

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>TERRY D. SMITH, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	<b>CIVIL ACTION</b>
<b>v.</b>	)	
	)	<b>Case No. 06-CV-2534-CM-DJW</b>
	)	
<b>BNSF RAILWAY COMPANY, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM AND ORDER**

Pending before the Court is Defendant BNSF Railway Company's ("BNSF") Motion to Compel Depositions (doc. 185). For the reasons set forth below, the Motion is granted.

**I. BACKGROUND**

This is an action to recover damages from defendants, including BNSF, for their alleged willful violation of the Fair Labor Standards Act by requiring Plaintiffs to perform services for BNSF and refusing to pay Plaintiffs for these services. On August 12, 2008, the Court approved Plaintiffs' Notice of Pendency of Collective Action, which was sent to approximately 2,700 potential opt-in plaintiffs. Eighty-eight individuals opted into this case as plaintiffs.

On June 25, 2009, BNSF served its First Request for Production of Documents and its First Set of Interrogatories (collectively, the "Discovery Requests") to the 88 opt-in plaintiffs. According to BNSF, by August 28, 2009, 51 of the 88 opt-in plaintiffs had not responded to the Discovery Requests. The discovery deadline was then moved from September 1, 2009 to December 31, 2009 by agreement of the parties. BNSF claims that during the month of September and the first two weeks of October, only two additional opt-in plaintiffs provided responses to the Discovery Requests.

According to BNSF, Plaintiffs' counsel informed BNSF's counsel that, absent a court order, he did not expect to receive any additional responses from the 49 opt-in plaintiffs who had not responded to the Discovery Requests. Thus, BNSF filed an Unopposed Motion to Compel Discovery Responses (doc. 161), which sought an order from the Court compelling the 49 non-responding opt-in plaintiffs to respond to the Discovery Requests and which sought an order compelling supplemental responses from four opt-in plaintiffs who had provided incomplete answers to the Discovery Requests. The Court granted this unopposed motion to compel on October 21, 2009, and ordered the 53 opt-in plaintiffs identified in BNSF's motion to serve on BNSF their answers to the Discovery Requests within 17 days of the date of the Order, which meant their responses were due November 9, 2009.

BNSF claims that on November 9, 2009, four plaintiffs served responses to the Discovery Requests and two supplemented prior incomplete responses. The remaining 47 opt-in plaintiffs did not comply with the Court's October 21, 2009 Order. Thus, on November 10, 2009, BNSF moved to dismiss those 47 opt-in plaintiffs.

On April 20, 2010, District Judge Murguia entered his Memorandum and Order denying BNSF's motion to dismiss, but requiring the non-responsive opt-in plaintiffs to respond to BNSF's Discovery Requests by May 21, 2010. District Judge Murguia warned the non-responsive opt-in plaintiffs that if they failed to respond to the Discovery Requests, the court may order them to appear for deposition at BNSF's convenience upon further motion by BNSF requesting that any non-responsive opt-in plaintiffs appear for a deposition in Overland Park, Kansas. District Judge Murguia further warned that if the non-responsive opt-in plaintiffs failed to appear for deposition, the court may dismiss their claims without further notice.

According to BNSF, the following 39 opt-in plaintiffs (the "Non-Responding Opt-in Plaintiffs") have not complied with District Judge Murguia's April 20, 2010 Memorandum and

Order: Mark C. Allen, Jason Alvarez, Adam D. Ashmore, Gilbert Casarez, Eva Cervantes, Mike Decker, Alan Duran, Steven L. Erickson, Herb L. Factory, James H. Felts, James B. Floyd, Brian H. Fransen, John D. Garside, Donald Godfrey, Douglas Gormann, Mitch L. Haight, Todd Henderson, Justin E. Hoot, Thomas King, Josh Lankford, D.W. Middleton, Carolyn Miller, Wayne Newton, Kyonni Olawumi, Jerry W. Oliver, PK Patel, Brett D. Ridgway, Ernest L. Ritchie, Marques Ross, Mark Schlachter, Joshua Sink, Nicolas M. Smith, Brian D. Steffen, Braden Thornton, Ralph Tolbert, Willie Torres, Derrick Webster, John Arnold, and Jay Pierce. Plaintiffs do not dispute BNSF's list of the Non-Responding Opt-in Plaintiffs.

## **II. DISCUSSION**

BNSF asks the Court to compel the Non-Responding Opt-in Plaintiffs to appear for a deposition because they have not complied with District Judge Murguia's April 20, 2010 Memorandum and Order. BNSF argues that the Non-Responding Opt-in Plaintiffs have had more than sufficient time to respond to the Discovery Requests, which were served over a year ago. BNSF asks that the Court move this case forward.

Plaintiffs oppose BNSF's Motion, arguing that the depositions are not necessary. However, BNSF points out that Plaintiffs did not oppose BNSF's earlier motion seeking to compel the Non-Responding Opt-in Plaintiffs to serve responses to the Discovery Requests. Further, the Non-Responding Opt-in Plaintiffs have had over a year to respond to the Discovery Requests and have had over three months to comply with District Judge Murguia's April 20, 2010 Memorandum and Order. Finally, District Judge Murguia specifically warned the Non-Responding Opt-in Plaintiffs that if they failed to respond to the Discovery Requests, they may be ordered to appear for depositions at BNSF's convenience upon further motion by BNSF requesting that they appear for depositions in Overland Park, Kansas. BNSF has now filed that motion and the Court is not convinced by Plaintiffs' argument that these depositions are not

necessary. The Court will therefore grant BNSF's Motion. The Non-Responding Opt-in Plaintiffs are again warned that if they do not appear for a deposition in Overland Park, Kansas, then the court may dismiss their claims without further notice.

**IT IS THEREFORE ORDERED** that Defendant's Motion to Compel Depositions (doc. 185) is granted, and the Non-Responding Opt-in Plaintiffs shall appear at a date convenient to BNSF, at its counsel's offices in Overland Park, Kansas for deposition. BNSF shall have **60** **days** from the date of the entry of this Order to schedule and complete these depositions.

**IT IS FURTHER ORDERED** that formal discovery and other pretrial proceedings shall be stayed for a period of **60 days** from the date of the entry of this Order while BNSF conducts these depositions.

**IT IS SO ORDERED.**

Dated in Kansas City, Kansas on this 11th day of August 2010.

s/ David J. Waxse  
David J. Waxse  
U.S. Magistrate Judge

cc: All counsel and *pro se* parties