

*Railroads—Amtrak***Amtrak Is Gov't. Entity for Setting Standards But Its Power Might Be Unconstitutional**

Amtrak is a governmental entity, not a private enterprise, in regards to its co-authority to issue industry metrics and standards with the Federal Railroad Administration, the U.S. Supreme Court decided March 9 (*DOT v. Ass'n of Am. R.R.*, 2015 BL 61681, U.S., No. 13-1080, 3/9/15).

But the decision is more notable for what it didn't decide, attorneys familiar with the case told Bloomberg BNA.

"Substantial" constitutional questions remain as to whether the standards are lawful according to separation of powers principles and the appointments clause in Article II of the U.S. Constitution, Justice Anthony M. Kennedy's majority opinion said.

Those issues should be addressed in the first instance on remand by the U.S. Court of Appeals for the District of Columbia Circuit, the high court said.

There's a good chance the regulations could be invalidated on remand, and the case may return to the Supreme Court before it is ultimately resolved, multiple attorneys told Bloomberg BNA.

"Amtrak won without really winning," Andrew M. Grossman of Baker Hostetler LLP, Washington, told Bloomberg BNA March 9.

"Passenger rail in the United States is looking at several more years of litigation," Karen E. Torrent of the Environmental Law and Policy Center, Washington, told Bloomberg BNA March 9.

Grossman filed an amicus curiae brief in support of the Association of American Railroads.

Torrent filed an amicus curiae brief in support of the Department of Transportation.

Congress granted Amtrak and the FRA joint authority to issue metrics and standards addressing the performance and scheduling of passenger rail services, according to the opinion. The AAR originally sued arguing it is improper for Amtrak to have a regulatory hand in an industry in which it is a market participant, and that Congress couldn't delegate such power to a private entity. An unusual twist in the litigation is that Amtrak is a member of the AAR.

Thomas, Alito Concur to Dissent. Justices Clarence Thomas and Samuel A. Alito Jr. both tipped their hands that they're likely to vote against Amtrak's power to make rules should the case reach the high court again.

Both concurred in vacating the court of appeals's holding that Amtrak was not a governmental entity here, but wrote separately that the statute under which Amtrak's power is granted, Section 207 of the 2008 Passenger Rail Investment and Improvement Act, is likely unconstitutional.

"They seem to indicate that if this matter continues to be litigated, and again reaches the Supreme Court, that they will be on the other side," Torrent said.

"For the reasons described in Justice Alito's concurrence," on remand the DOT is "likely to lose on any number of separation-of-powers grounds," Grossman said.

"Expect to see this case make another trip to the Supreme Court, raising fundamental issues regarding the allocation of power among the branches," Grossman said.

Created, Controlled, Used by Gov't. "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit," the majority said.

The D.C. Circuit erroneously relied on statutory language that Amtrak "is not a department, agency, or instrumentality of the United States Government," and that it "shall be operated and managed as a for profit corporation," 49 U.S.C. § 24301(a)(3) and (a)(2), the court said.

"Congressional pronouncements, though instructive as to matters within Congress' authority to address," are "not dispositive" for purposes of "separation of powers analysis under the Constitution," it said.

An "independent inquiry into Amtrak's status under the Constitution reveals the Court of Appeals' premise was flawed," the court said.

In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (U.S. 1995), a case in which Amtrak prohibited an artist from installing a politically controversial display in New York City's Penn Station, the high court held "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions."

Here, *Lebron* "teaches" that the "practical reality of federal control and supervision prevail over Congress's

disclaimer of Amtrak's governmental status," the court said.

Corporate Structure Relies on Gov't. The court looked to Amtrak's "ownership and corporate structure" for evidence of government control.

First, the Secretary of Transportation holds "all of Amtrak's preferred stock and most of its common stock," and is on Amtrak's board of directors, the court said.

Seven out of eight other board members are appointed by the president, confirmed by the Senate and removable by the president without cause, the court said.

The final board member, Amtrak's president, must possess "certain qualifications" and is elected by the other eight U.S. presidential appointees, it said.

In selecting those board members, the president must consult with leaders of both parties in both chambers of Congress in order to "provide adequate and balanced representation of the major geographic regions," the court said.

Gov't. Supervises, Sets Priorities, Funds. Amtrak must maintain an inspector general, "much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission," thanks to the 1978 Inspector General Act which designated Amtrak a "Federal entity," the court said.

Amtrak submits "numerous" annual reports to Congress and the president, and the Freedom of Information Act applies to Amtrak in "any year in which it receives a federal subsidy," which "thus far has been every year of its existence," the court said.

Amtrak is also required to pursue goals defined by statute "rather than advancing its own private economic interests," such as to "ensure mobility in times of national disaster" under Section 24101(c)(9), the court said.

"Finally, Amtrak is also dependent on federal financial support," the court said.

In 43 years of operation Amtrak has received over \$41 billion in federal subsidies, it said.

"Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise," the court said.

"Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions," it said.

Roadmap on Remand. Even though "Amtrak's actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2—may still remain in this case," the court said.

But "'ours is a court of final review and not first view,'" it said.

Even so, the majority hints at, and Thomas and Alito's concurrences spell out, at least three potential paths for invalidating the standards on remand, Torrent said.

First, the lower court could determine, as Alito argued, that it is "unconstitutional for Congress to have an arbitrator break ties" between Amtrak and the FRA, under Section 207(d) of the PRIIA, "because that would allow a private arbitrator to determine the regulations of the United States," Richard B. Katskee of Mayer Brown LLP told Bloomberg BNA March 9.

Katskee filed an amicus curiae brief in support of the AAR.

Second, the lower court could find that Amtrak's board of directors lacks constitutional authority to appoint "inferior officers," i.e. its president, Alito argued.

The court could also find that Amtrak's president needs to be a "principal officer" appointed by the U.S. president, but the AAR argues that in any case the board members don't take an oath of office to uphold the Constitution, "as do Article II officers vested with rulemaking authority," Alito said.

Third, the court could find Congress violated the due process clause by giving "a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry," the AAR argues, according to the majority.

Finally, Thomas would "return to the original understanding of the federal legislative power" and require that the government "create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."

Possible Legislative Fix. Speaking to that legislative process, "There is a quick fix here, and that's Congress," Torrent said.

Congress could step in and "cure the constitutional problems" in one of two ways, she said:

- by ratifying the metrics and standards that were previously adopted by Amtrak and the FRA; or

- by unilaterally authorizing the FRA, Surface Transportation Board or DOT to issue metrics and standards without Amtrak participating.

"I think it's possible" that Congress will act, Torrent said.

Congress passed PRIIA "because they wanted to improve passenger rail service in the U.S.," she said.

"It's now hit another glitch," so they have another chance to fix things, Torrent said.

But if Congress doesn't act, the future of "U.S. passenger rail services is uncertain again," she said.

Litigation Just Getting Started. First, "I would look to FRA to reinstate the metrics and standards" and "assume AAR would press to enjoin those," Torrent said.

Then the D.C. Circuit will have to make a determination "as to what issues were preserved," and "no matter how that comes out someone will try to get cert. on issue preservation," Torrent said.

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Eventually, there will be a trial on whatever the “preserved” issues are, but “there’s no discovery” in the case yet, because the lower court decision is a summary judgment decision, she said.

“You’re looking at a couple of years of discovery and document requests” before a trial could even get started, Torrent said.

Won Battle, Losing War? “The court’s ruling doesn’t really decide much, and it leaves open the strong possibility that several aspects of the Amtrak regulatory scheme could be invalidated on remand,” Shannen W. Coffin of Steptoe & Johnson LLP, Washington, told Bloomberg BNA March 9.

“The broader principle that Congress cannot delegate its legislative authority to a private party is still alive in the case,” Coffin said.

“Amtrak and the Solicitor General won this round, but serious constitutional issues remain to be resolved,”

Anthony T. Caso, Director of the Constitutional Jurisprudence Clinic at Fowler Law School, Orange, Calif., told Bloomberg BNA March 9.

Coffin and Caso both filed amicus curiae briefs in support of AAR.

The case is “far from over,” and “we may well see this case back in the Supreme Court before it is ultimately resolved,” Katskee said.

Curtis E. Gannon of the Department of Justice, Washington, argued for the Department of Transportation. Thomas H. Dupree Jr. of Gibson, Dunn & Crutcher LLP, Washington, argued for the Association of American Railroads. Neither responded to March 9 requests for comments.

Full text at http://www.bloomberglaw.com/public/document/Department_of_Transportation_v_Association_of_American_Railroads_and_83_U.S.L.W.4145.