UIC John Marshall Journal of Information Technology & Privacy Law

Volume 1
Issue 1 *Computer/Law Journal*

Article 25

1978

Case Digest, 1 Computer L.J. 749 (1978)

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CASE DIGEST

*by Drew Pomerance**

The materials in this section are intended to provide a concise overview of the case law which has developed in the area of computer evidence. Since there has been a large number of cases in this area, many of which are merely repetitious in fact and law, only the most relevant cases have been chosen for abstracting.

Each case is summarized in a separate digest entry. Each entry contains the following information:

- case name
- case citation
- subsequent history (if any)
- summary of salient facts
- legal analysis and holding of the court or administrative agency

The digest entries are organized alphabetically.

E-1 Adams v. Dan River Mills, Inc., 4 CLSR 33 (W.D. Va. 1972).

The action involved alleged racial discrimination by the defendant in its employment practice. The plaintiff filed a request for production of documents under Fed. R. Civ. P. 37, including computer printouts. Plaintiff argued that the computer printouts where both vital and relevant, as well as the most inexpensive and reliable method of ascertaining the needed information.

The court held that because of the speed, reliability and cost savings involved in the computer reproduction, defendant would be ordered to produce the requested documents.

E-2 Aggregate Weight Provisions on Paper, Mass. to N.Y. & N.J., 323 I.C.C. 525, 1 CLSR 327 (1964).

The respondent filed a proposal seeking to remove a tariff restriction which imposed an aggregate weight provision in connection

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with carrier rates on various paper article to and from a number of points in the northeastern United States. Action on the proposal was suspended when a protest was filed against it.

The protestant submitted a computer-generated cost study as evidence against the removal of the tariff restriction. The respondent then moved to strike the cost analysis evidence.

The Commission noted that for the evidence to be admissible two criteria must be met. It must be presented by a qualified witness and it must be made available to all parties. Here, the court found that there was no evidence that the protestant's witness prepared or supervised the preparation of the computer materials. In addition, the cost data was not made available to the opposing party or to the Commission itself. Therefore, the Commission granted respondent's motion to strike.

E-3 American Colloid Co. v. Akron, Canton & Youngstown Railway Co., 321 I.C.C. 91, 1 CLSR 244 (1963).

American Colloid alleged that rates maintained by the defendant rail carrier on shipments of clay to certain areas exceeded a maximum reasonable level, in violation of sections 1 and 3(1) of the Interstate Commerce Act. As part of its proof of the allegation, the plaintiff attempted to introduce certain computer-generated cost evidence which related solely to the differences in rates among the various areas.

The defendant objected to admission of the evidence on the grounds, *inter alia* that:

1. the underlying data for one study was not made available to defendant; and,
2. the cost analyst who testified had no actual knowledge of the person operating the computer.

The Commission overruled defendant's objections. It reasoned that the defendant had a chance to cross-examine the cost analyst, inspect the underlying data, and prepare its own data. The court held that any deficiencies in the evidence would go to its weight, and not its admissibility.

E-4 Arnold D. Kamen & Co. v. Young, 466 S.W.2d 381, 4 CLSR 444 (Ct. App. 1971).

Young brought an action to recover commissions allegedly due from his employment with appellants. A key issue was whether Young had entered into an agreement with defendants that would render him financially responsible for any customer deficiencies. If so, the difference would come out of his commissions. The jury found that Young assumed responsibility for only selected individ-

ual customer deficits, and rendered judgment for him on the remainder of the commissions claimed due.

During trial, defendants had sought unsuccessfully to introduce a computer-prepared statement of accounts showing the deficiencies for which Young should be held liable. The defendants argued for admissibility under the Business Records Act,[1] contending that such records were prepared during the normal course of business. Young objected to the evidence on the ground that the computer data was not prepared by someone having personal knowledge of the account.

The appellate court affirmed the judgment, agreeing with the trial court that the statute did not apply since the person preparing the computer data had no knowledge of the actual deficit accounts.[2]

E-5 Baggett Transportation Co., 57 M.C.C. 690, 1 CLSR 1 (1951).

The petitioner sought to purchase the operating rights of another motor carrier which had ceased operating over certain routes. The intervenors in the action were other common carriers who claimed that there was sufficient service at the present time, and that there was no public necessity for the acquisition.

The petitioner attempted to introduce into evidence certain computer-generated abstracts of various traffic data. Intervenors objected to their admission on the following grounds:

1. the actual underlying data (freight bills and shipping documents) were not available for inspection at the hearing;
2. no one with any knowledge of the underlying data, or with knowledge as to the data's preparation, was called to testify; and,
3. petitioner's witness testified that it would now be difficult to trace the original data.

The Commission held that the objections were valid and, under those circumstances, it was proper to reject the evidence. The Commission found that any objection must go to the weight accorded the evidence, and not its admissibility. The judgment was affirmed.

E-6 Bituminous Coal, Tenn., Ky. & Va. to N.C., Tenn. & Va., 325 I.C.C. 548, 1 CLSR 415 (1965).

Various railway companies proposed reduced rates on bituminous fine coal to certain destinations. Competing railway companies protested the action, and sought to introduce cost data evidence,

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1. TEX. REV. CIV. STAT. ANN., art. 3737 (Vernon).

2. *See* Note, *The Texas Business Records Act and Computer "Print-outs,"* 24 BAYLOR L. REV. 161 (1972), for a severe criticism of this case.

which was the product of a computer. The protestants furnished the opposition with some explanation of the program used, and enough data to provide the respondents an opportunity to manually check the cost evidence. Respondents nevertheless objected to admission of the evidence on the ground that they were denied access to the source language of the computer program, which they wanted to check on their own computer to ensure its reliability. They claimed that this was a denial of their right of cross-examination.

The court first observed that computer-generated materials may be admitted as evidence, provided that the program has been made available to the opposing party. The court then held that as long as the respondents were furnished with enough underlying data and explanation to permit them to check the logic and accuracy of the program by manual computation, the other party was under no obligation to release the entire program, which represented a two to three year effort. Thus, respondent's objection was overruled.

E-7 Bobbie Brooks, Inc v. Hyatt, 195 Neb. 596, 239 N.W.2d 792 (1976).

The plaintiff sought to recover the value of merchandise unaccounted for by the defendant, a former salesman of the plaintiff. The only evidence plaintiff offered was a computer printout showing a certain sum owed by the defendant. The witness who testified concerning the printout was not the custodian of records at the time they were made. The trial court found the evidence inadmissible, and plaintiff appealed.

At trial, the witness testified that he had personally observed plaintiff's record-keeping procedures before entering its employment. Furthermore, he indicated that because of his expertise in the computer field, he could determine the methods of input by studying the output. Finally, he testified that the plaintiff's computer information was transferred to him by the previous custodian during the normal course of business.

The Nebraska supreme court held that the testimony was sufficient to insure that the sources of information, and method and time of preparation were such as to justify admission of the output. The print-out was the type of evidence that the Nebraska Business Records Act was meant to cover.[3] The court concluded by stating that:

> the witness need not be the custodian of the records at the time they were made. To hold otherwise would fail to recognize the "realities of business," and would exclude a great amount of reliable

3. NEB. REV. STAT. § 25-12, 109.

evidence concerning the activities of large business organizations.[4]

E-8 Burnham Van Service, Inc., 98 M.C.C. 58, 1 CLSR 366 (1965).

The applicant sought a certificate to authorize its trucking operations in various states to proceed over some irregular routes. The application was based on public convenience and necessity. Applicant introduced some IBM data cards as evidence of the claimed public necessity. Certain competitors objected to the admissibility of such evidence, claiming that they did not meet the requirements of the business records statutes.

The court held that the IBM cards, prepared in the regular course of business, were admissible as evidence, though unaccompanied by the underlying documents. The court further noted that objections to such evidence go to the weight accorded them and not to their admissibility.

E-9 Campagna v. Hill, 53 A.D.2d 1050, 385 N.Y.S.2d 894, 6 CLSR 221 (1976).

The respondent appealed from an order directing him to post a $1,000 bond to guarantee his child support payments. The respondent denied that he was behind in payments, and in proof of his contention he offered to specify the payments made.

Though the petitioner, an agent for the county probation department, did not dispute any particular payment, both he and the court alleged that the computer at the department showed that defendant was $200 behind in his payments. The lower court did not grant respondent a full hearing, or give respondent a chance to introduce evidence on his behalf.

The appellate court held that, based on respondent's contentions and the lack of any evidence to the contrary, the lower court erred in ordering him to post the bond. The court determined that the statement by petitioner as to what the computer showed was not competent evidence upon which to base an order directing payment. The order was vacated and the matter remanded for a hearing.

E-10 Campbell Sixty-Six Express, Inc., 63 M.C.C. 569, 1 CLSR 17 (1955).

The applicant sought a certificate of public convenience and necessity authorizing its operation as a common carrier over interstate routes different from those currently serviced. The evidence of the volume of freight that applicant was transporting was prepared on IBM computer cards. This evidence was used to establish the public

4. 195 Neb. at 600, 293 N.W.2d at 795.

necessity for the application. Applicant testified that this data had been generated from the original shipping documents. The protestants objected to the admission of this evidence.

The Commission stated that such cards are admissible only if accompanied by the authentic documents,[5] to give the opponent an opportunity to cross-examine. The Commission held that the punch cards were merely abstracts of the originals, were not authenticating documents and were, therefore, inadmissible. Since the applicant failed to introduce admissible evidence to support its petition, its application was denied.

E-11 City of Seattle v. Heath, 10 Wash. App. 949, 520 P.2d 1392 (1974).

The defendant was convicted of negligent driving, leaving the scene of an accident, and driving without a license. He claimed that the trial court erred in admitting computer abstracts of his driving record and the status of his driver's license.

The defendant claimed that there was no proper foundation laid for admission of the evidence under Washington Revised Code 5.45.020.[6] At trial, the assistant director of the traffic violations bureau of the municipal court testified that his office had a direct terminal to the Department of Motor Vehicles computer. He testified as to how the information was prepared by the Department of Motor Vehicles computer and then sent to his office. He further testified that the information was entered into the computer at the time it was received by the Department of Motor Vehicles.

The appellate court first noted that, unless there was a manifest abuse of discretion, the trial judge's ruling admitting or excluding the records would not be disturbed. Here, it was established that the witness was a custodian of the bureau's records, and a qualified witness insofar as he testified to the method of preparation of the abstracts. In addition, the abstracts were clearly made during the regular course of business. In the absence of any abuse of discretion, the trial judgment was affirmed.

E-12 Cotton v. John W. Eshelman & Sons, Inc., 137 Ga. App. 360, 223 S.E.2d 757, 5 CLSR 1287 (1976).

Eshelman sued Cotton for a sum due on an open account for various farm supplies. At trial, plaintiff introduced certain computer printouts evidencing defendant's account. The defendant objected to the evidence, claiming that since no witness having personal

5. *But see* Burham Van Service, Inc., 98 M.C.C. 58, 1 CLSR 366 (1965). *See* Case E-8 *supra*.

6. WASH. REV. CODE 5.45.020.

knowledge of the account testified, the evidence did not fall within the business records exception to the hearsay rule.

The court of appeals first examined the business records statute to determine if computer-generated material was generally admissible. The statute stated that "[a]ny writing or record, whether in the form of an entry in a book or otherwise . . . shall be admissible in evidence. . . . This section shall be liberally interpreted and applied."[7] Based upon this language, the court held that computer-generated material was admissible, since "our statute was intended to bring the realities of business and professional practice into the courtroom and should not be interpreted so as to destroy its obvious usefulness."[8]

The court further held that the evidence was admissible despite the lack of testimony by any witness having knowledge of the account. As authority for this point, the court cited the Georgia Code which states "[a]ll other circumstances of the making of such writing or record, *including lack of personal knowledge by the entrant or maker*, may be shown to affect its weight, but they shall not affect its admissibility."[9] The judgment for plaintiff was affirmed.

E-13 D&H Auto Parts, Inc. v. Ford Marketing Corp., 57 F.R.D. 548, 3 CLSR 856 (E.D.N.Y. 1973).

D&H sued the defendant for violation of the Robinson-Patman and Clayton Acts, claiming that Ford granted extra discounts to other distributors and denied them to plaintiff. The complaint also contained a cause of action for breach of contract. The defendant counterclaimed for damages on the theory that D&H sought excessive discounts. In support of its counterclaim, defendant offered into evidence computer printouts of the amounts claimed as discounts, and the amount of sales. The trial court held for the defendant. Plaintiff moved to set aside the verdict, claiming as error admission of the printouts.

The court reviewed the printouts to determine if they met the standards of the business records exception to the hearsay rule. The court first noted that the computer records were prepared each month in the regular course of business, and not merely for the purpose of litigation. Additionally, though the plaintiff objected to the evidence, it failed to point to any specific inaccuracy in the data.[10]

7. GA. CODE ANNO. § 38-711.

8. 137 Ga. App. at 364, 223 S.E.2d at 761, 5 CLSR at 1291.

9. GA. CODE ANNO. § 38-711A; emphasis added.

10. The court cited Olympic Ins. Co. v. Harrison, Inc., 418 F.2d 669, 2 CLSR 344 (5th Cir. 1969), for the proposition that a party must object to a specific error, and not to a general inaccuracy. *See* Case E-31 *infra*.

Finally, since the defendant's witness, the head of accounting, gave sufficient testimony as to the nature of the data, Ford was not required to produce experts on data processing.

E-14 Ed Guth Realty v. Gingold, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 5 CLSR 880 (1974).

The issue presented was what kind of proof can be used to determine the ratio of assessed value to fair market value of a parcel of land. In addition to various other methods, the petitioners claimed that the state equalization rate was a proper means of assessing that ratio. Petitioners introduced computer printouts showing the data collected, and how it bore on the selection of the equalization rate.

The trial court adopted the equalization rate for assessing the ratio because of its reliability as established by the computer data. The city argued that the computer data was not the best evidence, was hearsay and should not have been admitted.

The court of appeals first determined that the computer information was prepared in the normal course of business, and therefore, was within a statutory exception to the hearsay rule. Second, the court held that the best evidence rule was not violated. It reasoned that summaries of voluminous materials are competent evidence as long as the opposition is given access to the original data. Since the city was afforded such access, the trial judgment was affirmed.

E-15 Endicott Johnson Corp. v. C.M. Golde, 190 N.W.2d 752, 4 CLSR 449 (N.D. 1971).

The plaintiff sued Golde for non-payment for certain goods. At trial, plaintiff attempted to introduce three electronically prepared exhibits through the testimony of its North Dakota representative. When the trial judge refused to admit these exhibits, the plaintiff rested. The defendant then moved for dismissal, and the motion was granted.

On appeal, the plaintiff argued that the three exhibits should have been admitted under the Business Records as Evidence Act.[11] The trial court's refusal was based on two grounds: (1) the com-

11. N.D. CENT. CODE § 31-08-01 provides that a record of an act is admissible if:
1. The custodian or other qualified witness testifies to its identity and the mode of its preparation;
2. It was made in the regular course of business, at or near the time of the act, condition, or event; and
3. The sources of information and the method and time of preparation, in the opinion of the court, were such as to justify its admission.

pany's representative was not the custodian of the records, and (2) the original records would have been the best evidence.

On the first ground, the court noted that the statutory language allows for either a custodian or "other qualified witness" to testify. Further, the orders for the goods were prepared by the North Dakota representative, and he was generally familiar with the actual operation of the computer.

The court observed with reference to the second ground that the complexities of modern business do not easily permit the furnishing of original records. Therefore, "such statutes rely on the trustworthiness of records as routine reflections of the day to day operations of a business, it being the interest of the entrant to have his records truthful and accurate so that they may be relied on in the conduct of business."[12] The court, therefore, reversed the dismissal and a new trial was granted.

E-16 Freightliner Corp. v. Gyles, 521 P.2d 1, 4 CLSR 1458 (Ore. 1974).

The plaintiff brought an action for an injunction and an accounting. The trial court found that neither the accounting nor the injunction was proper, but nevertheless entered judgment in plaintiff's favor for $8,000, based on defendant's conversion of plaintiff's truck parts.

To establish the conversion, plaintiff's witness testified that he had checked the computer tapes which store the inventory and sale information, and had determined that these missing parts had not been sold. The witness did not introduce a printout of that information, and the defendant objected to this evidence as hearsay.

The Oregon supreme court reversed the judgment, holding that the witness' testimony was not the best evidence and, therefore, the judgment was erroneous.

E-17 Gassett v. State, 532 S.W.2d 328, 5 CLSR 1309 (Tex. Crim. 1976).

The defendant was convicted of murder and sentenced to seven years imprisonment. At trial, defense counsel attempted to show the bad character of the deceased by offering into evidence his prior arrest record. To rebut this evidence, the State introduced a computer printout prepared by the National Criminal Information Center, which showed no arrests or indictments of the deceased. On appeal, the defendant claimed that the admission of such evidence was prejudicial error.

12. 190 N.W.2d at 757, 4 CLSR at 453.

The appellate court reversed on the ground that while the State did produce a witness who testified to the preparation of such data,[13] there was no evidence to indicate that such entries of arrest are made in the regular course of law enforcement business. Without evidence that such records are regularly kept, there is no assurance that these records are reliable. The evidence was therefore held to be hearsay, and the case was remanded for a new trial.[14]

E-18 Greyhound Computer Corp. v. IBM Corp., 3 CLSR 138 (D. Minn. 1971).

Plaintiff served a set of interrogatories on the defendant. Some of defendant's answers merely told plaintiff where various materials could be found. Plaintiff's counsel found himself confronted with several rooms full of thousands of documents. Unable to sort through the material, plaintiff made a motion for more specific answers to the interrogatories.

The court denied the motion, but required the defendant to have someone available to assist plaintiff in locating the desired information.

E-19 Harned v. Credit Bureau of Gillette, 513 P.2d 650, 5 CLSR 394 (Wyo. 1973).

The plaintiff, credit bureau and assignee of an open account, sued for a sum due. At trial it introduced a recapitulation of the account prepared from certain computer printout sheets. These printout sheets, in turn, had been prepared from the original invoices. The defendant argued that such evidence was inadmissible since it was not the best evidence.

The appellate court reversed and remanded for a new trial for two reasons. First, the recapitulation was an only summary, and since the original invoices were not produced, the plaintiff violated the best evidence rule. Second, the evidence was not admissible under the Uniform Business Records as Evidence Act,[15] since the recapitulation was not made in the regular course of business, though the computer printouts were. Thus, the court felt, there was no guaranty of reliability of the recapitulation.

E-20 *In re* Matthews, 47 Pa. D.&C.2d 529, 4 CLSR 163 (1969).

The deceased's estate was worth roughly $9,500. Since he had outstanding debts of over $50,000, the creditors would receive only a

13. The witness was therefore qualified pursuant to TEX. REV. CIV. STAT. ANN., art. 3737e (Vernon).

14. The error was prejudicial since the defense relied heavily on establishing the deceased's bad character to negate malice and show self-defense.

15. WYO. STAT. § 1-172.

pro rata share. Fireman's Fund Insurance Company had a claim of $11,000 and introduced a computer printout of the deceased's account in order to prove their claim. The other creditors objected to this printout on the basis that the record was not an original one, nor was it a daily itemization of transactions. Fireman's Fund argued that the evidence came within the Uniform Business Records as Evidence Act,[16] and should be admitted.

The court held that the printout was admissible, since the record was made in the usual course of business. The court found that the admissibility of computer-generated material is simply a logical extension of the old shop book exception to hearsay.[17] The court further reasoned that "the final form of the record is not material so long as it is the end product of a system which is designed to produce a record which is accurate and reliable."[18]

E-21 Keim v. John Hancock Life Insurance Co., 5 CLSR 1314 (Pa. 1974).

The insured plaintiff claimed benefits under a policy. The defendant argued that no payments on the premium were received after March 21, 1970, and, even with a thirty-one day grace period, the policy expired on April 23, 1970, one month prior to any claim for benefits.

The insurance company's standard procedure, however, was to send out a computer-prepared statement forty-five days after the premium was due to remind the insured to pay, instead of enforcing the thirty-one day grace period. Plaintiff offered evidence that no such statement had been sent to him. The court reasoned that this fact, combined with other circumstances, was sufficient to lead the jury to reasonably conclude that the company misled the insured into believing that his policy was in no danger of lapsing. Thus, the defendant's motions for judgment notwithstanding the verdict and new trial were denied.

E-22 King v. State *ex rel.* Murdock Acceptance Corp., 222 So.2d 393, 2 CLSR 180 (Miss. 1969).

Murdock was in the business of financing auto dealers through the purchase of conditional sales contracts. He purchased six such contracts from a dealer who then went bankrupt. The co-signer executed a note for the amount to be secured by a deed of trust on the property of the co-signer's parents. The deed of trust was acknowl-

16. 28 PA. CONS. STAT. §§ 91a *et seq.*
17. 47 Pa. D.&C.2d at 537, 4 CLSR at 169.
18. *Id.*

edged by King, who entered his notarial certificate on the acknowledgment to the deed.

The co-signer defaulted on the note, and Murdock sought to foreclose on the property. The owners of the property sued to enjoin foreclosure on the ground that King's notarial certificate was false. Murdock was successful in his suit against King for damages. Computer printout sheets showing various payments and balances due on the sales contracts were admitted into evidence in this suit.

On appeal, King claimed as error the admission of the computer printouts, contending that such evidence failed to meet the best evidence rule.[19] The court first commented that trial courts must begin to take into account the realities of modern business practice in keeping records.[20] The court held that printout sheets are admissible without the necessity of producing, as witnesses, the individuals who make the original entries, if:

1. the computer is recognized as a standard equipment in the business;
2. the records are made in the usual course of business; and,
3. relevant testimony satisfies the court that the sources of information, method and time of preparation are trustworthy.[21]

Having found the above criteria satisfied in the instant case, the judgment was affirmed.

E-23 Local 743, International Association of Machinists v. United Aircraft Corp., 220 F. Supp. 19, 1 CLSR 242 (D. Conn. 1963).

In response to a set of interrogatories, the defendants delivered 450 pounds (120,000 copies) of photographic and copied material as their answers. Plaintiffs contended that this was not an adequate answer. They further alleged that the defendants' non-compliance was deliberate, and, therefore, moved under Fed. R. Civ. P. 37(6)(2) for a default judgment.

The defendants claimed that it did comply with the court's order to the extent that time and physical limitations permitted. They contended that their electronic equipment could not handle the volume of materials to be processed in the given time period, and that they were now willing to hire additional personnel and equipment at their own expense to analyze the data in a sufficient manner to answer the interrogatories.

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19. King claimed that the original books and receipts were the most reliable, and therefore, best evidence.

20. 222 So.2d at 397, 2 CLSR at 183-84.

21. *Id.* at 398, 2 CLSR at 185.

The court concluded that the defendants did, in good faith, begin to comply with the previous court order compelling it to answer the interrogatories. In addition, the court found that the original order did not spell out the extent of the answers required, or the penalties for failure to comply. To enter a judgment by default at a point so early in the proceedings would be unjust and harsh. The court, therefore, ordered the defendants, at their own expense, to complete the analysis required by the interrogatories. It admonished defendants that failure to comply would subject them to any or all of the penalties set forth in Fed. R. Civ. P. 37(6)(2).

E-24 Local 787, Electrical, Radio & Machine Workers v. Collins Radio Co., 317 F.2d 214 (5th Cir. 1963).

The union and Collins entered into a collective bargaining agreement, effective July 1, 1960. The contract provided for arbitration in the event of a grievance arising between Collins and current employees. The contract expressly excluded arbitration as a means for settling any grievances arising out of pre-contract occurrences. In September 1960, the union protested Collins treatment of thirty-eight former employees, all of whom were dismissed before the present agreement was executed. The union sought to arbitrate this grievance.

In order to compel arbitration, the union had to affirmatively prove that a controversy did exist. To do this, they had to introduce evidence showing that these thirty-eight men had regained their status as employees subsequent to the July 1st agreement. If the union could not establish this, no controversy would exist since only grievances arising subsequent to the contract date could be settled by arbitration.

The union introduced a printout that listed the names of these thirty-eight men as employees who paid union dues during July and August. The printout was introduced solely for the purpose of showing that arbitration was appropriate, and not to prove any issue in the dispute.

The court determined that, since the union had introduced evidence on the question of arbitration, the court could hear all evidence pertaining to that single issue. Though at this point in the proceedings the court could not weigh the evidence, it could nevertheless determine whether there was *any* evidence to establish a legitimate grievance. The court determined that all the remaining evidence and testimony indicated that none of the thirty-eight men had been employed subsequent to July 1, 1960. Thus, the union's evidence failed to establish a controversy and the denial of their motion to compel arbitration was proper.

E-25 Louisville & Nashville Railroad Co. v. Knox Homes Corp., 343 F.2d 887, 1 CLSR 394 (5th Cir. 1965).

The plaintiff carrier filed a claim based on certain undercharges on freight. The carrier attempted to meet its burden of proof by offering into evidence freight waybills prepared by computer. The defendant did not object to admission of this evidence. The waybills were properly authenticated and admitted under the Business Records Act.[22] At the close of plaintiff's evidence, both parties moved for a directed verdict. The trial court granted defendant's motion on the ground that the carrier had failed to make out a *prima facie* case. The court reasoned that the evidence was not sufficient to determine the correct weight of the shipments.

The fifth circuit reversed, holding that the computer-generated evidence was sufficient under the Business Records Act. The waybills were held to be a record of business transactions made in the regular course of business, and were thus admissible as evidence of those transactions. In addition, since the shipper had previously paid the freight waybills with no claim that the charges were erroneous, the shipper had in effect admitted the accuracy of the weights shown.

E-26 Merrick v. United States Rubber Co., 7 Ariz. App. 443, 440 P.2d 314, 1 CLSR 995 (1968).

United States Rubber furnished Merrick with goods, both on consignment and on open account. Merrick experienced financial problems and was unable to pay for the goods. United States Rubber sued, and attached to its complaint an itemized statement of the accounts due from Merrick. At trial, plaintiff introduced into evidence eight multi-page documents in support of the itemized statement of account. This evidence was computer-generated data. The plaintiff also called as a witness an employee who was familiar with both Merrick's account and plaintiff's general accounting procedures. While the employee was able to explain the content and meaning of the computer-generated material, he was not familiar with the actual physical operation of the computer equipment. The plaintiff prevailed at trial, and defendant appealed, claiming that the computer-generated material did not meet the standards of admissibility required by the Arizona Business Records Rule.[23]

The judgment was affirmed. The court of appeals held that electronically produce evidence is admissible if the following criteria of the Arizona Business Records Rule are met:

22. 28 U.S.C. § 1732 (1976).

23. ARIZ. REV. STAT. ANN. § 12-2262.

> Any record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.[24]

Since the witness was able to explain the preparation and meaning of the data, and since such documents were produced during the regular course of business, the court held that it was unimportant that the witness did not know the actual physical operation of the computer equipment.

E-27 Miller v. Kusper, 3 CLSR 352 (N.D. Ill.), *aff'd*, 445 F.2d 1059, 3 CLSR 355 (7th Cir. 1971).

Plaintiffs, running for the office of alderman as independent candidates, sought a mandatory injunction against the City of Chicago to require it to produce certain computerized records containing substantial voting information. The cost of reproduction to the city would be $50.00, while the cost would be about $6,000 if the candidates were to gather the information themselves. Plaintiffs contended that the withholding of the records was a denial of their first amendment rights of speech, association, and political activity, as well as raising serious equal protection problems.

The court first noted that the plaintiffs' claim of denial of equal protection was without merit, since the defendant did not make the records available to any of the political parties. Thus, there was no unequal treatment or the establishment of any suspect classification.

Second, the court held that the plaintiffs could not legitimately raise a first amendment claim, since defendant's choice not to aid or facilitate plaintiffs' first amendment right did not rise to the level of an abridgment of those rights. The court denied the injunction.

E-28 Missouri Pacific Railroad Co. v. Austin, 292 F.2d 415 (5th Cir. 1961).

Austin's company, Western Wood Product, was awarded a claim for $2,500 against the railroad in an ICC hearing. The railroad refused to pay the claim, contending that Western Wood had assigned all of its assets, including the claim, to Aviation Corp. of Texas. Since the railroad had previously received a judgment of $5,000 against Aviation Corp. for unpaid freight, the railroad simply deducted the claim as a set off against the judgment from Aviation.

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24. *Id.*

Austin claimed that, while Western Wood had assigned some of its assets to Aviation, it did not assign that claim.

As proof of their contention, the railroad offered into evidence an electronically prepared Dun & Bradstreet report, quoting Austin as stating that Aviation had purchased all of the assets and had assumed all of the liabilities of Western Wood. Since Dun & Bradstreet was engaged in the business of compiling these types of reports upon which other companies relied, these reports were held to be kept in the regular course of business. It was also established that the investigator who interviewed Austin was unknown. Austin objected to the report on hearsay grounds, and his objection was sustained. The trial court concluded that, since the source of the information was not before the court, the evidence could not be admitted.

The fifth circuit affirmed, holding that even if the report was made in the regular course of business, there was no evidence of how or when the information was recorded. To be admissible, the court noted, the act in question must be recorded at or near the time it occurred. Here, the interview took place in June 1953, and the report did not come out until August 1954. Without evidence as to the method of preparation or nature of the record, the fourteen months between the interview and the release of the report was too long a period to guaranty reliability. The evidence was therefore properly excluded.

E-29 Neal v. United States, 5 CLSR 913 (D.N.J. 1975).

In 1973, plaintiff's withholding was $910 more than his income tax. Plaintiff sued for a tax refund. Instead of a refund, however, plaintiff received a computer-generated notice that the money was being used to adjust his 1971 tax balance. The plaintiff asked for an explanation on three occasions, but received only a computer-generated form response.

The court noted that there was evidence that a number of similar erroneous notices were reported in that year, indicating a possible computer malfunction. The court issued an order compelling the Government to provide the plaintiff with details of credits to his withholding account, federal income tax assessed and the amounts of any refunds due for a three year period. The court held that this information was vital to plaintiff's case and would prove or disprove the existence of a computer error. The court reasoned that under these circumstances, the Government's status was analogous to that of a retail merchant who, by law, must provide a customer with an explanation of a disputed bill, and to correct the bill if there was an error.

E-30 N.L.R.B. v. Pacific Intermountain Express Co., 228 F.2d 170 (8th Cir. 1955).

The defendant, a motor freight carrier engaged in interstate commerce, fired one employee and issued a warning to another for alleged safety violations. The N.L.R.B. found that no violation had occurred, and ordered re-instatement of the dismissed employee. The company claimed that the employee was speeding, while the examiner and the N.L.R.B. concluded that he was not. The Board based its conclusion on a chart taken from a tachograph,[25] which was attached to the employee's truck. The company challenged the admissibility of the tachographic evidence.

The eighth circuit noted that since tachographs are regularly installed and maintained by the company, and since drivers are regularly required to turn in charts, such records were therefore kept in the regular course of business and admissible under the Federal Business Records Act.[26] Since a reviewing court will disturb the Board's findings of fact only if clearly erroneous, the court held that the tachographic evidence was admissible, and affirmed the Board's ruling of re-instatement.

E-31 Olympic Insurance Co. v. Harrison, Inc., 418 F.2d 669, 2 CLSR 344 (5th Cir. 1969).

The plaintiff sued for the amount due on an insurance premium. In a motion for summary judgment, the plaintiff offered an IBM statement of an itemized bill as part of its affidavit. The trial court granted the motion. The defendant appealed, asserting that the IBM printouts were not reliable, and therefore, a material issue of fact existed as to the amount due and it was error to grant plaintiff's summary judgment motion.

The fifth circuit noted that the IBM printouts are the types of records that come within 28 U.S.C. § 1732, and are, therefore, *prima facie* reliable. In addition, the court noted that the defendant did not object to any specific inaccuracy, but merely alleged general unreliability of the printouts. The court held that there was no merit in the defendant's contention of unreliability. Without specific objections there was, as the trial court found, no material issue of fact, and summary judgment was properly granted.

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25. Though the opinion does not discuss the technical aspects of the device, it can be assumed that the tachograph is a mechanism which measures and records the speed of a vehicle.

26. 28 U.S.C. § 1732 (1976).

E-32 Oppenheimer Fund, Inc. v. Sanders, — U.S. —, 98 S. Ct. 2380, 6 CLSR 848 (1978).

The plaintiff brought a class action suit against the defendant for recovery of the amount paid by the plaintiff class for fund shares that were artificially inflated in excess of their true value. The plaintiff sought defendant's assistance in compiling a list of class members so that the required individual notice[27] could be sent. The district court held, and the second circuit affirmed, that compiling such a list was the defendant's responsibility, and it had to bear the entire cost of the process.

The United States Supreme Court held that the district court was empowered to direct the defendant to compile such a list but, while some discretion existed for allocating the costs of this process, that discretion was abused in this case.

Plaintiff urged that the defendant bear all costs of compilation. He argued that, since the defendant put the class list on computer tape, it should be required to bear the burden of retrieval. The plaintiff contended that otherwise, potential defendants would be encouraged to bury information deep within complex computer programs in order to escape scrutiny and discovery. Additionally, even absent such a motive, it would be a complex and expensive process for the plaintiff to retrieve such a list, whereas it would be simpler if another method of data recording had been used.

The Court first determined that there was no evidence of any ill motive. Further, the Court found that computer retrieval should be cheaper and easier, which is why there was a switch to computers in the first place. The Court held that the district court abused its discretion, and reversed and remanded the case.

E-33 Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122 (S.D. Tex. 1976).

In this complex antitrust suit alleging anticompetitive conduct among beer manufacturers, wholesalers, distributors and retailers in Texas, two of plaintiff's consultants designed an econometrics model to analyze various conditions in the Texas beer market. Sophisticated computer programs were utilized to test and process the data obtained from the model. Dr. Massy, plaintiff's economic consultant, was to testify concerning this information at trial to prove anticompetitive conduct.

Before trial, the plaintiff furnished the defendant with the computer output of the test results, and offered to make Dr. Massy available for deposition. The defendant claimed that this was

27. FED. R. CIV. P. 23(c)(2).

inadequate, and moved for further discovery on the following matters:

(1) access to all documentation and underlying data of each computer program;
(2) depositions of the two computer experts not scheduled to testify at trial, because Massy did not have the technical expertise to explain the intricasies of the computer program; and,
(3) the existence of alternative computer models rejected by the plaintiff, in order to test the reliability of the one used.

The court first cited the Federal Rules of Civil Procedure as providing for the production or availability for inspection and copying of "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonable usable form."[28] The court held that this rule provided for discovery in the computer age. However, defendant's request for the documentation of each program's underlying codes and contents went far beyond Rule 34 discovery of printouts of records kept in the normal course of business.

Thus, defendant's request would have to fall within the "exceptional circumstances" language of the Federal Rules of Civil Procedure, Rule 26(b)(4)(B).[29] The court discussed that section at length, noting that the rule was adopted to abolish the notion that expert information was protected as either privileged or as work product. The question thus narrowed to what information is unreasonable or unfair to require the defendant to obtain for himself.

Here, the defendant sought to discover the underlying bases for the mechanical tests and procedures that either support or refute Massy's testimony. Massy was an economics expert, and not a computer expert. He could not testify about the technicalities of computer operations. Therefore, without obtaining the underlying program, and the right to depose the two computer experts, the defendant would have to expend huge amounts of time, money and resources to comprehend the significance of the programs as components of Dr. Massy's trial testimony. The court concluded that this would be patently unfair, and thus the case fell within the "exceptional circumstances" language of Rule 26(b)(4)(B).

Defendant's requests for access to the computer programs and the opportunity to depose the two computer experts were granted.

28. FED. R. CIV. P. 34(a)(1).
29. FED. R. CIV. P. 26(6)(4)(B).

Since the defendant was not able to prove exceptional circumstances for discovering plaintiff's programs, this request was denied.

E-34 Perma Research & Development Co. v. Singer Co., 542 F.2d 111, 6 CLSR 98 (2d Cir. 1976).

Plaintiff entered into a contract with defendant for the manufacture and marketing of an automobile anti-skid device. The plaintiff assigned its patent in the device to the defendant in exchange for the payment of royalties. At the time the contract was executed, the brake device, while operable in theory, consistently failed the safety tests. After about one year, Singer abandoned the contract. The jury found that Singer breached its obligation to use its best efforts to manufacture and market the device, and awarded Perma $7 million.

At trial, the key evidence was testimony by plaintiff's witness that computer testing revealed such a device was feasible. The defendant objected to this, and claimed prejudicial error. Justice Clark, writing for the majority, held that though the plaintiff did not provide all of the underlying data for its testing model, it did establish sufficiently the feasibility of such a device.

There was a vigorous dissent which argued that this particular evidence did not fall within the business records exception to the hearsay rule.[30] He argued that this particular computer test was not made in the ordinary course of business, but rather specifically for the purpose of litigation. The program itself was not available for examination. Thus, there was nothing presented to insure the kind of reliability exhibited by a printout prepared in the usual course of business. Since the entire case rested on proof of the device's feasibility, the admission of such evidence was prejudicial. The dissent concluded that the evidence should have been excluded and the judgment reversed.

E-35 Railroad Commission v. Southern Pacific Co., 468 S.W.2d 125, 3 CLSR 720 (Ct. App. 1971).

Southern Pacific sought to discontinue one of its agencies and transfer it to a site twelve miles away. The Commission denied the application, prompting Southern Pacific to bring suit. The trial court reversed the Commission's order. At trial, Southern Pacific introduced as exhibits various computer-generated data covering shipments and revenues. The Commission objected, claiming that such evidence was hearsay.

30. 28 U.S.C. 1732 (1976).

The appeallate court first noted that business records are admissible, as exceptions to the hearsay rule, if:

1. the records are made in the usual course of business;
2. it is the normal business procedure for an employee with knowledge of such act to make the record; and,
3. the record was made at or near the time of the act.[31]

However, plaintiff's witness was not a qualified custodian of records, nor an employee having knowledge of the preparation of the records. In fact, no one who supervised the records, or who could testify as to their nature, was offered as a witness.

The court concluded that, even though the plaintiff produced the entire mass of underlying documents, it still had the burden of proving the accuracy of the computer abstracts; failing to do so, the evidence was hearsay, and thus inadmissible. The trial court's judgment was reversed.

E-36 Renfro Hosiery Mills Co. v. National Cash Register Co., 552 F.2d 1061, 6 CLSR 468 (4th Cir. 1977).

Renfro entered into a contract with National Cash Register ("NCR") for the rental of certain computer equipment to maintain Renfro's accounting and inventory records. After a few months, various mechanical problems occurred and Renfro asked NCR to remove the computers. Upon removal, NCR sued Renfro for early termination, and Renfro counterclaimed for damages based on a breach of express and implied warranties. The jury found for NCR, but awarded no damages. No findings were made with respect to the counterclaim.

Renfro claimed that evidence of NCR's own reliability tests of other, similar computers should have been admitted to prove the breach of implied warranty of fitness. The trial judge denied the admission on two grounds:

1. the test conditions were not substantially similar, and any inference of unreliability that could be drawn would be too remote, and
2. the evidence was hearsay.

The fourth circuit noted that a pre-trial stipulation between the parties provided that hearsay objections to any computer-generated evidence would be waived. Thus, it was error to exclude the evidence because it was hearsay. However, it was harmless error, since incompetence and remoteness were proper grounds for exclusion.

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31. These requirements have been codified in TEX. REV. CIV. STAT. ANN., art. 3737e (Vernon).

E-37 Sears, Roebuck & Co. v. Merla, 142 N.J. Super. 205, 361 A.2d 68, 5 CLSR 1370 (1976).

The plaintiff, in an action for an account due, sought to introduce at trial a printout giving information as to purchases, amounts paid, dates, etc. After transferring this information to the computer, it was the usual policy of plaintiff to destroy the original invoices. The trial judge, expressing a disdain for computer technology,[32] granted defendant's motion to dismiss.

The appellate court reversed, holding that "as long as proper foundation is laid, a computer printout is admissible on the same basis as any other business record."[33] The court conclude that, "because the business records exception is intended to bring the realities of the business world into the courtroom, a record kept on computer in the ordinary course of business qualifies as competent evidence."[34]

E-38 State v. Gauer, 7 Ill. App. 3d 512, 288 N.E.2d 24, 4 CLSR 477 (1974).

After receiving a number of annoying phone calls, the complaining witness had a tracer installed on her telephone. At trial, the state, *via* testimony of a records keeper for the telephone company, sought to introduce various IBM "Trouble Recorder" cards containing data on the location from which the calls were made, their time and dates. The defendant objected to admission of the IBM cards.

The court noted that computer records can be admitted as evidence if certain criteria are met. In the present case, however, there was no testimony that the sources of information, or the method and time of preparation were such as to justify admission. The only testimony offered concerned the meaning of the cards, but not how they were prepared. The court reversed and remanded the case for new trial to afford the State an opportunity to introduce competent testimony.

E-39 State v. Springer, 283 N.C. 627, 197 S.E.2d 530, 5 CLSR 432 (1973).

The defendant was charged with wilfully and feloniously withholding a Bankamericard credit card from the control and possession of the rightful owner.

At trial, the State produced a witness who testified that Bank-

32. 142 N.J. Super. at 207, 361 A.2d as 68, 5 CLSR at 1371.
33. 142 N.J. Super. at 207, 361 A.2d at 69, 5 CLSR at 1371.
34. 142 N.J. Super. at 207, 361 A.2d at 69, 5 CLSR at 1372.

americard regularly maintained IBM computer printouts of credit card transactions. He further testified that, based on a recent printout, the card in question had been used seventy-three times since it was reported missing, for a total of $1,209.63. The printout itself was not offered into evidence. The defendant contended that the admission of the witness' testimony was prejudicial error.

The court first noted that North Carolina law provides for the admission of computer generated business records,[35] but added that these statutes did not preclude judicial development of workable standards for evaluating the question of admissibility. The court determined that, in addition to the records being made in the regular course of business at or near the time of the act or transaction, admissibility also rests on whether

> a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.[36]

In the present case, the court held that a proper foundation was not laid since the witness merely testified to the contents of the printout, and not to its method of preparation. Furthermore, the printout itself was not produced, so the testimony was also found inadmissible under the Best Evidence Rule.

E-40 State v. Veres, 7 Ariz. App. 117, 436 P.2d 629, 1 CLSR 918 (1968).

The defendant was charged, *inter alia*, with passing bad checks. As evidence, the State introduced bank records for a two month period, consisting of four separate sheets. These records were generated by a computer, and showed the number of bad checks, and the amount of each. A bank official was called to testify to the identity of the records, though he did not know the mechanical operation of the computer. The defendant objected to admission of the evidence.

The court relied on the Business Records Rule[37] as the general law applicable to computer-generated evidence. The court emphasized the relevance of the clause "in the opinion of the court" in the statute and, based on the evidence admitted and the testimony of

35. 1969 N.C. Sess. Laws, c. 751, § 14 & c. 875, § 6.

36. 283 N.C. at 636, 197 S.E.2d at 536, 5 CLSR at 439.

37. Any record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

ARIZ. REV. STAT. ANN. § 12-2262.

the bank official, held that there was "an absence of an abuse of discretion by the trial judge in admitting the exhibit in evidence."[38]

E-41 State v. Watson, 192 Neb. 44, 218 N.W.2d 904 (1974).

The defendant was convicted of passing an insufficient funds check with the intent to defraud. The State introduced a computer printout of the rejected transaction. When the State's witness attempted to lay a foundation on the accuracy of the computer system, the defendant objected. The objection was sustained, but the evidence was nevertheless admitted. The defendant assigned the admission of that evidence as prejudicial error.

The court determined that the purpose of the Nebraska Business Records Act[39] was to "permit admission of systematically entered records without the necessity of identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of business . . . ."[40] It held that the "statute intended to bring realities of business and professional practice into the courtroom and the statute should not be interpreted narrowly to destroy its obvious usefulness."[41] The court concluded that the defendant's objection was erroneously sustained. Since the defendant asked no questions of the State's witness concerning the accuracy of the system, the court ruled that he could not complain about the lack of proper foundation which he succeeded in keeping out of evidence. The judgment was affirmed.

E-42 Strand v. Librascope, Inc., 197 F. Supp. 743, 1 CLSR 164 (E.D. Mich. 1961).

This action was for breach of express and implied warranties, and fraud and deceit in the sale of certain component parts of a computer to be assembled by the plaintiff.

Plaintiff ordered two hundred computer read/record heads of a specific design from the manufacturer, Librascope. For the type of computer that plaintiff was building, heads with a very low noise level were required. While Librascope's particular design produced a head which was very advanced in some respects, the noise level remained high. Assured by the defendant that the computer head was satisfactory in all respects, plaintiff commenced building the computer, as well as testing the new heads. When the heads continually recorded a high noise level, he assumed that the malfunction was in his equipment.

38. 7 Ariz. App. at 126, 436 P.2d at 638, 1 CLSR at 921.
39. NEB. REV. STAT. § 25-12,109.
40. 192 Neb. at 46, 218 N.W.2d at 906.
41. *Id.*

During the testing by plaintiff, defendant continued to modify its heads, and finally developed a model with a tolerable noise level. By this time, however, plaintiff had already received all two hundred of the older, unsatisfactory heads pursuant to his order. He asked the defendant if he could replace the heads with the newer model. While the defendant did not acknowledge that any of the original heads were defective, it did offer the plaintiff the newer model at a substantial reduction in price.

After further negotiations, the defendant claimed that there was no justification for plaintiff's demand and revoked its offer to sell plaintiff the new heads at reduced price. Plaintiff then brought suit for breach of warranties and fraud. The two main issues at trial were (1) whether the original two hundred heads were defective, and (2) if there was fraud and deceit.

On the first issue, the defendant brought a computer into the courtroom to demonstrate the reliability of its original heads. The court did not rule on the admissibility of the demonstration, but did conclude that the demonstration was not a valid test of the heads. The reason for this decision was that the demonstration involved the use of defendant's own computer—a model far less complex than the one that plaintiff was building. The defendant's model used only three heads, while plaintiff's required sixty. Expert testimony revealed that defendant's model would have to work continuously for many days to show that the heads would work satisfactorily in plaintiff's model for even a few minutes.

The court concluded that the demonstration was insufficient evidence, and that an examination of the entire transaction between the parties demonstrated that the heads were defective in their design and construction, since they were not suitable for plaintiff's intended use. The court further found fraud, and judgment was entered for plaintiff.

E-43 Sunset Motor Lines, Inc. v. Lu-Tex Packing Co., 256 F.2d 495, 1 CLSR 104 (5th Cir. 1958).

Lu-Tex brought an action in negligence against Sunset, a truck carrier, for the total loss of a shipment of beef. Lu-Tex attempted to introduce into evidence an IBM punch card prepared by the Department of Agriculture, which was normally used for accounting purposes, that stated that the beef was ruined. Sunset objected to the evidence on the ground it was not a business record.

The circuit affirmed the trial court's exclusion of the evidence. It reasoned that even if the card were a record within 28 U.S.C. §§ 1731 *et seq.*, it was not certified as required by Fed. R. Civ. P. 44(a), and was properly excluded.

E-44 Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871, 1 CLSR 368 (1965).

The plaintiff-insurance company had an insurance contract with the defendant covering certain injuries and losses that defendant might incur in his business. The defendant owed plaintiff a large amount of money for premiums on that contract, and plaintiff brought suit to recover those sums.

The plaintiff introduced evidence of the defendant's liability for the premiums. This evidence was in the form of business records prepared by computer. A witness for the plaintiff, the director of accounting, explained the meaning of the records and their method of preparation. The defendant objected to this evidence on the ground that it did not satisfy the foundational requirements of the Nebraska Business Records Rule.[42]

The supreme court of Nebraska held that the trial court properly admitted the evidence over defendant's objection. The court stated that the Nebraska Business Records Rule allows for electronically prepared material to be admitted into evidence. The rule allows for admission if:

> the custodian or other qualified witness testifies to its identity and mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.[43]

The court concluded that any objections would go only to the weight and credibility of the evidence, and not to its admissibility.

E-45 Union Electric Co. v. Mansion House Center North Redevelopment Co., 494 S.W.2d 309, 5 CLSR 929 (Mo. 1973).

Plaintiff brought suit for an amount due on electricity furnished to the defendant. Plaintiff offered into evidence printouts of defendant's account as proof of the amount due. Defendant objected to the admissibility of the evidence, claiming that the printout did not qualify under the business records statute since the accuracy of the printouts was not proven.

The court discussed the Uniform Business Records as Evidence Law,[44] and stated that "it is common knowledge, which a court need not ignore, that computerized record keeping is rapidly becoming a normal procedure in the business world."[45] Thus, any objection to the accuracy of the printouts must affect the weight accorded, and

42. NEB. REV. STAT. § 25-12,109.
43. *Id.*
44. MO. REV. STAT. § 490.680.
45. 494 S.W.2d at 315, 5 CLSR at 934-35.

not the admissibility of, the evidence. Since there was no specific allegation of error, the judgment for plaintiff was affirmed.

E-46 United States v. De Georgia, 420 F.2d 889, 2 CLSR 479 (9th Cir. 1969).

The defendant was charged with transporting a stolen Hertz rental car across state lines. His written confession was introduced at trial by the prosecution, prompting the court to note that a confession alone does not constitute adequate proof of the offense.[46] The prosecution, therefore, called a Hertz security manager to the stand. This witness testified that, based upon the computer information with which he was furnished, the vehicle in question was not out for rent at the time it was reported missing. Without such testimony, the defendant could only have been charged with a lesser crime.

The defendant contended that the fact that the car was not being rented was an assertion by the individuals who programmed the computer, and, since these people were not available as witnesses, the evidence was inadmissible hearsay. The defendant further contended that, even if the evidence were admissible, it would only show which vehicles had been rented. The fact that the vehicle in question was not on the records, defendant argued, could not by implication prove that it was *not* rented out.

Responding to the defendant's contentions, the court first noted that under 28 U.S.C. 1732,[47] regularly maintained business records are admissible, because, "the circumstances that they are regularly maintained records upon which the company relies in conducting its business assures accuracy not likely to be enhanced by introducing into evidence the original documents upon which the records are based."[48]

In answer to defendant's second contention, the court held that the fact that these records are maintained as part of the regular course of business "offers a like assurance that if a business record

46. The general rule is that an accused may not be convicted on his own uncorroborated confession. Opper v. United States, 348 U.S. 84 (1954).

47. The relevant language of that statute is:

> In any court of the United States and in any court established by an Act of Congress, any writing or record whether in the form of an entry in a book or otherwise; made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

28 U.S.C. § 1732(a) (1976).

48. 420 F.2d at 893, 2 CLSR at 484.

designed to note every transaction of a particular kind contains no notation of such a transaction between specified dates, no such transaction occurred between those dates.[49]

The court therefore concluded that the testimony was admissible to show that the vehicle had not been rented out, and the conviction was affirmed.

E-47 United States v. Dioguardi, 428 F.2d 1033, 2 CLSR 647 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970).

The defendants were charged and convicted of fraudulently transferring and concealing the property of a bankrupt in contemplation of bankruptcy, fraudulently concealing the bankrupt's assets from the trustee in bankruptcy, and conspiracy to do the same.

The Government introduced computer-generated evidence concerning the various sales and inventories of the bankrupt corporation to show the concealment and use of the bankrupt's property. The Government failed, however, to produce the actual computer program at trial; nor did it provide any other relevant materials for cross-examination. The defendants' objection to admission of the evidence under those circumstances was overruled.

The second circuit held that the Government must provide the defendants with the program and other relevant data before trial in order to aid cross-examination. However, the court also held that the trial court's error was not prejudicial, and the conviction was affirmed. The court found the error non-prejudicial, since

1. the computer compilation was very simple—summing purchases and sales and subtracting from inventory—and thus, the defendants could have checked the computer's accuracy by manual compilation; and
2. the evidence went to the issue of whether the property was concealed and used. On this point, there was really not much doubt. The crucial issue was the defendant's intent, on which the computer-generated evidence had no bearing.

E-48 United States v. Farris, 517 F.2d 226, 6 CLSR 254 (7th Cir. 1975).

The defendant was convicted of willfully failing to file his income tax returns. The Government introduced a printout prepared by the Treasury Department which showed no record of receiving defendant's tax returns for the years 1967-1971. Defendant objected

49. *Id.*

to the output on the basis that there was no proper foundation establishing its reliability.

The seventh circuit first noted that properly authenticated copies of government documents are admissible as evidence.[50] It further noted that Fed. R. Civ. P. 44(b)[51] allows for a written statement by a proper official as valid authentication. In this case, the Director of the National Computer Center for the Treasury Department certified the search of the computer records. The certificate was authenticated by the Treasury Department seal. The court held that under these circumstances, the authentication guaranteed reliability, and additional foundational testimony was unnecessary.

The defendant argued that even if government authenticated documents are admissible, 28 U.S.C. § 1733(b) does not pertain to computer printouts. The court, recognizing the growing acceptance of electronically kept records, found that the statute does apply. The court cited the Federal Rules of Evidence, which allow for the admission of records, including "data compilations in any form."[52] The court therefore affirmed the judgment.[53]

E-49 United States v. Fendley, 522 F.2d 181, 6 CLSR 265 (5th Cir. 1975).

The defendant embezzled a sum of money from an insurance company, and failed to include that sum as income in his tax return. He was convicted of filing a false return and for income tax invasion.[54]

The Government introduced a computer printout of the company's records showing a discrepancy between money received and money accounted for. The witness who testified about this information was not employed by the company at the time the records were made. Defendant objected to this evidence on the following grounds:

1. the evidence was hearsay;
2. the witness was someone other than the preparer of the records; and

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50. 28 U.S.C. § 1733(b) states that "properly authenticated copies or transcripts of any books, records, papers, or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

51. This provision is made applicable to criminal proceedings by FED. R. CRIM. P. § 27.

52. FED. R. EVID. 803(7).

53. The court noted that additional testimony indicated that the records were kept in the regular course of business, which would make them admissible under 28 U.S.C. § 1732. However, since the records were admissible under 28 U.S.C. § 1733(b), that testimony was superfluous. 517 F.2d at 229 n.2, 6 CLSR at 258 n.2.

54. 26 U.S.C. §§ 7201, 7206(1) (1976).

3. the witness was unable to personally attest to the accuracy of the information.

The court held that the evidence fell within the business records exception to the hearsay rule.[55] Additionally, it found that the statute does not require the witness to either personally attest to the accuracy of the output, or to personally prepare it. While the Government's witness failed to lay a proper foundation for the introduction of the evidence by detailing its method of preparation, no objection was made on this ground, and, if there was error, it was not prejudicial. The judgment was therefore affirmed.

E-50 United States v. Greenlee, 380 F. Supp. 652, 5 CLSR 949 (E.D.Pa. 1974), *aff'd*, 517 F.2d 899 (3rd Cir. 1975).

The defendant was convicted of failure to file an income tax return for 1970-1971.[56] At trial, the IRS introduced computerized records showing that no return had been filed. The Government's witness testified in detail as to a variety of verification procedures that are undertaken to insure reliability. It was also established that these records are kept in the normal course of business, and were therefore admissible under the Federal Business Records Rule.[57]

Just prior to trial, the defendant made a motion to compel access to the IRS computers, so that he could check their reliability for himself. The court denied that request on a variety of grounds. First, the defendant made no specific objection as to the machine's accuracy. He merely questioned generally the computer's reliability. Furthermore, the defendant was unable to make a *prima facie* showing that he had, in fact, filed his return. Finally, since his motion was made one year after his arraignment and only three days before trial, the defendant's request was patently unreasonable.

On appeal, the circuit court agreed that the defendant's motion was clearly untimely.

E-51 United States v. Russo, 480 F.2d 1228, 5 CLSR 687 (6th Cir. 1973).

The defendant was charged with mail fraud. The facts show that Russo operated a clinic and treated patients for a variety of illnesses. He filed claims with Blue Shield Insurance Co. for procedures that he did not perform. Blue Shield's policy was to compensate the doctor only for a limited number of special procedures. By filing claims for services not actually rendered, Russo

55. 28 U.S.C. § 1732 (1976).
56. 26 U.S.C. § 7203 (1976).
57. 28 U.S.C. § 1732 (1976).

caused Blue Shield to mail payment checks to him in violation of the mail fraud statute.

At trial, the Government introduced the Director of Service Review for Blue Shield, who testified in detail on their procedure for processing claims. In essence, individual claims are filed on a particular form, with a description of the compensable treatment; the forms are received by Blue Shield, and transferred onto computer tape; and every two weeks the computer totals the individual forms, and writes a check to each doctor who has filed a claim. The director then testified to a variety of verification procedures used to guaranty the reliability of the computer information.

The prosecution then introduced another witness who was in charge of Blue Shield's computer runs. He further testified to verification procedures, and offered a printout of an annual statistical survey showing each doctor's total claims and services rendered. The survey was done each year, and showed the unusually large amount of Russo's claims.

The defendant objected to the computer printout evidence on numerous grounds. Russo initially claimed that the evidence was not a business record pursuant to the Federal Business Records Act.[58] The court determined that, though the survey is done yearly, it was done in the regular course of business, and relied upon as a normal operating procedure and was therefore a proper record of defendant's acts and within the statute.

The defendant next contended that the actual statistical survey was not prepared at or near the time that the acts in question occurred. The court answered that as long as the information is properly recorded near the time of the occurrence, it is immaterial whether that information is extracted months later.

The defendant further argued that the survey was not a proper record, but rather a summary or recapitulation, and therefore not admissible. The court determined that the survey was not a summary, but rather a complete record of all of defendant's transactions. Such a record does not become a summary merely because the information is arranged in an ordered, pre-determined manner.

The sixth circuit also determined that the defendant's final objections were also properly overruled. The witnesses had laid a proper foundation for the admission of the survey by carefully detailing the methods of preparation and verification. Also, the defendant was provided ample time to examine the material. It was his choice to attempt to discredit the evidence, rather than to obtain his own evidence.

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58. *Id.*

E-52 Wheaton Van Lines, Inc., 65 M.C.C. 331, 1 CLSR 22 (1955).

Petitioner sought to purchase the operating rights of another motor carrier. Certain intervenors opposed the application and introduce evidence, generated by computer, that reflected the movement of 668 shipments. The electronic data, however, was sought to be authenticated by producing just ten of the original freight bills. Petitioner objected, claiming that admission of the evidence was error.

The Commission stated that such abstracts were normally admissible as evidence, if the data was authenticated by production of the original documents, and the opposing party had an opportunity to review the data. The commission concluded that the computer-generated data were abstracts, and not authenticating documents. Since only ten of the 668 originals were actually produced, the evidence was held inadmissible.