

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

|                              |   |                     |
|------------------------------|---|---------------------|
| MICHAEL E. McKINZY, SR.,     | ) |                     |
|                              | ) |                     |
| Plaintiff,                   | ) |                     |
| v.                           | ) | Case No. 08-2365-CM |
|                              | ) |                     |
| BURLINGTON NORTHERN SANTA FE | ) |                     |
| RAILWAY,                     | ) |                     |
|                              | ) |                     |
| Defendant.                   | ) |                     |

**ORDER**

Currently before the undersigned U.S. Magistrate Judge, James P. O'Hara, is the motion of the defendant, Burlington Northern Santa Fe Railway, requesting that the court order the pro se plaintiff, Michael E. McKinzy, Sr., to comply with the court's December 18, 2009 order (doc. 121) awarding fees to defendant, and to show cause why this case should not be dismissed if plaintiff fails to pay the fees (**doc. 130**). Defendant also requests its fees and costs incurred in bringing the instant motion. For the reasons discussed below, the motion is granted.

Plaintiff has not responded to the instant motion. D. Kan. Rule 7.4 provides "[i]f a respondent fails to file a response within the time required by Rule 6.1(d), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." While the court therefore considers the instant motion unopposed, the court will briefly address plaintiff's history of failing to comply with the court's procedural rules and orders, and the court's warnings to plaintiff regarding the potential consequences of such

conduct.

On October 21, 2009, the undersigned issued an order granting the first motion to compel discovery filed by defendant (doc. 89). Plaintiff sought review of that order by the presiding U.S. District Judge, Carlos Murguia, who affirmed the order (doc. 117). In his order, Judge Murguia acknowledged the court's "power, under Rule 11 and otherwise, to impose [fees and costs as] sanctions should the circumstances merit it," and cautioned plaintiff "to take care that his filings do not merit the imposition of sanctions in the future."

On December 2, 2009, the undersigned issued an order granting the second motion to compel discovery filed by defendant (doc. 113). The undersigned noted that plaintiff had failed to file a response to the motion to compel, and ordered plaintiff to show cause why the court should not order him to pay defendant's costs associated with filing the second motion to compel. Plaintiff did not respond to the show cause order. On December 18, 2009, the undersigned awarded defendant \$700 in attorneys' fees, a portion of the amount defendant incurred in bringing the second motion to compel (doc. 121). The undersigned admonished plaintiff "that failure to comply with court orders, including discovery orders and show cause orders, may be grounds for dismissal as a sanction pursuant to Fed. R. Civ. P. 37(b)(2) and 41(b)." Plaintiff sought review of the undersigned's order (doc. 122), which Judge Murguia denied on February 1, 2010 (doc. 126). In his order upholding the imposition of fees, Judge Murguia expressed concern that "plaintiff is abusing the judicial process." Judge Murguia noted, among other things, that "plaintiff should submit his arguments in accordance with the Federal Rules of Civil Procedure and the court's order, instead of failing to respond and then

proceeding with a motion to review.”

Despite the above warnings issued by the court, plaintiff has failed to comply with the court’s order awarding defendant \$700 in fees and has further failed to even respond to the instant motion to compel.

In consideration of the foregoing,

IT IS HEREBY ORDERED:

1. Plaintiff shall pay defendant \$700 for fees associated with the second motion to compel, as previously ordered by the court, by **March 31, 2010**.
2. If plaintiff fails to pay the fees by March 31, 2010, plaintiff shall show cause in writing to Judge Murguia by **April 2, 2010**, why this case should not be dismissed with prejudice as a sanction for failure to comply with the court’s orders.
3. Defendant shall file an affidavit stating the time and related expenses incurred in filing the instant motion by **March 31, 2010**.
4. Plaintiff shall show cause in writing to the undersigned by **April 2, 2010**, why the court should not require him to pay defendant’s costs and fees associated with the filing of the instant motion.
5. Copies of this order shall be served electronically on counsel of record and on the pro se plaintiff by certified and regular mail.

Dated this 15th day of March, 2010, at Kansas City, Kansas.

s/James P. O’Hara

James P. O'Hara  
U.S. Magistrate Judge