

PRESIDING OFFICER'S
RULING NO. C2009-1/40

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, AND DENYING, IN PART,
GAMEFLY'S MOTION TO COMPEL

(Issued October 1, 2010)

I. INTRODUCTION

On September 14, 2010, GameFly, Inc. (GameFly) filed a motion to compel responses to GFL/USPS-225 to 233, and 235.¹ GameFly contends that these updated responses are more important now due to the recently filed testimony of Postal Service witnesses.² *Id.* at 1. The Postal Service opposes GameFly's Motion.³

¹ Motion of GameFly, Inc., to Compel the Postal Service to Answer GameFly Discovery Requests (GFL/USPS-225 to 233, 235), September 14, 2010 (Motion). See also Motion of GameFly, Inc., for Leave to File Motion to Compel Out of Time, September 14, 2010 (Motion for Leave).

² The Postal Service's direct testimony was originally filed under seal on July 7, 2010. See P.O. Ruling No. C2009-1/27, July 16, 2010. Direct Testimony of Witness Nicholas F. Barranca (USPS-T-1); Direct Testimony of Witness Larry J. Belair (USPS-T-2); Direct Testimony of Witness Troy R. Seanor (USPS-T-3); and Direct Testimony of Robert Lundahl (USPS-T-4). It was not until July 29, 2010 that the Postal Service's direct testimony was made available to GameFly representatives who had participated in the Postal Service's cross-examination of GameFly's institutional witness. *Id.* On August 6, 2010, the Postal Service filed a revised version of witness Belair's testimony.

³ Response of the United States Postal Service to Motion of GameFly, Inc., to Compel the Postal Service to Answer GameFly Discovery Requests GFL/USPS-225 to 233, 235, September 21, 2010 (Response).

II. GAMEFLY'S MOTION

The discovery requests at issue were served on the Postal Service on August 16, 2010. Those requests sought supplementation of a series of earlier Postal Service discovery responses.⁴ Following the receipt of the Postal Service's objections on August 26, 2010,⁵ GameFly, on September 14, 2010, moved to compel answers to its requests arguing that the requests "have become newly relevant in light of the testimony of USPS witnesses...." *Id.* at 1. GameFly submits that the objections lack merit and that in presenting its objections, the Postal Service has conceded its continuing duty to produce newly discovered documents. *Id.* at 1-2.

III. THE POSTAL SERVICE'S RESPONSE

In opposing GameFly's motion, the Postal Service has incorporated its earlier objections, and has asserted that GameFly filed the discovery requests long after the close of discovery.⁶ Response at 1. The Postal Service also submits that GameFly's presumption that "it has unbounded freedom to conduct limitless discovery" is erroneous. It explains that its rebuttal testimony merely "reemphasizes what has been the foundation" of the Postal Service's defense from the beginning. *Id.* at 2. It also denies that the testimony contains any surprising points. In its objections, it asserts that "[t]hese discovery requests address the same subjects as earlier discovery requests, and for subjects not related to Postal Service witness testimony, discovery is closed and

⁴ Twelfth Discovery Requests of GameFly, Inc., to the United States Postal Service (GFL/USPS-225-235), August 16, 2010 (GameFly's Twelfth Request). Included were 11 separate requests beginning with GFL/USPS-225 and ending with GFL/USPS-335. The August 16, 2010 requests and the earlier discovery responses to which they relate are as follows: GFL/USPS-225 (GFL/USPS-24(d)); GFL/USPS-226 (GFL/USPS-25); GFL/USPS-227 (GFL/USPS-26); GFL/USPS-228 (GFL/USPS-27); GFL/USPS-229 (GFL/USPS-41); GFL/USPS-230 (GFL/USPS-43); GFL/USPS-231 (GFL/USPS-44); GFL/USPS-232 (GFL/USPS-50); GFL/USPS-233 (GFL/USPS-68(b)); GFL/USPS-234 (GFL/USPS-164(c)); and GFL/USPS-235 (weekly Netflix reports, *see, e.g.*, GFL71761, GFL71929).

⁵ Objections of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-225-235), August 26, 2010. (Objections).

⁶ The discovery responses that GameFly seeks to have supplemented were provided during a pre-trial discovery period that ended on October 5, 2009. *See infra.*

has not been reopened.” Thus, it adds, GameFly has had ample opportunities...to conduct discovery....” *Id.*

IV. ANALYSIS

Under the Commission’s rules of practice, the Postal Service has an obligation to supplement discovery responses. See rule 26(f). GameFly also has the right to follow-up discovery related to the Postal Service’s written rebuttal testimony.⁷ Yet, there is no basis for endless redundant discovery. This ruling examines whether certain supplementation requests presented in the context of follow-up discovery are justified.

A. Background

The closing date for pre-hearing discovery was October 5, 2009. See P.O. Ruling C2009-1/11 at 10. GameFly accepted that date long ago. Status Statement of GameFly, Inc., February 9, 2010, at 2. Some follow-up discovery was permitted because the Postal Service was unable to complete many of its discovery answers and productions before 2009 ended. See P.O. Ruling C2009-1/15 at 10.

GameFly also is entitled to conduct further discovery on the rebuttal testimony filed. GameFly’s discovery on witness testimony, however, was scheduled to close on August 16, 2010.⁸ This closing date was still two weeks before the original date for rebuttal hearings were to begin, and it did not necessarily foreclose follow-up requests on that testimony or motions to compel supplementation.⁹

⁷ See P.O. Ruling No. C2009-1/27, July 16, 2010.

⁸ GameFly’s discovery interval for witness testimony was fairly short. The Postal Service filed the testimony of four witnesses by July 8, 2010, but it was not unsealed for GameFly’s lead counsel to review before July 28, 2010.

⁹ Compare P.O. Ruling C2009-1/15 at 10 (“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.”). But this approach, even if applied here, would not generally require recurring searches nationwide for each request.

GameFly's Motion seeks to compel the Postal Service to produce essentially three kinds of information: (a) any responsive documents not previously produced which may reduce risks of inaccurate findings from the initial responses; (b) any responsive documents that should have been included in the initial production, but were overlooked; and (c) any responsive documents to renewed requests that now come within the scope of the original requests in view of the rebuttal testimony, including ones which the Postal Service either generated or could become aware of by renewed search.

The Postal Service acknowledges that it has a limited duty to supplement answers, but maintains that this extends only to "providing updated information when new facts within the scope of an original discovery request come to light undermining the accuracy of an earlier answer." Response at 2-3. It posits that "[i]n this context of a request to produce documents, all this means is that, if documents within the scope of an earlier request for production come to light because they were overlooked or were lost through...error, updating responses by providing the missing documents would be in order." *Id.* at 3.

1. The Postal Service's Objection on Grounds of Timeliness

The Postal Service contends that the requests at issue were untimely. The Postal Service does not dispute that the present motion could have been timely if filed within the rules by September 9, 2010. Nor does it dispute whether the additional 5-day delay in filing the Motion was excessive (given opposing counsel's illness).¹⁰ Instead, it

¹⁰ As a preliminary matter, GameFly's related Motion for Leave reflects that "[t]he late filing is due to the illness of one of GameFly's attorneys and the extended absence of several other attorneys." Motion for Leave at 1.

argues that GameFly filed its requests “well-after the close of discovery” by which is meant October 5, 2009.¹¹

Because the close of discovery on rebuttal testimony was on August 16, 2010 and the contested discovery requests were filed on that date, the requests do not appear to be late.

2. The Legal Standard for Supplementation

The parties take drastically different positions on discovery rights and obligations under the Commission’s rules of practice. GameFly interprets the Postal Service’s obligation to supplement prior discovery responses broadly. If accepted, this interpretation could require the Postal Service to conduct entirely new and extensive information searches at the Area, District, and National levels. By contrast, the Postal Service seems to view its supplementation obligation to be limited to the production of “new facts” or previously “overlooked” or “lost” documents “within the scope of an original discovery request” that “undermine[] the accuracy of an earlier answer.” Response at 2-3.

In reviewing this matter, the Presiding Officer has, as is customary in Commission proceedings, sought guidance from the Federal Rules of Civil Procedure.

Under Fed. R. Civ. P. rule 26(e), the rule for “supplementation of disclosures and responses,” parties ordinarily have a duty to supplement their discovery responses, absent any objections of merit. Unless otherwise ordered:

A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:

¹¹ Response at 1. Its original objection also posits that “[t]hese discovery requests discuss the same subjects as earlier requests and for subjects not related to Postal Service witness testimony.” See Objections at 2-3.

- (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
- (B) as ordered by the court.

Fed. R. Civ. P. rule 26(e)(1).

The basic obligation to supplement is limited to those situations in which a party “learns” that “in some material respect” its prior disclosure or response “is incomplete or incorrect” and has not “otherwise been made known to the other parties.” As formulated, the supplementation obligation does not ordinarily require a responding party to conduct new and extensive searches for information that arguably fall within an earlier discovery request. By the same token, the responding party cannot withhold relevant information within the scope of an earlier request simply because it does not demonstrate the earlier response to be incorrect. In other words, new material information that comes to the attention of a responding party must be produced when necessary to ensure the production to the opposing party of “complete” information. This general supplementation obligation can, of course, be superseded by specific orders directing more or less supplementation.

This rule of supplementation imposes a continuing duty on the responding party, as well as on its counsel. Notably, counsel ordinarily is obliged to exercise due diligence to ensure that the materials already produced are still reasonably complete to the extent of the party’s current knowledge. Counsel must update production as to any incomplete or incorrect information, unless otherwise ordered.

B. Application to the Current Controversy

1. GFL/USPS-225-227, and 230-233

In light of the foregoing principles, several of the requests covered by GameFly's Motion appear to have some merit. See GFL/USPS-225- 227, and 230-233. These requests seek updated information on the efficiency of operations in processing Netflix return DVD mailers, reliance upon local officials to process Netflix DVD returns on processing equipment or manually, the policies issued by each Area office, supervening causes of DVD breakage, GameFly's alleged contributing causes to breakages, breakage studies associated with bypass of automated processing, and all policies on when machinable letter volume should be handled manually or on automation.

GameFly contends that certain recourse is justified, since Netflix's treatment by the Postal Service is one of the principal points of GameFly's claim of unfair discrimination. See, e.g., P.O. Ruling C2009-1/12 at 23-26. In its Motion, GameFly submits that the testimony of Postal Service witnesses Barranca, Belair, and Seanor "[h]as given renewed importance" to other issues, which remain at the focal point of several follow-up discovery requests. See Motion at 6, citing GFL/USPS-225 to 233. That contention is supported by numerous passages of the recently filed rebuttal testimony that expressly address the discretion of local officials to process Netflix DVD return mailers outside the automated letter processing equipment, and the ways that, in the Postal Service's view, manual processing of Netflix allegedly improves overall efficiency to some degree.

At the same time, however, GameFly's demand for reactivation of wide searches for supplementation of earlier responses that are over a year old is not sufficiently supported to meaningfully advance the proper outcome with any greater accuracy or precision than it did several months ago.¹² Such wide ranging relief would likely entail excessive costs for limited benefit and threaten to delay the proceeding for several more months.

The Postal Service also argues that the GameFly Motion mischaracterizes Postal Service processing standards and policies, as well as the testimony of the Postal Service's witnesses. Response at 5. The Postal Service views the scope of the evidence too narrowly.¹³ Documents produced in the ordinary course of business tend to be admissible. GameFly is not obliged to fully link each implicated practice to its own sponsored witnesses' testimony to develop probative evidence. The Postal Service also neglects the evidentiary weight of its own discovery answers and concedes that the requests are not irrelevant.

The Postal Service's responsibility to comply with ordinary supplementation duties require it to perform supplementation not only to correct inaccuracies, but to cure any incomplete earlier responses. See *also* Fed. R. Civ. P. rule 26(g). In sum, the

¹² These points include, for instance (a) decisions to process DVDs manually promote efficiency, (b) local officials properly exercise discretion on when to cull DVDs manually, (c) instructions issued by Area that explain when Netflix DVD return mail should be processed manually, and (d) the causes of breakage are not limited to Postal Service malfeasance. See, *e.g.*, Motion at 6-7 and n.1.

¹³ The Postal Service submits that witness testimony is "the only evidence in the record stating Postal Service processing standards and policies." *Id.* at 5. Even if there were some basis to exclude the documents of record as the Postal Service professes for want of authenticity, a proposition which has repeatedly been denied under the law of the case, the written designations of discovery answers which often refer to the documents further belie the veracity of the Postal Service's argument as to the "only" evidence. Compare Response at 6, n.9 and Tr. 4/156 ("I am prepared to rule that we will allow them into evidence at this time..." [under seal]); see *also* Tr. 3/73-75. As the objections relating to authenticity do not withstand closer scrutiny, the documents may be presumed to speak for themselves.

Postal Service must confirm that any material and responsive information, of which it is aware, is not being withheld.¹⁴

In view of this ruling, GameFly's alternative request to preclude Postal Service testimony is denied as unnecessary.

2. GFL/USPS 228 and 229

Requests 228 and 229 concern instructions for DVD mail processing and breakage from processing. Request 228 specifically seeks all directives, standards, and instructions, or similar documents, on the treatment and processing of DVD return mailers of Netflix and other DVD mailers issued after 2006 by District offices to local employees.¹⁵ This request dates back to July, 2009 and appears as broad as it did before testimony was filed.

Request 229 basically pertains to documents generated after 2004 concerning DVD breakage or its reduction.¹⁶ Both of these topics are central to key issues in this case, and are addressed in Postal Service rebuttal. In these instances, the Postal Service is obliged to confirm its responses are complete and correct to the best of its knowledge, including further responsive information or documents not yet provided which the Postal Service became aware of up until the filing of its rebuttal testimony. These especially include documents that concern breakage of, or relating to the operations of processing, culling, sorting, or transportation of DVDs.

¹⁴ Notwithstanding any determination herein otherwise, and for all requests at issue under this ruling, the Postal Service remains obliged at this time to immediately supplement its production with regard to all non-privileged materials *upon which it relies* in this case, which are responsive to a request but were not yet provided to opposing counsel for GameFly. *Compare* Fed. R. Civ. P. rule 26 at subparts (a) and (e). All responsive documents relied upon by witnesses must be produced as well.

¹⁵ Motion, Appendix A at A-4, quoting GFL/USPS-228.

¹⁶ *Id.*, Appendix A at A-5, quoting GFL/USPS-229.

3. GFL/USPS-235

Request 235 seeks the allegedly omitted weekly reports Netflix provides to the Postal Service concerning disc breakage by geographic areas. It asks the Postal Service to update its production of such specific reports for a precise and limited interval, insofar as such reports were generated. The Postal Service has questioned whether the mailings of Netflix and GameFly are dissimilar, in part due to the allegedly lower risk of breakage for Netflix.¹⁷ The discovery request seems to be directed to explore the actual effects, if any, of certain additions, repairs, or reconfigurations that the Postal Service may have implemented to further reduce the risk of breakage in the recent past.

The duty to supplement exists when the initially produced information is routinely updated. The Postal Service urges that additional reports are unjustified since these would be duplicative and unduly burdensome. The Postal Service's objections as to these later dated reports and documents have not been well-supported with any quantitative assessments of costs and man-hours that may be required to substantiate claims of undue burden or duplication. Neither these objections, nor any other objections or privilege claims, appear to be sustainable for this request. The Postal Service's objections to GFL/USPS-235 are overruled.

The Postal Service is required to promptly satisfy its continuing obligation to produce its available responsive reports and documents, as soon as practicable, but in all events within 7 days and to provide adequate assurances that it has complied with its supplementation duties, as clarified under this ruling.

¹⁷ See Direct Testimony of Robert Lundahl on Behalf of the United States Postal Service (USPS-T-4), July 29, 2010.

RULING

1. The Motion of GameFly, Inc., for Leave to File Motion to Compel Out of Time, filed September 14, 2010, is granted.

2. GameFly, Inc's Motion to Compel is granted in part, and denied in part, in accordance with the body of this Ruling. The alternative relief that GameFly sought for limiting the contentions on certain issues, or otherwise excluding witness testimony, is denied.

Dan G. Blair
Presiding Officer