

PUBLIC VERSION

304216

**BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496**

ENTERED
Office of Proceedings
April 1, 2022
Part of
Public Record

**APPLICATION OF THE NATIONAL RAILROAD PASSENGER
CORPORATION UNDER 49 U.S.C. § 24308(e) – CSX
TRANSPORTATION, INC. AND NORFOLK SOUTHERN
CORPORATION**

**CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY
COMPANY'S MOTION IN LIMINE**

TABLE OF CONTENTS

INTRODUCTION	1
GOVERNING LEGAL STANDARD	1
I. EVIDENCE OR ARGUMENT BASED ON EXPERT ANALYSIS NOT PREVIOUSLY DISCLOSED SHOULD BE EXCLUDED UNDER FEDERAL RULES OF CIVIL PROCEDURE 26 AND 37.	2
CONCLUSION.....	5

PUBLIC VERSION

INTRODUCTION

CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) respectfully move to preclude the National Railroad Passenger Corporation (“Amtrak”) from introducing evidence and argument relating to expert analysis that was not previously disclosed in expert reports or verified statements filed by Amtrak. Amtrak’s apparent intent to use such evidence and argument on the eve of the evidentiary hearing would unfairly prejudice CSXT and NSR and undermine the Board’s interest in a full, fair, and efficient evidentiary proceeding.

GOVERNING LEGAL STANDARD

A motion in limine is intended to demonstrate “why certain categories of evidence should or should not, for evidentiary reasons, be introduced at trial.” *Williams v. Johnson*, 747 F. Supp. 2d 10, 18 (D.D.C. 2010) (emphasis omitted); *see also U.S. ex rel. El-Amin v. George Washington Univ.*, 533 F. Supp. 2d 12, 19 (D.D.C. 2008) (“A key purpose of motions in limine is to resolve specific evidentiary issues in advance of trial.”). Accordingly, motions *in limine* may effectively “narrow the evidentiary issues for trial” and “eliminate unnecessary trial interruptions.” *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561 (6th Cir. 2013). Motions *in limine* further promote judicial efficiency because they “serve to preserve issues that they raise without any need for renewed objections at trial, just so long as the movant has clearly identified the ruling sought and the trial court has ruled upon it.” *United States v. Williams*, 81 F. 3d 1321, 1325 (4th Cir. 1996) (citing 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5037, at 195 (1977)).

I. EVIDENCE OR ARGUMENT BASED ON EXPERT ANALYSIS NOT PREVIOUSLY DISCLOSED SHOULD BE EXCLUDED UNDER FEDERAL RULES OF CIVIL PROCEDURE 26 AND 37.

All evidence of or argument relating to expert analysis embedded in Amtrak's recently filed exhibits that was not disclosed in expert reports previously filed by Amtrak should be excluded as unfair surprise evidence. On March 28, 2022, Amtrak filed exhibits that appear to include evidence of expert analyses by Clayton Johanson that were not previously disclosed—not in verified statements filed in December, not in either of his two prior reports, and not in any of his workpapers.

{{Redacted

}}

While the evidentiary hearing in this matter appears to be the first in the Board's history, the Board can be informed by the standard rules of fair play that apply in other evidentiary settings.¹ For example, the Federal Rules of Civil Procedure establish a clear policy against unfair surprise and a legal architecture

¹ See Decision at 1, *Application of Nat'l Passenger R.R. Corp. Under 49 U.S.C. § 24309(e)—CSX Transp., Inc., & Norfolk S. Ry. Co.*, Docket No. FD 36496 (STB served Feb. 8, 2022) ("For the evidentiary hearing, the Board's rules of evidence at 49 C.F.R. part 1114 subpart A will apply, and the Federal Rules of Evidence may be consulted for guidance, where appropriate.").

PUBLIC VERSION

that mirrors the form of procedure adopted in this case. Rule 26(a)(2)(B) requires expert witnesses who are specifically retained for litigation to provide “a complete statement of all opinions the witness will express and the basis and reasons for them,” as well as “the facts or data considered by the witness in forming them.” *See* FED. R. CIV. P. 26(a)(2)(B)(i)–(ii). As the commentary to Rule 26 acknowledges, “effective rebuttal requires advance knowledge of the line of testimony of the other side.” FED. R. CIV. P. 26(a), advisory committee note (1993). When a party fails to disclose, “the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.” *Id.*; *see also Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995) (noting that the Rule requiring disclosure of expert reports seeks “the elimination of unfair surprise to the opposing party and the conservation of resources”). The remedy the Rules prescribe is exclusion of the testimony. FED. R. CIV. P. 37(c)(1) (“A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.”); *see also* Fed. R. Civ. P. 26(a), advisory committee note (1993) (“Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed.”); *Salgado v. General Motors Corp.*, 150 F.3d 735, 742–43 (7th Cir. 1998) (noting that a party “had a right to know the conclusions of . . . expert witnesses” and that “the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a)

was either justified or harmless”).

The procedural schedule in this case afforded Amtrak multiple opportunities to comply with these principles. The parties have submitted evidence in multiple rounds, each involving experts disclosing their opinions in verified statements, accompanying reports, and related workpapers. The Board’s August 6 order setting forth the original procedural schedule anticipated that the studies would be complete at the time of filing opening evidence.² Notwithstanding this expectation, Amtrak has had *two* opportunities to make the entirety of its expert analyses and workpapers part of the record in this case: first in its reply evidence, and again in Amtrak’s “surrebuttal,” filed on February 1—roughly *six weeks* after the close of evidence in December 23, 2021.³ And Amtrak still waited until the deadline for filing exhibits—*one week before trial*—to indicate its intent to submit analyses not contained in Mr. Johanson’s prior verified statements. These tactics severely restrict CSXT and NSR’s ability to adequately review and critique Mr. Johanson’s analyses and represent precisely the kind of tactic that the disclosure rule is meant to prevent. *See Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000) (“The expert witness discovery rules are designed to aid the court in its fact-finding mission by

² *See* Decision at 7, *Application of Nat’l Passenger R.R. Corp. Under 49 U.S.C. § 24309(e)—CSX Transp., Inc., & Norfolk S. Ry. Co.*, Docket No. FD 36496 (STB served Aug. 6, 2021) (noting that “the discovery period, . . . along with the time for CSXT and NSR to file their opening evidence, will allow sufficient time for completion of any supporting study or studies”).

³ *See* Amtrak’s Argument and Evidence (filed Dec. 3, 2021); Amtrak’s Motion for Leave and Proposed Surrebuttal (filed Feb. 1, 2022).

PUBLIC VERSION

allowing both sides to prepare their cases adequately . . . *and to prevent the tactic of surprise from affecting the outcome of the case.*”) (emphasis added). Because the material offered is prejudicial to NSR and CSXT and Amtrak’s late introduction forecloses NSR and CSXT from a full and fair opportunity to respond, the Board should therefore exclude evidence and argument relating to expert analyses not disclosed during the multiple rounds of prior evidence in this proceeding.

CONCLUSION

For these reasons, CSXT and NSR respectfully request that the Board grant this motion *in limine* to exclude evidence and argument relating to undisclosed expert analyses as untimely, unfair, and prejudicial.

PUBLIC VERSION

Respectfully submitted,

/s/ Raymond A. Atkins

Raymond A. Atkins
Matthew J. Warren
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
ratkins@sidley.com
mjwarren@sidley.com

Counsel for CSX Transportation, Inc.

/s/ William A. Mullins

William A. Mullins
Crystal M. Zorbaugh
Baker and Miller PLLC
2401 Pennsylvania Avenue
Suite 300
Washington, DC 20037
(202) 663-7823
wmullins@bakerandmiller.com
czorbaugh@bakerandmiller.com

*Counsel for Norfolk Southern Railway
Company*

Dated: April 1, 2022

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2022, a copy of the foregoing Motion in Limine was served by email or first class mail on the service list to Finance Docket No. 36496.

/s/ Raymond A. Atkins

Raymond A. Atkins
SIDLEY AUSTIN LLP