

DC Circ. Due Process Ruling Puts Amtrak Priority In Jeopardy

By **Linda Chiem**

Law360, New York (May 2, 2016, 10:12 PM ET) -- The D.C. Circuit's rejection of a federal law giving Amtrak power to regulate freight railroads that compete with it for track use sets up what experts say will be another drawn-out legal fight headed for the U.S. Supreme Court, and one that could jeopardize Amtrak's long-held priority status.

Freight railroads scored a win when the D.C. Circuit ruled Friday that the Passenger Rail Investment and Improvement Act of 2008 violated rail carriers' due process rights because it gave Amtrak authority to set performance and scheduling standards for the nation's passenger railways, most of which run on tracks used and owned by freight railroads. The court also invalidated an arbitration scheme set out in the statute, saying it violated the appointments clause of the U.S. Constitution.

The ruling shelves a powerful tool that Amtrak could wield to pursue penalties against freight railroads that don't let Amtrak coast through first on a busy track.

Experts say the ruling primes the dispute for its second bout before the Supreme Court on the broader question of Amtrak's board structure and whether a quasi-governmental, for-profit entity is even constitutionally eligible to exercise regulatory power. At stake is the viability of the nation's only high-speed intercity passenger rail provider and its ability to effectively compete with freight railroads for scarce track, they say.

"It certainly sends Amtrak and its minders on Capitol Hill into a scramble to figure out what it needs to do," Dan Wolff, chairman of Crowell & Moring LLP's administrative law and regulatory practice, told Law360.

With its decision, Wolff said, the D.C. Circuit recognized that in creating Amtrak's structure, Congress "put a self-interested market participant in the driver's seat as far as regulatory authority goes."

"Telling Congress that in legislating it violated the appointments clause, and the idea that Congress created a scheme that's inherently in violation of due process, that's a big deal," he said.

Decades after creating Amtrak as a for-profit entity in 1970, Congress complicated matters in 2008 by giving Amtrak the power to collaborate with the Federal Railroad Administration on standards defining Amtrak's statutory "priority" over freight trains running on the same tracks. That meant Amtrak could help come up with metrics for what's considered an on-time train, allowing it to bolster its economic position while frustrating freight railroads that actually own most of the tracks, experts say.

This was the second go-round before the D.C. Circuit, which found in 2013 that PRIIA was an unconstitutional delegation of regulatory power to what the panel believed was a private entity. But the Supreme Court reversed and remanded that decision in March 2015, ruling that for the purposes of the case, Amtrak could also be considered a government entity because Amtrak's stock is majority-owned by the government, its board of directors is appointed by the president and confirmed by the Senate, and the FRA has oversight over the company. The justices left it up to the D.C. Circuit to rule on the due process claims on remand — which it did Friday.

“Allowing Amtrak, a quasi-governmental entity that is also — albeit nominally — for-profit, the authority to regulate its competitors in this environment, presents an air of unfairness,” said Kendall Kelly Hayden, vice chair and managing partner of Cozen O’Connor’s Dallas office. “A future appeal will likely weigh in on how to fairly and constitutionally resolve disputes between Amtrak and its competitors.”

The appeals panel essentially labeled 2008’s PRIIA an unprecedented venture into private enterprise on the part of the government, saying Congress “piled anomaly on top of anomaly” when it “endowed this wholly unique statutory creature with agency powers, authorizing it to regulate its resource competitors,” according to the opinion.

And experts say they’re anticipating that the government will go to the mattresses defending PRIIA and the checks it says are in place for Amtrak’s regulatory authority by petitioning for an en banc rehearing before the D.C. Circuit before heading back to the high court.

Neither the railroad lobbying group that brought the challenge, the Association of American Railroads, nor Amtrak or the U.S. Department of Transportation have said what their next course of action will be. The case involved a constitutional facial attack on federal statute, leaving lawmakers and the government bruised, and experts say they are watching for whether a dismantling of PRIIA is on the horizon.

“All of PRIIA is ultimately thrown out if this ruling stands, so for sure, we’re going to see this up to the U.S. Supreme Court again,” Kathryn Thomas, a partner with Chicago-based Freeborn & Peters LLP, told Law360. “This is too big of an issue, so it’s going to be appealed.”

And future decisions to equalize Amtrak with other members of the AAR could diminish Amtrak’s ability to function effectively as an arm of government, Hayden said.

“Rail shippers should pay close attention to these pending determinations,” she said. “The outcome of this decision will affect the position of Amtrak and railroads within the transportation industry.”

Also noteworthy in the D.C. Circuit’s opinion was its rejection of the binding arbitration provision in PRIIA allowing the Surface Transportation Board, the nation’s economic rail regulator, to appoint an arbitrator in the event of a disagreement between Amtrak and the FRA on the metrics and standards, concluding that it “delegat[es] regulatory power to an improperly appointed arbitrator.”

And it remains to be seen what, if any, impact the ruling has on new rules the STB is currently promulgating to reinterpret the threshold at which railroads give Amtrak “preference” over freight on their tracks. That rulemaking and an accompanying policy statement in December 2015 have already sparked concerns of administrative overreach, with other rail companies saying it’s a fundamental shift in long-standing public policy.

"This raises questions about [the rulemaking] for sure because what has been happening is [Amtrak] is trying to levy fines against the railroads for not having on-time performance," Thomas said. "But all that is going to be held in abeyance because I can't see how Amtrak could make any of that stick now."

The AAR is represented by Thomas H. Dupree Jr., Amir C. Tayrani, Lucas C. Townsend and Louis P. Warchot of Gibson Dunn.

The government is represented by Michael S. Raab, Benjamin C. Mizer, Vincent H. Cohen Jr., Mark B. Stern, Daniel Tenny and Patrick G. Nemeroff of the U.S. Department of Justice, and Paul M. Geier, Peter J. Plocki and Joy Park of the U.S. Department of Transportation.

The case is Association of American Railroads v. U.S. Department of Transportation et al., case number 12-5204, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Mark Lebetkin and Catherine Sum.

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