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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BNSF RAILWAY COMPANY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SAN JOAQUIN VALLEY RAILROAD )  
 COMPANY, et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

1:08-cv-01086-AWI-SMS  
**ORDER DENYING SJVR'S MOTION  
TO COMPEL FURTHER RESPONSES  
TO INTERROGATORIES AND  
REQUESTS FOR PRODUCTION RE  
BNSF'S FUEL SURCHARGE  
INFORMATION**  
(Doc. 133)

Defendant San Joaquin Valley Railroad's motion to compel,  
filed on March 8, 2010, was originally set by the moving party to  
be heard before the district court trial judge, the Honorable  
Anthony W. Ishii, on April 16, 2010. The matter was moved to the  
appropriate case management/discovery presiding magistrate judge,  
the Honorable Sandra M. Snyder, to be heard on April 16, 2010.  
Counsel were directed by minute order (Doc. 135) to prepare and  
file a joint statement re: discovery disagreement pursuant to Local  
Rule 251(a).

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1 To accommodate counsels' vacation schedules, this motion to  
2 compel was continued to April 30, 2010 (Doc. 136), reminding  
3 counsel to comply with the Local Rule 251 requirements. The joint  
4 statement re: discovery disagreement was filed on April 23, 2010  
5 (Doc. 144), as were Plaintiff's fuel surcharge information exhibits  
6 filed under seal (Doc. 141), and the declaration of Weldon E. Hale  
7 in opposition to the motion to compel (Doc. 142). That same date,  
8 defendant, in support of the motion, filed notice of withdrawal of  
9 certain portions of the motion to compel (Doc. 146), as well as  
10 notice of lodging deposition transcripts, and the declaration of  
11 defendant's counsel James Hicks (Doc. 145). SJVR's evidentiary  
12 objections to Hale and Hemming declarations were filed on April 27,  
13 2010 (Doc. 147).

14 The hearing for April 30, 2010 was continued yet again to  
15 Friday, May 7, 2010 at 11:00 a.m. (Doc. 149). A telephonic status  
16 conference was held on that date, on the record, initially to  
17 clarify whether SJVR's entitlement to share in BNSF's fuel  
18 surcharges would or would not be a topic to be addressed in the  
19 upcoming summary judgment motions (Doc. 150). To that end, the  
20 Court entertained focused and limited oral argument regarding the  
21 herein motion to compel. BNSF represented that it had produced  
22 everything in its custody and care related to the fuel surcharge  
23 rates. SJVR argued that the declaration of BNSF's former employee  
24 James Shefelbine establishes that more information exists. BNSF  
25 pointed out that Shefelbine does not and could not have personal  
26 knowledge because he left BNSF in 1996 and was not a BNSF employee  
27 at the time that the fuel surcharge rates were established (2002).  
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1           Near the conclusion of the telephonic hearing, Attorney Hicks  
2 all but conceded the issue of the remoteness of Shefelbine's  
3 experience and knowledge of the business of BNSF due to his  
4 departure date, as well as acknowledging the word, as officers of  
5 the court, of counsel for BNSF that they had produced all they had  
6 in their care, control and custody regarding fuel surcharge  
7 information. Mr. Hicks wanted Messrs. Hemming and Thornton to  
8 swear under penalty of perjury that that was so, and he would  
9 accept their position. This Court believes Attorneys Hemming and  
10 Thornton *as officers of the court* and will require no further  
11 averment to these facts and this issue.

12           Finally, even if this Court misheard Attorney Hicks regarding  
13 perceived concessions, nonetheless by review of the court docket,  
14 it would appear Mr. Hicks has filed a Rule 56(f) request re: the  
15 pending summary judgments motions (Doc. 167), re-couching his  
16 arguments regarding fuel surcharge data in the custody of BNSF,  
17 arguing that at least in the past, BNSF has calculated and retained  
18 movement-specific fuel costs information at a carload level.  
19 Again, these are the same points raised before this Court  
20 informally in telephonic conference(s) and during this hearing.  
21 BNSF wholesale denies these arguments. It would appear to the  
22 undersigned that Mr. Hicks would have counsel and/or experts for  
23 BNSF *create* this information for production. BNSF shall not be  
24 directed to do so. SJVR has the burden to show that the evidence  
25 exists, not that it *could be created or might* exist. See Employers  
26 Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.,  
27 353 F.3d 1125, 1129-30 (9<sup>th</sup> Cir. 2004).

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1 GOOD CAUSE APPEARING, the Court accepting the proffer of  
2 Plaintiff's counsel that BNSF has provided all the information it  
3 has in its care, control and custody regarding the fuel surcharges  
4 collected on shipments to or from Table 1 stations, Defendant's  
5 motion to compel is DENIED.

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IT IS SO ORDERED.

**Dated: June 25, 2010**

**/s/ Sandra M. Snyder**  
**UNITED STATES MAGISTRATE JUDGE**