

## The Use of Discovery in Board Proceedings

### A. Generally

Discovery consists of the pre-hearing devices that can be used by one party to obtain facts and information about the case from the other party to assist the party's preparation for the hearing before the Board. The Board has adopted as applicable to its proceedings all the rules of the Vermont Rules of Civil Procedure ("V.R.C.P.") which relate to discovery.<sup>1</sup> Tools of discovery include depositions upon oral and written questions, written interrogatories, production of documents or things, permission to enter upon land or other property, physical and mental examination of persons, and requests for admission.

The scope of discoverable matter is broad. Parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action".<sup>2</sup> "It is not ground for objection that the information sought will be inadmissible at the (hearing) if the information sought appears reasonably calculated to lead to the discovery of admissible evidence".<sup>3</sup> An exception to the broad scope of discovery is privileged information. Information obtained through the physician - patient relationship or the attorney - client relationship are examples of privileges which may, absent a waiver, result in otherwise relevant information not being discoverable.<sup>4</sup>

The discovery rules are designed so that most discovery takes place between the parties without the involvement of the Board. Parties "have the obligation to make good faith efforts among themselves to resolve or reduce all differences

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<sup>1</sup> Rules 26-37, Vermont Rules of Civil Procedure; Sections 12.1, 22.1, 32.1 52.1, 62.1, and 72.1, Board Rules of Practice.

<sup>2</sup> V.R.C.P. 26(b)(1). Grievance of Towle, 15 VLRB 506 (1992), 16 VLRB 196 (1993).

<sup>3</sup> Id.

<sup>4</sup> Appeal of Harris, 28 VLRB 82 (2005). Grievance of Palmer, 25 VLRB 81 (2002). Grievance of Towle, 16 VLRB 196 (1993).

relating to discovery procedures and to avoid filing unnecessary motions”.<sup>5</sup> No motions seeking a Board ruling on a discovery issue “shall be filed unless counsel making the motion has conferred with opposing counsel or has attempted to confer about the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory solution”.<sup>6</sup>

## B. Discovery Methods

There are many Board cases in which the parties do not engage in discovery. If discovery does take place, in practice the discovery methods most used by parties involved in Board proceedings are depositions upon oral examination, written interrogatories, requests for production of documents, and requests for admission.

Depositions upon oral examination, the most frequently employed discovery device in Board proceedings, involve a party or parties taking the testimony of a witness outside of, and prior to, the Board hearing through questioning the witness. The deposition is taken under oath in the presence of each party’s attorney. A transcript is made of the deposition. The deposition is used in preparation for the Board hearing, and may be used at the hearing for purposes of impeaching the testimony of a witness at the hearing.<sup>7</sup> Depositions also may be used at Board hearings for all purposes where the witness testifies to a lack of memory of the subject matter of the deposition, the witness has been unable to be present at the hearing due to illness or disability, or the party seeking to have the deposition used has been unable to procure the attendance of the witness by process or other

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<sup>5</sup> V.R.C.P. 26(h).

<sup>6</sup> Id.

<sup>7</sup> See generally V.R.C.P. 30 and 32; Grievance of Towle, 16 VLRB 196 (1993).

reasonable means.<sup>8</sup> In other cases, depositions may be introduced into evidence at Board hearings in lieu of a person's testimony upon agreement of the parties.

Written interrogatories are a set of written questions about the case before the Board submitted by one party to the other party. The answers to the interrogatories are made under oath.<sup>9</sup> Requests for production of documents involve one party serving on the other party a request to produce, and permit the party making the request to inspect and copy, designated documents which are in the custody, control or possession of the party upon whom the request is served.<sup>10</sup>

Requests for admission are written statements of fact, or the application of law to fact, which is submitted to the other party, and which that party generally is required to admit or deny. Those statements which are admitted will be treated by the Board as having been established unless the Board permits withdrawal or amendment of the admission.<sup>11</sup>

Other discovery devices are available for use by the parties in Board proceedings. Depositions upon written questions involve a party or parties taking the testimony of a witness outside of, and prior to, the Board hearing through written questions which have been presented to the other party prior to the deposition.<sup>12</sup> Parties also are permitted to serve on the other party a request to enter upon land or other property in the possession or control of that party for inspection and other purposes.<sup>13</sup> Although parties are permitted the use of these latter two discovery devices, such devices have been used rarely, or not at all, in Board proceedings.

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<sup>8</sup> V.R.C.P. 32(a).

<sup>9</sup> See generally V.R.C.P. 33.

<sup>10</sup> See generally V.R.C.P. 34.

<sup>11</sup> See generally V.R.C.P. 36.

<sup>12</sup> V.R.C.P. 31.

<sup>13</sup> V.R.C.P. 34.

### C. Board Involvement in Discovery

Although most discovery takes place without Board involvement, the Board is called upon at times to intervene due to a discovery dispute between the parties. On some occasions, a party seeks a Board order compelling discovery. If a person deposed refuses to answer a question, if a party fails to answer an interrogatory, or if a person fails to produce documents or allow entry unto property, the discovering party may file a motion for a Board order compelling discovery.<sup>14</sup> Also, the Board becomes directly involved where the physical and mental examinations of persons are sought. When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Board may order the party or other person to submit to a physical or mental examination.<sup>15</sup>

If a party fails to comply with a Board discovery order, the party may be held in contempt. A party also may have to pay the other party's reasonable expenses, lose the ability to use or oppose defenses or introduce certain evidence, have facts established against them, and/or default in a case for failure to obey discovery orders.<sup>16</sup>

On other occasions, a party seeks a Board order limiting discovery or requests that the Board issue discovery protective orders. The frequency or extent of use of specific discovery methods may be limited by the Board on such grounds as being duplicative, unduly burdensome or expensive.<sup>17</sup> The Board also may issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense".<sup>18</sup> Such a protective order may prohibit discovery, limit it, provide that discovery only take place under

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<sup>14</sup> V.R.C.P. 37(a).

<sup>15</sup> V.R.C.P. 35.

<sup>16</sup> V.R.C.P. 37(b), (c), (d), and (e).

<sup>17</sup> V.R.C.P. 26(b)(1).

<sup>18</sup> V.R.C.P. 26(c). Grievance of Towle, 15 VLRB 506 (1992).

specified conditions, or provide for the sealing of products of discovery.<sup>19</sup> For example, in one case the Board issued a protective order sealing audit reports on a railway company, which had been completed by an employee grieving to the Board, from the public record pursuant to the trade secret exemption in the Vermont Public Records Act. However, the Board allowed the grievant to seek to have the reports admitted into evidence.<sup>20</sup>

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<sup>19</sup> Id. Appeal of Danforth, 27 VLRB 79 (2004).

<sup>20</sup> Grievance of McCort, 15 VLRB 287 (1992).