

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
et al.,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA
FE RAILWAY COMPANY, et al.

Defendants.

No. CV-F-92-5068 OWW

MEMORANDUM DECISION AND
ORDER AWARDING COSTS TO
DEFENDANT AND CROSS-
DEFENDANT SHELL OIL COMPANY
(Doc. 1511)

On September 9, 2009, Defendant and Cross-Defendant Shell Oil Company ("Shell"), timely filed a Bill of Costs and supporting declaration.

On September 21, 2009, the United States and the State of California Department of Toxic Substances and BNSF Railway Company and Union Pacific Railroad Company (collectively "Governments," "Railroads" and/or "Objectors") filed objections to the Bill of Costs.

On September 25, 2009, Shell filed a reply to these

1 objections.

2 On October 30, 2009, the Governments and Railroads filed the
3 Declaration of Marc A. Zeppetello in support of the objections to
4 the Bill of Costs.

5 A. LATE DECLARATION.

6 Shell objects to the October 30 declaration in support of
7 the objections on the ground that the declaration is untimely.

8 The October 30 declaration is untimely. Rule 292(c), Local
9 Rules of Practice, provides that objections to a cost bill shall
10 be filed within seven days from the date of service of the cost
11 bill. However, because Shell has addressed the objections in the
12 October 30 declaration on the merits, the October 30 declaration
13 will be considered.

14 B. MERITS OF COST BILL.

15 Shell's Bill of Costs sought costs as follows:

16 Fees of the Clerk \$202.86

17 Fees of the court reporter
18 for all or any part of that
19 transcript necessarily obtained
20 for use in the case \$28,135.88

21 Fees for exemplification and
22 copies of papers necessarily
23 obtained for use in the case \$15,564.40

24 Other costs \$255.00

25 \$44,158.14

26 Following objections, Shell reduced the Bill of Costs to
\$40,389.83 by deleting the following from the Bill of Costs:

Deposition Transcripts

1 Peggy J. Crawford - \$148.77
2 Jacob Rajfer - \$216.70

3 Thomas Delfino - \$873.20

4 Exemplification and Copy of Papers

5 Reproduction of boxes of documents for Lee
6 Arvin Case - \$2,349.03

7 Reproduction of boxes of documents for Lee
8 Arvin Case - \$1,053.81

9 Consequently, Shell seeks costs as follows:

10 Fees of the Clerk	\$202.86
11 Fees of the court reporter 12 for all or any part of that 13 transcript necessarily obtained 14 for use in the case	\$26,897.21
15 Fees for exemplification and 16 copies of papers necessarily 17 obtained for use in the case	\$12,161.56
18 Other costs	<u>\$255.00</u>
	\$39,516.63

18 1. Deposition Costs.

19 Objectors argue that certain of the deposition transcripts
20 should not be awarded as costs, on a number of grounds.

21 Deposition costs are taxable if they are reasonably
22 necessary for trial. *Evanow v. M/V Neptune*, 163 F.3d 1108, 1118
23 (9th Cir.1998). The District Court has discretion to award or
24 deny costs of depositions not used at trial. See *Washington*
25 *State Dept. of Transp. v. Washington Natural Gas Co., Pacificorp*,
26 59 F.3d 793, 806 (9th Cir.1995). "Whether a transcript or

1 deposition is "necessary" must be determined in light of the
2 facts known at the time the expense was incurred'" *Sunstone*
3 *Behavioral Health, Inc. v. Alameda County Medical Center*, 646
4 F.Supp.2d 1206, 1219 (E.D.Cal.2009), citing *Barber v. Ruth*, 7
5 F.3d 636, 645 (7th Cir.1993).

6 Objectors assert that the deposition costs for Kelly Adams,
7 H. Edwards, Merle Engelka, Halbasch, Ann Day Millan, Irvine
8 Phillips, Gilbert Ray, and Benjamin Ulloa should be disallowed
9 because these persons were not named in the Pretrial Order as
10 witnesses by deposition or otherwise and did not testify at
11 trial.

12 However, as Shell notes, Ann Day Millan and Benjamin Ulloa
13 are listed as witnesses in the Pretrial Order. It is not open to
14 dispute that a designated trial witness should be deposed.

15 As to the costs for the depositions of H. Edwards, Merle
16 Engelka, and Halbasch, Shell refers to the Local Rule of
17 Practice, requiring objections to a cost bill to set forth "the
18 specific objections to claimed items with a statement of grounds
19 for objection."

20 Objectors complain that the deposition costs for Kelly
21 Adams, Ann Day Millan and Lawrence Wheeler on the ground that
22 these depositions were taken in 1995 in the Railroads' original
23 action against Brown & Bryant, Inc. before the Governments filed
24 their cost recovery actions:

25 B & B filed a third-party complaint against
26 several chemical suppliers, including Shell,
in the Railroads' action, but this Court

1 granted motions to dismiss B & B's arranger
2 liability claims against the suppliers.
3 Shell was not required to engage in discovery
4 until after the Governments brought claims
5 against Shell in late-1996.

6 Shell responds that the Arvin site was placed on the NPL in
7 1989 and that the EPA began site investigation in 1989 and to
8 formulate a remedy in the early 1990s. EPA issued an
9 administrative order against the Railroads in 1991 and the
10 Railroads filed their contribution action against Shell in 1992.
11 Shell contends that it was necessary to obtain these depositions
12 relating to the site prior to the Governments' filing of its
13 action and that numerous documents and depositions from the
14 earlier Brown & Bryant case were used throughout the trial that
15 concerned the history of prior use of the site. Shell points to
16 the Governments' attempt to introduce the 1993 deposition of
17 Laurie Jardine at trial on May 14, 1999. Addressing the issue of
18 foundation, Mr. MacAyeal stated:

19 Judge, the point is that there were many
20 depositions taken in this case before the
21 lawyers got involved. We were all new to the
22 case, but counsel for the railroad got the
23 file from their predecessors. They have all
24 those depositions, they have all the
25 exhibits. They can confirm whether they are
26 accurate or inaccurate, and the witnesses
27 from the railroads identified them, they are
28 all marked. They are all Bates-stamped with
29 the same sequence and there should not be a
30 dispute on foundation at this point.

31 Objectors further contend that the deposition costs for
32 Sally W. Bilodeau, Richard C. Casias, David Clark, R. Reid,
33 Benjamin Ulloa and Richard S. Wooley, which Objectors asserts

1 were taken in the related but separate actions concerning the
2 Brown & Bryant Shafter site, including BNSF's action against
3 Hercules and the DSTC's cost recovery action against BNSF, Shell,
4 and others. Objectors assert that, other than the deposition of
5 Richard Wooley, the depositions were taken in January or
6 February, 1999, were attended solely by counsel in *Atchison,*
7 *Topeka & Santa Fe Railway Co. v. Hercules, Incorporated*, No. CV-
8 F-96-5979 OWW/DLB ("Consolidated Shafter Cases"), and concerned
9 only the Bryant & Brown Shafter site.

10 However, as Shell notes, Richard C. Casias, David Clark,
11 Benjamin Ulloa, and Richard Woolley were listed as witnesses in
12 the Pretrial Order. Shell contends that "[t]he Arvin and Shafter
13 sites were both owed by B & B and were consolidated for purposes
14 of discovery for an extended time" and that the depositions of
15 Bilodeau, Casias, Clark, Reid, Ulloa, and Woolley were necessary
16 for both sites. As to Sally W. Bilodeau and R. Reid, Shell
17 contends that the short excerpts of those depositions do not
18 establish that they only involved the Shafter site:

19 Rather, the excerpts show that the
20 depositions were taken in February 1999, not
21 only before this trial commenced, and many of
22 the depositions taken in these cases related
23 to both the Arvin and Shafter sites. These
24 depositions were reasonably necessary for
25 trial in light of the facts known at the time
26 the expense was incurred.

27 Under a parity of reasoning, the depositions costs for those
28 witnesses listed on the Pretrial Order are a fortiori
29 appropriate. Objectors do not suggest an allocation to

1 eliminate testimony about the Shafter site, probably because
2 Brown & Bryant used common operating methods. However, as to
3 Sally W. Bilodeau and R. Reid, Shell does not provide any excerpt
4 from those depositions establishing that both the Arvin and
5 Shafter sites were discussed. Consequently, those two deposition
6 costs (\$447.60 and \$414.95, respectively) are disallowed.

7 Objectors contend that deposition costs for John Connor,
8 Irvine Phillips, and Gilbert Ray should be disallowed because
9 Shell has not submitted invoices or other backup documentation
10 for these costs. However, Shell's reply submits a copy of Lewis
11 Brisbois's Disbursement Diary and A/P Cash Disbursements Detail
12 Report, itemizing the costs of those depositions. These costs
13 are allowed.

14 In principle, a deposition from a CERCLA historical witness
15 or from a witness not ultimately called at trial to testify, is
16 still useful to the preparation for trial of the case.

17 2. Trial Transcripts.

18 Objectors contend that Shell's request for costs of daily
19 trial transcripts should be disallowed to the extent that Shell
20 paid a premium for expedited trial transcripts. Objectors assert
21 that Shell did not obtain prior approval from the Court for this
22 expense, the Governments did not order expedited transcripts, and
23 the Court did not require daily transcripts.

24 "As a general rule, daily trial transcript costs should not
25 be awarded absent court approval prior to the trial ... However,
26 a District Court may overlook the lack of prior approval if the

1 case is complex and the transcripts proved invaluable to both the
2 counsel and the court." *Manildra Mill. Corp. v. Ogilvie Mills,*
3 *Inc.*, 76 F.3d 1178, 1184 (Fed.Cir.1996); see also *Maris*
4 *Distributing Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1226
5 (11th Cir.2002), cert. denied, 537 U.S. 1190 (2003):

6 Although we do not believe that the costs
7 associated with expedited trial transcripts
8 should be allowed as a matter of course, lest
9 litigation costs be unnecessarily increased,
10 the district court found that expedited
11 transcripts were necessary in this case given
12 its length and complexity. Under the
13 circumstances, we cannot say that the
14 district court clearly abused its discretion
15 by reaching this conclusion.

16 *But see Battenfield of America Holding Co., Inc. v. Baird*, 196
17 F.R.D. 613, 618 (D.Kan.2000):

18 While the court expresses no opinion as to
19 whether daily copy was necessary for counsel
20 at trial, the court is in the best position
21 to assess the value of the daily copy to it
22 ... Suffice it to say, daily copy was not
23 necessary for the court's handling of the
24 case ... The court cannot recall any
25 occasions in which it even looked to daily
26 copy for guidance in analyzing an evidentiary
27 issue. While daily copy may have aided the
28 parties in resolving various disputes amongst
29 themselves, the court is fairly confident
30 that it could have resolved those issues for
31 the parties in the absence of daily copy. In
32 short, this case was neither so complex nor
33 so lengthy as to justify imposing such
34 'special costs' on BKD.

35 Shell argues that these costs should be awarded in light of
36 the complexity and length of the trial. This action involved
37 numerous parties, the action was tried to the Court without a
38 jury, the trial lasted 27 days at which dozens of witnesses

1 testified and hundreds of exhibits were submitted. Extremely
2 complex scientific testimony was given by experts. Shell asserts
3 that the daily transcripts "were invaluable to the party's
4 preparation and organization of the case at trial and believed
5 also to be invaluable to the court's management of the case."

6 The daily transcripts provided valuable assistance to the
7 Court and the parties and were referred to during the trial in
8 making rulings and in confirming accuracy or existence of facts.
9 Shell's costs for expedited trial transcripts are allowed.¹

10 3. Copying Costs.

11 Objectors argue that the costs of copying CD-Roms of
12 chemical documents database (\$3,750) and boxes of DTSC documents
13 (\$2,140.91) should be disallowed. Objectors contend that the
14 copying of a database made by Brown & Bryant's attorneys relating
15 to other chemical manufacturers with no indication that the CD-
16 Roms of chemical documents database was specific to the Arvin
17 site, as opposed to the Shafter site and that these documents
18 were not introduced at trial, necessitates disallowance of this
19 cost. As to the boxes of DTSC documents, Objectors contend that
20 Shell has provided no explanation why these documents were
21 necessarily obtained for use in the case.

22
23 ¹Objectors further assert that Shell's claimed costs for trial
24 transcripts appear to be duplicative, "in that different costs for
25 each day of trial transcripts are included on two different
26 invoices from the two court reporters." However, two different
court reporters transcribed the trial, alternating during each
trial day in order to timely complete the daily transcript so it
was available for use the evening of each day's testimony. There
is no billing duplication.

1 The District Court has discretion to award copying costs for
2 any document necessarily obtained for use in the case even if the
3 documents are not introduced into the record. *Haagen-Dazs Co.,*
4 *Inc. v. Double Rainbow Gourmet Ice Cream, Inc.*, 920 F.2d 587, 588
5 (9th Cir.1990).

6 As to the CD-Roms of chemical documents database, Shell
7 asserts that these documents were necessary for both cases
8 because the Arvin and Shafter sites were owned by Brown & Bryant
9 and the two cases were consolidated for discovery. Shell asserts
10 that the boxes of DTSC documents were produced by DTSC and were
11 determined to be necessary for the case at the time the costs
12 were incurred. They arguably provide a foundation for DTSC cost
13 recovery and the cost recovery accounting experts. Shell
14 provides no other explanation why these documents were
15 necessarily obtained for use in the case. This is insufficient
16 justification for these costs. They are denied.

17 CONCLUSION

18 Shell Oil Company shall recover costs in the amount of
19 \$32,763.17.

20 IT IS SO ORDERED.

21 Dated: July 16, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE