

PRESIDING OFFICER'S
RULING NO. C2009-1/46

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING DENYING MOTION TO STRIKE,
RESOLVING REMAINING MOTIONS, AND CLOSING THE RECORD

(Issued November 8, 2010)

I. INTRODUCTION

The Postal Service moves to strike the rebuttal testimony of GameFly, Inc. (GameFly) witness Sander Glick.¹ GameFly filed its answer opposing the Motion in a timely manner on November 3, 2010.²

The Postal Service argues that witness Glick's rebuttal testimony consists largely of conjecture based on inadmissible documents fraught with hearsay and quotes from Postal Service witnesses during cross-examination, and witness Glick's comments and analysis on the material contained therein. GameFly, the Postal Service explains, "has tended to parry [objections as to authenticity and reliability] with a bare citation to the hearsay exception for business records in Federal Rule of Evidence 803(6), while neglecting to mention that this rule requires GameFly to submit sponsoring testimony or a written certification that the records are authentic." Motion at 2, citing Fed. R. Evid. 901(a), 902(11).

¹ Motion of the United States Postal Service to Strike the Rebuttal Testimony of Sander Glick for GameFly, Inc., November 1, 2010 (Motion).

² Answer of GameFly, Inc. in Opposition to Motion of USPS to Strike Rebuttal Testimony of Sander Glick (GFL-RT-1), November 3, 2010 (GameFly Answer).

The Postal Service “renew[s] its objections to admissibility, and arguments as to the lack of probative value, of any and all records,...which GameFly offers for the truth of the assertions therein” as lacking in a proper foundation. *Id.* at 3. The Motion contends GameFly improperly attempts to shift its burden by seeking “determinations made out of expedient inferences.” *Id.* Witness Glick’s statements are “not supported by any personal knowledge, observation or expertise.” *Id.*³ It contends witness Glick presents no new facts or expert opinion and characterizes the rebuttal as legal argument, not testimony. *Id.* at 3-4.

GameFly opposes the Motion. It argues that the Motion is the Postal Service’s eighth attempt to exclude certain documents from the evidentiary record. GameFly Answer at 1. It submits that (1) the Motion is untimely; (2) the law of the case as to admitting unsponsored Postal Service documents is correct; and (3) expert witnesses can rely on facts or data not derived from personal knowledge. *Id.* at 3, 7, 10. It cites Federal Rule of Evidence 703 to buttress its contention that there is “no requirement that the expert have personal knowledge of these underlying facts.” (Emphasis deleted.) *Id.* at 11. It argues that the Postal Service’s remaining objections are frivolous, suggesting the reference to obtaining advice from counsel by witness Glick was intended to avoid giving the impression that he was providing a legal opinion. *Id.* at 14. GameFly notes Postal Service witnesses also have used terms in their testimony that have specialized legal meanings. The Commission has the ability to distinguish witnesses who are not qualified to offer legal opinions.

³ See also *id.* at 3-4. (“Glick has no personal knowledge”, the Postal Service urges, of any special processing at non-machinable rates for Netflix, but not GameFly.) It adds, Glick has no basis to testify as to whether conditioning DVDs might reduce breakage beyond unacceptably high levels. *Id.* at 4.

II. ANALYSIS

The Motion is denied.

Rule 31 of the Commission's Rules of Practice and Procedure provides that "relevant and material evidence which is not unduly repetitious or cumulative shall be admissible." 39 CFR 3001.31(a).

GameFly exercised its option to file surrebuttal testimony. It properly appears to be intended to rebut claims made by Postal Service witnesses during either direct examination or upon cross-examination regarding the nature of the service provided, including Postal Service operations, classifications, rates, and costs. It addresses disputed facts at issue in this proceeding.

Apart from any issue concerning the merits of witness Glick's rebuttal testimony, it appears to respond to specific testimony offered by one or more of the Postal Service's witnesses. The Postal Service largely neglects that the opinion testimony of experts is not subject to the constraint that testimony be based on personal knowledge. See Fed. R. Evid. 602, 703. It also improperly presumes prejudice is likely to arise from legal argument in an administrative complaint proceeding even though testimony on factual issues may be readily distinguished from conclusions of law.

A motion to strike testimony asks for extraordinary relief. The Motion fails to provide authoritative legal analysis that requires that the requested relief be granted. The pending motions for late acceptance of filings are granted. All other pending motions are denied.

The evidentiary record in this case is closed.

RULING

1. The Motion of the United States Postal Service to Strike the Rebuttal Testimony of Sander Glick for GameFly, Inc., filed November 1, 2010, is denied.
2. All motions for late acceptance filed prior to November 5, 2010, which were not previously granted, are hereby granted. The Motion and Application of the United States Postal Service for Non-Public Treatment of Materials, filed August 31, 2010, is also granted. Any other unresolved motions on the record as of this date are denied.
3. The record in Docket No. C2009-1 is closed.

Dan G. Blair
Presiding Officer