

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAVID L. SCHAUER,)	4:07CV3282
)	
Plaintiff,)	MEMORANDUM
v.)	AND ORDER
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	

On October 7, 2008, Plaintiff filed a motion to compel discovery ([filing 52](#)). No brief was filed in support of the motion, but Plaintiff’s counsel attached a supporting affidavit to the motion, together with copies of correspondence and discovery documents. On October 21, 2008, Defendant filed a 12-page opposing brief ([filing 56](#)). Among other things, Defendant argued that the motion to compel should be deemed abandoned for Plaintiff’s failure to file a supporting brief. *See* [NECivR 7.1\(a\)\(1\)\(B\)](#) (“A party need not file a brief if the motion raises no substantial issue of law and relief is within the court’s discretion. . . . Should the court conclude that the motion raises a substantial issue of law, however, it may treat a party’s failure to file a brief as an abandonment of the motion.”).

Plaintiff filed a reply brief on October 28, 2008 ([filing 58](#)). Later that same day, Defendant filed a motion to strike the reply brief ([filing 62](#)) because it was filed without leave of court. In response, on October 29, 2008, Plaintiff filed a motion requesting leave to file a reply brief ([filing 63](#)).

Under our local rules, “[i]f the moving party has not filed an initial brief, it may not file a reply brief without the court’s leave.” [NECivR 7.1\(c\)](#). Although Plaintiff violated this rule, Defendant does not appear to have been prejudiced by the filing, which was made within the time period prescribed by our local rules. *See id.* Plaintiff has previously indicated that the requested discovery is necessary in order

for him to respond to Defendant's pending motion for summary judgment, and I have granted him a continuance pursuant to Federal Rule of Civil Procedure 56(f). *See* Order entered October 14, 2008 ([filing 55](#)). I therefore will consider the filed reply brief, but will allow Defendant to file a surreply brief if it so desires.

Accordingly,

IT IS ORDERED that:

1. Defendant's motion to strike ([filing 62](#)) is denied.
2. Plaintiff's motion for leave to file a reply brief ([filing 63](#)) is granted *instanter*, as follows:
 - a. Plaintiff's filed reply brief ([filing 58](#)) will be considered by the court in support of Plaintiff's motion to compel discovery; and
 - b. Defendant may, but is not required to, file a surreply brief on or before November 10, 2008.

October 30, 2008.

BY THE COURT:

s/ Richard G. Kopf
United States District Judge