

# Arbitration Continues After New Prime



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The 2019 decision of the Supreme Court of the United States in *New Prime v Oliveira*,<sup>1</sup> shocked many in the transportation world, holding that the contracts of all truck drivers, including owner-operator independent contractors, are contracts of employment of *transportation workers*. Under an exemption in Section 1 of the Federal Arbitration Act, the provisions of the FAA shall not apply to arbitration clauses in their contracts. Thus, arbitration cannot be compelled against these workers under the FAA.

Transportation and arbitration lawyers have since worked to devise means to get to arbitration even in the face of *New Prime*. Many have succeeded. These are their stories (with apologies to the venerable television series, "Law and Order").

## Starting Close to Home – New Jersey

In 2020 the Supreme Court of New Jersey issued two refreshing decisions that favor arbitration under the New Jersey Arbitration Act<sup>2</sup>, when the FAA may not be available. The first, *Arafa v. Health Express Corp.*,<sup>3</sup> involved local drivers who arguably were engaged in interstate commerce. Their arbitration agreement called for arbitration under the FAA and made no mention of the New Jersey Arbitration Act. The high court held that even if the FAA did not apply because of *New Prime*, the New Jersey Arbitration Act would always apply regardless

of whether it was referred to in the arbitration agreement, and thus the case should proceed to arbitration.<sup>4</sup> No express mention of the NJAA is required to establish a meeting of the minds that it will apply inasmuch as its application is automatic.

Two months later the New Jersey Supreme Court issued another common-sense decision in *Flanzman v. Jenny Craig*,<sup>5</sup> an employment case alleging age discrimination. Marilyn Flanzman was a long-time "weight management consultant" for Jenny Craig, Inc., whose headquarters are in Carlsbad, California. Ms. Flanzman worked about 35 hours per week, but in 2017 her hours were cut in stages, ultimately to just three hours per week. Younger employees were also reduced in hours, but none to less than 22 hours per week. Marilyn complained to superiors but ultimately left her employment and brought suit for age discrimination. When she left, Marilyn was 82 years of age.<sup>6</sup> (You can't make this up.)

Jenny Craig moved to compel arbitration but was rebuffed by the lower courts. The arbitration clause in Marilyn's contract made no selection of an arbitrator or dispute resolution organization, and gave no prescription for appointing an arbitrator. The New Jersey Supreme Court held that the NJAA provides that prescription.<sup>7</sup> Like FAA § 9, Section 11(a) of the State's Act authorizes the Superior Court to appoint an arbitrator, who will have all the powers of an arbitrator "designated in the agreement or appointed pursuant to the agreed method."<sup>8</sup>

These New Jersey Supreme Court decisions give hope that other courts, state and federal, will be finding means to resolve the problems created by *New Prime*, or found elsewhere.

## What is a Transportation Worker?

Section 2 of the Federal Arbitration Act is the engine for arbitrability. It makes "valid, irrevocable, and enforceable," any agreement to submit to arbitration a controversy arising from a contract "involving commerce." The Supreme Court of the United States has ruled that this phrase signals an intent to exercise the full commerce power of the Congress. If a contract affects foreign or interstate commerce, any arbitration provision within it is to be enforced. See, *Allied-Bruce Terminix Cos. v. Dobson*,<sup>9</sup> which held a contract for home extermination services in Alabama sufficiently affected interstate commerce as to be governed by Section 2 of the FAA.

But a residual clause in Section 1, introducing definitions, states that the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." [Emphasis added.] And it is that last phrase that has mystified courts, including the Supreme Court. Is it to be read restrictively? Can an employee's work "involve" interstate commerce (§ 2), and yet the worker not be "engaged" in interstate commerce (§ 1)?

In *Circuit City Stores v. Adams*<sup>10</sup> the Supreme Court ruled that Congress intended the wording "engaged in" of Section 1 to be afforded a narrow construction. The phrase "any other class of workers engaged in" interstate commerce, stated in general words, follows specific wordings, including seamen and railroad workers. It must, therefore, be construed to mean transportation workers. Saint Clair Adams took a job with a national retailer of consumer electronics. He was *involved* in interstate commerce as relating to FAA § 2. But he was not a transportation

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worker engaged in interstate commerce for purposes of the FAA § 1 exemption. And that meant his employment discrimination claim would have to be arbitrated.<sup>11</sup>

Clearly, a truck driver, even if a purported independent contractor, is a transportation worker. Mr. Oliveira was actually engaged in interstate commerce. For that reason, the Court in *New Prime*, applied the § 1 exemption and ruled that his employment misclassification lawsuit could not be referred to arbitration under the FAA.

But other employment situations are not so clearly defined. Is a warehouse worker engaged in interstate commerce, under this Section? Or, a legal professional employed by a motor carrier? Is an intrastate "last mile" delivery driver in the last stage of interstate commerce engaged in interstate commerce even if he does not cross state lines? Does the § 1 exemption apply to transportation business-to-business agreements, or to contracts of employment to transport people, rather than goods?

Following the decision in *Circuit City*, the Courts of Appeals, District Courts, and state courts have attempted to discern whether a given worker is "involved" in interstate commerce, is a "transportation worker," and is "engaged" in foreign or interstate commerce. And where a transportation worker's employment contract claim cannot be arbitrated under the FAA, the courts are asked whether the dispute be arbitrated under an applicable State arbitration act.

### The Courts of Appeals Address the Issues

In *Waithaka v. Amazon.com, Inc.*,<sup>12</sup> the First Circuit held that the FAA § 1 exemption applies to Amazon's "last mile" local delivery drivers. They are engaged in interstate commerce, even though they do not personally cross state lines. The court recognized that "engaged in interstate" commerce is narrower than "involving commerce," but nonetheless ruled the Federal Arbitration Act not applicable to their employment law claims.<sup>13</sup> In so doing, the court relied on precedent in FELA cases to support its decision.

The Third Circuit extended the § 1 exemption to workers who transport passengers in *Singh v. Uber Technologies, Inc.*,<sup>14</sup> "so long as they are engaged in interstate

commerce or in work closely related thereto as to be in practical effect part of it."<sup>15</sup> The court collected and distinguished cases from other circuits declining to apply FAA § 1 to workers deemed not to be engaged in transportation work. It remanded the case to the New Jersey district court for fact finding as to whether Mr. Singh belongs to a class of transportation workers engaged in interstate commerce as the Third Circuit defines that term as used in § 1. Circuit Judge Porter, concurring in the result, would reach it in a simpler manner, because nowhere in the FAA is the term interstate commerce defined to include only the transportation of goods.

The definition of "transportation worker" came into play in the Fifth Circuit, in *Eastus v. ISS Facility Services*,<sup>16</sup> Plaintiff Heidi Eastus was a supervisor of 27 ticketing and gate agents at the George Bush International Airport in Houston, Texas. The agents ticketed passengers, accepted or rejected baggage, issued tags, and placed baggage on the conveyor belts. She brought an employment-discrimination lawsuit and her employer moved to compel arbitration. The district court ordered arbitration, and the Circuit Court affirmed, because Ms. Eastus was not herself involved "in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."<sup>17</sup> "Important to us is that though the passengers moved in interstate commerce, Eastus' role preceded that movement."<sup>18</sup>

The Seventh Circuit took a restrictive approach to the exemption in *Wallace v. Grubhub Holdings, Inc.*,<sup>19</sup> requiring that transportation workers be actually engaged in the movement of goods \*\*\* in the channels of interstate commerce" [Emphasis added.] (quoting *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998)). Grubhub drivers deliver prepared food to diners who place internet orders to restaurants. Their work can involve interstate commerce in the § 2 sense, and yet the drivers may not be "engaged" in interstate commerce under § 1. The district court judgments requiring FAA arbitration were affirmed.

The Ninth Circuit has aligned itself with the First Circuit's *Waithaka* decision, in *Rittman v. Amazon.com, Inc.*<sup>20</sup> In another case of "last mile" delivery drivers, the Ninth Circuit holds that such transportation

workers are "engaged in the movement of goods in interstate commerce, even if they do not cross state lines." These workers complete the delivery of goods that Amazon ships across state lines . . . [and] form a part of the channels of interstate commerce, and are thus engaged in interstate commerce as we understand that term."<sup>21</sup> Also like the *Waithaka* court, the Ninth Circuit relied on FELA cases for this interpretation, even though the FELA has nothing to do with the Federal Arbitration Act.

In a dissenting opinion, Circuit Judge Daniel A. Bress writes he would adhere to the Seventh Circuit's ruling in *Wallace v. Grubhub Holdings, Inc.*, because for § 1 application it requires that the workers must be connected to the act of moving the goods across state or national borders, yielding a rule that is relatively easy to apply. This comports with the Supreme Court's caution to avoid introducing complexity and uncertainty into the construction of § 1.<sup>22</sup>

Returning to the New Jersey case of *Arafa v. Health Express Corp.*, we note that one of the companion cases was ordered to arbitration outright. The other was remanded to the trial court to determine whether the employees in that case were transportation workers engaged in interstate commerce, in which case the New Jersey Arbitration Act would apply in place of the FAA.<sup>23</sup>

### TLA Members Enter the Fray

In October 2019, TLA member Eric Zalud led a team of lawyers to victory in *Byars v. Dart Transit Co.*,<sup>24</sup> securing an order compelling arbitration under the Minnesota Uniform Arbitration Act. The relevant arbitration provision called for application of the Federal Arbitration Act, but under *New Prime*, FAA § 1 exempts plaintiff's employment contracts from the Act. The district court reiterated that "the fact that the [FAA] doesn't apply only means that its enforcement mechanisms aren't available, not that the whole dispute can't be arbitrated by enforcing the contract through another vehicle (like state law)."<sup>25</sup> (internal citations omitted.) The contract's default governing law was that of Minnesota, so the court ordered that State's arbitration act to stand in place of the contractually-chosen FAA.

Equally important, the district court gave its imprimatur to the contract's selected arbitration forum, the Transportation ADR Council, the TLA's ADR arm.

Not to be outdone, TLA member **William "Bill" Pentecost** garnered a victory in the Western District of Pennsylvania, in *R&C Oilfield Services, LLC v. Am. Wind Transp. Grp., LLC*,<sup>26</sup> when he obtained an order compelling arbitration, in a setting that could have had adverse results. Plaintiff R&C, a limited liability company owned by Robert Fleming and his stepson, Wuttichai Timula, in turn owned and operated three trucks to haul wind energy equipment components. It entered into an Independent Contractor Service Agreement with American Wind, to haul wind energy components to American Wind's customers. R&C claimed that American Wind failed to make certain detention payments required under the contract, which had an arbitration clause. R&C brought suit to recover the payments

allegedly due. American Wind moved to dismiss and to compel arbitration.<sup>27</sup>

R&C objected to arbitration, arguing that the arbitration clause is unenforceable because the FAA § 1 exemption applies pursuant to *New Prime v. Oliveira*. It argued that its independent contractor service agreement constitutes a contract of employment concerning interstate commerce. The district court disagreed, holding that the contract is not a contract of employment, but rather a commercial contract between two business entities, and does not fall under the exclusion of FAA § 1. The dispute is arbitrable under the Federal Arbitration Act.<sup>28</sup>

### **Conclusion - There Will Be More Opportunities to Support Arbitration in Transportation**

*New Prime* is just two years old. Since issuance of the decision, it has spawned many disputes over the applicability of FAA

§ 1 and the arbitrability of disputes arising from transportation employment contracts. The cases will continue, and it is important for us to remain vigilant for attacks on the viability of arbitration and the benefits that it brings. Transportation and arbitration lawyers have countered those attacks with a wealth of arguments supporting arbitration. In each case, we face the questions of whether a contract evidences a transaction involving interstate commerce, whether it is a contract of employment of transportation workers engaged in interstate commerce, whether the FAA will apply to require arbitration of a dispute, and if not, whether the party seeking arbitration can resort to a state arbitration act to secure the desired order to compel arbitration.

Thanks to the laudable work of many transportation and arbitration lawyers up to this time, we are all better prepared to protect contracts of arbitration. 

#### **Endnotes**

<sup>1</sup> 586 U.S. \_\_\_, 139 S.Ct. 532 (2019).

<sup>2</sup> N.J.S.A. 2A:23B-1, et seq.

<sup>3</sup> 243 N.J. 147, 233 A.3d 495 (1920).

<sup>4</sup> *Id.* at 174-175, 233 A.3d. at 510-511.

<sup>5</sup> 244 N.J. 119, 236 A.3d 990 (2020).

<sup>6</sup> *Id.* at 124-130.

<sup>7</sup> *Id.* at 133-140

<sup>8</sup> N.J.S.A. 2A:23B-11(a).

<sup>9</sup> 513 U.S. 265, 277 (1995).

<sup>10</sup> 532 U.S. 105 (2001).

<sup>11</sup> *Id.* at 105-122

<sup>12</sup> 966 F.3d 10 (2020).

<sup>13</sup> *Id.* at 26-28.

<sup>14</sup> 939 F.3d 210, 219 (3rd Cir. 2019).

<sup>15</sup> *Id.* at 219-220

<sup>16</sup> 960 F.3d 207 (5th Cir. 2020).

<sup>17</sup> 87 F.3d 745, 748 (5th Cir. 1996) (quoting and reaffirming the pre-*Circuit City* standard in *Rojas v. TK Communs.*, 87 F.3d 745 (5th Cir. 1996)).

<sup>18</sup> 960 F.3d at 211.

<sup>19</sup> 970 F.3d 798 (7th Cir. 2020).

<sup>20</sup> 971 F.3d 904, 915 (9th Cir. 2020).

<sup>21</sup> *Id.* at 917.

<sup>22</sup> *Id.* at 928.

<sup>23</sup> 243 N.J. at 172-73, 233 A.3d at 509.

<sup>24</sup> 414 F.Supp.3d 1082 (M.D. Tenn. 2019).

<sup>25</sup> *Id.* at 1088.

<sup>26</sup> 447 F.Supp.3d 339 (W.D. Pa. 2020).

<sup>27</sup> *Id.* at 343-45

<sup>28</sup> *Id.* at 348.