

1995 WL 293934
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United States District Court, D. Kansas.

Saul ZAPATA, et al., Plaintiffs,
v.
IBP, INC., Defendant.

Civ. A. No. 93-2366-EEO.

May 10, 1995.

Attorneys and Law Firms

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Paula S. Greathouse, Pamela L. Falk, IBP, Inc., Emporia, KS, Nancy M. Landis, Jack L. Whitacre, Spencer, Fane, Britt & Browne, Kansas City, MO, John N. Badgerow, Michaela M. Warden, Spencer, Fane, Britt & Browne, Overland Park, KS, Russell P. Wright, Dakota City, KS, for defendant.

MEMORANDUM AND ORDER

RUSHFELT, United States Magistrate Judge.

***1** The court has before it Plaintiffs' Motions to Compel and for Sanctions (doc. 193). They ask for an order to compel defendant to produce all computer data contained in computer tables, identified as TEMPCHANGE, TEMPCALE, TEMPBID, TEMPAPPL, TEMPLOA, TEMCLOA, and TEMPTURN (collectively TEMP data), for all employees of IBP's Emporia and Finney County plants employed at any time since January 1, 1988. They also ask the court to sanction defendant in several respects for its alleged failure to produce its management data, as required by the Memorandum and Order of November 10, 1994. Counsel for plaintiffs certify their compliance with D. Kan. Rule 210(j), requiring preliminary conferring before filing a motion to compel.

Defendant opposes the motion in its entirety. It agrees not to use in opposing a pending motion for certification, however, any computer information plaintiffs did not have when they filed it. Defendant denies, furthermore, the certification that plaintiffs have complied with D. Kan. Rule 210(j). Defendant also contends its earlier failure to produce the requested data was inadvertent and that it has now produced all of it. It argues that the requested sanctions are inappropriate and in any event excessive.

Fed. R. Civ. P. 37 governs motions to compel. The motions before the court do not clearly reflect whether plaintiffs seek relief under subsection (a) or (b) of the rule. Their memoranda suggests both. Subsection (a) addresses motions to compel responses to requests for discovery. Subsection (b) relates to motions to compel compliance with an already issued order to provide discovery. From the record the court cannot determine whether the TEMP data is comprehended by item 7 of the First Request for Production of Documents and Things, served on defendant. In their supporting memorandum plaintiffs state that the "additional computer data was not specifically requested in the prior Motion to Compel." (Doc. 194 at 1.) Accordingly, the court will apply Rule 37(a) to their motion to compel discovery of the TEMP data.

In part defendant has mooted the issue of discoverability of the TEMP data. Its opposing memorandum includes affidavits, showing it has now produced it. The affidavits also explain how the personnel of the defendant believed they had complied with the prior requests for production, until depositions on February 14 and 15, 1995. At that time they realized that they had misunderstood and miscommunicated about the extent of the discovery. They say they inadvertently withheld the TEMP data from discovery. They promptly agreed to provide it to plaintiffs. They state they were in the process of doing so and anticipating further communication from counsel for plaintiffs to complete the production. Defendant assumed the parties were co-operating, therefore, to conclude the procedure, until it received the present motions. For these reasons it contends plaintiff did not comply with the duty to confer, required by D. Kan. Rule 210(j). It also points out that it has in good faith complied with its duties to provide discovery, notwithstanding its mistake.

***2** In asserting compliance with D. Kan. Rule 210(j), plaintiffs describe generally as frustrated their efforts to obtain discovery over a period of eighteen months. They refer to repeated attempts without success to resolve the dispute. To refute defendant, an affidavit of their counsel states *inter alia*:

... Although Mr. Wright agreed that the management data should be produced, he never agreed to produce the TEMP files. Mr. Wright simply indicated that he would discuss any request for additional data with corporate personnel and Mr. Nick Badgerow. After the deposition and my discussion with Mr. Wright, I believed that plaintiffs would have the same difficulties in getting the TEMP files as they did in getting the other computer data. Based on my experiences in dealing with IBP on the computer issue, I believed that any negotiations with IBP on production of additional computer data would be pointless.

Affidavit of James C. Sullivan at 3, 4, attached to the Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion to Compel and for Sanctions (doc. 211).

The court does not find that plaintiffs adequately complied with D. Kan. Rule 210(j) before filing their motion to compel production of the TEMP data. The discoverability of that data evidently did not become a specific item of discussion, until February 14, 1995, when a deposition alerted the parties to its relevance and discoverability. They apparently misunderstood each other about any willingness by defendant to produce it. Based on past experience, counsel for plaintiffs obviously believed defendant would not produce it without a motion. The court does not know whether or not that belief was well founded, at least in this instance. It will not speculate on that point. It will accept the affidavits produced by defendant. They disclose in sufficient detail its intent and indeed additional action taken to further comply with a perceived duty to do so.

The court does not characterize the affidavit of counsel for plaintiffs to be factually untrue. It finds it inadequate, nevertheless, to refute the affirmations that defendant intended to produce the TEMP data, once its discoverability was understood, and that it had taken specific steps to do so. Aside any frustrations about discovery generally, counsel for plaintiffs should have communicated further with defendant about production of

that data, before filing their motion to compel. To support any argument they were entitled to it, they had the benefit of at least one order which had by then compelled defendant to produce similar information.

D. Kan. Rule 210(j) provides as follows:

Unless otherwise ordered, the court will not entertain ... any motion under Fed. R. Civ. P. 26(c) or 37(a) unless counsel for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion

At times the court has waived compliance with the rule, when it would have been a futility to confer. The court will not do so in this instance. As a general rule frustration in trying to resolve prior disputes does not necessarily supplant the duty of counsel to try again with regard to a specific dispute when it occurs.

***3** With one exception the court finds nothing to persuade it to impose the kind of sanctions plaintiffs seek for the failure of defendant to timely produce the management data. As already noted, defendant has agreed not to use in opposing the motion for certification any of the computer information which plaintiffs did not have before that motion was filed. The court, therefore, will sustain the motion for sanctions to that extent. For the reasons set forth in the memorandum of defendant, it will otherwise over-rule the motion for sanctions.

In summary, the court declines to entertain Plaintiffs' Motion to Compel (doc. 193) and sustains in part and overrules in part their Motion for Sanctions (doc. 193), as herein set forth.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1995 WL 293934