Supreme Court Arbitration Decision:
New Prime Inc. v Oliveira

By Michael J. Leech © 2019

The Supreme Court's decision in *New Prime Inc. v. Oliveira*, - - -U.S. - - -, 2019 WL 189342 (Jan. 15, 2019) resolves a significant issue concerning the applicability of the Federal Arbitration Act, 9 U.S.C. §1 *et seq*. (FAA) to interstate transportation workers hired under independent contractor agreements. Spoiler alert: they're exempt from the FAA. As significant a victory for opponents of arbitration as the decision may appear to be, it comes with an important caveat. Such employees may still be required to arbitrate their cases under *State* arbitration statutes, which would otherwise be pre-empted by the FAA.

The decision also decided a significant procedural issue under the FAA. It finds that even when the agreement delegates arbitrability questions to the arbitrator for decision, questions about the applicability of the FAA are *not* included in that delegation, but remain issues for the court to resolve. The decision confirms that the power of the general statutory policy favoring arbitration does not prevail in the face of specific statutory language, even if it means that arbitration is not mandated. It also teaches that in construing the FAA, the meaning of terms used in the statute depends on the meaning those terms had when the statute was adopted in 1925.

FAA Exception for Interstate Transportation Workers

When the FAA was adopted in 1925, the Seamen's Union and the American Federation of Labor representatives of initially opposed the statute out of concern that it would mandate arbitration of disputes involving their members. Their concerns were gladly assuaged by the advocates of commercial arbitration who championed the bill. As a result, the statute contains a carve-out providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1.

When the FAA was enacted, the scope of Congressional power to legislate under the Commerce Clause was much narrower that it has since become. There is a sound argument that the carve-out was designed to exclude all employees subject to federal jurisdiction, and indeed, the legislative history supports this argument, Finkin, "Workers' Contracts Under The United States Arbitration Act: An Essay in Historical Clarification," 17 *Berkeley J. of Emplt. & Labor Law* 282 (1996). But the Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 121 (2001) rejected that interpretation, focusing instead on the

specific "engaged in . . . interstate commerce" phraseology of the carve-out. It refused to consider the legislative history, finding that the Congressional intent expressed in the statute's wording was that "workers in general would be covered by the provisions of the FAA, while reserving for itself [Congress] more specific legislation for those engaged in transportation."

Background of the Case

In *New Prime,* the operating agreement between a trucking company and truck driver designated the driver as an independent contractor. The agreement also contained an arbitration clause. The truck driver filed a class action suit, contending that he was in fact not an independent contractor, but an "employee" under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*. He claimed that he and his co-workers had not been paid the minimum wage required by that statute. The company sought to compel arbitration.

The Scope of the Transportation Worker Carve-Out

The truck driver argued that the case was not subject to arbitration under the FAA because he was "engaged in . . . interstate commerce" and thus within the scope of the FAA carve-out. The operating agreement designating him as an independent contractor was a "contract of employment" under the FAA, he argued, even without his having to prove first that the relationship was an "employment" relationship

The Supreme Court agreed. It recognized the distinction between employment relationships and independent contractor relationships. It pointed out, however, that a statute must be interpreted in accordance with the meaning of the words it uses at the time the statute was adopted. "At that time, a 'contract of employment' usually meant nothing more than an agreement to perform work." 2019 WL 189342 at *6. The conclusion was supported by usage in contemporary legal dictionaries, as well as in statutes and published decisions of state and federal courts.

The Court rejected the trucking company's argument that by 1925 the word "employee" had begun to replace the archaic "servant" (as in "master and servant"). Unimpressed by the etymological debate over use of the word "employee," the Court found that the expression "contract of employment" still had a meaning extending to independent contractors at the time the FAA was adopted. The carve-out's use of the term "worker" to refer to its subject reinforced the Court' conclusion. Nor could the statute's general policy favoring arbitration overcome the limitations imposed by the express provisions of the statute.

Arbitrability Questions versus Statutory Questions

Before the Court could even reach the question of how the carve-out should be construed, though, it had to wade into the complicated question of what issues were for the District Court to decide and which ones had to be left to an arbitrator. The arbitration clause in the operating agreement adopted the rules of the American Arbitration Association. Those rules provide that disputes over "gateway," or "arbitrability" issues,

which are normally a question for the court to decide under the FAA, were to be decided instead by the arbitrator. Such "delegation" provisions have been found to be enforceable as their a kind of mini-arbitration agreement, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

In the absence of such a delegation, where a defendant contends that the dispute is subject to arbitration, the court is called on under 9 U.S.C. §3 to hold a hearing and decide whether "the issue involved in such suit or proceeding is referable to arbitration under [an arbitration] agreement." If it so finds, it is required by the statute to stay the action and order the parties to arbitration. Many different questions can be presented in such a hearing, including:

- whether the mutual assent and consideration required to establish a contract are present; or
- whether there has been a waiver of arbitration, or
- whether there is a state statutory bar to enforcement of the contract, and if so, whether the state statute is valid under the FAA; or
- whether an unconscionability defense is applicable.

Most important, and common, are disputes over the meaning of the arbitration clause and whether the dispute in question comes within its terms. All of these issues may be for the arbitrator to decide under a delegation clause.

The trucking company argued that the scope of the carve-out under the FAA was another such issue. It sought to have that question submitted to arbitration under the operating agreement's arbitration clause. The Court disagreed. It noted that the carve-out provision begins with the directive that "nothing herein contained shall apply." If the agreement between the parties does constitute a "contract of employment" covered by the carve-out, then the Act itself could not apply and the court would lack the power to send any part of the dispute to an arbitrator:

> [A] court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.
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> 2019 WL 189342 at *4

Since the delegation clause is itself a form of arbitration agreement, it too was subject to the limitations of the FAA. And the FAA does not authorize a court to send a case to arbitration where the carve-out applies. Accordingly, the court is required before anything else to consider and decide about the carve-out for itself. Finding the carve-out applicable meant that the court could not send the case to an arbitrator to decide anything, even this preliminary issue.

Surprise Ending:
State Law Mandates Arbitration

The FAA is not the only statute governing and mandating arbitration. The Pennsylvania Uniform Arbitration Act, which is very similar to the FAA,

also authorizes courts to order parties to arbitration where they have a valid arbitration agreement, 42 Pa.Stat. §§7301, 7302, 7304, 7341, 7342. The statute has exceptions for government contracts and collective bargaining agreements, but not for interstate transportation workers.

The question of whether or not a state arbitration act can be applied where the FAA is inapplicable because of the transportation worker carve-out was decided in *Palcko v. Airborne Express, Inc*., 372 F.3d 588, 596 (3rd Cir. 2004). There, the court found that state arbitration law did not contravene any provision of the FAA, nor did it interfere with the goals of the FAA. Thus, the court concluded, the effect of the carve-out was "merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted." The result was that the state arbitration law, in that case under Washington law, was applicable and required that the case be sent to arbitration.

Thus, the truck driver's Supreme Court win in *New Prime* may, in the end, prove to be a pyrrhic victory.