

## § 1114.24

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or insular possession subject to the dominion of the United States, depositions should be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country, depositions may be taken before an officer or person designated by the Board or agreed upon by the parties by stipulation in writing to be filed with the Board.

(c) *Fees.* A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Board, shall be entitled to the same fee paid for like service in the courts of the United States, which fee should be paid by the party at whose instance the deposition is taken.

(d) *Failure to attend or to serve subpoena; expenses.* (1) If the party who filed a petition for discovery fails to attend and proceed with the taking of the deposition and another party attends in person or by representative pursuant to an order of the Board granting discovery the Board may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(2) If the party who filed a petition for discovery fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by representative because he expects the deposition of the witness to be taken, the Board may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(e) *Disqualification for interest.* No deposition should be taken before a person who is a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel or is financially interested in the proceeding.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

### § 1114.24 Depositions; procedures.

(a) *Examination.* Examination and cross-examination of witnesses should

proceed as permitted at a hearing and should be limited to the subject matter specified in the order granting discovery. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, should be noted by the officer upon the deposition. Evidence objected to should be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and shall transmit them to the officer, who shall open the sealed envelope, propound the questions to the witness, and record the answers verbatim.

(b) *Use of depositions.* At the hearings, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership, association or governmental agency (other than this Board, except in those instances where the Board itself is a party to the proceeding) which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer or Board finds:

(i) That the witness is dead; or

(ii) That the witness is at a greater distance than 100 miles from the place of hearing or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally at public hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken.

(c) *Effect of taking or using depositions.* A party should not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this should not apply to the use of an adverse party of a deposition under paragraph (b)(2) of this section. At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Motions to protect.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Board may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in §1114.21(c). If the order made terminates the examination, it should be resumed thereafter only if so ordered. Upon demand of the objecting party or deponent, the taking of the deposition should be suspended for the time necessary to make a motion for an order.

(e) *Recordation.* The officer before whom the deposition is to be taken

shall observe the provisions of §1113.6 respecting appearances and typographical specifications, shall put the witness under oath, and shall personally, or by someone acting under his direction and in his presence, record and transcribe the testimony of the witness as required by these rules.

(f) *Signing.* When the testimony is fully transcribed or otherwise recorded, the deposition should be submitted to the witness for examination and should be read to or by him unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make should be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The witness shall then sign the deposition, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 15 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used fully as though signed, unless, on a motion to suppress, it is found that the reasons given for refusal to sign require rejection of the deposition in whole or in part.

(g) *Attestation.* The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is: (1) Not a relative, employee, representative or counsel of any of the parties, (2) not a relative or employee of such representative or counsel, and (3) not financially interested in the proceeding.

(h) *Return.* The officer shall securely seal the deposition in an envelope endorsed with sufficient information to identify the proceeding and marked "Deposition of (here insert name of witness)" and shall either personally deliver or promptly send the original and one copy of all exhibits by registered mail to the Secretary of the Board. A deposition to be offered in evidence must reach the Board not

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later than 5 days before the date it is to be so offered.

(i) *Notice.* The party taking the deposition shall give prompt notice of its filing to all other parties.

(j) *Copies.* Upon payment of reasonable charges, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

### § 1114.25 Effect of errors and irregularities in depositions.

(a) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) *As to taking of deposition.* (1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under § 1114.23 and 1114.24 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

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### § 1114.26 Written interrogatories to parties.

(a) *Availability; procedures for use.* Subject to the provisions of § 1114.21(b)(2), any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation, partnership, association, or Governmental agency (other than this Board, except in those instances where the Board itself is a party to the proceeding), by any officer or agent, who shall furnish such information as is available to the party. Each interrogatory should be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection should be stated in lieu of an answer. The answers are to be signed by the person making them and subscribed by an appropriate verification generally in the form prescribed in § 1112.9. Objections are to be signed by the representative or counsel making them. The person upon whom the interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories, but not less than 15 days after the service thereof.

(b) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof, or compilation, abstracts, or summaries therefrom. If information sought is contained in computer runs, punchcards, or tapes which also contain privileged or proprietary information or information the disclosure of which is proscribed by the act, it will be sufficient response under