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Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 590

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

COMMENTS

ENTERED
Office of Proceedings
OCT 25 2002
Part of
Public Record

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Due Date: October 28, 2002

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COMMENTS

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these comments in response to Notice of Proposed Exemption (NPE), dated September 19, 2002 (served September 26), 67 Fed. Reg. 61186-88. (Sept. 27, 2002).

The Surface Transportation Board (Board) in its NPE does not propose to revise existing agency regulations; rather, the NPE would completely remove rail carriers from the provisions of 49 U.S.C. 723, recently amended in § 201(a) of ICC Termination Act of 1995 (ICCTA), 109 Stat. 803, 937 (Dec. 29, 1995). Section 723 requires that a rail carrier designate an agent in Washington DC. Thereafter, rail carriers would not be required to designate an agent for Board proceedings. However, the NPE states it does not purport to alter the requirements, set forth in 49 U.S.C. 724, that a carrier designate an agent in Washington DC for District Court proceedings.

^{1/} General Chairman for United Transportation Union on lines of The Burlington Northern and Santa Fe Railway Company, with offices at 400 E. Evergreen Boulevard, Vancouver, WA 98660.

The Board should not adopt the NPE.

ARGUMENT

1. Text of Statute. The provisions of 49 U.S.C. § 723, and the related 49 U.S.C. § 724, are not set forth in the NPE. Accordingly, the text follows, 49 U.S.C. 723, 724:

§ 723. Service of notice in Board proceedings

(a) DESIGNATION OF AGENT.-A carrier providing transportation subject to the jurisdiction of the Board under subtitle IV shall designate an agent in the District of Columbia, on whom service of notices in a proceeding before, and of actions of, the Board may be made.

(b) FILING AND CHANGE IN DESIGNATIONS.-A designation under subsection (a) shall be in writing and filed with the Board. The designation may be changed at any time in the same manner originally made.

(c) SERVICE OF NOTICE.-Except as otherwise provided, notices of the Board shall be served on its designated agent at the office or usual place of residence in the District of Columbia of that agent. A notice of action of the Board shall be served immediately on the agent or in another manner provided by law. If that carrier does not have a designated agent, service may be made by posting the notice in the office of the Board.

(d) SPECIAL RULE FOR RAIL CARRIERS.-In a proceeding involving the lawfulness of classifications, rates, or practices of a rail carrier that has not designated an agent under this section, service of notice of the Board on an attorney in fact for the carrier constitutes service of notice on the carrier.

§ 724. Service of process in court proceedings

(a) DESIGNATION OF AGENT.-A carrier providing transportation subject to the jurisdiction of the Board under subtitle IV shall designate an agent in the District of Columbia on whom service of process in an action before a district court may be made. Except as otherwise provided, process in an action before a district court shall be served on the designated agent of that carrier at the office or usual place of residence in the District of Columbia of that agent. If the carrier does not have a designated agent, service may

be made by posting the notice in the office of the Board.

(b) CHANGING DESIGNATION.-A designation under this section may be changed at any time in the same manner as originally made.

2. History of § 723: The present 49 U.S.C. 723 derives from the Mann-Elkins Act, § 6(2), enacted in 1910. See: 49 U.S.C. § 50 (1976 Ed.) The text of 49 U.S.C. 50, Appendix 1 hereto, was modified by the 1978 recodification of the Interstate Commerce Act, and 49 U.S.C. 16(5) was incorporated into that revision. The service of notice in agency proceedings was separated from notice in court proceedings, by the recodified 49 U.S.C. 10329 and 49 U.S.C. 10330. (49 U.S.C. 10312-30) (1976 Supp. II). However, the 1978 recodification may not be construed as making a substantive change. P.L. 95-473, § 3(a). 92 Stat. 1466. (Oct. 13, 1978).

The present text of 49 U.S.C. 723(a) is virtually identical with the former 49 U.S.C. 10329(a)(1) (1976 Supp. II) (1978). ICCTA did not modify 49 U.S.C. 10329(a)(1), and there was no intent to do so. See: H.Rept. 104-422 (Conf.), ICC Termination Act of 1995, 233-34 (Dec. 18, 1995).

It is clear from the language of § 723(a), and its antecedents, that the duty of having a designated agent in Washington DC is not only that the Board may serve the agent of the carrier, but likewise that the public may serve the agent of a carrier in a Board proceeding.

The Board does not have the power under its exemption authority, 49 U.S.C. 10502, to void present provisions of the former Mann-Elkins Act. These provisions are not embraced in 49 U.S.C.

Subtitle IV, Part A, and by the express terms of 49 U.S.C. § 10502(a), cannot be exempted. The provisions of 49 U.S.C. 723 in ICCTA were placed in 49 U.S.C. Subtitle I, and thus outside the Board's reach. Cf. Association of American Railroads-Pet. to Exempt., 8 I.C.C.2d 365, 366-70 (1992).

3. The NPE Is Irrational. The NPE considers the designation of a carrier's agent as exclusively concerned with service by the Board of Board notices upon the carrier's agent. But "designation" and "service" are not inextricably intertwined. Designation of agents has functions beyond service of Board notices. For example, the public may desire a list of carrier designated agents, apart from the Board's use in effecting service.

Moreover, it is irrational for the NPE to accord any carrier savings by eliminating the § 723 designation requirement, for the carriers must also make the court designation under § 724. Likewise, there is no major expenses for the Board in effecting service under § 723 for, as the NPE acknowledges, a Board action "shall be served immediately on the agent or in another manner provided by law." (NPE 4).

Finally, it is apparent that a number of carriers do not designate agents, despite the directives of §§ 723, 724, so that they would not face any expense if the statutory terms are continued in force.

4. Need for Designation. There is a strong and continuing need for carrier designation under § 723. There are many new carriers which have arisen over the past 20-25 years. It is often difficult to determine details concerning many of these smaller

entities. A continued requirement of agent designation would be most helpful to the public. An example is any Board orders directing compilation of statistics, list of officers, etc. Carrier designation could be an important tool in securing compliance with agency directives. To be sure, the Board now exempts most carriers from filing reports on carrier affairs, but this may not always be the situation in the future.^{2/}

Designations under § 723 are important with respect to filing complaints. Until recently, the Board itself served private complaints against carriers. See: 49 CFR 1111.3 (1996 Ed.). This was changed in late 1996, to provide that private parties will serve complaints, but with a reservation that the Board could be called upon to perform the task. See: 49 CFR 1111.3 (1997 Ed.). The present complaint service rule was responsive to concerns raised by UTU and AAR. Expedited Procedures For Processing Rail Rate, 1 S.T.B. 754, 762 (1996).^{3/} Elimination of carrier agent designation would pose difficulty in identifying proper service for private parties, and for the Board itself, and would not serve the ends of speedy resolution of disputes.

5. Exemption Criteria. The NPE cites expense savings as its basis for satisfying three criteria of the rail transportation policy. (NPE 6). This expense matter is bogus, as already men-

^{2/} It is understood that employees of railroad trade groups, such as Association of American Railroads, and American Short Line and Regional Railroads Association, attempt to compile data and to seek information, but such is on a voluntary and incomplete basis. A government agency directive secures more positive results.

^{3/} United Transportation Union and Association of American Railroads. 1 S.T.B. 754, 755 n.1.

tioned in these comments, and the NPE would have no affect on minimizing the need for Federal regulatory control of railroads; indeed, to the extent difficulties are created in serving rail carriers (agents), regulation would become more onerous and more complex.

The finding that elimination of § 723 would have no effect on shippers, thus no abuse of market power, is not supported by logic. Requiring shippers with complaints to hunt down carriers, particularly where damages may be involved, is per se an abuse of market power.

The NPE with elimination of carrier designations would adversely affect railroad employees in asserting their rights against carriers under provisions of Title 49, and would not encourage fair wages and safe and suitable working conditions in the railroad industry. 49 U.S.C. § 10101(11).

Respectfully submitted,


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October 28, 2002

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MANN-ELKINS ACT

MANN-ELKINS ACT

Title 49.—Chapter 2, U. S. Code

36 Stat. 544.

Carriers to
designate
agent in
Washington.

Service on
such agent.

Service by
posting notice
or process.

SEC. 6. (2) [June 18, 1910.] [49 U. S. C. § 50.] It shall be the duty of every common carrier subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said Commerce Court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or Commerce Court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

NOTE.—Although the act of October 22, 1913, District Court Jurisdiction Act, 38 Stat. 219, did not in terms amend this section, it abolished the Commerce Court and transferred its jurisdiction to the district courts. Reference to the Commerce Court is omitted in the U. S. Code.

Comparable provisions, part I, § 16 (5); part II, § 221 (a); part III, § 315 (a); part IV, § 416 (a).