

September 26, 2002, and published in the **Federal Register** on September 27, 2002 (67 FR 61186) (September notice), we proposed to exempt rail carriers providing transportation subject to the Board's jurisdiction from the requirement of 49 U.S.C. 723(a), to designate an agent in the District of Columbia on whom service of notices and actions of the Board may be made.<sup>1</sup> In proposing the exemption, we indicated that designation of, and service on, agents was unnecessary. Such an exemption, we submitted, "would end a duplicative method of giving notice with resulting cost reduction and efficiency benefits to rail carriers and the Board." September notice at 4.

The September notice delineated the various methods available for rail carriers to obtain notice of Board actions. We indicated that the Board currently issues the majority of its decisions and/or notices as "regular releases" at 10:30 a.m. and the others, on occasion, as "late releases" at other times later in 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.<sup>2</sup> Where a rail carrier has a designated agent, a messenger is contacted at about 10:30 a.m. to retrieve a copy of the decision or notice to deliver to a designated agent, and the railroad is billed for the messenger's cost. 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. 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 Web site (<http://www.stb.dot.gov>), usually between 10:30 a.m. and 11:30 a.m.<sup>3</sup>

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. 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. Depending on how late in the day the late release occurs, the decision or notice is mailed, a messenger called, and the decision or notice is placed on the Board's Internet Web site either on the same day or the next.<sup>4</sup>

In the September notice, we indicated our belief that not serving designated agents was consistent with the statutory scheme. While mandating the designation of agents and the service of decisions and notices, section 723 does not make service on agents the exclusive method of service:

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. September notice at 4 n.7.

In response to our proposal, we received only one comment, filed by John D. Fitzgerald, for and on behalf of the United Transportation Union-General Committee of Adjustment (UTU-GCA). UTU-GCA argues that the designation of an agent is not exclusively concerned with the service of a decision or notice on the agent. It claims that many new carriers have been formed in the recent past, and designating agents would facilitate obtaining information about these

smaller entities. Moreover, UTU-GCA submits that because, under 49 CFR 1111.3, private parties, and not the Board, serve complaints, eliminating the designated agent would make it more difficult to identify the appropriate individual to serve.

UTU-GCA's concern is focused on the issue of the designation of, and not service on, agents. It argues that concern about the cost of effecting service is misplaced, because there are alternative means of service available under the statute. UTU-GCA also submits that exempting the designation of agents would bring no cost savings because, under 49 U.S.C. 724, rail carriers still have to designate agents "on whom service of process in an action before a district court may be made."

UTU-GCA also asserts that the Board does not have the authority under 49 U.S.C. 10502 to grant an exemption from the requirements of section 723, which is in Subtitle I of Title 49, because, it contends, section 10502 applies only to Subtitle IV, Part A of Title 49. In any event, UTU-GCA claims that the exemption criteria of section 10502 are not met because there would be no savings as a result of the proposal, regulation would become more onerous because of the difficulties in serving carriers, and the proposal would adversely affect shippers and railroad employees in having to locate carriers.

## Discussion and Conclusions

We will withdraw the proposed exemption in light of the UTU-GCA's comments, but we will proceed with adoption of alternative methods of providing for service and notice instead of effecting service on designated agents. Under the statutory scheme of section 723, while designating an agent and serving a notice or decision are mandatory (section 723(a)),<sup>5</sup> serving the notice or decision on a designated agent is not (section 723(c)). A decision or notice must be immediately served on an agent or in another manner provided by law. *Id.* As UTU-GCA notes, "'designation' and 'service' are not inextricably intertwined." UTU-GCA petition at 5. On the record there is opposition to exempting rail carriers from the section 723(a) requirement of designating agents, but no one has objected to our proposal to discontinue the practice of serving designated agents under section 723(c). As noted, UTU-GCA was the only party to file comments, and, while it opposed

<sup>1</sup> The statute also provides that 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). (Emphasis supplied.) In the absence of a designated agent, the Board can effect service by posting the notice in the Board's office. 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).

<sup>2</sup> Our practice of placing all notices and decisions in our Docket File Reading Room goes beyond the requirements of maintaining a "reading room" in conformity with the Freedom of Information Act (FOIA), 5 U.S.C. 552, which must contain 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). Our Docket File Reading Room makes these reading room documents available—including all decisions and notices in adjudications—and also rulemakings, which are not required to be made available in this way.

<sup>3</sup> 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). As in the case of FOIA, *supra*, the Board, however, goes beyond the requirements of EFOIA and makes documents available in rulemakings as well as adjudications.

<sup>4</sup> 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 release documents are listed in the Daily Release for the next business day.

<sup>5</sup> In reviewing our list of designated agents, it appears that some of the information is out of date and that a number of carriers have not designated agents. We request that the carriers provide the necessary information.