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SERVICE DATE - LATE RELEASE SEPTEMBER 26, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 590

EXEMPTION FOR RAILROAD AGENT DESIGNATION UNDER 49 U.S.C. 723

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Exemption.

SUMMARY: The Surface Transportation Board (Board) is proposing an exemption from the statutory requirement that rail carriers designate agents in the District of Columbia on whom the Board may serve notices in proceedings. Because carriers have alternative methods of obtaining notice of Board actions, and because there is no apparent need for the Board to continue to serve agents with notice, the Board believes that designation of, and service on, agents in Board proceedings is no longer necessary.

DATES: Comments on this proposal are due October 28, 2002.

FOR FURTHER INFORMATION CONTACT: John Sado, (202) 565-1661. [Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: Under 49 U.S.C. 723(a), a carrier providing transportation subject to the Board's jurisdiction is required to designate an agent in the District of Columbia. The Board "shall" serve notices of proceedings and actions "immediately on the agent or in another manner provided by law." 49 U.S.C. 723(c). In the absence of a designated agent, the Board can effect service by posting the notice in the Board's office. Service on a designated agent shall be made in the District of Columbia at the agent's office or usual place of residence. 49 U.S.C. 723(c). And in proceedings concerning the lawfulness of a rail carrier's rates, practices, or classifications, where there is no designated agent the statute provides that "service of notice . . . on an attorney in fact for the carrier constitutes service of notice on the carrier." 49 U.S.C. 723(d).¹

¹ Under 49 U.S.C. 724, a carrier is also required to designate an agent "on whom service of process in an action before a district court may be made." The requirements of section 724 will not be considered in this proceeding.

ISSUANCE OF BOARD DECISIONS

The Board currently has two categories for issuing its decisions – regular release and late release. Regular release occurs at 10:30 a.m., and late release can occur later in the day, sometimes late in the afternoon. On some days, late releases occur several times during the day.

For regular release, at 10:30 a.m. the official copies of all Board decisions or notices are placed in the Board’s seventh floor Docket File Reading Room (Room 755), where they can be read or photocopied for a fee.² Also, in instances where a rail carrier has a designated agent, a messenger is contacted at about 10:30 a.m. to pick up a copy of the decision or notice to deliver to a designated agent. The messenger normally arrives within a half hour or hour to get the decision. The railroad is billed for the cost of the messenger. If the railroad does not have a designated agent, a copy of the decision is placed on the Board’s first floor bulletin board, located in Suite 100, with a notice from the Secretary.³ A copy of the decision is also mailed at about 4:30 p.m. by first class mail to all parties of record in the proceeding. Finally, the decision is put on the Board’s Internet website (www.stb.dot.gov), usually between 10:30 a.m. and 11:30 a.m.⁴ This placement is done automatically

² Independent of our practice of placing all notices and decisions in Room 755, the Board maintains a “reading room” in conformity with the Freedom of Information Act (FOIA), 5 U.S.C. 552, which contains final decisions in adjudications; statements of policy and interpretation not published in the Federal Register; administrative staff manuals; and records released pursuant to a request under FOIA that have become or are likely to become the subject of a subsequent request. See 49 CFR 1001.1(b). See also Removal, Revision, and Redesignation of Miscellaneous Regulations, STB Ex Parte No. 572 (Sub-No. 1) (STB served Aug. 31, 1999) (Revision I), aff’d, Removal, Revision, and Redesignation of Miscellaneous Regulations, STB Ex Parte No. 572 (Sub-No. 1) (STB served June 22, 2000) (Revision II).

³ This notice states in relevant part:

Service of the attached document is hereby made on the following named-carrier(s) with no designated agent in the Washington, DC area by posting same at the Offices of the Surface Transportation Board.

⁴ The Board maintains an Electronic Reading Room at this website, pursuant to the Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3049 (1996) (EFOIA), containing documents found in the reading room, including final decisions issued on or after November 1, 1996. See 49 CFR 1001.1(d). The Board, however, goes beyond the requirements of FOIA and EFOIA and makes available in both the traditional and electronic reading rooms not only all
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by the Board's computer "agent," which, starting at 10:30 a.m. and until the close of business each day, examines the file server about every half hour to select (or "launch") issued decisions to be placed on the Board's Internet website. Board personnel check to ensure that decisions are timely placed on the website.

For late releases, as in regular releases, the official copy of the Board decision or notice is placed in the Board's Docket File Reading Room. Depending on how late in the day the late release occurs, the decision may not be mailed out until the next day, and a messenger may not be asked to pick up the decision on that day but instead may be called at 10:30 a.m. the next day when regular release occurs. Copies of all late releases are also placed on the Board's first floor bulletin board, whether or not the carrier has a designated agent.⁵ As already noted, the Board's computer "agent" automatically begins at 10:30 a.m. each day to scan the file server on a half hourly basis to launch decisions onto the web. But in some cases, a late release may not be launched onto the Board's website until 10:30 a.m. the next day.⁶

⁴(...continued)

decisions and notices in adjudications but also rulemakings, which are not required to be made available in this way. See Revision II at 2 n.6.

⁵ We note that when the offices of the Board and the Interstate Commerce Commission (ICC) were located at 12th Street and Constitution Avenue, NW, Washington, DC, all decisions, whether regular or late releases, were placed on the bulletin board outside the second floor offices of the Office of the Secretary. After moving to 1925 K Street, NW, Washington, DC, the Board, for convenience to the public, in addition to placing all decisions in the seventh floor Docket File Reading Room, has placed all late releases as well as decisions where there was no designated agent on the Board's bulletin board.

⁶ The Board also issues an index of its decisions called the "Surface Transportation Board Daily Releases" (Daily Release), which is placed both in the seventh floor Docket File Reading Room and on the Board's first floor bulletin board. Each Daily Release index sheet lists all of the decisional documents issued by the Board as of 10:30 a.m. on that day. Late-released documents are listed in the Daily Release for the next business day. In Removal, Revision, and Redesignation of Miscellaneous Regulations, STB Ex Parte No. 572 (Sub-No. 1) (STB served Aug. 31, 1999) at 3-4 (footnote omitted), we noted that besides listing the documents issued that day:

[t]hese documents are categorized by the decisional body that issues them (such as the entire Board, Director of the Office of Proceedings, Chief of the Section of Environmental Analysis, Secretary). Within each of these categories, the documents

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DISCUSSION AND CONCLUSIONS

Because the Board is currently providing at least four methods of providing notice, including, with computer technology, a method usually faster than messenger delivery to agents, we believe that it is no longer necessary for the Board to serve copies of decisions or notices affecting a particular railroad on that railroad's designated agent. We therefore believe that an exemption is warranted from the requirement that a rail carrier designate an agent on whom the Board serves decisions. Such an exemption would end a duplicative method of giving notice, with resulting cost reduction and efficiency benefits to the rail carriers and the Board. We are seeking public comments on the proposed action.

We believe that such an exemption is consistent with the statutory scheme. While mandating the designation of agents, section 723 does not make service on agents the exclusive method of notice. Rather, under section 723(c), a Board action "shall be served immediately on the agent or in another manner provided by law." As noted, where no agent is designated, "service may be made by posting the notice in the office of the Board." Id.⁷

Accordingly, we believe that making the decision or notice available through other means is consistent with the provisions of section 723(c) that service may be made "in another manner provided by law." Rail carriers can also readily obtain decisions on our Internet website, in many cases before the designated agent would receive them.⁸ As noted, because all Board decisions and notices, not just adjudications, are available in the Docket File Reading Room and on our website, the Board goes beyond the requirements of FOIA and EFOIA. Thus, with the statute allowing alternatives to service

⁶(...continued)

are further indexed in alpha-numeric order, by an alphabetical docket prefix (such as AB for abandonment-related matters, and FD for finance-related matters) and docket number. The title of the case, the date the matter was decided, and the document type (decision, notice, or environmental review, for example) are also provided. Finally, a brief summary of the content of the document is given.

⁷ Service on the designated agent appears to be an option and not a requirement. As indicated, section 723(c) states that a Board action "shall be served on the agent or in another manner provided by law," and section 723(a) indicates that a carrier is required to designate an agent "on whom service . . . may be made." (Emphasis supplied.) While service is required, serving an agent appears to be only one of the permissible ways of effecting service.

⁸ Section 723(c) provides that, when service is made on a designated agent, it shall be done "immediately." In many cases, the decision or notice is available on our website before the agent receives it.

on designated agents, and with the Board providing alternatives, we do not see a need for designating an agent for the purposes of section 723. Carriers will still be required to designate agents under section 724 for service of process in an action before a district court.

Even apart from these statutory considerations, an exemption would be justified from the perspective of promoting good government. Rail carriers with designated agents receive notice of decisions in proceedings in which they are involved in four ways: through their agent, on the Board's website, by reading and copying the official copy of the decision in the Board's Docket File Reading Room, and by first class mail.⁹ We believe that retaining the requirement of designated service agents in addition to all of these other methods of notice is unnecessary and duplicative, for both railroads and the Board, particularly given that service on designated agents no longer appears to be the fastest or most convenient method of notice.

In this regard, the ICC exempted individual rail carriers from the requirements of former 49 U.S.C. 10329 (the predecessor of section 723), noting the cost and the "needlessly cumbersome procedure" involved in using a designated agent. See Altra Railroad Company - Exemption from 49 U.S.C. 10329(a)(1), 10746, and 11301, Finance Docket No. 30524 (ICC served Aug. 17, 1984) at 1. See also Alabama Industrial Railroad, Inc. - Exemption from 49 U.S.C. 10329(a)(1), 10746, and 11301, Finance Docket No. 30523 (ICC served Oct. 1, 1984); Cheney Railroad Company, Inc. - Exemption from 10329(a)(1), 10746, and 11301, Finance Docket No. 30525 (ICC served Oct. 1, 1984). The ICC indicated in those proceedings (issued before the availability of the Board's website) that service by first class mail upon an attorney was more efficient than serving an agent who would then notify the carrier, which then would contact its attorney.

Likewise, with decisions or notices made available via the Docket File Reading Room, first class mail, and on the website (and, for late releases, also via the Board's first floor bulletin board), serving a designated agent appears to be unnecessary. Granting an exemption should provide cost savings to the rail carriers and make the notice process more efficient.

Under 49 U.S.C. 10502, we are directed to exempt a transaction from regulation when we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Requiring rail carriers to designate agents and the Board to serve notices on them pursuant to 49 U.S.C. 723 would not appear to be necessary to carry out the rail transportation policy. By

⁹ For late releases, there is a fifth method of obtaining notice: reading items posted on the Board's first floor bulletin board.

minimizing the administrative expense in obtaining decisions and notices, an exemption would minimize the need for Federal regulatory control over the rail transportation system [49 U.S.C. 10101(2)]. By eliminating an unnecessary expense for railroads, an exemption would also foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy would not be adversely affected.

Continued designation of, and service upon, agents under section 723 is not needed to protect shippers from the abuse of market power. This process has no direct effect on shippers, and to the extent an exemption reduces administrative costs of providing rail service, it should benefit shippers. Given our finding regarding the lack of effect of the exemption on market power, we need not determine whether the proposed exemption is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Labor protection, however, is not implicated under section 723.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: September 19, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary