

Justices Pass On Railroads' Bid To Choke Amtrak's Power

By [Linda Chiem](#)

Law360 (June 3, 2019, 3:04 PM EDT) -- The [U.S. Supreme Court](#) on Monday declined to hear the [Association of American Railroads'](#) constitutional challenge to a federal statute allowing [Amtrak](#) to help the [Federal Railroad Administration](#) set performance and scheduling standards along the nation's railways.

The high court denied the [AAR's petition for certiorari](#) seeking to undo the D.C. Circuit's July [decision](#) reinstating the Passenger Railroad Investment and Improvement Act of 2008, the federal law that gives for-profit passenger rail service Amtrak a say in performance and scheduling standards for freight railroads. In the U.S., freight railroads own and maintain the railways but they're required by law to give Amtrak priority to use those same tracks for its passenger rail service.

The justices didn't give a reason for denying AAR's petition, as is customary. The trade group for the nation's largest railroads had maintained that PRIIA — which a separate D.C. Circuit panel had [struck down](#) in 2016 — shouldn't be allowed to stand because Amtrak is a for-profit government corporation that competes with freight railroads for "scarce track capacity," and as such, Amtrak shouldn't have regulatory power over its commercial rivals.

"While AAR and the freight railroad industry are disappointed that the Supreme Court denied our petition for cert regarding metrics and standards for Amtrak schedule performance, we are pleased that the metrics and standards remain invalidated," AAR President and CEO Ian Jefferies said in a statement Monday. "Freight railroads are committed to providing efficient and reliable service to all their customers and tenant railroads, and we will work with the FRA and Amtrak in a way that recognizes the importance of moving increased freight volume to help support the U.S. economy."

The Federal Railroad Administration and Amtrak had jointly developed and finalized a version of rail performance metrics and standards in 2010, but those were vacated amid the AAR's long-running litigation over PRIIA.

The litigation had already made its way through the D.C. courts and up to the Supreme Court once before on the issue of whether Amtrak was a private or government entity for the purposes of this litigation, which kicked off in 2011.

All nine justices of the Supreme Court ruled in March 2015 that the for-profit [Amtrak was a government entity](#) properly granted regulatory powers by Congress. Though the Supreme Court determined that Amtrak had the power to set performance standards, it did not rule on whether the standards it helped set were lawful.

So the case went back to the D.C. Circuit to decide AAR's [due process claims](#), resulting in an AAR win in April 2016 after the panel struck down PRIIA for violating freight rail carriers' due process rights by giving Amtrak authority to collaborate with the FRA on standards defining Amtrak's statutory "priority," as in its right-of-way over freight trains running on the same tracks.

After its [rehearing petition](#) was [denied](#) in September 2016, the [U.S. Department of Transportation](#) tried a [different approach](#) in February 2017, asking the D.C. district court to "sever" the problematic arbitration provision — known as Section 207(d) — and preserve the rest of PRIIA to ensure that the statute "passed constitutional muster."

The district court [rejected](#) that, but the DOT [appealed](#) to the D.C. Circuit and ended up victorious when a divided panel ruled in the government's favor in July, declaring "we at long last come to the end of the tracks in this lengthy litigation." The full D.C. Circuit then [denied](#) the AAR's rehearing petition in October, prompting the railroads to petition the high court in January.

Section 207(d) of PRIIA provided that if the metrics and standards were not completed within 180 days, "any party involved in the development of those standards [could] petition the federal [Surface Transportation Board](#) to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."

That section essentially allowed a private citizen or an improperly appointed government official to exercise significant governmental power in the event that Amtrak and the FRA disagreed on what metrics or standards to come up with, according to court documents.

The DOT had argued that "the crux of the constitutional problem was not that Amtrak had

input or the opportunity to 'persuade' the administration." It was "that Amtrak, through unilateral resort to the arbitrator, had the power 'to make law' by formulating regulatory metrics and standards without the agreement or control of the administration." So [taking a scalpel](#) to the arbitration provision rendered the statute constitutional, according to the DOT.

But the railroads countered that "under the refashioned version of the statute, the grant of rulemaking authority is permanent and unbridled," so it cannot be allowed to stand. In fact, four of the six D.C. Circuit judges who decided this case on remand determined that any fix to Section 207 must come from Congress, not the courts, the AAR said in court documents.

Amtrak, which is not named as a party in the litigation, said in a statement to Law360 on Monday that it is pleased that the Supreme Court denied the AAR's petition.

"We are eager to work with the Federal Railroad Administration and all other stakeholders to develop clear, efficient and impactful metrics that will lead to better on-time performance for Amtrak customers and the entire rail system," Amtrak said.

Representatives for the FRA did not immediately respond to a request for comment Monday.

AAR is represented by Thomas H. Dupree Jr., Amir C. Tayrani, Lucas C. Townsend and David A. Schnitzer of [Gibson Dunn & Crutcher LLP](#) and in-house counsel Kathryn Kirmayer and Daniel Saphire.

The government is represented by U.S. Solicitor General Noel Francisco and Joseph H. Hunt, Mark B. Stern, Michael S. Raab, Daniel Tenny and Patrick G. Nemeroff of the [U.S. Department of Justice's](#) Civil Division.

The case is Association of American Railroads v. Department of Transportation, case number 17-5123, in the Supreme Court of the United States.