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January 18, 2000

FILED[2]
JAN 18 2000
Missouri Public Service Commission

VIA HAND-DELIVERY & FEDERAL EXPRESS

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
MISSOURI PUBLIC SERVICE COMMISSION
301 W. High Street, Suite 530
Jefferson City, MO 65101

Re: ***In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company***
Case No. TO-2000-322

Dear Mr. Roberts:

Enclosed for filing with the Commission are an original and fifteen copies of Covad Communications' Reply to Response of Southwestern Bell Telephone Company to Request for Depositions in the above-referenced matter. Please return a filed-stamped copy of the reply to me in the enclosed return envelope. **This notice is being filed with the Commission via hand-delivery by Jeff City Filing on this date.**

By copy of this letter, I have mailed a copy of the enclosed to all parties of record.

Thank you for bringing this matter to Commission's attention.

Very truly yours,

Mark P. Johnson

MPJ/rgr
Enclosures
cc: All Parties of Record (w/encl.)

21034867\V-1

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements With Southwestern Bell Telephone Company	))))))	Case No. TO-2000-322

REPLY OF COVAD COMMUNICATIONS TO RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY TO REQUEST FOR DEPOSITIONS

Comes now DIECA Communications, Inc., dba Covad Communications Company, and in reply to Southwestern Bell Telephone Company's response to Covad's Request for Depositions, states the following:

1. At the prehearing conference on December 22, 1999, counsel for Covad expressed Covad's intent to take depositions in this matter. Although counsel for Southwestern Bell expressed opposition to depositions, there can be no question that Southwestern Bell knew no later than that date that depositions would be sought. Covad filed and served a Request for Depositions on January 11, 2000, setting depositions for January 18, 2000, in St. Louis. The notice period complied with Rule 57.03(b)(1), Mo. R. Civ. P., which requires that notices of deposition be given at least seven days in advance of the deposition. In its Response, Southwestern Bell does not question Covad's compliance with Rule 57.03(b)(1).

2. At approximately 11:45 a.m. on Friday, January 14, 2000, counsel for Covad received by telefacsimile transmission the Commission's order granting Covad's request. In fact, the Commission noted that Covad's request was unnecessary in light of the Commission's order of June 17, 1996, concerning arbitration proceedings, which expressly states that arbitrations are to

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be conducted in the manner of contested cases. Depositions are expressly authorized by 4 C.S.R. 240-2.090.

3. Counsel for Covad received by telefacsimile a copy of Southwestern Bell's Response at 3:48 p.m. on Friday, January 14, four hours after receiving the Commission's order. Southwestern Bell's Response was out of time and should be disregarded by the Commission.

4. Southwestern Bell argues that the arbitration procedures of June 17, 1996, do not provide for discovery. That flies in the face of the January 14 order and the provision in those rules that arbitrations are to be conducted like contested cases. Discovery is provided for in contested cases, as provided in 4 C.S.R. 240-2.090(1): "[a]ny party, in any proceeding before the commission, may obtain discovery by one (1) or more of the following methods: depositions upon oral examination..."

5. Southwestern Bell also argues that depositions are improper here because Covad should be aware of Southwestern Bell's positions because of Covad's participation in arbitrations in other states and this Commission's previous arbitrations. Southwestern Bell cannot have it both ways. As was demonstrated at the prehearing conference, Southwestern Bell-Missouri argues that the arbitration pending between Covad and Southwestern Bell in Kansas has no bearing on this case. Southwestern Bell has taken a similar position on the case between the companies in Texas. The same may be said of the arbitrations which this Commission has already tried in which other companies were involved. The evidence in this matter, at least the evidence from Covad, will be markedly different and more sophisticated than the evidence presented by the parties in those cases. In addition, an issue of great importance to Covad, that of Southwestern Bell's unilateral changes to its Technical Publications, was not involved in any of those cases.

6. On Friday, January 14, Covad's counsel informed Southwestern Bell as to the identities of the persons who would attend the depositions for Covad. Two of those persons, Mr. John Donovan and Ms. Terry Murray, are expert witnesses who have filed direct testimony for Covad. Nowhere in the Missouri Rules of Civil Procedure is there any specification as to who may or may not attend a deposition. In spite of that fact, Southwestern Bell has objected to the presence of Mr. Donovan and Ms. Murray at the depositions. The deponents are to be Mr. James Smallwood and Mr. John Lube, who have filed direct testimony for Southwestern Bell on costing and network engineering issues, respectively.

7. The attached affidavits of Christopher Goodpastor and Laura Izon demonstrate that neither attorney is qualified by education or experience to thoroughly evaluate the testimony of witnesses presented as experts on telecommunications costing and network issues, as is the case with Mssrs. Lube and Smallwood. In cases where an expert whose services have been engaged by a party can render needed help to an attorney taking a deposition, the courts have allowed that expert's presence at the deposition over the opposing party's objection. First, it is clear that the rule concerning exclusion of witnesses at trial, which is a matter of right for any party, does not apply to depositions. Skidmore v. Northwest Engineering Co., 90 F.R.D. 75 (S.D. Fla. 1981) (copy attached). Second, in the case of exclusion of experts from depositions, "[t]he party seeking to exclude persons from depositions must show good cause, and the protection is limited to circumstances where justice requires such exclusion to protect a party from annoyance, embarrassment, oppression or undue burden or expense." Id. In Skidmore the court found that the plaintiff's expert witness could attend the deposition, as the plaintiff had argued his presence was "..necessary to assist counsel in understanding the technological testimony of the

defendant's employee.." This is precisely why Covad's attorneys require the presence of their experts at the depositions in this case.[1]

8. In In Re:Terra International, Inc., 134 F. 3d 302 (5th Cir. 1998), the court considered a challenge to a lower court's order that witnesses could not attend the depositions of other witnesses. In determining whether the party seeking exclusion of the witnesses had met its burden, the court observed that the requirement to show good cause

> ...to support the issuance of a protective order indicates that 'the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.'

Id. at 306 (quoting United States v. Garrett, 571 F.2d 1323, 1326 n. 3 (5th Cir. 1978). Thus, Southwestern Bell must come forward with specific proof of injury or intimidation of witnesses. It has failed to do so, so the experts should be allowed to attend the depositions.

9. In fact, the extent to which the Missouri courts consider important the right to attend depositions is pointed up by decision of the Court of Appeals for the Eastern District in State of Missouri ex rel. Karl Schwebe, Jr. v. Campbell, 878 S.W.2d 827 (Mo. App. E.D. 1993), where the court issued a writ of prohibition, ordering the Circuit Court to allow the presence of a criminal defendant at the depositions of three minors the defendant had allegedly sodomized. The court held that Rule 56.01(c)(5), Mo. R. Civ. P., requires a showing of good cause based on evidence and a record. Id. at 828. If the Missouri courts allow the presence of non-deponents in such situations, where the prospect of witness intimidation is obvious, the Commission in this case should surely allow the attendance of Covad's experts.

---

[1] Covad's reliance on federal precedent is entirely appropriate, as the language of the relevant rules, Rule 26(c)(5), Fed. R. Civ. P., and Rule 56.01(c)(5), Mo. R. Civ. P., is identical in all crucial respects, the only difference being that the federal rules require the moving party to certify that the dispute has been discussed with its opponent.

10. Finally, Covad notes that Southwestern Bell's counsel has even objected to the presence of Covad's experts at a location outside the hearing room, but sufficiently near for Covad's counsel to consult with them at breaks. Even though Southwestern Bell has failed to demonstrate that the witnesses should be excluded, Covad notes the holding of the court in In Re Shell Oil Refinery, 136 F.R.D. 615 (E.D. La. 1991)(copy attached), where the court granted the plaintiffs' motion to exclude their direct supervisors from their depositions, the court allowed the excluded person to sit outside the deposition room:

> [t]o balance the interests of both parties, the Court will allow [the excluded person] to sit outside the deposition room so that he will be available to assist counsel during breaks.

Id.

12. The presence of Mr. Donovan and Ms. Murray will not disrupt the depositions. They will ask no questions themselves, but their advice to Ms. Izon and Mr. Goodpastor will greatly aid the attorneys in conducting the depositions. Southwestern Bell has failed to demonstrate that their presence will in any annoy or embarrass the witnesses. They should be allowed to attend.

Respectfully submitted,

Mark P. Johnson MO #30740
Lisa C. Creighton MO #42194
Sonnenschein, Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
816/932-4400
816/531-7545 FAX

ATTORNEYS FOR DIECA COMMUNICATIONS COMPANY, DBA COVAD COMMUNICATIONS COMPANY

Dated: January 17, 2000

VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

COMES NOW Mark P. Johnson, being of lawful age and duly sworn, swears and affirms as follows:

1. My name is Mark P. Johnson and I am the attorney for Covad Communications. In that capacity I am authorized to verify this pleading and the information contained therein on behalf of Covad.

2. The information contained in this pleading is true and accurate to the best of my knowledge and belief.

Mark P. Johnson

Subscribed and sworn to before me this 18th day of January, 2000.

Linda S. Curran
Notary Public

My Commission Expires:

LINDA S. CURRAN
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: Aug. 6, 2002

CERTIFICATE OF SERVICE

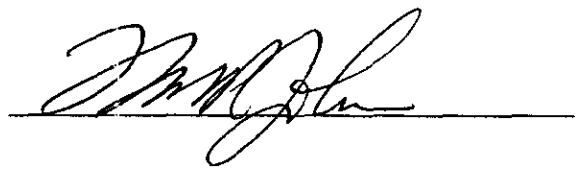
The undersigned hereby certifies that on this date, a true and correct copy of the above and foregoing was sent by telefacsimile and mailed via Federal Express to:

Paul Lane, Esq.
Southwestern Bell Telephone
One Bell Central, Room 3536
St. Louis, Missouri 63101

Office of the Public Counsel
P. O. Box 7800
Jefferson City, Missouri 65102

Office of General Counsel
ATTN: Bill Haas
P. O. Box 360
Jefferson City, Missouri 65102

Dated this 18th day of January, 2000.



STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

AFFIDAVIT OF CHRISTOPHER GOODPASTOR

Comes now Christopher Goodpastor, being of lawful age and duly sworn, who swears and affirms as follows:

My name is Christopher Goodpastor, and I hold the position of Regional Counsel with DIECA Communications, Inc., dba Covad Communications. I am an attorney admitted to practice in Texas and California. I have been a member of the Texas bar since 1994 and the California bar since 1998.

I am counsel in the matter of the Petition of DIECA Communications, Inc., dba Covad Communications, Case No. TO-3000-322 before the Missouri Public Service Commissioin, and intend to enter my appearance on behalf of Covad. I anticipate that I will participate in the hearing scheduled in this matter.

On January 18, 2000, on behalf of Covad Communications, I will take the deposition of witness John Lube produced by Southwestern Bell Telephone Company in this matter. Mr. Lube has prefiled testimony in this proceeding. The subject matter of Mr. Lube's testimony is engineering and technical publications issues.

By training and experience I am an attorney, and neither an economist or network engineer, nor have I ever had practical employment experience in the preparation or evaluation of telecommunications costing or engineering. In this proceeding, Covad has engaged the services of two telecommunications consultants with expertise in costing and engineering issues, Terry Murray and John Donovan, respectively.

The presence and aid of Ms. Murray and Mr. Donovan is necessary at the deposition, to aid me in the formulation of questions on complex and esoteric issues which are beyond my practical experience. In compliance with the rules governing the taking of depositions, neither Ms. Murray nor Mr. Donovan will ask questions of the witness, but will rather provide help to me.

It is my belief that Ms. Murray and Mr. Donovan must be present at the depositions to allow for an efficient and comprehensive examination of the witness. Without their presence I will be unable to evaluate much of the information which may be elicited from the witness, raising the distinct possibility that the deposition will not be as focused and useful as it could otherwise be.

Further affiant sayeth not.

Christopher Goodpastor

On this 14th day of January, 2000, before me, a Notary Public, personally appeared Christopher Goodpastor and being first duly sworn upon his oath stated that he is over twenty-one years, sound of mind and the attorney for petitioner Covad Communications, Inc., and the facts contained therein are true and correct according to the best of his information, knowledge and belief.

IN WTINESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year above-written.

Linda S. Curran
Notary Public

My Commission Expires:

LINDA S. CURRAN
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: Aug. 6, 2002

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

AFFIDAVIT OF LAURA IZON

Comes now Laura Izon, being of lawful age and duly sworn, who swears and affirms as follows:

My name is Laura Izon, and I hold the position of counsel with DIECA Communications, Inc., dba Covad Communications. I am an attorney admitted to practice in California. I have been a member of the bar since 1996.

I am counsel of record in the matter of the Petition of DIECA Communications, Inc., Case No. TO-2000-322 before the Public Service Commission of Missouri. I anticipate that I will participate in the hearing scheduled in this matter.

On January 18, 2000, on behalf of Covad Communications, I will take the deposition of witness James R. Smallwood produced by Southwestern Bell Telephone Company in this matter. Mr. Smallwood has filed direct testimony with the Commission in this matter. The subject matter of Mr. Smallwood's testimony relates to SWBT's cost studies.

By training and experience I am an attorney, and neither an economist nor an engineer, nor have I ever had practical employment experience in the preparation or evaluation of telecommunications costing or engineering. In this proceeding, Covad has engaged the services of two telecommunications consultants with expertise in costing and engineering issues, Terry Murray and John Donovan, respectively.

The presence and aid of Ms. Murray and Mr. Donovan is necessary at the depositions, to aid me in the formulation of questions on complex and esoteric issues which are beyond my practical experience. In compliance with the rules governing the taking of depositions, neither Ms. Murray nor Mr. Donovan will ask questions of the witnesses, but will rather provide help to me.

It is my belief that Ms. Murray and Mr. Donovan must be present at the depositions to allow for an efficient and comprehensive examination of the witnesses. Without their presence I will be unable to evaluate much of the information which may be elicited from the witnesses, raising the distinct possibility that the depositions will not be as focused and useful as the could otherwise be.

Further affiant sayeth not.

Laura Izon

On this 14th day of January, 2000, before me, a Notary Public, personally appeared Laura Izon and being first duly sworn upon her oath stated that she is over twenty-one years, sound of mind and the attorney for petitioner Covad Communications, Inc., and the facts contained therein are true and correct according to the best of her information, knowledge and belief.

IN WTINESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year above-written.

Linda S. Curran
Notary Public

My Commission Expires:

LINDA S. CURRAN
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: Aug. 6, 2002

6TH CASE of Focus printed in FULL format.

JOSEPH T. SKIDMORE, Plaintiff, vs. NORTHWEST ENGINEERING CO., Defendant.

No. 80-2877-CIV-EBD

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

90 F.R.D. 75; 1981 U.S. Dist. LEXIS 11791; 31 Fed. R. Serv. 2d (Callaghan) 738; 8 Fed. R. Evid. Serv. (Callaghan) 214

March 24, 1981

COUNSEL: [**1]

Ronald I. Strauss of Highsmith & Strauss, Coconut Grove, for plaintiff.

H. Clay Roberts of Dixon, Dixon, Hurst, Nicklaus & Webb, Miami, for defendant.

OPINIONBY: DAVIS

OPINION: [*75]

This matter is before the Court on various motions after the defendant insisted that an expert for the plaintiff be excluded from a deposition upon oral examination of an employee of the defendant.

The plaintiff represents that the presence of his expert at depositions is necessary to assist counsel in understanding the technological testimony of the defendant's employee in this products liability action. The defendant argues that the attendance of the expert would result in a "circus atmosphere" at deposition, would be unfair because the plaintiff's expert has not yet formed opinions, and is not necessary because the defendant's employee is not himself an expert. At an attempted deposition, the defendant purported to invoke the Rule regarding exclusion of witnesses. Fed.R.Evid. 615. The plaintiff contends that no one, including experts who will testify for an opponent, may be excluded from a deposition except by an order of the court secured pursuant to Fed.R.Civ.P. 26(c)(5).

The sequestration [**2] rule has been held to apply to depositions. *Williams v. Electronic Control Systems, Inc., 68 F.R.D. 703 (E.D.Tenn.1975);* see *Naismith v. Professional [*76] Golfers Association, 85 F.R.D. 552, 567-68 (N.D.Ga.1979);* Fed.R.Civ.P. 30(c) (depositions "under the provisions of the Federal Rules of Evidence"). n1

n1. The Court construes the defendant's motion for a protective order to be the "request of a party" required to bring Rule 615 into play, and thus the Court need not consider the propriety of the exclusion of the plaintiff's expert without such a request.

On the other hand, the Federal Rules of Civil Procedure allow exclusion of persons from discovery only in exceptional circumstances, and then only upon motion and order of the court. The party seeking to exclude persons from depositions must show good cause, and the protection is limited to circumstances where justice requires such exclusion to protect a party from annoyance, embarrassment, oppression or undue burden or expense. Fed.R.Civ.P. 26(c)(5). [**3]

Even if Fed.R.Evid. 615 applies exclusively, to the exclusion of Fed.R.Civ.P. 26(c)(5), certain witnesses are exempted from sequestration. The presence of experts is allowed despite the general exclusion when their presence is essential to the presentation of the cause. Fed.R.Evid. 615(3). The purpose of that exception is to allow the attendance of experts "needed to advise counsel in the management of the litigation." Advisory Committee's Note to Fed.R.Evid. 615; see 3 Weinstein's Evidence P 615(01); 6 Wigmore on Evidence § 1841 (Chadbourn rev. 1976).

Even at trial, the showing necessary for the inclusion of an expert under Fed.R.Evid. 615(3) has been held to be a minor burden. *Morvant v. Construction Aggregates Corp., 570 F.2d 626, 630* (6th Cir.), appeal dismissed, *439 U.S. 801, 99 S. Ct. 44, 58 L. Ed. 2d 94 (1978)* (trial court bound to accept any reasonable, substantiated representation); see *T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338, 384 (5th Cir. 1980)* (trial court "probably required" to permit presence of expert); Annot., *48 A.L.R.Fed. 484, 487, 494-95 (1980);* cf. Clark Enterprises, Inc. v. Pasewalk, (1979) Fire & Casualty Cas. (CCH) 1134 (D.D.C.1978) [**4] (some

showing needed).

The plaintiff's burden to show the need for his expert's attendance here would seem to be even lighter in view of the liberal discovery philosophy of the Federal Rules of Civil Procedure even if the Evidence Rules were to control. Also, the long-accepted n2 policy reasons for the sequestration rule preventing one witness from conforming his testimony to that of another are not applicable when an expert is involved. The expert testifies to his opinion, not to controverted facts. See *T. J. Stevenson & Co., 620 F.2d at 384; Morvant, 570 F.2d at 630;* 3 Weinstein's Evidence P 615(01); 6 Wigmore on Evidence § 1837 (Chadbourn rev. 1976).

n2. Separation of witnesses dates from biblical times. See Daniel's judgment in Susanna's case, Apocrypha 36-64, reprinted in 6 Wigmore on Evidence § 1837 (Chadbourn rev. 1976).

In contrast to the slight burden on the party seeking to secure the attendance of an expert under the Federal Rules of Evidence, a heavier burden is imposed under the Federal [**5] Rules of Civil Procedure, and that burden is on the party seeking exclusion. The burden contemplated by the procedure rules thus conflicts with the burden set by the evidentiary rules. The concept of ejusdem generis, however, suggests that the general application of Fed.R.Evid. 615 should be restricted by the particularity of Fed.R.Civ.P. 26(c)(5). Having considered this aid to canonical construction, as well as the policies behind both the liberal discovery rules and the exemptions of Fed.R.Evid. 615(3), the Court finds as a matter of law that it is the burden of the party opposing the presence of an expert at a deposition to show good cause why attendance should be restricted. Fed.R.Civ.P. 26(c)(5); cf. *Williams v. Electronic Control Systems, Inc., 68 F.R.D. 703 (1975)* (attendance of expert allowed upon mere assertion of need; procedure rules not considered).

The Court concludes that the defendant here has not met its burden to show that the plaintiff's expert should be [*77] excluded from depositions of the defendant's employees. Alternatively, the Court finds that the plaintiff has made a sufficient representation to show that the attendance of his expert is needed. [**6] It is

ORDERED AND ADJUDGED that the plaintiff's motion to compel the defendant to allow the attendance of the plaintiff's expert, James Best, at the deposition of the defendant's employee, Henry Hall, is GRANTED. The defendant's motion for a protective order is DENIED.

The plaintiff also moved for the imposition of Rule 37 sanctions against the defendant for the failure to allow the attendance of the plaintiff's expert. Sanctions under the Rules of Civil Procedure may be considered only when a party has failed to obey an order to compel. Fed.R.Civ.P. 37(b). It is therefore

ORDERED AND ADJUDGED that the plaintiff's motion for sanctions is DENIED.

1ST CASE of Focus printed in FULL format.

In Re: TERRA INTERNATIONAL, INC., Petitioner.

No. 97-60834

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

134 F.3d 302; 1998 U.S. App. LEXIS 1054; 39 Fed. R. Serv. 3d (Callaghan) 1397

January 26, 1998, Decided

PRIOR HISTORY: [**1] On Petition for Writ of Mandamus to the United States District Court for the Southern District of Mississippi. 5:95-CV-127BrN.

DISPOSITION: DENIED Terra's petition for a writ of mandamus as to the magistrate judge's Production Orders, and we GRANTED Terra's petition for writ of mandamus as to the magistrate judge's Sequestration Order and REMANDED with instructions to vacate that order.

CORE TERMS: protective order, deposition, discovery, writ of mandamus, explosion, affirming, good cause, sparger, discoverable, Federal Rules Of Civil Procedure, underlying litigation, motion to compel, sequestration, vacate, movant, mandamus, demonstration, stereotyped, conclusory, issuance, abused, Federal Rules Of Evidence, exceptional circumstances, deposition testimony, advisory committee, ammonium nitrate, federal district, attorney-client, clarification, nontestifying

COUNSEL: For In Re: TERRA INTERNATIONAL, Petitioner: Javier H Rubinstein, Mayer, Brown & Platt, Chicago, IL. William N Reed, Baker, Donelson, Bearman & Caldwell, Jackson, MS.

DAVID C BRAMLETTE, US District Judge, Respondent, Pro se, Biloxi, MS.

For MISSISSIPPI CHEMICAL CORPORATION, Defendant: R David Kaufman, Jackson, MS.

JUDGES: Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

OPINION: [*303]

PER CURIAM:

Petitioner Terra International, Inc. seeks a writ of mandamus compelling the district court to vacate certain discovery orders entered by the magistrate judge (and affirmed by the district court) in a civil suit between Terra International, Inc. and Mississippi Chemical Corporation. We grant the petition for writ of mandamus in part and deny it in part.

[*304]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Litigation

On December 13, 1994, an explosion occurred at Terra International's ("Terra") ammonium nitrate facility in Port Neal, Iowa, killing four people, injuring eighteen others, and causing substantial property damage. Shortly thereafter, Terra formed an "Incident Investigation Committee" (the "Committee") to investigate the cause [**2] of the accident. The Committee's membership consisted of Terra employees, outside consulting experts, Terra's general counsel, and an outside attorney.

On June 8, 1995, Terra released a report (the "Report") prepared by the Committee containing its conclusion that the explosion was principally caused by the faulty design of a "sparger," an apparatus used to feed nitric acid into a closed vessel known as a neutralizer in which Terra processed liquid ammonium nitrate. Mississippi Chemical Corporation ("MCC") had designed the sparger and licensed the design to Terra. Terra released the report to interested parties as required by OSHA regulations, as well as to others in the fertilizer industry. Terra employees also conducted press conferences at which they reiterated the Report's conclusion that a defect in the sparger's design caused the explosion. n1

n1 The magistrate judge made this factual conclusion regarding the scope of Terra's dissemination of the reports and its contents. Terra does not dispute it.

On [**3] August 31, 1995, Terra filed a products liability suit against MCC in federal district court in the Northern District of Iowa, alleging that MCC's defective sparger design proximately caused the explosion at Terra's plant. Shortly thereafter, MCC filed suit in federal district court in the Southern District of Mississippi, asserting a claim of defamation based upon Terra's dissemination of the Report and its conclusion that MCC's sparger design caused the explosion as well as a claim for a declaratory judgment that MCC-designed equipment did not cause the explosion. Terra's products liability action was subsequently transferred to the Mississippi district court.

This petition for writ of mandamus arises out of the district court's affirmation of certain discovery orders entered by the magistrate judge in the underlying litigation. These include (1) orders requiring Terra to produce certain categories of documents that Terra alleges are undiscoverable (the "Production Orders") and (2) an order granting MCC's motion for a protective order sequestering fact witnesses prior to their depositions and barring fact witnesses from attending the depositions of other witnesses (the "Sequestration [**4] Order").

B. The Production Orders

On August 10, 1996, MCC filed a motion to compel the production of a number of categories of documents relating to the Committee's preparation of the Report. Terra responded with a motion for protective order, asserting that a number of categories of documents that were responsive to MCC's motion to compel were protected from discovery by the attorney-client privilege, the work product rule, and Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure, the rule that limits discovery of facts known or opinions held by a party's nontestifying expert. On December 4, 1996, the magistrate judge entered the first Production Order, which granted in part and denied in part MCC's motion to compel and Terra's motion for protective order. In the first Production Order, the magistrate judge concluded that the following categories of documents for which Terra asserted privilege or other protection from discovery were discoverable:

(1) Terra's counsel's notes of confidential employee interviews;

(2) documents prepared by Terra employees at the request of Terra's counsel or counsel's experts;

(3) documents prepared by Terra's counsel's experts [**5] containing test results and analyses; and

(4) certain scientific and engineering literature used by Terra's counsel's experts.

The parties each objected to the first Production Order, and, in a July 16, 1997 order, the [*305] district court remanded the case to the magistrate judge for further fact-finding and clarification of certain portions of the first Protective Order.

On July 27, 1997, the magistrate judge issued the second Production Order, in which he made a number of clarifications as to the legal bases for his conclusion that the four categories of documents enumerated above were discoverable. First, the magistrate judge concluded that the attorney-client privilege never applied to the first and second categories because the employees about whom Terra's counsel made notes and who prepared documents at the request of counsel or counsel's experts were not clients. Second, he concluded that, with respect to these two categories of documents, MCC had made the requisite showing of substantial need and undue hardship necessary to overcome the protection afforded them by the work product doctrine. Third, he concluded that the third and fourth categories of documents were [**6] discoverable under Rule 26(b)(4)(B) because, although they constituted the work of nontestifying experts, MCC had made the requisite showing of exceptional circumstances necessary to render them discoverable in light of the fact that (1) the condition of the explosion site had changed through the passage of time and (2) the documents contained in these two categories were necessary to support MCC's defamation claim. On October 30, 1997, the district court entered an order affirming the magistrate judge's Production Orders.

C. The Sequestration Order

On February 19, 1997, MCC moved for a protective order under Rule 26(c)(5), seeking to prohibit all fact witnesses from attending the depositions of other fact witnesses and to prevent counsel from disclosing any prior deposition testimony to any prospective fact witness. MCC's motion was not supported by affidavits or other evidence, but merely alleged that Terra employees might feel a sense of camaraderie or feel pressure from Terra that might taint their testimony and preclude counsel from obtaining the witness's "raw reactions." MCC contended that these factors constituted the "good cause" necessary to justify sequestration [**7] during discovery under Rule 26(c)(5). On April 14, 1997, the magistrate judge issued the Sequestration Order, which granted MCC's motion and directed that (1) when preparing witnesses for their depositions, attorneys may not refer "directly or indirectly by innuendo, to what other witnesses say about the facts;" (2) attorneys and officers

of any party may not reveal prior deposition testimony to any witness prior to that witness's deposition; and (3) a party may not designate more than two corporate representatives to attend depositions before the representatives themselves have been deposed and may have only six corporate representatives overall, two of whom will not be deposed. In support of his decision to grant MCC's motion, the magistrate judge stated:

The court finds validity in the contentions of MCC that most fact witnesses are subject to substantial influence and even perhaps subtle pressures from their relationships with Terra. The court further finds that MCC has made a substantial showing of exceptional circumstances that make it appropriate for the court to fashion a reasonable protective order.

On October 30, 1997, the district court issued an order affirming [**8] the Sequestration Order.

Terra seeks a writ of mandamus to compel the district court to vacate its orders of October 30, 1997 affirming the magistrate judge's Production Orders and Sequestration Order.

II. ANALYSIS

"The writ of mandamus is an extraordinary remedy reserved for extraordinary situations" and "is not to be used as a substitute for appeal." *In re American Marine Holding Co., 14 F.3d 276, 277 (5th Cir. 1994).* "Mandamus is appropriate 'when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court.'" See *In re Dresser Indus., 972 F.2d 540, 543 (5th Cir. 1992)* (quoting *In re Chesson, 897 F.2d 156, 159 (5th Cir. 1990)).* We will grant a writ of mandamus only when the petitioner demonstrates [*306] that its right to the writ is "clear and indisputable." Id.

We conclude that Terra has failed to meet the above standard with respect to its challenge to the district court's order affirming the magistrate judge's Production Orders. Terra's petition for writ of mandamus is therefore denied in this regard. We intimate [**9] no view as to the merits of Terra's claims of privilege and other limitations on discovery. However, we conclude that Terra has met the standard with respect to the district court's order affirming the magistrate judge's Sequestration Order.

In 1993, Rule 30(c) of the Federal Rules of Civil Procedure was amended to make clear that, in the typical case, deposition witnesses are not subject to sequestration. See FED. R. CIV. P. 30(c) advisory committee notes. Rule 30(c) now provides in relevant part that "examination and cross-examination of witnesses [at oral depositions] may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615." FED. R. CIV. P. 30(c) (emphasis added). Rule 615 of the Federal Rules of Evidence establishes the right of any party at trial to request that the court "order witnesses excluded so that they cannot hear the testimony of other witnesses." FED. R. EVID. 615. Rule 30(c)'s exclusion of depositions from the strictures of Rule 615 was intended to establish a general rule that "other witnesses are not automatically excluded from a deposition simply by the request of a party." FED. R. CIV. P. 30(c) [**10] advisory committee notes. Rather, exclusion of other witnesses requires that the court grant a protective order pursuant to Rule 26(c)(5) of the Federal Rules of Civil Procedure.

Rule 26(c)(5) provides as follows:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

. . .

(5) that discovery be conducted with no one present except persons designated by the court . . . .

FED. R. CIV. P. 26(c)(5) (emphasis added). Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that "the burden is upon the movant to show the necessity of its [**11] issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978);* see also 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2035, at 483-86 (2d ed. 1994).

In this case, MCC made nothing more than a conclusory allegation that a substantial majority of the fact witnesses in the underlying litigation are employees of Terra and that they will therefore be subject to Terra's influence and will be inclined to protect each other through a sense of "camaraderie." MCC did not support its motion

for protective order with any affidavits or other evidence that might provide support for this simple assertion. The district court's entry of the protective order requested by MCC was therefore unsupported by a "particular and specific demonstration of fact" and therefore constituted a clear abuse of discretion. *Garrett, 571 F.2d at 1326 n.3.* To conclude otherwise would indicate that good cause exists for granting a protective order any time fact witnesses in a case are employed by the same employer or are employed by a party in the case. [**12] Such a conclusion is inconsistent with this court's admonition that a district court may not grant a protective order solely on the basis of "stereotyped and conclusory statements." Id.; see also *Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 17 (E.D. Wis. 1996)* (denying [*307] a request for a protective order based on the fact that several fact witnesses were employed by the defendant and worked together because a finding of good cause based on this showing alone "would surely mandate the same result in all cases in which there was more than one fact witness on an issue and where the movant alleges that prejudice could result"); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 155, 160 (N.D. Ala. 1986)* (holding that the defendant's allegations regarding the need to preclude plaintiff's witnesses, some of whom were the plaintiff's employees, "from hearing or being exposed to deponents' testimony" did not constitute "anything more than ordinary garden variety or boilerplate 'good cause' facts which will exist in most civil litigation"). The district court therefore clearly abused its discretion in affirming the magistrate's sequestration order on the present [**13] record.

III. CONCLUSION

For the foregoing reasons, we DENY Terra's petition for a writ of mandamus as to the magistrate judge's Production Orders, and we GRANT Terra's petition for writ of mandamus as to the magistrate judge's Sequestration Order and REMAND with instructions to vacate that order.

2ND CASE of Focus printed in FULL format.

In re SHELL OIL REFINERY; Robert ADAMS, Sr. v. SHELL OIL COMPANY

Civil Action Nos. 88-1935, 88-2719

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

136 F.R.D. 615; 1991 U.S. Dist. LEXIS 7013

May 16, 1991, Decided

May 17, 1991, Filed

CORE TERMS: deposition, sequestration, deponent, knowledgeable, designated, supervisor, authorize, supervisory authority, good cause shown, assist counsel, natural person, presentation, designate, refinery, power to exclude, good cause, revision, Federal Rule Of Civil Procedure, protective order, intimidated, explosion, catalytic, mandatory, attending, discovery, cracking, orally

COUNSEL:

JUDGES: [**1] Henry A. Mentz, Jr., United States District Judge.

OPINIONBY: MENTZ

OPINION: [*615] ORDER AND REASONS

In this class action suit arising from an explosion in the catalytic cracking unit at Shell Oil Company's refinery in Norco, Louisiana, the plaintiffs orally moved for a protective order to exclude Shell's designated corporate representative, Frank Abatte, from the deposition of the plaintiff, Richard E. Hodges. In an expedited hearing the Court orally granted the plaintiffs' motion for the reasons stated herein.

The many depositions taken in this case to date primarily have been liability depositions, that is, depositions noticed by the plaintiffs of Shell employees and others who have knowledge about refinery operations, procedures, safety practices, etc. Recently, Shell began noticing the depositions of plaintiffs who are Shell employees. Thus far, two of these depositions have commenced, and each time a different Shell corporate representative appeared. At each deposition, the plaintiffs objected to the particular corporate representative attending the deposition on the ground that the corporate representative was the deponent's supervisor at work. The plaintiffs contend that the supervisory authority of [**2] these corporate representatives has an intimidating influence on the deponent's testimony.

Shell contends that it is entitled to have a knowledgeable corporate representative present to assist counsel in asking questions. Shell contends that the presence of someone knowledgeable about the deponent's work at the refinery is particularly [*616] necessary in this case due to the technical nature of the subject matter.

The first time the plaintiffs objected to the presence of Shell's designated corporate representative, the Court ruled in a telephone conference that the corporate representative was entitled to be present during the deposition. The ruling was based on Shell's right to defend against the plaintiffs' allegations at all stages of the litigation. As explained below, this right is not unqualified.

When the plaintiffs made the current motion regarding Richard Hodges' deposition, it became apparent to the Court that Shell intends to designate a different corporate representative at each of the plaintiff-employee depositions, depending on who has the most knowledge about the deponent's work. Shell has not denied this fact. Indeed, Shell has indicated that the corporate representatives [**3] to be selected will typically not only have some supervisory authority over the deponent, but will also be a listed fact witness for trial.

Richard Hodges was working in the catalytic cracking unit at the time of the explosion. He is the only survivor from the operating personnel in that unit. He has returned to work at Shell, but because of his health problems, he is being retrained for another position. Shell maintains that while Frank Abatte trained Hodges as an operator, he is not his supervisor, nor does he evaluate Hodges' work for promotions. Also, Shell states that Abatte has already given his deposition so he cannot be influenced by Hodges' testimony. The plaintiffs

assert that Hodges' is intimidated by Abatte's presence. The Court confirmed this fact by questioning Hodges about his ability to testify with Abatte present. Hodges is worried about Abatte's presence because even though Abatte is not his supervisor, he is in a position to talk with Hodges' supervisors and possibly affect his job security.

This dispute falls under Federal Rule of Civil Procedure 26(c)(5), which authorizes the trial court to designate the persons who may be present during a deposition:

Rule 26. [**4] General Provisions Governing Discovery

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . . (5) that discovery be conducted with no one present except persons designated by the court; . . . .

Prior to the 1970 amendments to the Federal Rules of Civil Procedure, then Rule 30(b) stated that "the examination shall be held with no one present except the parties to the action and their officers or counsel." Certain commentators argue that the present Rule 26(c)(5) does not alter a party's right to attend a deposition, citing Federal Rule of Evidence 615, the evidentiary rule regarding sequestration of witnesses, which states that it "does not authorize exclusion of . . . . (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, ..." See Wright & Miller, Federal Practice and Procedure, § 2041 at 295-96 (1970). This interpretation [**5] gives no effect to Rule 26(c)(5).

Rule 615 is mandatory in nature and makes exclusion of witnesses a matter of right to a requesting party, with three exceptions. See 33 Fed. Proc., L. Ed., § 80:32 at 413 (1985). Rule 615 reads as follows:

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

[*617] Reading Rule 615 and Rule 26(c)(5) together, n1 this Court concludes that a party may be excluded from a deposition for good cause shown.

n1 Federal Rule of Evidence 615 applies to pretrial depositions through Federal Rule of Civil Procedure 30(c), which states that the Federal Rules of Evidence apply to depositions. See also *Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451, 453 (M.D. Ga. 1987)* (citing *Naismith v. Professional Golfers Ass'n, 85 F.R.D. 552, 567 (N.D. Ga. 1979)* and *Williams v. Electronic Control Sys., 68 F.R.D. 703 (E.D. Tenn. 1975));* 33 Fed. Proc., L. Ed. § 80:32 (1985). But see *BCI Communication Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154 (N.D. Ala. 1986)* ("Since Rule 26(c), Fed. R. Civ. P., specifically requires a court order before persons may be excluded from the conduct of the depositions discovery process, it is clear that Fed. R. Evid. 615 does not apply to the taking of depositions").

[**6] By its own terms, Rule 615(2) "does not authorize" the sequestration of a corporate representative. Therefore, the exclusion of a corporate representative from a deposition is governed by Rule 26(c)(5), and the party seeking to exclude a corporate representative at a deposition must show good cause for his exclusion. See *Skidmore v. Northwest Eng'g Co., 90 F.R.D. 75, 76 (S.D. Fla. 1981)* (Sequestration of an expert witness or a "person whose presence is shown by a party to be essential to the presentation of the party's cause" is not authorized by Rule 615(3), but such a person may be excluded from a deposition pursuant to Rule 26(c)(5) for good cause shown). See also *Galella v. Onassis, 487 F.2d 986, 997 (2nd Cir. 1973)* ("The extent of the court's authority to determine those present was enlarged by the 1970 revision of the Rules of Discovery . . . . In view of the revision, it is clear that the court has the power to exclude even a party, although such an exclusion should be ordered rarely indeed"); 10 Fed. Proc., L. Ed., § 26:166 at 407 (1985) (Under Rule 26(c)(5), the court has the power to exclude even a party). If a deponent does not [**7] fall within one of Rule 615's three exceptions to sequestration, then Rule 615's mandatory rule of sequestration applies. See Lumpkin, 117 F.R.D. at n. 1. n2

n2 See note 1, supra.

In this case, we are dealing with the designation of a succession of corporate representatives who are listed fact witnesses for trial. In addition, Shell has stated that Frank Abatte will not be a corporate representative at trial. There is a risk that in Abatte's presence Hodges might not testify as fully as he would otherwise. But, regardless of whether Abatte has the ability to harm Hodges' job evaluation and whether Hodges' feels intimidated, if Shell is permitted to continue this procedure, many of its fact witnesses will have the benefit of attending the plaintiffs' depositions. Thus, by designating multiple corporate representatives who are also fact witnesses, Shell would in effect avoid the sequestration of witnesses rule. That would give Shell an unfair advantage over the plaintiffs.

Accordingly, the Court finds that [**8] the plaintiffs have shown good cause to exclude Frank Abatte from the deposition of Richard Hodges. The Court is not aware of any authority that a party is entitled to have a knowledgeable corporate representative. The authority for having someone knowledgeable present to assist counsel is found in Rule 615(3), excepting from the rule of sequestration "a person whose presence is shown by a party to be essential to the presentation of the party's cause." See Fed. R. Evid. 615(3). Even were Shell proceeding under Rule 615(3), the Court's decision would be the same.

To balance the interests of both parties, the Court will allow Frank Abatte to sit outside the deposition room so that he will be available to assist counsel during breaks. Shell will not be prejudiced by this order. Shell will be fully and effectively represented at the deposition. The Court is not precluding Shell from having a corporate representative present at the deposition. Shell may designate another corporate representative, who does not have supervisory authority over the plaintiff and who is not a witness, to be present during the deposition. Having actively participated in numerous liability depositions, [**9] Shell is aware of the issues and questions to be addressed during its examination of [*618] these plaintiffs. In addition, Shell receives daily transcripts of the depositions, so Shell and Abatte or any other knowledgeable employee can review the deposition transcript during the evening recess, and Shell can follow up the next day.

For the foregoing reasons,

IT IS ORDERED that the plaintiffs' oral motion for protective order to exclude Frank Abatte from the deposition of Richard E. Hodges is GRANTED.

New Orleans, Louisiana this 16th day of May, 1991.