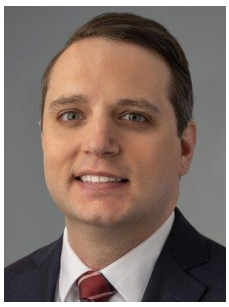
LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

History Supports 2nd Circ. View Of FAA Transport Exemption

By **Joshua Wesneski and Crystal Weeks** (May 17, 2023, 5:38 PM EDT)


Joshua Wesneski


Crystal Weeks

In June 2022, the U.S. Supreme Court decided Southwest Airlines Co. v. Saxon, a case regarding the scope of the exemption from the Federal Arbitration Act set forth in Title 9 of the U.S. Code, Section 1 for transportation workers engaged in foreign or interstate commerce.

At oral argument, respondent Latrice Saxon's counsel — arguing against compelled arbitration and thus for a broader reading of the exemption — made a notable concession. The attorney opined that workers who perform transportation for companies that ship only their own goods — as opposed to companies who ship goods on behalf of others — are likely not exempt from the FAA.

Though it is perhaps surprising that plaintiff-side counsel would adopt such a view of the statute, the admission was based on a principled reading of the Section 1 exemption grounded in text and history.

Since Saxon, two federal courts of appeals have reached diametrically opposed conclusions on this issue. The U.S. Court of Appeals for the Second Circuit has interpreted the Section 1 exemption to apply only to those transportation workers who actually work in the transportation industry, consistent with counsel's approach at argument.

The U.S. Court of Appeals for the First Circuit, however, has expressly rejected that interpretation, insisting that anyone who transports goods or people — regardless of industry or context — qualifies as a transportation worker for purposes of Section 1.

As this conflict continues to brew, a close historical analysis confirms that the former approach is the most faithful to the FAA, though perhaps not for the reasons articulated by the Second Circuit and other courts.

The Origins of the Conflict

For context, the FAA generally provides that arbitration agreements are enforceable in federal and state courts, but exempts from its scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[1]

In Circuit City Stores Inc. v. Adams in 2001, the Supreme Court held that under the principle of ejusdem generis — pursuant to which words following a specific statutory enumeration are construed to embrace only objects similar in nature to those separately enumerated — the exemption is limited to contracts of employment for seamen, railroad employees and other transportation workers engaged in interstate commerce.[2]

The court observed that Congress was concerned with "transportation workers and their necessary role in the free flow of goods," and thus likely exempted such workers from the FAA to reserve "for itself more specific legislation for those engaged in transportation."[3]

Since Circuit City, the lower courts have been inundated with disputes about how much interaction with interstate commerce is required in order for a transportation worker to qualify for the exemption.

In many cases, though, the courts — and sometimes the parties — overlook the antecedent question of whether the plaintiff is a transportation worker at all. Many decisions simply assume that any worker transporting goods or people qualifies, whereas the U.S. Court of Appeals for the Eleventh Circuit, for example, held in Hill v. Rent-A-Center Inc. in 2005 that a worker who transports goods or services is not covered by the exemption unless they work in the transportation industry.[4]

Saxon did not settle the issue. There, the question was whether an airline ramp agent supervisor who occasionally loaded and unloaded baggage from airplanes was sufficiently engaged in foreign or interstate commerce to qualify for the Section 1 exemption.

There was no dispute that the ramp supervisor worked in the transportation industry. The parties' arguments focused instead on whether the category of "transportation workers," as informed by "railroad employees" and "seamen," included those workers who loaded and unloaded cargo, or instead only those who physically transported the goods.

The court held the former, but in doing so, rejected the plaintiff's suggestion that all workers in the transportation industry — regardless of the individual work they perform — qualify for the Section 1 exemption. Instead, the court held that the plaintiff was "a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally."[5]

Since Saxon, a circuit split has arisen regarding whether the Section 1 exemption covers all workers who move goods or people in interstate commerce — regardless of whether they work in the transportation industry — or whether the exemption instead reaches only those workers who are actually employed in the transportation industry — that is, those who transport goods or people on behalf of others, and not for their own benefit.

On one side, the Second Circuit in Bissonnette v. LePage Bakeries Park Street LLC in 2022 joined the Eleventh Circuit in holding that, to qualify as a transportation worker, the employee must work in the transportation industry.[6] The divided panel of the Second Circuit articulated a test for this approach:

> 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.[7]

In February 2023, the Second Circuit denied a petition for rehearing en banc, over dissent.[8]

On the other side, the First Circuit broke with the Second Circuit in Fraga v. Premium Retail Services in March.[9] There, the First Circuit expressly rejected the Second Circuit's approach and held that

> Saxon's repeated and emphasized command to focus on what the workers themselves actually do strongly suggests that workers who do transportation work are transportation workers, [and that] focusing on the employer's business rather than the workers' work would lead to odd results.[10]

The Ninth Circuit, for its part, held in Rittmann v. Amazon.com Inc. in 2020 that delivery drivers for Amazon are subject to the exemption, but without critical analysis of this discrete issue.[11]

The Second and Eleventh Circuits reached the better result, but perhaps not for the right reasons. The First Circuit is correct that the Section 1 exemption turns on the work done by the class of workers at issue, not the work of their employer. But that does not lead to the conclusion that all workers who transport goods or people in interstate commerce qualify as transportation workers within the meaning of Section 1.

A close analysis of the text and history instructs that the exemption reaches only those workers performing the work of a common carrier — that is, those who transport goods or peoples on behalf of others, not for their own accord — or who are subject to unique and exclusive government regulation for their work.

Putting the Statute in Context

The analysis begins with the Supreme Court's application in Circuit City of the ejusdem generis canon to the Section 1 exemption. Because the scope of the Section 1 exemption must be determined in light of the statute's express references to seamen and railroad employees, interpreting Section 1 requires an understanding of what kinds of workers were understood to be seamen and railroad employees as those terms were used in the FAA at the time of its passage in 1925.

In Circuit City, the Supreme Court opined that the FAA exemptions for seamen and railroad employees was intended to avoid unsettling then-established dispute resolution schemes covering workers, in particular, those applying to railroad employees under the Transportation Act of 1920 and those applying to seamen under the Shipping Commissioners Act of 1872.

The question, then, is what kinds of workers were covered by the dispute resolution schemes of the Transportation Act and the Shipping Commissioners Act.

Perhaps surprisingly, not everyone who worked on a train was considered a railroad employee under the Transportation Act. The dispute resolution provisions of the Transportation Act applied to "all carriers and their officers, employees, and agents."[12] "Carrier" was in turn defined as "any carrier by railroad, subject to the Interstate Commerce Act."[13]

In turn, the Interstate Commerce Act generally applied "to any common carrier or carriers engaged in the [foreign or interstate] transportation of passengers or property wholly by railroad, or party by railroad and party by water."[14]

In other words, the only employees subject to the dispute resolution provisions of the Transportation Act were employees of carriers subject to regulation under the Interstate Commerce Act. And, the only

carriers governed by the Interstate Commerce Act were common carriers; that is, those who carry "goods or persons for hire and for all persons indifferently."[15]

Thus, read in its historical context, the FAA exemption for railroad employees is confined only to those employees who work for a common rail carrier — not merely any employee who happens to find themself working on a train car.

Contemporaneous precedent confirms this distinction. Companies who used the railroads to ship goods for their own benefit — rather than acting as common carriers for others — were held to be outside the scope of the Interstate Commerce Act.[16] The dispositive issue was the "right of the public to use the road's facilities and to demand service of it, rather than the extent of [the company's] business."[17]

The Supreme Court thus held in United States v. Ohio Oil Co. in 1914, for example, that when "a company is simply drawing oil from its own wells across a state line to its own refinery, for its own use, and that is all," the company does not fall "within the description of the [Interstate Commerce Act], the transportation being merely an incident to use at the end."[18]

The history regarding the meaning of seamen is different. General maritime law has long defined a seaman as a "person ... employed on board a vessel in furtherance of its purpose."[19] "The key to seaman status is [an] employment-related connection to a vessel in navigation."[20]

But in many ways, seamen occupy a unique place in the history of American jurisprudence: Their rights are adjudicated by courts of admiralty, they are deemed wards of admiralty subject to unique and exclusive oversight and disciplinary regimes, and they do not even enjoy full constitutional rights, such as, for example, the right against involuntary servitude under the 13th Amendment.[21]

Viewed in historical context, the enumerated categories under the Section 1 exemption thus imply two alternative dimensions to the scope of transportation workers covered by the statute. The first — derived from the meaning of "railroad employees" — suggests the exemption covers those transportation workers engaged in the transportation work of common carriers.

The second — derived from the meaning of "seamen" — suggests the exemption reaches classes of transportation workers that are subject to a unique and exclusive legal framework. It is not clear how many modern analogues to seamen there are in this respect, since no other class of transportation workers is governed by an entirely separate body of law in the way seamen are.

The Section 1 Exemption Today

Turning back to the modern debate, it seems clear that the First Circuit's view — that the nature of the transportation work being done by the class of workers in question is irrelevant — is incorrect.

Railroad employees and seamen, at the time of the FAA and even today, were unique, tightly regulated categories of transportation workers largely engaged in the business of common carriage. Interpreting the phrase "any other class of workers engaged in foreign or interstate commerce" to apply to all manner of workers transporting goods or people in interstate commerce is not consistent with the Supreme Court's instruction in Circuit City that the clause must be read narrowly in light of the enumerated categories.

As U.S. Circuit Judge Dennis Jacobs observed in his statement of views in support of the denial of rehearing en banc in Bissonnette:

> The statute creates an exemption for those who work moving goods and passengers in one of the mighty engines of interstate and international transport, not for everyone who works on wheels.[22]

The First Circuit — and the dissenters in the Second Circuit — have objected that the narrower interpretation advanced by the Second Circuit is inconsistent with the Supreme Court's observation in Saxon that a worker is "a member of a 'class of workers' based on what she does at [her employer], not what [her employer] does generally."

The Supreme Court's construction of the statute plainly is correct, but it does not follow that the nature of the employer's industry is irrelevant.

The question is not whether the worker's employer is a common carrier as that term was understood in 1925 — although that may inform the analysis — but rather whether the worker is engaged in the kind of common-carrier work that would have been covered by the FAA exemption. That is the analysis called for by Saxon and the FAA.

Consider, for example, common carriers like FedEx or UPS. Certain of their employees are tasked with delivering packages over state lines at the request of third parties, and thus are themselves plainly engaged in the kind of common-carrier interstate commerce contemplated by the FAA exemption.

Other employees, however, might engage in transportation activities that have nothing to do with the core business of delivering customers' packages. Some employees may be responsible for moving goods for FedEx's or UPS's own benefit — for example, a mechanic who carries tools and replacement parts between hubs in different states for use in repairing damaged delivery trucks.

Unlike their counterparts carrying goods on behalf of the general public, those employees likely would not fall within the FAA exemption, because they are transporting goods for their employers' own use.

This distinction is apparent from Saxon, in which the Supreme Court rejected the plaintiff's contention that railroad employees and seamen included all workers generally employed in those industries. The court observed that "seamen did not include all those employed by companies engaged in maritime shipping," and that the term instead "includes only those who work on board a vessel ... [and] constitute a subset of workers engaged in the maritime shipping industry."[23]

The same rationale applies to other classes of workers: Not everyone employed by a common carrier is a qualified transportation worker, but every qualified transportation worker must be carrying out the business of a common carrier or comparable entity.

Existing precedent and historical background thus indicate that the Section 1 exemption requires a two-step test similar to that employed by the Eleventh Circuit.

First, the court must consider whether the class of workers at issue is either

- Engaged in the work of common carriage, or
- A class of workers uniquely and specially regulated in a manner akin to seamen.

Second, if the answer to either consideration is "yes," the court must ask whether the class of workers is engaged in foreign or interstate commerce within the meaning of the Section 1 exemption — an independent inquiry with its own developing body of law.

This test properly puts the Section 1 exemption into its historical and legislative context. Creative plaintiffs have tried to use the exemption to avoid arbitration for whole categories of workers whose exclusion from arbitration does nothing to advance the text or design of the FAA. As properly recognized at argument in Saxon, history rebuts such a broad interpretation.

Josh Wesneski is counsel and Crystal Weeks is an associate at Weil Gotshal & Manges LLP.

[1] 9 U.S.C. § 1.

[2] Circuit City Stores Inc. v. Adams, 532 U.S. 105, 114-19 (2001).

[3] Id. at 121.

[4] Hill v. Rent-A-Center Inc., 398 F.3d 1286, 1288 (11th Cir. 2005).

[5] Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783, 1788 (2022).

[6] Bissonnette v. LePage Bakeries Park St. LLC, 49 F.4th 655 (2d Cir. 2022).

[7] Id. at 661.

[8] Bissonnette v. LePage Bakeries Park St. LLC, 59 F.4th 594 (2d Cir. 2023) (Mem).

[9] Fraga v. Premium Retail Servs., 61 F.4th 228 (1st Cir. 2023).

[10] Id. at 235.

[11] See Rittmann v. Amazon.com Inc., 971 F.3d 904 (9th Cir. 2020).

[12] Transportation Act of 1920, § 301, 41 Stat. 456.

[13] Id. § 300(1).

[14] Interstate Commerce Act, Pub. L. No. 49-104, § 1, 24 Stat. 379 (1887).

[15] "Common Carrier," Webster's Collegiate Dictionary (1919).

[16] See Pennsylvania Railroad Co. v. Public Utilities Comm'n of Ohio, 298 U.S. 170, 175 (1936).

[17] United States v. Louisiana & Pacific Railway Co., 234 U.S. 1, 23-25 (1914).

[18] United States v. Ohio Oil Co., 234 U.S. 548, 562 (1914).

[19] McDermott Int'l Inc. v. Wilander, 498 U.S. 337, 346 (1991).

[20] Id. at 355.

[21] Robertson v. Baldwin, 165 U.S. 275, 286-88 (1897).

[22] Bissonnette v. LePage Bakeries Park St. LLC, 59 F.4th 594, 598 (2d Cir. 2023).

[23] Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783, 1791 (2022).