

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-00844-WYD-SKC

BRANDON FRESQUEZ,

Plaintiff,

v.

BNSF RAILWAY CO.,

Defendant

ORDER DENYING MOTION TO COMPEL AND FOR SANCTIONS [ECF #63]

S. Kato Crews, United States Magistrate Judge

This matter is before the Court on Plaintiff Brandon Fresquez's ("Fresquez") Motion to Compel and for Sanctions ("Motion") [ECF #63]. Senior District Court Judge Wiley Y. Daniel referred the Motion to this Court. [ECF #4, #64, #76.] The Court has reviewed the Motion, Defendant's Response to Plaintiff's Motion to Compel and for Sanctions [ECF #68], and Plaintiff's Reply in Support of His Motion to Compel and for Sanctions [ECF #72]. The Court has determined that oral argument will not materially assist in resolving the Motion. The Court has considered the Parties' filings, other filings in the docket, the extensive exhibits submitted by the Parties, the transcript of the December 13, 2017 discovery conference with Magistrate Judge Carmen, and is sufficiently advised of the premises. For the reasons set forth below, the Court DENIES the Motion.

A. Background

Defendant BNSF Railway Company ("BNSF") operates a system of railroads. It employed Fresquez as a track inspector until it terminated his employment claiming

insubordination. Fresquez contends, among other claims, that his termination was unlawful because it was in retaliation for his having reported safety concerns.

The Parties exchanged Rule 26(a)(1) Initial Disclosures on June 6, 2017. [ECF #68-2.] They deposed at least five individuals from October to December 6, 2017 [ECF ##68-7, -8, -9, -12, -13]. They then appeared before Magistrate Judge Carmen for a discovery conference on December 13, 2017 (“Discovery Conference”) [ECF #78]. Defendant filed a Motion for Summary Judgement on January 5, 2018. [ECF #39.] Thereafter, the Parties continued their conferrals based on the results of the Discovery Conference. On January 10, 2018, Fresquez told BNSF the subjects over which he intended to file a motion to compel. [ECF #63-3 p.4.] The Parties then deposed at least four more individuals in January 2018, until discovery closed on January 31, 2018. Fresquez filed the Motion 19 days after the close of discovery, on February 19, 2018. [ECF #63.]

Fresquez has admittedly taken an aggressive approach to discovery. He contends that BNSF has a “well-documented history of abusing discovery” in other cases, and therefore, he “began this case by noticing [BNSF] to a deposition on its search for relevant documents.” [ECF #63 p.5.] But, “[a]t an informal hearing on the deposition notice, the magistrate judge told Fresquez that [the Court] was disinclined to let [Fresquez] engage in discover about discovery unless and until Fresquez could show that BNSF had abused discovery in this case.” [I/d.] Fresquez contends that this time has now come.

Fresquez claims 13 discovery violations by BNSF, as follows:

1. failure to adequately preserve, sufficiently search, and timely produce relevant emails;

2. failure to search for emails;
3. failure to search for text messages;
4. destruction of Ryan Akers' notes;
5. changes to an administrative hearing transcript;
6. failure to prepare its corporate designee(s) for a Rule 30(b)(6) deposition;
7. failure to produce documents showing the fairness of its internal hearing process;
8. instructing witnesses not to answer certain questions in depositions;
9. refusal to produce documents bearing on retaliatory motive;
10. untimely production of documents;
11. misuse of privilege;
12. refusal to authenticate records; and
13. pattern and practice of abusing discovery in other unrelated cases.

[ECF #63 p.2.]

Fresquez seeks: (1) an order requiring BNSF to search for and produce “what evidence it has not already destroyed;” (2) an award of fees and costs related to his Motion; and, (3) an adverse-inference instruction to the jury in relation to “those pieces [of evidence] that have been destroyed.” [ECF #63.]

B. Scope of Discovery

In evaluating the Motion, the Court is obligated to construe and apply the Federal Rules of Civil Procedure in a manner to secure a “just, speedy, and inexpensive determination” of this action and its proceedings. Fed. R. Civ. P. 1. While litigants may obtain discovery on nonprivileged matters relevant to the claims and defenses in an action, discovery must be “proportional to the needs of the case considering the

importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

Rule 37 provides that "[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection" if the other party fails to provide discovery responses. Fed. R. Civ. P. 37(a)(3)(B). The moving party bears the burden of proof. *Echostar Commc'ns. Corp. v. News Corp.*, 180 F.R.D. 391, 394 (D. Colo. 1998). The moving party must prove the opposing party's responses are incomplete. *Daiflon Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 227 (10th Cir. 1976); *Equal Rights Ctr. v. Post Props.*, 246 F.R.D. 29, 32 (D. D.C. 2007).

C. Timeliness of the Motion

The Federal Rules of Civil Procedure do not provide a deadline for filing a motion to compel. The courts, however, generally look to the discovery deadline when considering whether a motion to compel is timely. See *Days Inn Worldwide, Inc., v. Sonia Invs.*, 237 F.R.D. 395, 397-98 (N.D. Tex. 2006) (collecting cases). Other factors courts have considered include: (1) the length of time since the discovery deadline expired; (2) the length of time that the moving party has known about the discovery; (3) whether the discovery deadline has been extended; (4) the explanation for the tardiness or delay in filing the motion to compel; (5) whether dispositive motions have been scheduled or filed; (6) the age of the case; (7) any prejudice to the party from whom the discovery is being sought; and, (8) any disruption of the court's schedule. See *id.* at 398.

On December 13, 2017, Magistrate Judge Carmen granted Fresquez leave to file a motion to compel on the following seven issues raised, but not resolved, at the Discovery Conference: (1) failure to adequately preserve, sufficiently search, and timely produce relevant emails [ECF #78 at pp.51-65];¹ (2) failure to search for text messages [*Id.*]; (3) failure to produce documents showing the fairness of its internal hearing process [*Id.* at pp.19-32]; (4) instructing witnesses not to answer certain questions in depositions [*Id.* at pp.36-42]; (5) refusal to produce documents bearing on retaliatory motive [*Id.* at pp.35-39]; (6) untimely production of documents [*Id.* at pp.4-10, 51-65]; and, (7) misuse of privilege [*Id.* at p.49-51]. The Motion seeks sanctions and compelled responses over these same seven issues. [See *generally* ECF #63.]

Fresquez did not file the Motion on these seven issues until 68 days *after* Magistrate Judge Carmen gave him leave to file a motion to compel, 45 days *after* BNSF filed its motion for summary judgment, and 19 days *after* the close of discovery. Notably, Fresquez had already partially drafted the Motion as of the time of the December 13, 2017 Discovery Conference. During the Discovery Conference, his counsel told the Court: “You will see if and when we bring a discovery motion, there *is* a long footnote about BNSF’s

¹ On the additional issue of BNSF producing documents shortly before some witness depositions, at the Discovery Conference, Fresquez’s counsel expressed his appreciation for BNSF’s efforts to provide documents in time for a deposition when it produced those documents the night before the deposition. [ECF #46.] The Court understands the focus of that discussion (at the time) involved BNSF’s confidentiality designations. But the statement reflects counsel’s understanding that BNSF was working in good faith to fulfill its discovery obligations. There is an inconsistency between this show of appreciation for documents received the night before a deposition, and the angst Fresquez now expresses over receiving documents responsive to his RFP No. 17 shortly before a deponent’s deposition. Moreover, the Court finds BNSF’s explanation of why documents a deponent reviewed in preparation for a deposition were not produced until shortly before a deposition, reasonable and practical when considering the realities of preparing witnesses to be deposed.

history that I don't include in any other employer I sue.” [ECF #78 p.53.] [Emphasis added.] Indeed, that already-drafted portion appears to be footnote number four in the Motion. [ECF #63 at pp.21-22 fn4.]

For these reasons, the Court FINDS Fresquez has not provided a compelling reason for waiting until after the close of discovery to bring these seven issues to the Court's attention. The Court FINDS the delay unreasonable and DENIES the Motion as to these seven issues as untimely.

D. Failure to Confer

Before filing a motion, Local Rule 7.1(a) *requires* “counsel for the moving party...[to] confer or make reasonable good faith efforts to confer with any opposing counsel...to resolve any disputed matter. The moving party shall describe in the motion, or in a certificate attached to the motion, the specific efforts to fulfill this duty.” D.C.COLO.LCivR. 7.1(a). The purpose of the rule is to require parties to confer and attempt to resolve a dispute before incurring the expense of filing a motion and requiring the court to address a disputed issue. *Hoelzel v. First Selection Corp.*, 214 F.R.D. 634, 635 (D. Colo. 2003). The rule “serves a particularly important function in connection with discovery disputes because the parties, through negotiations, frequently are able to narrow the discovery requests in a way which eliminates the need for judicial intervention.” *Id.*

Fresquez has confessed his violation of the conferral obligation on the issue of BNSF's refusal to authenticate records. He admits he failed to confer before filing the Motion seeking sanctions on this issue. [ECF #72 p.3.] And indeed, based on BNSF's

response, it appears there is much more conferring to be had on this subject. Therefore, the Motion is DENIED as to this issue.

E. Fresquez's Remaining Issues

The timeliness of the Motion and lacking conferrals aside, the Court addresses the merits of Fresquez's four remaining issues:

1. BNSF's failure to search for emails.

Fresquez argues that BNSF "has done nothing to search for and timely produce relevant documents possessed by at least seven managers," all of whom Fresquez deposed: (1) Ryan Akers; (2) Cason Cole; (3) David Dunn; (4) Damon Fry; (5) Ned Percival; (6) Doreen Powers; and (7) Thomas Royston. BNSF says "there is absolutely no reason to think" these seven managers would have relevant information. That is because, as BNSF contends, none of them were involved with Fresquez's 2016 insubordination and dismissal. BNSF rested on its objection to Request for Production of Documents 8 (which it contends broadly sought all manner of communications and notes sent to, or received by, these seven managers), stating "responsive materials are being withheld on the basis of this objection." [ECF #68 pp.6-7; #68-3 p.5.]

Fresquez does not directly explain what relevant documents he believes BNSF has improperly withheld as it pertains to these seven managers. This is important because, at the Discovery Conference, Fresquez's counsel said the following concerning discovery as it pertains to the claim of a retaliatory motive in this case: "Here's what we want to show the jury, that the direct supervisor, who's Michael Paz, we already have, his boss who we think is the bad actor and mastermind, Mark Carpenter and ultimately the decision maker, Adam Miller, all have a personal incentive to hide defects." [ECF #78

p.8.] None of these three individuals (Paz, Carpenter, and Miller) are the subject (part of the seven managers) of Fresquez failure-to-search-emails argument.

At the Discovery Conference, Fresquez acknowledged the relevant decision makers vis-à-vis his insubordination and dismissal were Paz, Carpenter, and Miller. Fresquez has not disputed BNSF's contention that the seven individuals whose emails he now seeks were *not* involved in his 2016 insubordination and dismissal. As a result, the Court DENIES the Motion on this issue finding that the vague information Fresquez seeks to compel exceeds the proportional needs of the case. Fed R. Civ. P. 26(b)(1).

Additionally, this alleged discovery violation appears to have also been addressed at the Discovery Conference, at least regarding some of the seven managers at issue. [See ECF #72 p.6, wherein Fresquez states that the only two issues not discussed at the Discovery Conference were BNSF's failure to prepare corporate designees and BNSF's refusal to authenticate documents.] In this regard, the Motion is further DENIED on this issue as untimely to the extent this alleged discovery violation overlaps with Fresquez's first argument alleging a failure to adequately preserve, sufficiently search, and timely produce relevant emails.

2. Destruction of Ryan Akers' notes

When Fresquez deposed Ryan Akers, Akers testified about an email or his notes that he said show 35 track defects were repaired. Fresquez, by contrast, claims he "has evidence that the defects, in fact, were not repaired." Akers' notes no longer exist because he discarded them in the Spring of 2015, according to BNSF.

Fresquez considers this spoliation. On the one hand, he requests "an adverse-inference instruction being read to the jury," and "an adverse-inference instruction should

be given for those pieces that have been destroyed.” [ECF #63 pp.11, 29.] On the other hand, he states that while he believes “BNSF’s destruction of the documents” could support an adverse-inference instruction, he “asks only that BNSF not be allowed to rebut his assertion that the thirty-five defects Akers had marked as repaired were not, in fact, repaired.” [*Id.* at p.13.] The Parties dispute whether BNSF provided Akers with any, or sufficient, notice to preserve relevant documents and records.

To the extent Fresquez seeks an adverse inference instruction, to obtain sanctions for spoliation of evidence a party must first show that “(1) a party ha[d] a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.” *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007). Even if a party establishes duty and prejudice, if it “seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. Without a showing of bad faith, a district court may only impose lesser sanctions.” *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (citations and quotation omitted).

The Court does not find evidence of bad faith. Nor does the Court find evidence of circumstances warranting any lesser sanction. According to BNSF, Akers discarded his notes in Spring 2015, 18 months *before* Fresquez made his OSHA complaint. [ECF #68 p.13.] The Akers’ deposition excerpt cited by Fresquez in his reply does not refute this timing because the testimony focused on what Akers would have been able to preserve had he received notice “when this case was first filed” in August 2016. [ECF #72.]

Moreover, BNSF's counsel contends that BNSF sent a litigation notice and hold order to Akers (and the seven other managers) on August 15, 2016, which specifically informed the recipients that Fresquez filed an FRSA lawsuit alleging that BNSF retaliated against him for reporting track defects. [ECF #68 pp.5-6.] BNSF attached a Declaration from counsel to this effect, but the Declaration is unexecuted. [ECF #68-1.] The Court, however, accepts counsel's representation as an officer of the Court. See *Parkside at Mountain Shadows Owners Assoc., Inc. v. Travelers Cas. & Sur. Co. of America*, No. 15-cv-0120-WJM-KMT, 2015 WL 3903020, at *3 (D. Colo. June 24, 2015) ("[T]he Court will trust that Plaintiff's counsel, as officers of this Court, would not have misrepresented any facts material to the Motion's adjudication..."). Considering defense counsel's representations, the Court is not convinced the witness deposition testimony submitted by Fresquez to support his argument that BNSF failed to notify Akers (and other witnesses) to preserve relevant documents, establishes a failure to notify by BNSF versus merely reflecting a laypersons' interpretation or understanding of events or notice received.

For these reasons, the Court FINDS no bad faith on behalf of BNSF with regard to Akers having discarded his notes in the Spring 2015. The Court further FINDS no adverse inference instruction, or lesser sanction, is warranted on this issue.

3. Changes to an administrative hearing transcript.

Fresquez accuses BNSF of altering a transcript of the May 13, 2016 disciplinary hearing leading to his termination. A third-party transcription service prepared the transcript from an audio recording of the proceedings. BNSF disclosed both the transcript and the recording with its Rule 26(a)(1) Initial Disclosures, dated June 6, 2017. [ECF #68-

2.] It is unclear whether (or when) BNSF produced the audio recording on that same date, but in any event, Fresquez does not dispute his possession of the recording.

The Court FINDS this request untimely considering the duration Fresquez appears to have possessed both the recording and transcript of the hearing. The Court also FINDS Fresquez's argument that BNSF intentionally altered the transcript a stretch and non-persuasive. The Court agrees with BNSF that, for Fresquez's argument to work, BNSF would (or should) have also deleted the phrase, "I didn't say no." Regardless, the Court will not expend further judicial time to discern between "ahs" and "nahs," or insertions of "no" after pauses in speech when Fresquez has possessed the complete recording for some time. Assuming its admissibility, he may be free to play the recording at trial and draw whatever distinctions he chooses between it and the transcript for the jury. But the Court does not find support for Fresquez's conspiracy-theory that BNSF falsified the transcript. The Motion is DENIED as to this issue.

4. Failure to prepare corporate designee for a Rule 30(b)(6) deposition.

Federal Rule of Civil Procedure 30(b)(6) provides the avenue to depose an entity. It implicitly requires the designated entity representative to review all matters known or reasonably available to prepare for the Rule 30(b)(6) deposition. *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 WL 1054279, at *3 (D. Kan. Apr. 9, 2007). This interpretation is necessary to make the deposition meaningful. "Inadequate preparation of a Rule 30(b)(6) designee can be sanctioned based on the lack of good faith, prejudice to the opposing side, and disruption of the proceedings." *Starlight Int'l. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999); *Payless*

Shoesource Worldwide, Inc. v. Target Corp., No. 05-4023-JAR, 2007 WL 1959194, at *1 (D. Kan. June 29, 2007).

The fact that the designee cannot answer every question posed at the deposition does not mean that the organization failed to satisfy its obligation to prepare the witness. *Costa v. Cty. of Burlington*, 254 F.R.D. 187, 190 (D.N.J. 2008). In determining whether a corporate deponent has met its Rule 30(b)(6) obligations, courts have examined the degree and type of effort made by the organization to prepare a witness in light of the deposition topics, and whether the organization acted “in good faith.” *Id.*; see also *Ecclesiastes 9:10–11–12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007). Courts have made clear that “there is no obligation to produce witnesses who know every single fact, only those that are relevant and material to the incident or incidents that underlie the suit.” *Wilson v. Lakner*, 228 F.R.D. 524, 528–29 n. 7 (D. Md. 2005).

Fresquez argues that BNSF failed to adequately prepare Thomas Royston as a corporate designee for a Rule 30(b)(6) deposition. BNSF claims Fresquez failed to confer on this issue prior to filing the Motion, and in any event, states that the Parties had an agreement in place that allowed BNSF to retroactively adopt portions of Royston’s fact-witness testimony as its corporate testimony. The reason for the purported agreement was because Royston was retired from BNSF and lived out of state. In reply, Fresquez appears to dispute there was such an agreement between the Parties, at least by the time Royston’s deposition occurred.

The problem the Court faces on this subject is similar to the problem faced by Magistrate Judge Mix in *Int’l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-cv-02007-MSK-KLM, 2013 WL 627149 (D. Colo. Feb. 19, 2013). There, due to the

procedural posture of the issue before the court, Magistrate Judge Mix struggled to determine whether the organization acted in “good faith” in its preparation of a Rule 30(b)(6) designee, stating:

In light of the procedural posture of this case, where the parties hotly dispute the extent, content and results of their pre-deposition communications, where neither party sought pre-deposition relief from the Court, and where the entire deposition was conducted without a single objection on the record to which either party refers, the Court is at a loss to determine whether “good cause” exists. If the Airlines are correct about the scope of pre-deposition communications and agreements between the parties, good cause for a second deposition may well exist. If IBT is right about reaching an agreement with the Airlines that the proposed topics were too indefinite, too broad, or simply irrelevant, it is more difficult to find “good cause” for a second bite at the apple. The bottom line is that the parties’ versions of the facts are diametrically opposed, and the Court does not know who to believe.

Id., 2013 WL 627149, at *8.

Similarly, here, neither Party sought pre-deposition relief from the Court in advance of Royston’s January 25, 2018 deposition. And, while the Parties appear to be on different pages concerning their pre-deposition agreement, each side has been inconsistent on this point. For example, BNSF argues the existence of the pre-deposition agreement in its response to the Motion, but clearly took the position at Royston’s deposition that he was “designated as a 30(b)(6).” For his part, at the Discovery Conference, Fresquez’s counsel acknowledged a pre-deposition agreement [ECF #78 p.71], to only now take the opposite position.

Royston’s deposition does *not* identify him as testifying in a Rule 30(b)(6) capacity. [Compare ECF #68-10 (Royston) with ECF #68-11 (Powers).] Further, during Royston’s deposition, and in response to defense counsel’s representation that Royston was a Rule

30(b)(6) witness, Fresquez's counsel stated: "He's a fact witness. I'm not asking about the 30(b)(6), so it's fair game;" and, "This is – look at the notice. It's a *personal deposition*. You guys can't just change after the fact and say he's a 30(b)(6) witness now. *Right now he's a fact witness. That's what we noticed him as. I'm asking fact questions.*" [ECF #50-2 pp.13-14.] [Emphasis added.]

The record shows that the Parties have taken both sides of the issue of Royston's status as of the time of his January 25, 2018 deposition. However, at the time of the deposition, Fresquez's counsel clearly stated that he noticed the deposition not as a Rule 30(b)(6) deposition, but as a "fact witness" deposition. The transcript itself reflects that Royston was testifying in a non-representative capacity. For these reasons, Fresquez has failed to meet his burden of proof on this issue, and the Motion is DENIED as it pertains to this issue.²

5. Pattern and practice of abusing discovery in other unrelated cases.

The Court is not persuaded by Fresquez's reliance on cases from other jurisdictions (primarily Montana state court) in which BNSF may have been sanctioned for discovery violations, as a basis for sanctioning BNSF here. Despite Fresquez's characterizations of BNSF's conduct, the Court does not find any suggestion from the record in this case that BNSF is attempting to prevail through misconduct, rather than on the merits of the case.

² Fresquez's corporate-designee argument appears to also encompass Percival's deposition testimony (and possibly other "designees"). Due to the purported agreement between the Parties acknowledged by Fresquez's counsel at the Discovery Hearing [ECF #78 p.71.], the Court's denial pertains to Percival's (or any other purported "designees") deposition testimony as well. Fresquez has simply failed to satisfy his burden of proof on this issue regardless of which purported Rule 30(b)(6) designee.

F. Sanctions Pursuant to Rule 37(a)(5)(B)

BNSF requested an award of fees and costs at various points in its response assuming the Court's denial of the Motion.

Rule 37(a)(5)(B) provides, in pertinent part:

If the motion is denied, the court ... must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party ... who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(B). To avoid a mandatory award of expenses, including attorney's fees, the moving part must show that its motion had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Kirzhner v. Silverstein*, No. 09-cv-02858-RBJ-BNB, 2012 WL 123265, at *5-6 (D.Colo. Jan. 17, 2012).

The Court finds this issue an *extremely* close call, particularly when considering the untimeliness of the Motion, the conferral failures, and the overall aggressive-tenor and characterizations in the Motion that the Court finds were unsupported by the record. Due to a few inconsistencies on BNSF's part, however, and in the same way the Court accepted defense counsel's representation as an officer of the Court, the Court will similarly trust that Fresquez's counsel would not have filed the instant Motion without some reasonable basis in law and fact. See *Parkside at Mountain Shadows Owners Assoc., Inc.*, 2015 WL 3903020 at *3. Indeed, despite its failures, the Motion is supported by ample case law, which Fresquez appears to believe, in good faith, support his positions and requested relief.

G. Order

For the reasons discussed above, the Motion [ECF #63] is DENIED. To the extent BNSF has requested an award of fees and costs pursuant to Fed. R. Civ. P. 37(a)(5)(B), BNSF's request is also DENIED.

Dated: September 17, 2018

BY THE COURT:

A handwritten signature in black ink, appearing to read "S. Kato Crews", written over a horizontal line.

S. KATO CREWS
United States Magistrate Judge