USPS-226 and 233).
- Directives, guidance, guidelines, handbooks, SOPs and similar documents issued by Area or District Offices concerning when Netflix DVD return mail should be processed manually (GFL/USPS-227 and 228).
- Studies of the causes of DVD breakage and related matters (GFI/USPS-229, 230, 231 and 232).

The testimony of Postal Service witnesses Barranca, Belair and Seanor has given renewed importance to these issues. Each witness devotes a major part of his testimony to the propositions that (1) manual processing results from local decisions, and (2) the main goal of these decisions is the maximization of Postal Service efficiency, not the accommodation of Netflix's wishes. See USPS-

T-1 (Barranca) at 14-16; USPS-T-2 (Belair) at 3-4, 8, 11-12, 13; USPS-T-3 (Seanor) at 2-8, 10.¹

Similarly, all four Postal Service witnesses place directly at issue the issue of the causes and extent of DVD damage. See USPS-T-1 (Barranca) at 11 (“and perhaps even physical differences in the DVDs themselves would support the conclusion that GameFly DVDs might be more susceptible to breakage than movie DVDs rented by Netflix”); USPS-T-2 (Belair) at 13-18; USPS-T-4 (Lundahl). Mr. Lundahl’s testimony in particular focuses on the alleged qualities and differences among DVDs and the measures mailers can take to manage or reduce damage to DVDs during automated or manual processing.

The purpose of requests GFL/USPS-225 to 233 is to make sure that the record contains the most current possible information on these matters, all of which the Postal Service’s witnesses have placed squarely in dispute. Moreover,

¹ For example, Mr. Barranca testifies that “operations practices involving the processing of DVD mail are supported by sound reasons and are well-justified.” According to Mr. Barranca, local decisions are “supported by the logic of each individual set of circumstances, reliance on local data and experience, and judicious coordination at both District and Area levels of administration.” USPS-T-1 at 15-16. Similarly, Mr. Seanor testifies that field managers “do not rely upon analyses by economists or statistical studies,” but rather “rely upon expertise developed over the course of a career that involves endless trial and error or success, followed by exploration of better alternatives or best practices identified by colleagues.” USPA-T-3 at 3. According to Mr. Seanor, “all in operations are constantly making decisions that hone and improve efficiency. These improvements have enabled the Postal Service to take out billions of dollars of costs from its operations.” *Id.* at 5. Mr. Seanor also testifies extensively on the conditions or criteria used by local USPS officials to determine how to process DVD mail. He identifies various factors, including processing equipment, volume, visibility, the physical mail piece characteristics and any requested tracking services, that influence the choice of processing methods. *Id.* at 9.

the Postal Service's claim of undue burden is completely unsupported. The universe of supplemental documents sought by GameFly is narrowly drawn. The requests studies, analyses, directives, SOPs and similar documents issued by or to Headquarters, Area offices, and District offices in the past few months. Given the state of the litigation, it is unlikely that any such documents would have been developed without the participation or awareness of Headquarters.

Accordingly, the Postal Service should be compelled to update the record as requested by GameFly. If the Postal Service fails to do so, it should be barred from claiming that the processing standards and policies (and the studies, analyses and data that ostensibly justify those standards and policies) set forth in Postal Service documents produced earlier in this case have changed since their production to GameFly.

CONCLUSION

For the reasons stated above, GameFly requests that the Presiding Officer order the Postal Service to compel responses to the discovery requests discussed in this motion. In the alternative, the Postal Service should be barred from claiming that its practices, standards, rationales or justifications have changed from those reflected in the documents previously produced.

Respectfully submitted,

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GAMEFLY QUESTIONS

(When the GameFly question in dispute asks the Postal Service to update its answer to a previous GameFly question, we reproduce the earlier question too.)

GFL/USPS-225. Please update the Postal Service's response to GFL/USPS-24(d).

GFL/USPS-24. This question refers to Paragraph 81 of the parties' July 20, 2009, Joint Statement of Undisputed and Disputed Facts. Paragraph 81 contains the following contention by the Postal Service: "[M]ail processing decisions concerning the automated or manual handling of Netflix DVD return mail are made locally based on determinations as to what makes the best sense in the local mail processing environment, and processing decisions to remove Netflix mail from automated operations ensure the overall efficiency of mail processing operations, based on the characteristics of Netflix mail (such as the density of its volume)."

- (d) Has the Postal Service performed any studies, analyses, surveys or other inquiries to determine since January 2007 whether the choices made by local, district or area officials between the "automated" and "manual handling of Netflix DVD return mail" in fact are promoting the "overall efficiency of mail processing operations"? If your answer is anything but an unqualified negative, please produce all documentation of those studies, analyses, surveys and other inquiries, and the results thereby obtained.

* * *

GFL/USPS-226. Please update the Postal Service's response to GFL/USPS-25.

GFL/USPS-25. This question refers to Paragraph 86 of the parties' July 20, 2009, Joint Statement of Undisputed and Disputed Facts. Paragraph 86 contains the following contention by the Postal Service: "Headquarters policy is to allow local officials to determine whether to process Netflix DVD returns on processing equipment or manually."

- (a) Please produce all directives, guidance, guidelines, handbooks, instructions, manuals, notices, rules, SOPs, standards and similar communications issued from Postal Service headquarters officials (or other employees or groups with national authority) to local, district or area officials since January 1, 2007 (or issued before that date but maintained in effect for any period since then) on the degree of discretion possessed by those local, district or area officials in "determin[ing] whether to process Netflix DVD returns on processing equipment or manually."
- (b) Please produce all directives, guidance, guidelines, handbooks, instructions, manuals, notices, rules, SOPs, standards and similar communications issued from Postal Service headquarters officials (or other employees or groups with national authority) to local, district or area officials since January 1, 2007 (or issued before that date but maintained in effect for any period since then) stating the criteria (if any) to be used by those local, district or area officials in "determin[ing] whether to process Netflix DVD returns on processing equipment or manually."
- (c) Please produce all studies, reports or analyses issued by Postal Service headquarters officials (or other employees or groups with national authority) since January 1, 2007, concerning the extent to which local, district or area officials are in fact free to "determine whether to process Netflix DVD returns on processing equipment or manually."

GFL/USPS-227. Please update the Postal Service's response to GFL/USPS-26.

GFL/USPS-26. Please produce all directives, guidance, guidelines, handbooks, instructions, manuals, notices, rules, SOPs, standards and similar communications issued by Postal Service **Area** offices to District, local or other subordinate employees since January 1, 2007 (or issued before that date but maintained in effect for any period since then), concerning:

- (a) Whether (and under what criteria) Netflix DVD return mail should be processed on automated processing equipment vs. manually.
- (b) Whether (and under what criteria) Netflix DVD return mail should be culled or otherwise diverted from the automated mail stream.
- (c) Whether (and under what criteria) the DVD return mail of other DVD rental companies should be processed on automated processing equipment vs. manually.
- (d) Whether (and under what criteria) the DVD return mail of other DVD rental companies should be culled or otherwise diverted from the automated mail stream.

GFL/USPS-228. Please update the Postal Service's response to GFL/USPS-27.

GFL/USPS-27. Please produce all directives, guidance, guidelines, handbooks, instructions, manuals, notices, rules, SOPs, standards and similar documents issued by Postal Service *District* offices to local or other subordinate employees since January 1, 2007 (or issued before that date but maintained in effect for any period since then), concerning:

- (a) Whether (and under what criteria) Netflix DVD return mailers should be processed on automated processing equipment vs. manually.
- (b) Whether (and under what criteria) Netflix DVD return mailers should be culled or otherwise diverted from the automated mail stream.
- (c) Whether (and under what criteria) the DVD return mailers of other DVD rental companies should be processed on automated processing equipment vs. manually.
- (d) Whether (and under what criteria) the DVD return mailers of other DVD rental companies should be culled or otherwise diverted from the automated mail stream.

GFL/USPS-229. Please update the Postal Service's response to GFL/USPS-41.

GFL/USPS-41. Please produce all studies, analyses, reports, internal reviews, memoranda, and similar documents created since January 1, 2005, by the Postal Service, any subordinate department or division of the Postal Service with national responsibilities (e.g., engineering, operations, marketing, pricing, Postal Inspection Service or Office of Inspector General), or any contractor or consultant to the Postal Service, relating to any of the following subjects:

- (a) DVD breakage.
- (b) The cause(s) of DVD breakage.
- (c) The actual rate of DVD breakage (for Netflix, any other DVD rental company, any group of DVD rental companies, or the DVD rental industry generally).
- (d) Trends in DVD breakage rates over time.
- (e) Possible methods of reducing or eliminating DVD breakage.

GFL/USPS-230. Please update the Postal Service's response to GFL/USPS-43.

GFL/USPS-43. This question concerns the last sentence of paragraph 16 of the Postal Service's Answer filed on May 26, 2009. In that paragraph, the Postal Service denied that "postal acceptance, processing and/or delivery is the proximate cause of all, a majority of, or a significant portion of overall DVD damage." Paragraph 16 of the Postal Service's Answer also suggested that DVD damage is (or may be) caused by other factors such as the brittleness or rigidity of the DVD, the design of the "mailing envelopes and/or insufficiently protective inserts; the degree of care (or lack thereof) exercised by Complainant's customers in handling or using DVDs obtained via the mail; or by Complainant's employees processing DVDs, preparing outgoing mailpieces or opening return mailpieces." Please produce all data, studies and analyses created since January 1, 2005, concerning:

- (a) The relative significance of each factor listed in paragraph 16 of the Postal Service's Answer as a cause of damage to DVDs.
- (b) The relative "brittleness" of GameFly's DVDs versus the DVDs of Netflix, Blockbuster and other DVD rental companies that are customers of the Postal Service.
- (c) The relative "rigidity" of GameFly's DVDs versus the DVDs of Netflix, Blockbuster and other DVD rental companies that are customers of the Postal Service.
- (d) The degree of protection afforded by GameFly's mailing envelopes and protective inserts versus the envelopes and inserts used by Netflix, Blockbuster and other DVD rental companies that are customers of the Postal Service.
- (e) The degree of care (or lack thereof) exercised by GameFly's customers in handling or using DVDs obtained via the mail, versus the degree of care exercised by the customers of Netflix, Blockbuster and other DVD rental companies that are customers of the Postal Service.
- (f) The degree of care (or lack thereof) exercised by GameFly's employees in processing DVDs, preparing outgoing mailpieces or opening return mailpieces, versus the degree of care exercised by the employees of Netflix, Blockbuster and other DVD rental companies that are customers of the Postal Service.

GFL/USPS-231. Please update the Postal Service's response to GFL/USPS-44.

GFL/USPS-44. This question concerns paragraph 32 of the parties' July 20, 2009, Joint Statement of Undisputed and Disputed Facts. In paragraph 32, the Postal Service contends that "some amount of the DVD breakage experienced by GameFly is due to mishandling by GameFly employees."

- (a) Please produce all data, studies and analyses that support this contention.
- (b) Please produce all other data, studies and analyses concerning the significance of the mishandling of DVDs by the employees of any DVD rental company as a cause of DVD breakage.
- (c) Please produce all other data, studies and analyses concerning the significance of the mishandling of DVDs by the employees of the DVD rental industry generally as a cause of DVD breakage.

(This question seeks responsive information created since January 1, 2005.)

GFL/USPS-232. Please update the Postal Service's response to GFL/USPS-50.

GFL/USPS-50. Please produce all data, studies or analyses created since January 1, 2005, concerning the effect on DVD breakage rates from bypassing the automated letter processing of DVD return mailers by the Postal Service.

GFL/USPS-233. Please update the Postal Service's response to GFL/USPS-68(b).

GFL/USPS-68. Please refer to Paragraph 81 of the parties' July 20, 2009, Joint Statement of Undisputed and Disputed Facts. Paragraph 81 contains the following contention by the Postal Service:

[M]ail processing decisions concerning the automated or manual handling of Netflix DVD return mail are made locally based on determinations as to what makes the best sense in the local mail processing environment, and processing decisions to remove Netflix mail from automated operations ensure the overall efficiency of mail processing operations, based on the characteristics of Netflix mail (such as the density of its volume).

Please refer further to R2006-1, USPS-T-42 (March McCrery, then Manager, Operational Requirements) at 3, which states:

Letter processing operations are geared towards barcoding and/or sorting as much letter volume through automated operations as possible, with the ultimate goal of processing letters into Delivery Point Sequence (DPS), or, to a lesser extent, to the carrier route level.

(b) Please provide all Headquarters, Area, and District policies on when machinable letter volumes should be handled manually or on automation.

GFL/USPS-235. This request relates to the weekly reports Netflix provides to the USPS (see, e.g., GFL71761, 71929). Please update the Postal Service's production of such reports.

POSTAL SERVICE OBJECTIONS

The Postal Service filed a single blanket set of objections to all of the questions:

The Postal Service objects to the above discovery requests because they are duplicative and unduly burdensome. To the extent that these requests instruct the Postal Service to conduct new and extensive searches of Postal Service documents, they impose an undue burden. In responding to GameFly's earlier document requests, the Postal Service undertook a thorough search of its documents that took several months and produced tens of thousands of responsive documents. There is no reason to believe that additional responsive information exists. These discovery requests address the same subjects as earlier discovery requests, and for subjects not related to Postal Service witness testimony, discovery is closed and has not been reopened. However, the Postal Service recognizes that it has a continuing obligation to produce newly discovered documents responsive to GameFly discovery requests, and the Postal Service will produce additional responsive documents as they are discovered.