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And Frontier Rail Corporation*

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

JAKE SHREVES,

Plaintiff,

vs.

FRONTIER RAIL CORPORATION
and YAKIMA CENTRAL RAILWAY,

Defendants.

NO. 1:19-CV-03012-SMJ

DEFENDANTS' MOTIONS FOR
A PROTECTIVE ORDER AND
TO TERMINATE DEPOSITIONS

Hearing Date: February 26, 2021
at 11:00 a.m. to noon

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DEFENDANTS' MOTIONS FOR A
PROTECTIVE ORDER AND TO
TERMINATE DEPOSITIONS
(NO. 1:19-CV-03012-SMJ) - 1

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I. INTRODUCTION

Defendants Yakima Central Railway (“YCR”) and Frontier Rail Corporation (“FRC”) originally provided corporate designees to sit for their FRCP 30(b)(6) depositions in July 2020, where Plaintiff’s counsel elicited testimony on a wide range of topics. Defendants rightly considered those depositions to be completed at that time, and were shocked when Plaintiff’s counsel served additional deposition notices to obtain additional testimony from those same witnesses shortly before the discovery deadline was to expire, without any notice or conferral with defense counsel. The proposed additional topics were not based upon newly discovered information or other extenuating circumstances, but rather it appeared that Plaintiff’s counsel probably forgot to cover topic areas that properly should have been covered during the first depositions. In hindsight, it is clear to Defendants that the motive for noting the depositions again was to harass corporate deponent, Paul Didelius, and for other improper purposes.

Defendants’ counsel advised Plaintiff’s counsel that the tardy notices were incompatible with the FRCP and common law, which do not give the Plaintiff free rein to notice multiple depositions of a corporation simply because his seven hours had not been used. Declaration of David P. Rossmiller (“Rossmiller Decl.”) ¶ 6 Exh. 2. Plaintiff was **obligated** to seek leave of the Court to conduct further

1 corporate depositions of YCR and FRC. Fed. R. Civ. P. 30(a)(2)(A)(ii); *Burdick v.*
2 *Union Sec. Ins. Co.*, 2008 WL 5102851, at *3 (C.D. Cal. 2008); *Ameristar Jet*
3 *Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001).
4 Plaintiff did not do so, and in fact, expressly rejected that seeking leave from the
5 Court was required. Rossmiller Decl. ¶ 7, Exh. 3.

7 In an effort to refrain from additional discovery motion practice, which has
8 burdened this Court, Defendants agreed to a stipulation to produce a corporate
9 witness for the topics so long as the testimony would be limited to topics in the
10 notices only. *Id.* ¶ 6, Exh. 2 and ¶ 7. In other words, if Plaintiff’s counsel could
11 refrain from straying from listed topics or engaging in improper lines of
12 questioning and get the information he needed in an efficient manner without
13 wasting the parties’ time, Defendants were amenable to stipulating to providing the
14 limited testimony. Defendants’ agreement turned out to be a mistake because
15 Plaintiff’s counsel’s actions during the depositions demonstrated that he had no
16 intention of staying within the limits of the stipulation.

17 Throughout the course of the recent FRCP 30(b)(6) depositions of
18 Defendants, Plaintiff’s counsel engaged in bad-faith efforts to harass
19 Defendants/Mr. Didelius by arguing with the witness about his preparations and
20 answers, attempting to exceed the scope of the depositions, attempting to inject

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1 himself into the attorney-client relationship and discover the content of privileged
2 communications, seeking legal conclusions from the witness and otherwise
3 attempting to intimidate the witness. Very little of Plaintiff’s questioning ever
4 reached the topics for which he claimed he needed testimony, and which
5 Defendants had voluntarily allowed to proceed pursuant to an agreed stipulation.
6 When it became clear that Plaintiff did not actually want to conduct any further
7 fact discovery, and that the depositions were merely an exercise in harassment and
8 intimidation, Defendants’ counsel terminated FRC’s deposition.
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11 Accordingly, Defendants have been forced into moving this Court for
12 another discovery order, and hereby move to this Court for a protective order and
13 to terminate the FRCP 30(b)(6) depositions of YCR and FRC.
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15 **II. CERTIFICATION**

16 Defendants made a good faith effort to confer with counsel for Plaintiff prior
17 to the filing of this Motion, but they were unable to reach an agreement.
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19 **III. MOTIONS FOR A PROTECTIVE ORDER AND TO TERMINATE**

20 **A. Background.**

21 On July 21, 2020, Plaintiff took the fact witness deposition of Paul Didelius
22 – the owner of both defendants YCR and FRC. Rossmiller Decl., ¶ 2. On July 22,
23 2020, Plaintiff took the FRCP 30(b)(6) depositions of YCR and FRC, where Mr.
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1 Didelius was the corporate designee. *Id.* Nearly five months after those depositions
2 were completed, on January 5, 2021, Plaintiff served additional notices of
3 depositions to Defendants, which sought additional testimony from YCR and FRC
4 without conferring with defense counsel. *Id.* ¶ 3. Plaintiff, however, did not file a
5 motion for leave with this court pursuant to FRCP 30(a)(2) prior to serving the
6 additional FRCP 30(b)(6) notices. *Id.* Defendants permitted the depositions to
7 move forward without requiring Plaintiff to file a motion for leave on the condition
8 that the depositions be limited to topics not already covered in the previous
9 depositions – Plaintiff’s counsel agreed. *Id.* ¶ 4. Defendants also served written
10 objections to the deposition topics. *Id.* Ex. 1.

14 On January 27, 2021, the parties convened to conduct limited questioning of
15 Defendants on the topics in the new notices *only*. *Id.* ¶ 5. YCR’s deposition
16 proceeded first, with Plaintiff’s counsel devoting roughly the first 70 minutes to
17 questioning the witness about his qualifications to testify and what he did to
18 prepare for the deposition. *See id.* ¶ 8, Ex. 4 at pp. 9:24-49:16. Of course,
19 Plaintiff’s counsel was already aware of Mr. Didelius’ qualifications to testify –
20 having taken Mr. Didelius’ deposition on three separate occasions already. *See id.*
21 ¶¶ 2-3. Plaintiff’s counsel repeatedly attempted to elicit legal conclusions from the
22 witness despite Defendants’ counsel’s notice and objections that those questions
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1 were improper and that Plaintiff’s counsel should refrain from asking questions
2 that seek a legal conclusion. *See id.* ¶ 8, Ex. 4 at pp. 11:10-18, 11:23-12:14, 13:22-
3 14:1, 37:8-12, 67:25-69:19, 86:25-87:4. Plaintiff’s counsel repeatedly sought to
4 confuse or misstate the applicable legal standards to the witness. *See, e.g., id.* at pp.
5 28:18-32:7, 36:20-23 (repeatedly questioning whether the witness had 100 percent
6 of the information – a disingenuous representation of the legal standard). Plaintiff’s
7 counsel repeatedly asked questions that attempted to probe the attorney-client
8 relationship. *Id.* at pp. 19:11-13, 19:25-20:4. 20:5 to 22:12, 33:7-22, 50:21-51:1.
9 Where Plaintiff’s counsel actually asked questions of substance regarding facts that
10 related to the deposition topics, the deposition was able to proceed without event.
11 *See id.*

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15 FRC’s deposition began after a short break, but Plaintiff’s counsel’s pattern
16 of conduct continued. *Id.* ¶ 9, Ex. 5. Counsel repeatedly asked the same or
17 substantially the same questions of the witness. *See generally id.* Plaintiff’s counsel
18 again attempted to elicit legal conclusions. *See id.* at pp. 19:15 to 21:7, 22:2 to
19 23:10, 25:24-26:5. Counsel again engaged in a series of questions implicating the
20 attorney-client privilege, which directly lead to the termination of the deposition.
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- 23 • Q. Okay. What facts in response to the matters of examination that are
24 listed in the deposition notice were provided to you by Frontier Rail
25 corporation’s attorneys. *Id.* at p. 26:19-21.

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- Q. Were you provided information in preparation for your testimony today by Frontier Rail Corporation’s attorneys? *Id.* at p. 27:4-6.
- Q. Did you speak with Mr. Rossmiller in preparation for your testimony today? *Id.* at p. 27:13-14.

Defendants’ counsel attempted to caution Plaintiff’s counsel that the deposition would be terminated if the witness continued to be harassed with questions that sought attorney-client privileged information. *Id.* at p. 27:15-28:9. Plaintiff’s counsel paid no attention, asking the following immediately after:

- Q. Mr. Didelius, did you meet with Kelsey Terry in preparation for your testimony today? *Id.* at p. 28:11-12.

At this point, the deposition was terminated, and this Motion followed.

B. Legal Authority.

A Court may issue a protective order for good cause “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including an order that limits its scope. Fed. R. Civ. P. 26(c)(1)(D). Further, FRCP 30(d)(3)(A) provides the legal authority for the termination of a deposition:

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. . . .

“It is not the embarrassment or annoyance caused by unfavorable answers that is the controlling criterion under [Rule] 30(d)(3), but the manner in which the interrogation is conducted that is the basis for refusing to proceed, followed by the

1 required motion to seek relief.” *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D.
2 614, 619 (D. Nev. 1998). Of note, the Notes of the Advisory Committee on Rules -
3 1993 Amendments state: “In general, counsel should not engage in any conduct
4 during a deposition that would not be allowed in the presence of a judicial officer.”

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6 Rule 30(d)(3)(B) provides that “[t]he court may order that the deposition be
7 terminated . . .” and “[i]f terminated, the deposition may be resumed only by order
8 of the court where the action is pending.” FRCP 30(d)(3)(C) provides that FRCP
9 37(a)(5) applies to the award of expenses.

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11 **C. The Depositions of YCR and FRC Should be Terminated.**

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13 Defendants voluntarily, and through a mutually agreed stipulation, allowed
14 Plaintiff the opportunity to question Defendants regarding the subjects listed in his
15 additional deposition notices without moving the Court for permission to conduct
16 the additional depositions. Plaintiff’s counsel, however, refused to take advantage
17 of this opportunity, and instead persisted in conducting the depositions in bad faith
18 and/or in a manner that was for the purpose of unreasonable annoyance,
19 embarrassment and clear harassment of Mr. Didelius, the corporate witness.
20 Because Plaintiff did not have an absolute entitlement to conduct these depositions,
21 and the manner of conducting the additional depositions grossly deviated from the
22 standards of FRCP 30(d)(3) and from the terms of the parties’ stipulation, this
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1 Court should enter a protective order preventing further depositions of YCR and
2 FRC and order the termination of the depositions of YCR and FRC.

3 Plaintiff's counsel refused to accept the witness' answers at face value, was
4 argumentative and repeatedly asked the same or almost the same question. Further,
5 Plaintiff's counsel devoted an inordinate amount of time to questioning the witness
6 regarding his preparations and qualifications even though Plaintiff's counsel had
7 previously questioned the witness. The witness voluntarily made himself available
8 for an additional day of testimony despite the fact that all of this testimony could
9 have been completed in July 2020. Thus, the witness was inconvenienced by
10 Plaintiff's counsel's inability to complete his depositions in July, and the refusal of
11 Plaintiff's counsel to focus on the topics that prompted his deposition notices
12 suggests that Plaintiff's counsel only desired to harass and bully the witness now
13 that he had appeared for a fourth and fifth time. In addition, at least some of the
14 testimony on the topic of whether FRC was Plaintiff's employer was already
15 discussed extensively in the July 2020 deposition, but Plaintiff's counsel wanted to
16 relitigate the issue again in January 2021 by arguing with and taunting the witness
17 about the Court's ruling on the Motion to Dismiss filed by the defense in the early
18 stages of this litigation. Before the deposition of FRC was terminated, Plaintiff's
19 counsel never began to ask any questions related to the topics listed in the
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1 deposition notice, and the questions during the YCR deposition barely touched on
2 those topics. Accordingly, counsel’s method of questioning was improper and in
3 bad faith, was intended to harass the witness and is improper under FRCP 26 and
4 30. It also violated the stipulation that counsel agreed to with the defense.
5

6 Counsel’s repeated questions that sought legal conclusions is a violation of
7 federal common law and the evidentiary rules. Deposition questions that call for a
8 legal conclusion from a fact witness are improper and no answer is required. *E.g.*,
9 *Quiksilver, Inc. v. Kymsta Corp.*, 247 F.R.D. 579, 585 (C.D. Cal. 2007)
10 (concluding that “since plaintiff’s objections of ‘legal conclusion’ were proper, the
11 witnesses need not answer these questions.”). As discussed above, Plaintiff’s
12 counsel repeatedly attempted to elicit legal conclusions from the witness during
13 both the YCR and FRC depositions. Counsel was reminded repeatedly that this line
14 of questioning from a fact witness was improper. Despite the repeated objections
15 and discussions on the record, counsel continued in a course of badgering conduct
16 intended to frustrate and harass the witness. This manner of questioning warrants a
17 protective order and termination of the depositions of YCR and FRC.
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22 Plaintiff’s counsel repeatedly attempted to probe privileged communications
23 between YCR, FRC and their attorneys. Plaintiff’s counsel was repeatedly warned
24 to cease this behavior. Deposition questions that seek the discovery of information
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1 protected by the attorney-client privilege are improper and a witness may be
2 instructed not to answer. *E.g., Corker v. Costco Wholesale Corp.*, 2020 WL
3 6874480, at *2 (W.D. Wash. Nov. 23, 2020). The attorney-client privilege must be
4 protected, and Plaintiff’s counsel’s refusal to accept that fact demonstrates that
5 these depositions were for the purpose of harassment only.
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7 The witness’ voluntary appearance was an inconvenience, as he had already
8 made himself available for two days of depositions in July where the same
9 information could have been covered. The January depositions do not appear to
10 have been aimed at gathering facts related to the topics, but rather as an
11 opportunity for Plaintiff’s counsel to argue with, intimidate and otherwise harr
12 the owner of the defendant companies. Therefore, this Court should enter a protective
13 order terminating and barring further depositions of YCR and FRC.
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17 **D. Defendants’ Fees and Costs Should be Awarded.**

18 Applying FRCP 30(d)(3)(C) and FRCP 37(a)(5), this Court should award
19 Defendants their fees and costs incurred in briefing this Motion.
20

21 **IV. CONCLUSION**

22 Because Plaintiff’s counsel’s conduct during the depositions was intended to
23 harass, annoy and oppress the voluntarily provided witness, this Court should enter
24 a protective order and an order terminating the depositions of YCR and FRC.
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DATED this 11th day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record listed below:

DEFENDANTS’ MOTIONS FOR A PROTECTIVE ORDER AND TO TERMINATE DEPOSITIONS.

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