20-1681-cv
Bissonnette v. LePage Bakeries

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2021
No. 20-1681

NEAL BISSONNETTE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND TYLER WOJNAROWSKI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, AND FLOWERS FOODS, INC.,
Defendants-Appellees.

ARGUED: OCTOBER 22, 2021
DECIDED: MAY 5, 2022
AMENDED: SEPTEMBER 26, 2022

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Before: JACOBS, POOLER, Circuit Judges, GUJARATI, District Judge.*

* Judge Diane Gujarati of the United States District Court for the Eastern District of New York, sitting by designation.

Plaintiffs, who deliver baked goods in designated territories in Connecticut, brought this action in the United States District Court for the District of Connecticut (Dooley, J.) on behalf of a putative class against the manufacturer of the baked goods that plaintiffs deliver. The plaintiffs allege unpaid or withheld wages, unpaid overtime wages, and unjust enrichment.

The district court compelled arbitration pursuant to an arbitration agreement that is governed by the Federal Arbitration Act ("FAA") and Connecticut law. Plaintiffs claim that they are not subject to the FAA because Section 1 of the FAA excludes contracts with "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The exclusion is construed to cover "transportation workers." The district court held that the plaintiffs did not qualify as transportation workers, ordered arbitration, and dismissed the case. For the reasons below, we affirm.

Judge Jacobs concurs in a separate opinion, and Judge Pooler dissents in a separate opinion.

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DENNIS JACOBS, Circuit Judge:

Plaintiffs deliver baked goods by truck to stores and restaurants in designated territories within Connecticut. They bring this action in the United States District Court for the District of Connecticut (Dooley, J.) on behalf of a putative class against Flowers Foods, Inc. and two of its subsidiaries, which manufacture the baked goods that the plaintiffs deliver. Plaintiffs allege unpaid or withheld wages, unpaid overtime wages, and unjust enrichment pursuant to the Fair Labor Standards Act and Connecticut wage laws. The district court granted the defendants' motion to compel arbitration and dismissed the case.

The decisive question on appeal is whether the plaintiffs are "transportation workers" within the meaning of the Federal Arbitration Act

("FAA"). That matters because the FAA, which confers on the federal courts an expansive obligation to enforce arbitration agreements, has an exclusion for contracts with "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. That exclusion is construed to cover "transportation workers." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

Of the issues subsumed in that question, some are settled. For example, an independent contractor can be a transportation worker, a point germane to this case in which the drivers own their routes and may sell them to others. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 543-44 (2019).

The district court ruled that the plaintiffs are not "transportation workers" and "grant[ed] the Defendants' motion to dismiss in favor of arbitration." Special App'x 15. The court undertook a thorough review of the circumstances that might bear on the question, such as the extent of similarity between the plaintiffs' work and the work of those in the maritime and railroad industries. That analysis is consonant with the prescription in Lenz v. Yellow Transportation, Inc., 431 F.3d 348 (8th Cir. 2005), which approached the question

by considering eight non-exclusive factors. We affirm without rejecting or adopting the district court's analysis, which may very well be a way to decide closer cases. We hold that the plaintiffs are not "transportation workers," even though they drive trucks, because they are in the bakery industry, not a transportation industry.

In arriving at that holding, we first consider an alternative ground for affirmance that might obviate the federal statutory question by allowing the arbitration to proceed under Connecticut arbitration law, which has no exclusion for transportation workers; but vexed questions beset a ruling that affirms on that alternative basis.

We therefore must come to grips with whether the plaintiffs are "transportation workers." Our initial opinion on this appeal, Bissonnette v. LePage Bakeries Park St., LLC, 33 F.4th 650 (2d Cir. 2022), concluded that they are not. The Supreme Court subsequently issued Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022) ("Saxon"), which provides guidance on the meaning of "transportation workers," and the plaintiffs moved for rehearing or rehearing en banc in light of this intervening authority. We granted the motion for

rehearing and withdrew our opinion of May 5, 2022. Now, after considering Saxon, we again affirm the district court's order compelling arbitration and dismissing the case. Additional oral argument is unnecessary.[1]

## I

Flowers Foods, Inc. is the holding company of subsidiaries that produce breads (including Wonder Bread), as well as buns, rolls, and snack cakes in 47 bakeries. Other subsidiaries of Flowers Foods sell exclusive distribution rights for the baked goods within specified geographic areas. (Flowers Foods, Inc. and its subsidiaries, including defendants LePage Bakeries Park St., LLC and C.K. Sales Co., LLC, are hereinafter referred to as "Flowers.") The individuals who purchase the distribution rights--designated independent distributors--market, sell, and distribute Flowers baked goods. The relationship between Flowers and

[1] Defendants' request to respond to plaintiffs' petition for rehearing is denied as moot.

each independent distributor is set out in a Distributor Agreement. See Joint App'x 84-159.

Plaintiffs Neal Bissonnette and Tyler Wojnarowski are two of these independent distributors, both of whom own distribution rights in Connecticut. Bissonnette, who previously delivered baked goods as an employee of Flowers, entered into a Distributor Agreement with Flowers in 2017. Wojnarowski entered into a Distributor Agreement with Flowers in 2018.

Pursuant to the Distributor Agreement, the plaintiffs pick up the baked goods from local Connecticut warehouses and deliver the goods to stores and restaurants within their assigned territories. Subject to certain adjustments, the plaintiffs earn the difference between the price at which the plaintiffs acquire the bakery products from Flowers, and the price paid by the stores and restaurants. In their roles as independent distributors, the plaintiffs undertake to maximize sales; solicit new locations; stock shelves and rotate products; remove stale products; acquire delivery vehicles; maintain equipment and insurance; distribute Flowers' advertising materials and develop their own (with prior approval by Flowers); retain legal and accounting services; and hire help. The plaintiffs may

also profit from the sale of their distribution rights.[2] Though the plaintiffs are permitted to sell noncompetitive products alongside Flowers products, the plaintiffs concede that they do not work for any other company or entity, and that they typically work at least forty hours per week selling and distributing Flowers products.

The Distributor Agreement states that the parties may submit disputes arising from the Distributor Agreement to binding arbitration in accordance with the conditions set forth in an appended Arbitration Agreement. The Arbitration Agreement provides that "any claim, dispute, and/or controversy . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1, et seq.) . . ." Joint App'x 117. Arbitrability is an issue reserved to the arbitrator except for issues concerning the "prohibition

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[2] The Distributor Agreement defines the plaintiffs as "independent contractor[s]" for all purposes, and makes clear that the plaintiffs are "independent business[es]." The plaintiffs dispute that characterization. But this distinction no longer matters for FAA purposes because the Supreme Court has clarified that the exclusion for "transportation workers" applies with equal force to employees and to independent contractors. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 543-44 (2019).

against class, collective, representative or multi-plaintiff action arbitration" and the "applicability of the FAA." Id. at 118. The Arbitration Agreement is "governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA." Id. at 119.

## II

We have jurisdiction over the district court's order compelling arbitration and dismissing the case because it is a "final decision with respect to an arbitration" pursuant to Section 16(a)(3) of the FAA. See Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 86-87, 89 (2000).

## III

We review de novo the district court's order compelling arbitration. Atlas Air, Inc. v. Int'l Bhd. of Teamsters, 943 F.3d 568, 577 (2d Cir. 2019).

The Arbitration Agreement, which provides for arbitration "under the Federal Arbitration Act," elsewhere provides that it "shall be governed by the FAA and *Connecticut law to the extent Connecticut law is not inconsistent with the*

*FAA*." Joint App'x 117, 119 (emphasis added). Since Connecticut arbitration law has no exclusion for transportation workers, see Conn. Gen. Stat. Ann. § 52-408 (arbitration agreements shall be "valid, irrevocable and enforceable"), Flowers urges that we compel arbitration pursuant to Connecticut law, regardless of whether the FAA applies.

The Second Circuit has not ruled on the application of state law to arbitration agreements under the FAA. One court within this Circuit has observed that "[m]ultiple courts" have rejected the proposition that "state arbitration law is preempted" when a plaintiff is excluded from the FAA. Smith v. Allstate Power Vac, Inc., 482 F. Supp. 3d 40, 47 (E.D.N.Y. 2020) (Gershon, J.); see also Michel v. Parts Auth., Inc., 15 Civ. 5730 (ARR), 2016 WL 5372797, at *3 (E.D.N.Y. Sept. 26, 2016) ("Even assuming the FAA does not apply, New York state law governing arbitration does apply."). Other Circuits lean the same way.[3]

[3] See, e.g., Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 295 (3d Cir. 2021) (observing that there is no language in the FAA that "explicitly preempts the enforcement of state arbitration statutes") (quoting Palcko v. Airborne Express, Inc., 372 F.3d 588, 595 (3d Cir. 2004)); see also Saxon v. Sw. Airlines Co., 993 F.3d 492, 502 (7th Cir. 2021) (explaining that even though the plaintiff qualified for the "transportation worker" exclusion to the FAA, she "could still face arbitration

Even if state law can compel arbitration when the FAA does not, the meaning of the phrase "not inconsistent" in the Arbitration Agreement is unclear. Joint App'x 119. Flowers argues that Connecticut law is "not inconsistent" with the FAA because the FAA does not *preclude* the enforcement of arbitration agreements with transportation workers. The plaintiffs counter that Connecticut law *is* inconsistent because the FAA excludes transportation workers while Connecticut law does not.

Prudence counsels against a remand for arbitration to proceed under Connecticut law. The availability of Connecticut arbitration entails the construal of a phrase with a disputed meaning. Ascertaining the intent of the parties would ordinarily involve a remand for fact finding. Although the Agreement provides that issues of arbitrability are reserved for the arbitrator, that expedient

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under state law"), aff'd, 142 S. Ct. 1783 (2022); Oliveira v. New Prime, Inc., 857 F.3d 7, 24 (1st Cir. 2017), aff'd, 139 S. Ct. 532 (2019) (explaining that exclusion from the FAA pursuant to Section 1 "has no impact on other avenues (such as state law) by which a party may compel arbitration"); Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[W]e have little doubt that, even if an arbitration agreement is outside the FAA, the agreement still may be enforced.").

may be blocked because the arbitrator's ambit excludes the applicability of the FAA, which is implicated here.

True, "a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration." New Prime Inc., 139 S. Ct. at 537. But that prescription may not bear upon whether the availability of arbitration under state law can obviate the exclusion. See Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 296 n.8 (3d Cir. 2021) (observing that "no binding precedent requires district courts to ignore arbitrability under state law when the applicability of § 1 is uncertain"); Hamrick v. Partsfleet, LLC, 1 F.4th 1337, 1353 (11th Cir. 2021) ("We would only look to state arbitration law *after* we decided the federal issue of whether the transportation worker exemption applied to the drivers.") (emphasis in original). Therefore, we proceed to decide whether the plaintiffs fall within the FAA exclusion.

## IV

The FAA, which reflects a "liberal federal policy favoring arbitration agreements," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1,

24 (1983), nevertheless excludes the employment contracts of "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The class of workers encompassed by that residual clause is "transportation workers." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001). Since neither Congress nor the Supreme Court has defined "transportation worker," we define it by affinity. The two examples that the FAA gives are "seamen" and "railroad employees." 9 U.S.C. § 1. These examples are telling because they locate the "transportation worker" in the context of a *transportation industry*. See, e.g., Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1791 (2022) (explaining that "seamen" constitute a "subset of workers engaged in the maritime shipping industry").

One explanation advanced for the exclusion is that Congress "did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." See Circuit City, 532 U.S. at 121. But that explanation does not limit or delineate the category. The specification of workers in a *transportation industry* is a reliable principle for construing the clause here.

Our cases have dealt with the exclusion, albeit in quite different contexts

and largely prior to Circuit City, 532 U.S. at 119, which narrowed the scope to transportation workers. The cases nevertheless adumbrated the principle that decides this case. The holding in Erving v. Virginia Squires Basketball, 468 F.2d 1064 (2d Cir. 1972)--that the FAA exclusion is limited to workers involved in the transportation industry--is still vital. Id. at 1069. For example, Maryland Casualty Co. v. Realty Advisory Board on Labor Relations, 107 F.3d 979 (2d Cir. 1997), ruled that employees of a commercial cleaner were not covered by the exclusion, which is "limited to workers involved in the transportation industries." Id. at 982. After Circuit City, 532 U.S. at 119, this Court observed that the exclusion did not apply to sheriffs because the clause is "interpreted . . . narrowly to encompass only 'workers involved in the transportation industries.'" Adams v. Suozzi, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (quoting Md. Cas. Co., 107 F.3d at 982).

Similarly, the Eleventh Circuit has held that an account manager at a company that rents and delivers furniture across state borders was subject to the FAA because he was "not a transportation industry worker." Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1288 (11th Cir. 2005). Hill discerned that Congress intended

to exclude "a class of workers in the transportation industry, rather than . . . workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated." Id. at 1289; see also id. at 1290 ("[I]t is apparent Congress was concerned only with giving the arbitration exemption to 'classes' of transportation workers within the transportation industry."). The test most recently articulated by the Eleventh Circuit is that the transportation worker exclusion applies if the employee is part of a class of workers: "(1) employed in the transportation industry; and (2) [who], in the main, actually engage[] in foreign or interstate commerce." Hamrick, 1 F.4th at 1349 (remanding for the district court to consider whether last-mile delivery workers qualify for the exclusion).[4]

Although none of these cases defines "transportation industry," we

[4] The plaintiffs in this case cite Martins v. Flowers Foods, Inc., 463 F. Supp. 3d 1290 (M.D. Fla. 2020), which held that Flowers distributors perform their work in the transportation industry. Id. at 1298. But the Eleventh Circuit vacated the judgment by a summary order, directing reconsideration in light of Hamrick v. Partsfleet, LLC, 1 F.4th 1337 (11th Cir. 2021). See Martins v. Flowers Foods, Inc., 852 F. App'x 519 (11th Cir. 2021) (summary order). The district court has not yet issued a ruling on remand.

conclude that an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement.

In Erving and Maryland Casualty, this Court set forth that only a worker in a transportation industry can be classified as a transportation worker. That point needed no elaboration in Saxon because there the plaintiff worked for an airline. An airline, an analog to transport by rail and sea, is in the business of moving people and freight, and its charges are for activity related to that movement. (Customers do not fly for the infotainment or the food.)

At the same time, as Saxon teaches, not everyone who works in a transportation industry is a transportation worker. To determine who is, we must consider "the actual work that the members of the class, as a whole, typically carry out," that is, what the worker "frequently" does for the employer. See 142 S. Ct. at 1788. It follows that not everybody who works in the airline industry is a transportation worker--many airline employees are engaged in accounting, regulatory compliance, advertising, and such. But in our case, the

distinctions drawn in Saxon do not come into play; those who work in the bakery industry are not transportation workers, even those who drive a truck from which they sell and deliver the breads and cakes.

The dissent's repeated incantation that the plaintiffs are exempt because they work in the "trucking industry" is erroneous. Although the plaintiffs spend appreciable parts of their working days moving goods from place to place by truck, the decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. Customers pay for the baked goods themselves; the movement of those goods is at most a component of total price. The commerce is in breads, buns, rolls, and snack cakes--not transportation services. See, e.g., Hill, 398 F.3d at 1288-90 (holding that a Rent-A-Center manager whose "duties involved making delivery of goods to customers out of state in his employer's truck" did not work in the "transportation industry"). Although contractual parties cannot effectively stipulate to the status of employees as transportation workers (or not), the Distributor Agreement here recognizes and identifies the industry: "[m]aintaining a fresh market is a

fundamental tenet of the *baking industry*."[5] Joint App'x 95 (emphasis added).

Because the plaintiffs do not work in the transportation industry, they are not excluded from the FAA, and the district court appropriately compelled arbitration under the Arbitration Agreement.

## V

The district court decided this case along the lines of analysis prescribed by the Eighth Circuit in Lenz v. Yellow Transportation, Inc., 431 F.3d 348 (8th

[5] Although the plaintiffs never leave the state of Connecticut, we do not consider whether this case could be decided on the ground that the interstate element of the exclusion is not satisfied. The issue may not be simple. See, e.g., Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1789 n.2 (2022) (acknowledging that it can be difficult to define a class of workers' involvement in interstate commerce). The baked goods originate outside of Connecticut; and there are railroads that operate within a single state, terminus to terminus--the Long Island Railroad comes to mind.

Notably, on successive days, two courts in the same district reached opposite conclusions as to whether rideshare drivers are engaged in interstate commerce. Compare Islam v. Lyft, Inc., 524 F. Supp. 3d 338, 353 (S.D.N.Y. 2021) (Abrams, J.) (exempt from the FAA because they perform "sufficient numbers of interstate rides, with sufficient regularity"), with Aleksanian v. Uber Techs. Inc., 524 F. Supp. 3d 251, 262-63 (S.D.N.Y. 2021) (Carter, J.) (not exempt because "interstate trip[s]" are "occasional").

Cir. 2005). Lenz adduced eight "non-exclusive" factors for "determining whether an employee is so closely related to interstate commerce that he or she fits within the § 1 exemption":

> [F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).

Id. at 352. The district court relied upon certain Lenz factors, but not all, and not explicitly. See Bissonnette v. Lepage Bakeries Park St., LLC, 460 F. Supp. 3d 191, 198-202 (D. Conn. 2020). Although we identify no error in the district court's conscientious analysis, we resolve the question before us on the more

straightforward ground that the plaintiffs do not work in a transportation industry.

We acknowledge that our approach is not a universal solvent. We do not attempt to decide issues that have arisen across the federal court system as to which of the following workers may be a "transportation worker":

- Workers who transport goods or passengers within a state, when those goods or passengers originate out of state. See, e.g., Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 802 (7th Cir. 2020) (holding that food delivery drivers who do not cross state lines are subject to the FAA); Capriole v. Uber Techs., Inc., 7 F.4th 854, 865-66 (9th Cir. 2021) (holding that Uber drivers are subject to the FAA because most of their trips are intrastate).

- Workers for major retailers who transport goods intrastate within a larger transportation network that is interstate. Compare Rittmann v. Amazon.com, Inc., 971 F.3d 904, 917 (9th Cir. 2020), cert. denied, 141 S. Ct. 1374 (2021) (holding that Amazon contractors are transportation workers because they "complete the delivery of goods that Amazon ships across state lines and for which Amazon hires . . . workers to complete the delivery"); Waithaka v. Amazon.com, Inc., 966 F.3d 10, 26 (1st Cir. 2020), cert. denied, 141 S. Ct. 2794 (2021), reh'g denied, 141 S. Ct. 2886 (2021) (holding that "last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers engaged in . . . interstate commerce," even if they do not themselves cross state lines) (internal quotation marks omitted), with Hamrick, 1 F.4th at 1351 (remanding to consider whether final-mile delivery workers "are in a class of workers employed in the transportation industry

that actually engages in foreign or interstate commerce").

We have no occasion to hazard answers to these questions.

## CONCLUSION

For the reasons stated above, we affirm the order compelling arbitration and dismissing the case.

**United States Court of Appeals for the Second Circuit**
**Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**DEBRA ANN LIVINGSTON**
**CHIEF JUDGE**

**CATHERINE O'HAGAN WOLFE**
**CLERK OF COURT**

Date: September 26, 2022
Docket #: 20-1681cv
Short Title: Bissonnette v. LePage Bakeries Park St., LLC

DC Docket #: 19-cv-965
DC Court: CT (NEW HAVEN)
DC Judge: Dooley

## BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit**
**Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**DEBRA ANN LIVINGSTON**
**CHIEF JUDGE**

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DC Judge: Dooley

## VERIFIED ITEMIZED BILL OF COSTS

Counsel for
_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the
_____

and in favor of
_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____ ) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____ ) _____

**(VERIFICATION HERE)**

_____
Signature