Justices Clarify FAA But Leave Behind Important Questions

By **Joshua Wesneski and Crystal Weeks** (May 8, 2024)

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There has been a growing circuit split regarding 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. Does it apply to any transportation workers in interstate commerce, or is it limited to those workers who transport goods on behalf of an employer in the transportation industry, i.e., an employer that transports goods for others, and not just on its own account?

In a Law360 guest article a year ago, we argued that under principles of statutory interpretation and historical context, the Section 1 exemption should be read narrowly to cover only those transportation workers who transport goods on behalf of businesses other than their employer.

Last month, the U.S. Supreme Court decided Bissonnette v. LePage Bakeries Park St. LLC, and unanimously held that the Section 1 exemption is not limited to transportation workers whose employers transport goods on behalf of others.

In reaching this conclusion, the court leaned on its prior precedent, pointing in particular to its 2022 conclusion in Southwest Airlines Co. v. Saxon that the language of Section 1 "focuses on the performance of work rather than the industry of the employer."[1]

The court rejected the U.S. Court of Appeals for the Second Circuit's interpretation in Bissonnette, which focused on the employers' source of revenue,[2] as "without any guide in the text of § 1 or [the court's] precedents."[3] The court held that the historical context of Section 1 did not suggest a different reading, concluding that when Congress has intended to limit a statute to a particular industry, it has said so explicitly.[4]

The court's decision does not dramatically alter the landscape for the Section 1 exemption, given that the Second Circuit was a relative outlier in holding that only workers in the transportation industry could qualify for the exemption.

The decision is somewhat surprising in how quickly it brushes past the statutory language, context and history of Section 1 — which were vigorously debated at oral argument — but such abbreviated analyses sometimes are the product of compromise among the justices, who may not fully agree on all analytical issues in the case.

In any event, the court has firmly shut the door on any argument that the Section 1 exemption categorically does not apply to employees of businesses other than those that transport goods or people for others.

Significantly, though, the court left open two important questions.

First, the court did not resolve whether interstate transportation of goods must be an integral and/or primary component of the worker's responsibilities in order to qualify for the

Section 1 exemption.

The U.S. Court of Appeals for the Seventh Circuit held, in a 2020 decision authored by then-U.S. Circuit Judge Amy Coney Barrett, that the exemption applies only if "the interstate movement of goods is a central part of the class members' job description."[5] That test from Wallace v. Grubhub Holdings Inc. appears to require that the worker's scope of responsibilities be principally — or at least substantially — focused on the interstate transportation of goods, such that the incidental interstate transportation of goods is not sufficient.

In Bissonnette, the district court held that the Section 1 exemption did not apply because the workers had a much broader scope of responsibility than just transportation, but the Supreme Court did not address that conclusion because the Second Circuit did not rely on it. Although there is no circuit split on this point, the precise contours of what it means for the interstate movement of goods to be a "central part" of a class member's job description has and will continue to generate significant debate among the lower courts.

Also expressly left unresolved by the Supreme Court is whether the class of workers in question must actually be engaged in the transportation of goods across state lines, or whether it is sufficient that the class transports goods that are in the flow of interstate commerce more generally.

In the Wallace v. Grubhub decision, the Seventh Circuit adopted the former view, holding that "to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders."[6]

The First and the Ninth Circuits, however, both have applied the Section 1 exemption to "last-mile" drivers, who perform intrastate deliveries of goods that previously were moved in interstate commerce.[7] Complicating the matter is the Supreme Court's decision in Southwest Airlines Co. v. Saxon, in which the court held that cargo loaders for an airline were sufficiently engaged in the transportation of goods across state borders, even though they themselves did not cross state lines in doing so.[8]

These issues are likely to find their way up to the Supreme Court in one way or another in the coming terms. The court recently denied certiorari in Domino's Pizza LLC v. Carmona, a case raising the question of whether Domino's truck drivers who deliver goods from a central supply chain center to various intrastate franchisee locations in California qualify for the exemption.

Given that the court already had Bissonnette before it, it is not surprising the court declined to take another FAA case, but as the issue continues to percolate, more petitions for writs of certiorari are a certainty.

In addition, employers should not overlook other arguments and issues that could be relevant in this context.

For example, courts generally allow an employer to enforce an arbitration agreement under state law, even if the FAA does not apply, although whether a particular arbitration agreement provides for enforcement under state law is a matter of contract interpretation determined on a case-by-case basis. And what kind of work exactly qualifies as "transportation" remains an open question — for example, does a dispatcher who coordinates deliveries qualify for the Section 1 exemption?

There also is emerging discussion regarding whether arbitration agreements between two businesses — as opposed to agreements between a business and an individual — can qualify for the exemption, with two courts of appeals holding that they cannot.[9] These and other arguments remain open to employers who seek to enforce an arbitration agreement.

The landscape around the Section 1 exemption is quickly evolving. Although the exemption has been in the statute since its enactment in 1925, it has only recently become a focal point of litigation. And because the contours of the exemption remain uncertain, employers should not shy away from new and creative arguments regarding the meaning of the exemption.

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[1] Bissonnette, slip op. at 6 (quotation marks omitted).

[2] Bissonnette v. LePage Bakeries Park St. LLC, 49 F.4th 655, 661 (2d Cir. 2022).

[3] Id.

[4] See id. at 7–8.

[5] Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 801 (7th Cir. 2020).

[6] Wallace, 970 F.3d at 802.

[7] See Waithaka v. Amazon.com, Inc., 966 F.3d 10 (1st Cir. 2020); Rittmann v. Amazon, Inc., 971 F.3d 904 (9th Cir. 2020).

[8] 596 U.S. 450, 458–59 (2022).

[9] See Fli-Lo Falcon, LLC v. Amazon.com, Inc., 97 F.4th 1190 (9th Cir. 2024); Amos v. Amazon Logistics, Inc., 74 F.4th 591 (4th Cir. 2023).