UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Cherry Hill, New Jersey

Issue Date: 20 July 2023

Case No.: 2022-NTS-00002

In the Matter of

ANTHONY INGANAMORTE,
Complainant

v.

MTA LONG ISLAND RAILROAD, CO.
Respondent

ORDER GRANTING COMPLAINANT'S RENEWED MOTION FOR SANCTIONS; DENYING COMPLAINANT'S MOTION TO STRIKE; DENYING AS MOOT COMPLAINANT'S MOTIONS FOR THE PRODUCTION OF THE LITIGATION HOLD LETTER AND TO AMEND COMPLAINT; AND SETTING THE BRIEFING DEADLINES

This matter arises under the National Transit Systems Security Act of 2007 ("NTSSA" or "the Act"), 6 U.S.C. § 1142. Applicable regulations are set forth at 29 C.F.R. Part 1982. Per 6 U.S.C. § 1142(c)(2)(A) and implemented by 29 C.F.R. § 1982.107(b).

Pertinent Procedural History

On October 16, 2020, Complainant filed a complaint with OSHA alleging a violation of the NTSSA and timely amended his complaint on January 7, 2021. Discovery closed on December 16, 2022. A January 20, 2023 Order denied the parties' respective Motions for Summary Decision. A January 27, 2023 Order directed Respondent to fulfill Complainant's Document Request Nos. 110 and 116. A March 6, 2023 Order granted in part Complainant's Motion for Sanctions.[1] The Order gave Complainant until April 28, 2023–after the formal hearing–to renew its sanctions motion should he still believe prejudice occurred due to how Respondent engaged with Document Request Nos. 110 and 116. The formal hearing occurred as planned over five days in March 2023. Thereafter, Complainant filed a May 12, 2023 Motion for Renewed Sanctions[2]; Employer timely responded.

[1] There, the Tribunal gave Respondent 21 days to produce the documents at issue. It reserved the right to impose additional sanctions for failure to comply with the Order.

[2] On May 3, 2023, the Tribunal granted Complainant's motion to extend the deadline to file this Motion.

Complainant's Arguments Concerning the Motion

Complainant called "Respondent's GPS surveillance" the "core issue" of the case. Complainant's Motion at 1. Complainant alleged that–despite Respondent's representations that it only conducted GPS audits of him and Subdivision 12 ("Sub 12") on September 4, 2020–he now learned about additional GPS surveillance Respondent conducted in November and December 2020, which he termed "the immediate aftermath of [Complainant's] filing of his OSHA complaint in this matter." *Id.* at 1–2. This "rendered a nullity," the pre-trial discovery process. *Id.* at 2. In response to the Tribunal's Orders, Respondent engaged in "GPS data dumps and the production of only about 30% of the relevant testing forms." *Id.*

Addressing the misconduct through additional discovery is "an exercise in futility" due to Respondent's witnesses evasive answering and inability to recall events; Jayson Garcia, Respondent's retriever of GPS data was not a credible witness. Respondent did not attempt to preserve any evidence within its control. *Id.* Therefore, Complainant requested default judgment against Respondent; alternatively, Complainant requested that the Tribunal find that Complainant has satisfied his prima facie case; to wit, "establishing the causal nexus between his protected activity and the adverse actions of the Respondent in the form of GPS surveillance and the imposition of a discriminatory headquarters usage rule." *Id.* Finally, if the Tribunal did not grant those requests, Complainant requested the Tribunal to reopen discovery for an additional six months "to seek additional evidence related to Respondent's GPS surveillance and headquarters usage practices." *Id.* at 3.

Complainant further alleged that after August 16, 2020, when he was promoted to Foreman, he was "immediately singled out for an unprecedented GPS surveillance audit." *Id.* at 4. At trial, Respondent's witnesses allegedly admitted that GPS audits are "extremely rare" and normally reserved for truck accidents, lost keys, or investigations into public complaints. Complainant alleged that Respondent's GPS audit constituted an adverse action "which . . . led to the further adverse action of a dangerous directive that imposed on him and Subdivision 12 restriction on test prep time and headquarters usage suffered by no other subdivision." *Id.* In response to a request made in Complainant's NTSSA complaint of October 16, 2020, Respondent stated that that it was "not in possession of the requested GPS records in that they were never requested." The Tribunal eventually required disclosure of such information, and Respondent had told Complainant that GPS records from 2020 were electronically corrupted. *Id.* at 5. On March 6, 2023, the Tribunal again required Respondent to provide the requested GPS data; the Tribunal cautioned it would consider imposing further sanctions if Respondent could not provide the data by March 27, 2023. *Id.* at 5–6. On March 29, 2023, Complainant received an Excel file with millions of lines of data. On March 31, and April 4, 2023, Complainant's counsel demanded that the GPS data be provided in the same format at the data reflected in JX D (appended to the Motion as Exh. B). When Respondent balked, Complainant argued that caselaw requires it to produce the GPS data in usable form. *Id.* at 8–9. Complainant's counsel put in "weeks of labor" to distill the GPS data provided into the "usable" form as Respondent's counsel told the Tribunal it would do. *Id.* at 9.

According to Complainant, Exhibit D shows that Respondent has failed to produce testing documentation concerning 187 FRA-mandated tests. *Id.* at 10–12. Exhibit A purportedly shows

that Respondent only limited Subdivision 12's headquarters' usage. *Id.* at 12–22. Forcing Subdivision 12 to leave their headquarters prematurely "compromises test preparation and railroad safety." *Id.* at 13. Complainant further alleged that the GPS data showed the non-existence of a headquarters usage rules and "pervasive FRA testing fraud." *Id.* at 23.

Complainant stated that at trial, Garcia testified that Respondent had never asked him for copies of GPS data stored on his computer or to preserve such information. *Id.* at 26. Complainant noted the Tribunal's concern throughout discovery concerning Respondent's actions related to GPS information. *Id.* at 26–27. It was only after the close of hearing that Complainant received additional information from Respondent about such GPS data. That information allegedly conflicted with Respondent's prior discovery responses. *Id.* at 27–28.

Complainant argued that Respondent's failure to instruct Garcia to preserve and to produce relevant evidence has prejudiced the Complainant to the extent that the Tribunal should make an adverse evidentiary determination that Respondent committed an adverse action against Complainant due in part to his protected activity. *Id.* at 30. Additionally, in response to Complainant's efforts to enforce FRA signal testing requirements, Respondent allegedly demoted and disqualified Complainant from his position as Foreman. *Id.* at 31. Thereafter, Complainant filed NTSSA complaints in 2017, and May and November 2018 due to additional adverse actions Respondent took against Complainant after filing his original NTSSA complaint. *Id.* Administrative Law Judge Calianos ordered Respondent to reinstate Complainant. Respondent's actions led to more adverse actions and another whistleblower complaint (2019-FRS-00014), which the parties settled on February 10, 2023. *Id.* at 31–32.

Complainant argued that Respondent's GPS audit was an adverse action; such an audit is "time-consuming and rarely invoked." *Id.* at 32–33. In 2020, Respondent conducted GPS audits only on Subdivisions 12 and 13. *Id.* at 33. Complainant averred that other courts have found that "heightened surveillance" are forms of prohibited retaliation. *Id.* at 35–37. When Complainant filed the current complaint on October 16, 2020, Respondent knew that GPS data was relevant to this case and on notice to preserve GPS data which was "a vital source of evidence." However, Respondent took no action to preserve such data.

Respondent's actions prejudiced Complainant. *Id.* at 37–45. First, Respondent never identified or produced "massive amounts of evidence" which Complainant requested in Interrogatory No. 3. *Id*. at 37–39. Second, Respondent had analyzed the additional GPS data; it was not raw GPS data like what Respondent produced in response to Document Request No. 110. *Id.* at 39. Third, Respondent deleted the requested evidence, so Complainant "will never know what is missing." *Id.* Fourth, Respondent did not properly advise key witnesses to preserve relevant evidence. *Id.* at 39–40. Fifth, Complainant never received opportunity to conduct proper discovery concerning the GPS-surveillance issue. *Id.* at 40. Complainant further noted that the withheld GPS surveillance was limited to the day Complainant resumed his position as Foreman of Sub 12. Thus, the data was more than likely relevant to Complainant's case. *Id.* Finally, Respondent conducted the GPS surveillance "with a total disregard of the relevant operational circumstances that applied." However, Complainant has lost any meaningful opportunity to probe into the motivations underlying Respondent's GPS surveillance due to Respondent's own actions.

Complainant further argued that the GPS data betrayed Respondent's retaliatory intent. *Id.* at 41–45. Complainant stated that the GPS data showed that Respondent singled out Sub 12, even though Sub 13 spent much more time at its own headquarters. *Id.* at 42. Respondent's actions deprived Complainant of the ability to conduct discovery related to Respondent's motives.

Complainant reasoned that re-opening discovery will not remedy the prejudice he has suffered due to Respondent's actions. *Id.* at 45–59. Re-opening discovery would involve excessive costs and would further prejudice Complainant. *Id.* at 46–48. Complainant noted that due to the importance of the March 27, 2023 admission from Respondent about the GPS data, re-opening of discovery would include the re-depositioning of witnesses. Complainant would require IT experts to analyze any additional information received. *Id.* at 46–48. Respondent had also made "false representations" concerning various aspects of its GPS surveillance, including the individuals involved in retrieving such data, and when the GPS audits occurred. *Id.* at 48–50. Complainant had no reason to believe that emails still exist between Respondent's counsel and Garcia and management concerning Respondent's surveillance of Sub 12 in November and December 2020. *Id.* at 50–53. Complainant called Garcia's testimony evasive, so deposing him again would be futile. *Id.* at 54. Reynolds' and Walker's testimony was similarly unreliable. *Id.* at 54–59. Thus, reopening discovery "would be futile. *Id.*

Because of Respondent's continuing failures to comply with document requests Nos. 110 and 116, Complainant requested adverse evidentiary determinations "that Respondent committed an adverse personnel action and that Complainant's protected activity contributed to its action." *Id.* at 59. Complainant claimed prejudice since the withheld documents would help to establish the pretextual nature of Respondent's rationale for conducting GPS surveillance on Complainant and Sub 12. *Id.* Sub 12 was performing "flawlessly", and Respondent used the "pretextual rationale" that Sub 13, and the union would be offended if Sub 12 were not subject to GPS surveillance. *Id.* at 60–61. This GPS surveillance began the day Complainant resumed his Foreman position. *Id.* at 61. "The evidence that has been provided by the Respondent, while highly probative, is a mere fragment of what is or should have been available." *Id.* at 65.

Respondent's Opposition

Respondent argued that it has met its discovery obligations; Complainant pointed only to "a single test record" which was not produced so he cannot establish prejudice. *Respondent's Opposition* at 5–7. Respondent admitted that it did not produce the GPS data in the same format as the August/September 2020 GPS reports; however, it did not have a duty to produce them in any manner beside the medium in which they were created. *Id.* at 7–11. Respondent no longer had the software to create the August/September 2020 reports and "the GPS data is not kept in the ordinary course of business in such a way that it can be broken out by signal department – that is why Respondent produced the data in Excel format (rather than a static PDF format), so that Complainant's counsel can search through it" based on truck numbers. *Id.* at 7–8. Sanctions are not warranted because data was produced in a format not deemed preferable or convenient for the opposing party. *Id.* at 8–9 (citing *Crawford v. City of New London*, No. 3:11-CV1-371(JBA), 2014 WL 2168430, at *2 (D. Conn. May 23, 2014)). The cases Complainant cited refer to an obligation to produce electronically stored data, not the way the data must be produced. *Id.* at 9–11.

Respondent continued that it produced all documents kept on Garcia's computer. *Id.* at 11–13. Complainant allegedly relied on speculation that Respondent did not produce all documents and that any such withheld evidence is relevant; Complainant declined the opportunity conduct additional post-hearing discovery to prove the argument. *Id.* at 11. Sanctions are not supportable when based on pure speculation as to the relevancy of allegedly missing evidence. *Id.* at 12 (citing to *Sovulj v. United States*, No. 98 CV 5550, 2005 WL 2290495, at *5 (E.D.N.Y. Sept. 20, 2005)). Respondent has complied with the Tribunal's request to check Garcia's computer to ensure that all "GPS data" was provided; the Tribunal did not direct Respondent to produce any other type of document. *Id.* at 12–13. To prove that emails were destroyed, Complainant relied on Peter Volz's "belie[f]" about an email sent to railroad counsel; however, Volz testified he was non "100 percent sure." *Id.* at 13. Complainant further argued that GPS Audits and Respondent's headquarters policy do not constitute adverse personnel actions. *Id.* at 14–19. Finally, if sanctions are appropriate, the Tribunal should apply lesser sanctions such as reopening discovery. *Id.* at 19–20.

Complainant's Arguments Concerning the Motion to Strike

On June 19, 2023, Complainant submitted a Motion to Strike. The Motion to Strike noted that Respondent's Opposition to the Motion contained the Declaration of John Reynolds, which had allegedly "introduced substantial new testimony"; Reynolds is "incompetent" to provide some of that testimony. Motion to Strike at 2–3. Reynold was not competent to provide such testimony because, despite what was written on the declaration, Mark Ellentruck planned, managed, and scheduled the signal test gangs. *Id.* at 3–4 (citing Tr. at 485–86, 492, 524.) Additionally, Complainant argued that Reynolds's Declaration involved the presentation of additional testimony; the formal hearing ended on March 10, 2023 and the Tribunal stated it would "not take any additional testimony except for that [relating] to the [then] outstanding issues in the order." *Id.* at 1 (citing Tr. at 920). Additionally, Reynolds's new testimony could have been raised during the hearing. *Id.*at 5–6. Finally, Complainant requested the opportunity to respond to the Reynolds Declaration should the Tribunal deny the Motion to Strike. *Id.* at 7–9.

Respondent's Opposition to the Motion to Strike

Respondent argued that, despite the contents of Complainant's Motion to Strike, Reynolds is competent to offer testimony, and the Reynolds Declaration did not include testimony not offered at trial. Concerning the latter assertion, Respondent noted that it has averred that Gang 12 performed different tests than other subdivisions. Reynolds testified to how such differences in testing impacted their headquarters usage. Opp. To MTS at 1–2. Respondent introduced Reynolds's declaration considering "new testimony" contained in Complainant's Motion. *Id.* Respondent noted Reynolds' testimony concerning his knowledge of the FRA requirements and responsibilities concerning testing and documentation. *Id.* at 3–5. Respondent alleged that Complainant's motion contained new factual assertions and that Reynolds' declaration merely explained how those allegations "fit into the story already told at the hearing." *Id.* at 5. For example, Complainant's assertions concerning Test 5 required Reynolds to describe the circumstances surrounding Test 5; these assertions were consistent with Volz's testimony. *Id.* at 5–6. Moreover, Reynolds discussed the unique nature of Complainant's Gang 12. *Id.* at 6 (quoting Tr. at 446.) Finally, Reynolds did not include new testimony when stating that Respondent had

allowed workers to use their own vehicles during the COVID-19 pandemic. *Id.* at 7. It was Complainant's Declaration that included new allegations, such as: (1) it was common for gangs to spend multiple hours at headquarters reviewing schematics and preparing tests; (2) Respondent committed FRA testing fraud and had an inconsistently applied headquarters usage policy; (3) Respondent's rationale for surveilling Sub 12 was pretextual based on a supposition that Subs 1–6 were the only appropriate comparators; and (4) Gang 12 was in compliance with the headquarters policy. *Id.* at 7–8. Respondent argued that even if Reynolds's Declaration contained new information, it was appropriate considering the new allegations contained in Complainant's Declaration. *Id.*at 8.[3]

Discussion

The Administrative Procedure Act authorizes administrative law judges to regulate adjudicatory proceedings and to dispose of procedural matters. 5 U.S.C. § 556(c)(5) & (9). The Secretary of Labor's procedural regulations delegate "all powers necessary to conduct fair and impartial proceedings," including regulating the course of a proceeding and to compel the production of documents. 29 C.F.R. § 18.12. Furthermore, the governing regulations allow for an administrative law judge to apply sanctions when a party "fails to obey an order to provide or permit discovery." § 18.57(b).[4]

The regulation includes six non-exhaustive types of sanctions; including, deeming factual matters admitted, excluding evidence, or entering a decision against the non-complying party. *Id; see generally Federal Maritime Comm. v. S.C. State Ports Auth.* 535 U.S. 743, 756-757 (2002) (cataloguing the many similarities that make administrative law judges functionally comparable, although not identical, to Article III trial judges). Article III courts generally employ a two-part test to determine appropriate sanctions. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982) (interpreting the analogous grant of sanctions authority at FRCP 37(b)(2)). First, any sanction must be "just." *Id.*; *see also* § 18.57(b). Second, any sanction must relate to the specific "claim" at issue when the tribunal issued its discovery order. *Bauxites de Guinee*, at 707. The decision on whether to impose a sanction against a party is left to the discretion of the factfinder. *Samson v. U.S. Dept. of Labor,* 2018 U.S. App. LEXIS 13174 (7th Cir. May 21, 2018)(unpub.) The Administrative Review Board reviews an ALJ's imposition of discovery sanctions, under an abuse of discretion standard. *Ho v. Air Wisconsin Airlines,* ARB Case No. 2020-0027, ALJ Case No. 2019-AIR-00009 (June 30, 2021)(citations omitted).

At the outset, the Tribunal must emphasize that the hearing in this matter has been significantly colored by Respondent's discovery conduct. For example, the hearing in this matter began on March 6, 2023. On that very day, the Tribunal issued its Order Granting In Part Complainant's Motion for Sanctions, which sought to right certain wrongs perpetrated on Complainant. By the fourth day of hearing, after hearing the testimony of Jayson Garcia, the

[3] On June 28, 2023, Complainant submitted a "Motion to Amend Complaint and Renew Discovery in the Event That the Tribunal Declines to Grant Complainant's Renewed Motion for Sanctions Dated May 12, 2023." Respondent responded in opposition on July 11, 2023.

[4] At the outset, the Tribunal denies the Motion to Strike. Complainant's arguments largely go to the weight of the Reynolds Declaration; not to its admissibility. The Tribunal is well situated to make such judgment calls and will exercise that discretion here. Thus, the Motion to Strike is DENIED.

Tribunal noted on the record:

> In my previous sanction, I was considering mere negligence on the part of Respondent's behavior in discovery. I am now very concerned as to whether or not this was willful.

(Tr. at 861.) The Motion and Opposition before the Tribunal demonstrate that the latter situation is likely, at least to some sanctionable extent, true and that Respondent's contumacious discovery behavior has prejudiced Complainant's ability to prosecute its case-in-chief. Notably, it was only on March 27, 2023–two weeks after the close of the formal hearings in this matter–that Complainant received a tranche of documents that specifically relate to his claim of an adverse employment action based on Respondent's GPS monitoring.

This was no mere insignificant late disclosure. It involved a late review of Garcia's computer–a review which should have already occurred based on Respondent's responses to Complainant's discovery requests[5]–which found hundreds of pages of relevant information concerning Respondent's GPS surveillance of Complainant and Sub 12. *See* Exhibits H–O of the May 12, 2023 Inganamorte Declaration. Importantly, at least two of the late disclosures involve GPS surveillance occurring on or around August 16, 2020. *See, e.g.*, EX H and EX N of the Inganamorte Declaration. This date is materially significant[6] to Complainant's allegations of workplace discrimination because it is the exact date Complainant returned to work after Administrative Law Judge Jonathan C. Calianos ordered reinstatement resulting from Complainant's prior complaint before the Tribunal. *See Inganamorte v. MTA LIRR*, 2019–FRS-00014 (August 11, 2020). The Tribunal recognizes that it had already sanctioned Complainant on similar grounds. *See* March 6, 2023 Order granting in part Complainant's Motion for Sanctions. Thus, the totality of the evidence about Respondent's conduct concerning production of the GPS data prior to the fourth day of the hearing[7] leads this Tribunal to conclude that the evidence points towards the willful withholding of evidence.[8] Thus, the post-hearing disclosures[9] were significant and materially changed the landscape of the case, including the likely contours of Complainant's litigation strategy and certainly his examination of witnesses (both at depositions and during the formal hearing).

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[5] *See, e.g.*, Request Nos. 110 and 116 concerning Complainant's October 16, 2020 NTSSA complaint; Complainant's December 2, 2022 Motion to Compel Response to Document Request Nos. 110 and 116.

[6] The remainder of Respondent's late disclosure were certainly relevant to Complainant's case (as they mostly concerned GPS surveillance of Sub 12), but were less probative because they lacked the immediate temporal proximity of the August 16, 2020 GPS surveillance.

[7] The only reason spoilation did not permanently occur in this case is because the Tribunal asked Mr. Garcia during his testimony about the whereabouts of the requested data and about his reports to management from August and September 2020, and whether anyone had asked him for the data or to preserve the data for any reason. Tr. at 852–62.

[8] *See Vanceah v. Nat'l R.R. Passenger Corp,* No. 18 Civ. 9418(ER), 2022 U.S. Dist. LEXIS 136500 (S.D.N.Y. Aug. 1, 2022)(dismissal of claim when plaintiff engaged in multiple discovery violations, including deletion and withholding of relevant evidence and failing to correct false information).

[9] The Tribunal recognizes Respondent's argument that it searched for and produced on March 27, 2023 the documents found on Garcia's computer; however, this action does not absolve Respondent of culpability for only providing the Garcia documents **after** the hearing. *See* Respondent's Opposition at 4, 12.

Sanctions, therefore, are warranted. The formal hearing in this matter has already occurred, which supports Complainant's argument that reopening discovery is an inappropriate sanction in this instance. Moreover, based on the Tribunal's observations of the vague and likely obfuscatory testimony of Respondent's witnesses on these points, it agrees with the sentiment that the taking of additional post-hearing depositions of Respondent's witnesses will result in the expenditure of additional time (and for the parties money) for very little value in what is an already over-litigated case. Therefore, the sanction of an adverse finding is required.

Colorable evidence of Respondent's gamesmanship is also found in the motion practice surrounding Complainant's April 18, 2023 Motion for Order Directing Respondent to Produce Litigation Hold Letter. Litigation holds are generally protected from discovery; however, exceptions exist. *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 425 (S.D.N.Y. 2004)(disclosing details of litigation hold communications after discovering email had not been produced); *In re eBay*, Case No. C 07-01882 JF (RS), 2007 U.S. Dist. LEXIS 75498 (N.D. Ca. Oct. 2, 2007), at *7 (Despite the fact that plaintiffs typically do not have the automatic right to obtain copies of a defendants litigation hold letters, plaintiffs are entitled to know which categories of electronic storage information employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end.). Although this Order moots Complainant's Motion to Produce the Litigation Hold Letter, the very fact that Complainant was compelled to request such a document–and that the Tribunal had seriously considered taking action upon the Motion–demonstrates Respondent's culpability. Respondent's contumacious conduct raised at least the specter of spoliation. And, although the Motion is moot, consequences are required due to Respondent's behavior.

As a consequence for such gamesmanship, the Tribunal sanctions Respondent by finding that its GPS monitoring of Complainant on or around August 16, 2023 was an adverse employment action.[10] The Tribunal is sympathetic to the idea–generally true–that an employee has no reasonable expectation of privacy in an employer provided vehicle communally shared by other employees at work; however, Respondent's discovery conduct and the temporal proximity between Complainant's return to work as a Foreman and Respondent's GPS surveillance of Sub 12 work in concert give rise to this sanction. This sanction is necessary and appropriate because, at this stage of litigation, Complainant has been deprived of the full ability to overcome the general maxim that GPS monitoring conducted at work is not an adverse action.[11] Because discovery has

[10] As alluded to above, even in the absence of this sanction, the Tribunal would likely find solely based on the temporal proximity between Complainant's return to work and Respondent's GPS monitoring that such action rose to the level of adverse action. Although temporal proximity typically goes to causation, the rational mind cannot disentangle the temporal proximity of Complainant's return to work with the GPS monitoring. This renders the act a likely adverse employment action.

[11] For example, the circumstantial evidence Complainant provided on this point based on the information Respondent provided–late–suggests an adverse action, but likely would not demonstrate an adverse action on its own. However, the Tribunal affirmatively declines to apply a sanction based on the millions of lines of GPS data Respondent provided to Complainant; Respondent has no affirmative duty to provide discovery responses in any form aside from the condition it stores the data within the ordinary course of business. *See* 29 C.F.R. § 18.61(b)(v)(A) (mandating that parties produce documents "as they are kept in the usual course of business"). Here, Respondent produced to Complainant a searchable Excel file, which reasonably satisfies its burden to produce. Therefore, this piece of evidence does not help Complainant establish the sanction.

long since closed and these documents were not available at the hearing for Complainant to conduct a more fulsome examination of Respondent's witnesses (such as Garcia), the exigencies of the case support this adverse finding.[12]

Briefing Deadlines

During the hearing–due in large part due to Respondent's substantial gamesmanship necessitating its post-hearing provision of GPS data–the Tribunal did not provide the parties with briefing dates. (Tr. at 922–26.) With Respondent now so sanctioned, it is now appropriate to provide briefing deadlines. The deadlines follow:

- Complainant's brief is due no later than **September 29, 2023**. His brief shall be no longer than 35 pages.
- Respondent's brief is due no later than **October 30, 2023**. It shall be no more than 35 pages.
- Should Complainant wish to submit a reply brief, it is due no later than **November 13, 2023**, and shall be no more than 10 pages.

The Tribunal's instructions for fonts and spacing for these briefs are set forth in its Notice of Hearing. Further, an index to a brief, or a list of citations within the brief, are not required. However, should the parties choose to include an index or a list of citations, they will not count against the above page limits.

Order

WHEREFORE, based on the above the Tribunal hereby ORDERS:

- Complainant' Motion for Sanctions is **GRANTED**;
- The May 12, 2023 Motion to Amend the Caption and the April 18, 2023 Motion to Produce the Litigation Hold Letter are **DENIED** as moot;
- The June 19, 2023 Motion to Strike is **DENIED**; and
- The parties are **ORDERED** to follow the foregoing briefing deadline.

SO ORDERED

Digitally signed by Scott R. Morris
DN: CN=Scott R. Morris, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: Washington DC

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey-District Office

[12] This order specifically does not decide whether Respondent's headquarters policy warrants an adverse finding (or even an adverse inference). The parties should brief this issue in a more fulsome way for the Tribunal to make traditional findings of fact and conclusions of law on the matter.

SERVICE SHEET

Case Name: **INGANAMORTE_v_MTA_Long_**

Case Number: **2022NTS00002**

Document Title: **ORDER GRANTING COMPLAINANT'S RENEWED MOTION FOR SANCTIONS; DENYING COMPLAINANT'S MOTION TO STRIKE;**

I hereby certify that a copy of the above-referenced document was sent to the following this 20th day of July, 2023:

Digitally signed by Donna M. Broome
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