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SECOND CIRCUIT REVIEW

The 2nd Circuit and the Federal Arbitration Act Transportation Worker Exemption

By Martin Flumenbaum and Brad S. Karp
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In *Bissonnette v. LePage Bakeries*, 49 F.4th 655 (2d Cir. 2022), the U.S. Court of Appeals for the Second Circuit revisited its prior decision finding that truck drivers who deliver baked goods do not fall within the "transportation workers" exemption in the Federal Arbitration Act (FAA). The Second Circuit did so because, in the intervening period, the U.S. Supreme Court had addressed the scope of the "transportation worker" exemption in *Southwest Airlines v. Saxon*, 142 S.Ct. 1783 (2022). In an opinion authored by Senior Circuit Judge Dennis Jacobs and joined by District Court Judge Gujarati, the majority in *Bissonnette* adhered to its prior ruling finding that the truck drivers were not "transportation workers." Circuit Judge Rosemary Pooler dissented, opining that the majority decision conflicted with the Supreme Court's decision in *Saxon*.

In February, the Second Circuit subsequently denied rehearing en banc. *Bissonnette v. LePage Bakeries Park St.*, 59 F.4th 594 (2d Cir. 2023). But Circuit Judge Alison J. Nathan, joined by Circuit Judges Beth Robinson and Myrna Pérez, dissented from the order on the basis

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that the majority's decision was in direct conflict with *Saxon* because it ignored the type of work the truck drivers are engaged in and erroneously focused only on the industry of their employer. Judge Jacobs issued a statement supporting the denial of rehearing en banc, while Judge Pooler issued a statement opposing the denial. Considering the disagreement among members of the Second Circuit regarding the correct application of *Saxon,* as well as the possibility that other circuits may also struggle to reach consensus on the meaning of the decision, the Supreme Court may need to clarify whether the definition of "transportation worker" encompasses employees who perform transportation work but do not work in a transportation industry.

The Federal Arbitration Act Exemption

Section 1 of the FAA exempts from the statute's reach "contracts of employment of seamen, railroad

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employees, or any other class of workers engaged in foreign or interstate commerce." This exemption is construed to cover "transportation workers." See *Circuit City Stores v. Adams,* 532 U.S. 105, 119 (2001). The scope of this FAA exemption is significant because the FAA confers on the federal courts "an expansive obligation to enforce arbitration agreements." *Bissonnette,* 49 F.4th at 657. Those who fall within the exemption cannot be compelled by contract to arbitrate any claims against their employer.

The Second Circuit's First Decision in 'Bissonnette'

The first Second Circuit decision, from May 2022, held that plaintiffs, commercial truck drivers who distributed baked goods, are not "transportation workers" because they are in the bakery industry, not a transportation industry. See *Bissonnette v. LePage Bakeries Park St.*, 33 F.4th 650, 652 (2d Cir.), amended and superseded on reh'g, 49 F.4th 655 (2d Cir. 2022). The Second Circuit defined "transportation industry" as one "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 holding that plaintiffs did not work in a transportation industry, the Second Circuit affirmed the district court, but on different grounds, as the district court had applied an eight-factor test prescribed by the Eighth Circuit.

Circuit Judge Pooler dissented. Understood against the backdrop of prior Second Circuit decisions, she said that plaintiffs are "paradigmatic transportation workers": they work at least forty hours delivering baked goods and "form a vital link in the chain of interstate transportation"; it is immaterial if plaintiffs themselves cross state lines or perform a few customer service and sales tasks beyond their transportation work. She also noted that, although the Supreme Court had yet to define who precisely qualifies as a "transportation worker," there are "clearer lodestars than the majority acknowledges," and pointed to a Seventh Circuit decision summarizing the inquiry as "whether the interstate movement of goods is a central part of the class members' job description," and then "whether the plaintiff is a member of it."

The Intervening Supreme Court Opinion in 'Saxon'

In June 2022, the Supreme Court resolved a circuit split between the Fifth and Seventh circuits in *Southwest Airlines v. Saxon*. Saxon, an employee at Southwest who supervised teams of "ramp agents" who load and unload cargo, had brought a class action against Southwest for failing to pay proper overtime wages. Southwest moved to dismiss the case, seeking to enforce the arbitration provision contained in Saxon's employment agreement.

> Considering the disagreement among members of the Second Circuit regarding the correct application of Saxon, as well as the possibility that other circuits may also struggle to reach consensus on the meaning of the decision, the Supreme Court may need to clarify whether the definition of "transportation worker."

The question before the Supreme Court was whether airline ramp supervisors fell within the "transportation worker" exemption in Section 1 of the FAA. In an 8-0 opinion authored by Justice Clarence Thomas, the Supreme Court held that they fell within the exemption and outlined a two-step textual analysis: first, begin by defining the "class of workers"; then, determine whether that class of workers is "engaged in foreign or interstate commerce."

As to the first step, the Supreme Court noted that the FAA speaks of "workers," not of "employees," thus directing attention to the performance of work by Saxon "based on what she does at Southwest, not what Southwest does generally." Id. It found that ramp supervisors are a "class of workers" who physically load and unload cargo on and off airplanes.

As to the second step, the Supreme Court held that workers who load cargo are "engaged in foreign or interstate commerce" because they are "intimately involved" with commerce and exhibit the "central feature of a transportation worker."

The Second Circuit's Second Decision in 'Bissonnette'

In September 2022, the Second Circuit withdrew its May 2022 opinion in *Bissonnette* and granted rehearing. The majority adhered to its first decision in an amended opinion, noting, "as *Saxon* teaches, not everyone who works in a transportation industry is a transportation worker." Rather, courts must consider "the actual work that the members of the class, as a whole, typically carry out." (quoting *Saxon*, 142 S. Ct. at 1788). The majority held, however, that "the distinctions drawn in *Saxon* [did] not come into play" because "those who work in the bakery industry are not transportation workers, even those who drive a truck from which they sell and deliver breads and cakes." Judge Pooler again dissented, criticizing the majority for continuing to hold, even after *Saxon,* "that the plaintiffs are not transportation workers, even though they spend appreciable parts of their working days moving goods from place to place."

The Second Circuit's Denial of Rehearing En Banc

Following the Second Circuit's reaffirmance of its prior decision, plaintiff sought rehearing en banc. Last month, the Second Circuit denied the petition, with Circuit Judge Nathan authoring a dissent that was joined by Circuit Judges Robinson and Pérez. While acknowledging that en banc review is "quite rare," the dissenting judges concluded that such review was warranted because they considered the majority opinion to be in "direct conflict with the textual reasoning and holding of the Supreme Court's intervening decision in *Saxon*."

According to the dissent, the majority had erred by focusing on whether plaintiffs worked in a "transportation industry" rather than by, as *Saxon* instructs, focusing on "both the work they perform and the work their employer does on an industry-wide basis."

Judge Jacobs, who, as noted above, authored both the first and second majority opinions, filed a statement supporting the denial of rehearing en banc, reiterating that the defining factor of the majority's analysis was that plaintiffs were not working in a transportation industry. He explained that the majority decision did not conflict with *Saxon* because the "self-evident premise of *Saxon* was that an airline is a transportation industry" and thus the Supreme Court had "no cause to consider the status of workers who transport goods in an industry that is not a transportation industry." Judge Pooler, who, as noted above, dissented from both majority opinions, noted that the amended majority opinion declined to engage in *Saxon*'s two-step analysis and again noted that the Seventh Circuit and other courts had recognized that transportation workers need not work for a company in the transportation industry.

The uncertainty recognized by the Second Circuit judges may lead to the Supreme Court weighing in again on the scope of the exemption.

Conclusion

The many Second Circuit *Bissonnette* opinions and other litigation concerning the FAA "transportation worker" exemption suggest that the question of whether employees who perform transportation work in a non-transportation industry can be "transportation workers" exempt from the FAA remains open after *Saxon*. The uncertainty recognized by the Second Circuit judges may lead to the Supreme Court weighing in again on the scope of the exemption.