

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

MARIO G. COMUSO : CIVIL ACTION  
 :  
 v. :  
 :  
 NATIONAL RAILROAD PASSENGER :  
 CORPORATION a/k/a AMTRAK : NO. 97-7891

**MEMORANDUM AND ORDER**

HUTTON, J.

November 9, 1998

Presently before this Court is the Motion of Defendant National Railroad Passenger Corporation a/k/a AMTRAK to Extend the Deadline to Disclose Expert Liability Testimony (Docket No. 6), the Plaintiff's response thereto (Docket No. 7), the Defendant's Supplemental Memorandum of Law in support of its motion (Docket No. 8) and the Defendant's Supplement to its Motion for Extension (Docket No. 9).

**I. BACKGROUND**

On December 19, 1997, the Plaintiff, Mario G. Comuso, commenced the instant litigation pursuant to the Provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq., alleging that on May 21, 1997, he injured his hand while attempting to remove pole foundation bolts near milepost 66.35, on the Conestoga River Bridge, Conestoga Creek, Lancaster, Pennsylvania. On August 17, 1998, this Court issued an Amended Scheduling Order requesting that all discovery be completed on or

before November 2, 1998, and that all disclosure of expert testimony be completed thirty (30) days before the close of discovery. The thirtieth day before the close of discovery was October 3, 1998. On October 5, 1998, the Defendant alleges that the Plaintiff disclosed testimony of an engineering expert, George P. Widas, P.E., CSP. On October 6, 1998, after having failed to disclose expert testimony by the deadline, the Defendant, National Railroad Passenger Corporation a/k/a AMTRAK, filed the instant motion seeking an extension of time to disclose expert liability testimony until November 2, 1998. On October 19, 1998, the Plaintiff filed his motion and memorandum in opposition to the Defendant's motion. The Plaintiff seeks to preclude the Defendant from introducing expert testimony to rebut his own liability expert, or in the alternative, at least to pay the costs associated with the delay including attorney's fees. On October 30, 1998, the Defendant filed two supplements to its motion to extend deadline to disclose expert testimony. For the following reasons, the Defendant's motion is **GRANTED**.

## **II. DISCUSSION**

### **A. Extension of Deadline**

Under Rule 16(b) of the Federal Rules of Civil Procedure, the Court may only modify the Scheduling Order upon a showing of good cause. Fed. R. Civ. P. 16(b). The Advisory Committee Notes to Rule 16 provide that "the court may modify the

schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension." In order to establish good cause, the Defendant should demonstrate that a more diligent pursuit of discovery was impossible. McElyea v. Navistar Int'l Trans. Corp., 788 F. Supp. 1366, 1371 (E.D. Pa. 1991), aff'd without opinion, 950 F.2d 723 (3d Cir. 1991). The Defendant has sustained its burden as to the reason for failing to meet the deadline for expert disclosures and the additional time needed to do so. Defendant explains that its failure to timely disclose expert testimony was justified, because of the Plaintiff's own failure to identify an expert in engineering until October 5, 1998. The Defendant contends that it was unable to retain experts before reviewing the discovery materials disclosed by the Plaintiff. The Defendant alleges that it has submitted all expert reports in its possession, with the exception of expert reports in liability, since the Plaintiff at no time indicated that he would be producing an expert liability report. Accordingly, the Defendant's Motion to extend the deadline for disclosing expert testimony is granted.

## **B. Sanctions**

### **1. Prohibiting Expert Testimony**

The automatic disclosure provisions governed by Federal Rule of Civil Procedure 26 require the disclosure of expert reports. The purpose behind "requiring expert reports is 'the

elimination of unfair surprise to the opposing party and the conservation of resources.' " Reed v. Binder, 165 F.R.D. 424, 429 (D.N.J. 1996) (quoting Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 284 (8th Cir.), cert. denied, 516 U.S. 822 (1995)). Federal Rule of Civil Procedure 37(c)(1) controls where a party fails to comply with Rule 26(a) or 26(e)(1). It states:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial ... any witness or information not disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

Fed. R. Civ. P. 37(c)(1).

The imposition of sanctions under Rule 37(c)(1) is within the discretion of the trial court. Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995). However, "[t]he exclusion of critical evidence is an extreme sanction, not normally imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence." " In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 791-92 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995) (quoting Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977), overruled on other grounds, Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987)).

When determining whether to exclude expert testimony under Rule 37(c), a court must consider: (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or other cases of the court, and (4) the bad faith or willfulness in failing to comply with the district court's order. Meyers, 559 F.2d at 904-905.

"[S]anctions should not be imposed if substantial justification exists for the failure to disclose, or if the failure to disclose was harmless." Newman, 60 F.3d at 156. Moreover, "[t]he importance of the excluded testimony is an important final consideration." Gibson v. National R.R. Passenger Corp., 176 F.R.D. 190, 192 (E.D. Pa. 1997) (citing Meyers, 559 F.2d at 905); see also Tunis Brothers Co., Inc. v. Ford Motor Co., 124 F.R.D. 95, 97-98 (E.D. Pa. 1989) (discussing 37(c) considerations).

In the instant action, these considerations weigh against the Plaintiff's request that the Defendant be prohibited from presenting expert testimony. First, the Defendant explains that its failure to timely disclose expert testimony was justified, because of the Plaintiff's own failure to identify an expert in engineering until October 5, 1998. The Defendant contends that since the Plaintiff never previously indicated that

he would be producing an expert liability report, it was impossible for the Defendant to disclose its own expert liability report. Accordingly, the Defendant asserts that its delay was excusable.

Second, the prejudice to the Plaintiff is minimal. According to this Court's Scheduling Order of August 17, 1998, the parties were required to disclose all expert testimony by October 5, 1998. Although the Defendant failed to do so, the delay has been minimal. Moreover, the Defendant's expert will address the very issues raised by the Plaintiff and will not inject any new elements or controversies into the case. Thus, this Court finds that the Plaintiff has not been unduly prejudiced or unfairly surprised by the Defendant's delayed production of its expert reports.

Third, this Court cannot make a finding that the Defendant acted willfully and in bad faith. Although the Defendant admits that it failed to follow the Court's scheduling order, they have provided a reasonable excuse for their actions.

Finally, the Defendant's expert testimony is clearly essential to its ability to properly defend itself. The Plaintiff seeks to recover damages arising from an injury incurred while attempting to remove pole foundation bolts. To prove his case, the Plaintiff proposes to use an expert in

engineering. The Defendant would suffer significant problems challenging this evidence without an expert of its own.

## **2. Expenses Including Attorney's Fees**

Rule 16(f) of the Federal Rules of Civil Procedure authorizes sanctions for the failure of a party or a party's attorney to obey a scheduling order. Fed. R. Civ. P. 16(f). It provides that the Court "shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust." Id. In his response to the Defendant's motion, the Plaintiff requests that the Defendant pay all expenses incurred because of its noncompliance with the August 17, 1998 Order, including an award of attorney's fees. For the reasons stated above, this Court finds the Defendant's failure to disclose expert testimony of its liability expert substantially justified.

An appropriate Order follows.

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O R D E R

AND NOW, this 9th day of November, 1998, upon consideration of the Motion of Defendant National Railroad Passenger Corporation a/k/a AMTRAK to Extend the Deadline to Disclose Expert Liability Testimony (Docket No. 6), the Plaintiff's response thereto (Docket No. 7), the Defendant's Supplemental Memorandum of Law in support of its motion (Docket No. 8) and the Defendant's Supplement to its Motion for Extension (Docket No. 9), IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that the Defendant SHALL have until November 23, 1998, to disclose expert liability testimony in rebuttal to the Plaintiff's expert in engineering, George P. Widas, P.E., CSP.

BY THE COURT:

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HERBERT J. HUTTON, J.