



Office of the Attorney General
Washington, D. C. 20530

February 1, 2017

The Honorable Paul D. Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Association of American Railroads v. Department of Transportation*,
821 F.3d 19 (D.C. Cir. 2016)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to you concerning the above-referenced decision of the United States Court of Appeals for the District of Columbia Circuit. A copy of the decision is enclosed.

The decision addressed a constitutional challenge to Section 207 of the Passenger Railroad Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916. Section 207(a) authorizes the Federal Railroad Administration (FRA) and Amtrak to “jointly * * * develop” metrics and standards for evaluating Amtrak’s performance and service quality. Among other things, the metrics and standards may be used by the Surface Transportation Board (STB) in deciding whether to investigate freight railroads for failing to provide a preference to Amtrak over freight transportation, as required by 49 U.S.C. 24308(c). In the event that the FRA and Amtrak could not agree on the metrics and standards within 180 days, Section 207(d) provided for the STB to “appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.” Pursuant to Section 207(a), FRA and Amtrak jointly adopted metrics and standards, after receiving and considering public comments, in May 2010.

In this case, an association of major North American freight railroads has challenged the metrics and standards on several constitutional grounds. The district court granted summary judgment for the government, but the Court of Appeals reversed, holding that Section 207 “constitutes an unlawful delegation of regulatory power to a private entity.” 721 F.3d 666, 668 (D.C. Cir. 2013). The government successfully petitioned for a writ of certiorari, and the Supreme Court reversed, holding that “Amtrak is a governmental entity, not a private one,” for purposes of determining the constitutional validity of the metrics and standards. 135 S. Ct. 1225, 1233 (2015). The Court remanded the case for consideration of any remaining constitutional challenges. *Id.* at 1234.

On remand, the Court of Appeals invalidated the metrics and standards for two reasons. First, the Court ruled that Section 207 violates due process by allowing Amtrak, an economically self-interested entity, to regulate its competitors. 821 F.3d 19, 27-36 (D.C. Cir. 2016). Second,

the Court ruled that Section 207 violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, insofar as the arbitration provision vests the power to resolve disputes between FRA and Amtrak in an arbitrator who has not been properly appointed. 821 F.3d at 36-39.

Although the Department has defended the constitutionality of Section 207 in this case, I write to advise you that the Department of Justice has decided, based on the particular circumstances of the case, not to seek Supreme Court review of the Court of Appeals' decision at the present time. Instead, the Department intends to argue in the district court that, under the Court of Appeals' decision, the arbitration provision should be severed from the rest of the statute. FRA and Amtrak could then jointly develop metrics and standards pursuant to the remaining provisions of Section 207, unencumbered by the arbitration provision. See 821 F.3d at 34-35 & n.4. The determination not to seek Supreme Court review of the Court of Appeals' decision at this time, however, would not prevent the Department from pursuing such review after further proceedings, should that course be appropriate.

A petition for a writ of certiorari would be due on February 6, 2017. Please do not hesitate to contact this office if we can be of further assistance in this matter.

Sincerely,



Dana J. Boente
Acting Attorney General

Enclosure