Outside Counsel

The FAA Keeps On Trucking: The Second Circuit and 'Bissonnette'

By **Anthony Michael Sabino**

Since its promulgation nearly a century ago, the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the FAA), has embodied the strong federal policy favoring arbitration. See *Viking River Cruises v. Moriana*, 596 U.S. ___ (No. 20-1573) (June 15, 2022). The statutory regime's prime directive is succinct and inarguable: agreements to arbitrate "*shall* be valid, irrevocable, and enforceable." 9 U.S.C. §2 (emphasis supplied). And a wealth of recent U.S. Supreme Court pronouncements have sustained that inexorable command. See, i.e., *Henry Schein v. Archer & White Sales*, 586 U.S. ___ (2019).

Yet even the FAA has an exception; explicitly exempt from its purview are "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. §1 (emphasis supplied). And the meaning of that proviso's closing words has been fraught with controversy.

Very recently, in *Bissonnette v. LePage Bakeries Park St.*, ___ F.4th ___ (No. 20-1681) (2d Cir. May 5, 2022), the U.S. Court of Appeals for the Second Circuit ruled that distributors of sliced bread, of all things, fell outside the statute's ambit. Yet, barely a month later, the Supreme Court in *Southwest Airlines Co. v. Saxon*, 596 U.S. ___ (No. 21-309) (June 6, 2022), decreed that airport baggage handlers come within the bounds of §1's exemption, notwithstanding that they never cross state lines in the performance of their duties.

Given the exquisite counterpoise between these two fresh, yet distinct, proclamations, and the ramifications of each, we shall explore both in this two-part article, commencing, naturally, with the junior of the pairing, *Bissonnette*.

There, the eponymous plaintiff was an independent contractor for the defendants, a family of affiliated bakeries engaged in the rather delicious business of producing that great staple of American pantries, the iconic Wonder Bread, as well as buns, rolls, and snack cakes. The complainants operated under a "distributor agreement," entitling them to vend LePage's products within assigned sectors, all wholly within the state of Connecticut.

Yet Bissonnette and his compatriots had responsibilities far beyond the mere carriage of baked goods. Writing for the panel, Circuit Judge Dennis Jacobs detailed the full panoply of the distributors' obligations. They were required to maximize sales to existing and new customers, stock shelves, rotate products, remove stale items for return to the defendants, acquire, maintain, and insure their own vehicles, advertise, retain their own legal and accounting professionals, and hire their own employees. The plaintiffs were also permitted to sell their distribution rights to another.

> The Second Circuit decreed that the plaintiffs "do not work in the transportation industry, they are not excluded from the FAA," and, therefore, they must return to the arbitral forum.

Notably, Bissonnette and his contemporaries contended that they were unable to capitalize on their contractual right to sell non-competitive products, for reason that their entire work week was occupied with fulfilling the tasks the defendants had assigned them.

In response to the filing of a complaint alleging unpaid wages, overtime, and a variety of federal and state labor law violations, the bakeries invoked the distributor agreement's arbitration clause. The plaintiffs then asserted that they were workers engaged in interstate commerce, and therefore came within the exception for arbitration found within the FAA's opening statute.

Given that §1's first two classifications are self-evident, the Second Circuit declared that the "decisive question" before it was the scope of proviso's final category, commonly synthesized to "transportation workers." See *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). "Since neither Congress nor the Supreme Court has defined 'transportation workers,'" Judge Jacobs announced the panel's intention to "define it by affinity," in other words, the end clause's undeniably close proximity to "seamen" and "railroad employees."

The august tribunal found that "[t]hese examples are telling because they locate the 'transportation worker' in the context of a *transportation industry*" (emphasis in the original). Accordingly, "still vital" was *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), wherein a half-century ago the Second Circuit held that "the FAA exclusion is limited to workers in the transportation industry," and ordered basketball legend Julius "Dr. J." Erving back to arbitrate any disagreement with his employer.

Nor would this panel "limit or delineate" the statute's closing description in light of the notion that, when the FAA was enacted in 1925, Congress did not wish to disturb existing mechanisms for dispute resolution between the specified categories of employers and employees. "[T]he specification of workers in a *transportation industry* is a reliable principle for construing the clause here," remonstrated Judge Jacobs.

Bissonnette then joined itself to the circuits which had reasoned that, since the phrase "engaged in...interstate commerce" is preceded by specific occupations within the transportation industry, the term "transporta- » Page 8

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'Bissonnette'

« Continued from page 4

tion workers" must be delimited to individuals actually moving goods in interstate commerce in the same manner as seamen and railroad employees.

The tribunal was further encouraged by those federal appellate courts which had ruled that workers who only incidentally transport merchandise cannot avail themselves of the exemption. And the fact that these distributors were independent contractors made no difference. See *New Prime v. Oliveira*, 586 U.S. ___ (2019) (the §1 exception applies to independent contractors and employees alike).

To be sure, Jacobs "acknowledge[d] that our approach is not a universal solvent," for reason that none of these cases precisely define "transportation worker." Nevertheless, *Bissonnette* concluded that these precedents all coalesced around the fundamental proposition that an individual comes within the ambit of the statute's exclusion only if her work relates "chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement."

Consistent with this mode of analysis, the Second Circuit proclaimed that the plaintiffs were employed in the bakery industry, as distinct from the transportation industry, notwithstanding that Bissonnette and his colleagues spent an appreciable part of their workdays moving the defendants' wares from place to place. Jacobs found determinative the facts that the distributors' customers were paying for baked goods, not trucking, and, at most, transportation costs were no more than a subcomponent of the total price charged. As summarized by the circuit's former chief judge, "[t]he commerce is in bread, buns, rolls, and snack cakes—not transportation services."

Accordingly, the Second Circuit decreed that the plaintiffs "do not work in the transportation industry, they are not excluded from the FAA," and, therefore, they must return to the arbitral forum. And while the *Bissonnette* majority concluded there, our analysis would be incomplete if we failed to address other, provocative issues, which might be ripe for subsequent adjudication in this or another litigation.

For one, there is the subtle parenthetical wherein this panel expressly declined to rule whether §1's interstate predicate for exclusion was satisfied, notwithstanding the apparently undisputed assertion that the plaintiffs worked wholly within the state of Connecticut. "The issue may not be simple," ventured Circuit Judge Jacobs, alluding to the equally uncontested point that LePage's baked goods moved in interstate commerce before reaching Bissonnette and friends.

Similarly, the appeals court sidestepped a clause averring that the FAA *and* Connecticut law governed the parties' arbitral accord, to the extent the state statutes were "not inconsistent" with the federal regime. First reminding that this circuit "has not ruled on the application of state law to arbitration agreements under the FAA," and then characterizing the paragraph's phrasing as ambiguous, the tribunal demurred, reasoning that "[p]rudence counsels against" relying upon local law as grounds for compelling arbitration in the instant case.

Finally, Jacobs took the uncommon step of also contributing a concurring opinion, addressing the fact that, in the proceedings below, the district court had dismissed the action outright, instead of staying the plaintiffs' case, pending the arbitration. The concurrence found this to be an error of consequence, for reason that "[w]hen a case is stayed *pending* arbitration, the order compelling...arbitration is interlocutory, and therefore *unappealable*" (emphasis supplied), whereas a full ouster encourages the party resisting arbitration to "appeal at once," contrary to "the congressional policy of 'rapid and unobstructed enforcement of arbitration agreements,'" quoting *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1 (1983).

Such eventualities are inapposite to the FAA's §3, which authorizes, upon the application of any party, the stay of the trial of an action until the arbitration has been conducted. See 9 U.S.C. §3. That proviso "is defeated if a dismissal is entered instead of a stay," leading Jacobs to posit that, regardless of whether any party requests such relief, the trial court should, on its own recognizance, enter a stay. Such a procedure is far more consistent with "the FAA's pro-arbitration posture."

For a final observation, we note Circuit Judge Rosemary Pooler's dissent, for while we unequivocally agree with the *Bissonnette* majority, we admire her pithy, final riposte that the daily toil of these distributors transporting foodstuffs "in the stream of interstate commerce places them in the transportation worker exemption's heartland."

This completes our dissertation on *Bissonnette*, and with it Part One of this article. In Part Two, we shall set forth the decisive ruling in *Southwest*, and explore what directions the high court's newest pronouncement may yet lead us.