2000

Does the Federal Arbitration Act Apply to Contracts of Employment?

Ralph C. Anzivino
Marquette University Law School, ralph.anzivino@marquette.edu

Publication Information
Ralph C. Anzivino, Does the Federal Arbitration Act Apply to Contracts of Employment?, 2000-01 Term Preview U.S. Sup. Ct. Cas. 76 (2000).

Case at a Glance

In 1925, Congress passed the Federal Arbitration Act to expand the use of arbitration to resolve disputes that arise from contracts or transactions in interstate commerce. Employment disputes are a major source of litigation. In this case, the Supreme Court will decide whether the Exclusion Clause in section 1 of the Federal Arbitration Act excludes the employment contracts of all workers in interstate commerce from arbitration, or whether it excludes only the contracts of workers who transport goods in interstate commerce.

Does the Federal Arbitration Act Apply to Contracts of Employment?

by Ralph C. Anzivino

PREVIEW of United States Supreme Court Cases, pages 76–81.

Ralph C. Anzivino is a professor of law at Marquette University Law School in Milwaukee, Wis.; RCAnzivino@aol.com or (414) 288-7094.

ISSUE

Does the Exclusion Clause in section 1 of the Federal Arbitration Act exclude the employment contracts of all workers in interstate commerce from arbitration, or only the contracts of workers who transport goods in interstate commerce?

FACTS

Circuit City is a national retailer of brand-name consumer electronics and related products. In March 1995, the company implemented an Associate Issue Resolution Program. This program contained a number of components, one of which was a program of final and binding arbitration of all employment-related disputes pursuant to the Federal Arbitration Act (FAA). Those individuals who were employed at the time the program was introduced were given the opportunity to "opt out" of the arbitration component of the program. After implementation of the program, all individuals seeking employment with Circuit City, as part of the job application process, were presented with the Circuit City Dispute Resolution Agreement (DRA). Any individual who executed the DRA agreed to resolve "any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator." Only those individuals who signed the DRA and agreed to be bound by its terms had their application for employment considered by Circuit City. Any prospective applicant who executed the DRA but then changed his mind could withdraw from the agreement to arbitrate by notifying Circuit City that he was withdrawing his application for employment. The DRA provided that "neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me." The obligation to arbitrate existed independently of the

CIRCUIT CITY STORES, INC. V. ADAMS
DOCKET NO. 99-1379

ARGUMENT DATE:
NOVEMBER 6, 2000
FROM: THE NINTH CIRCUIT

employment relationship and applied before, during, and after the employment relationship. The DRA was a separate agreement between the prospective applicant and Circuit City.

Saint Clair Adams (respondent) entered into an agreement with Circuit City to arbitrate any and all employment-related legal claims on Oct. 23, 1995, when he executed the DRA and submitted it with his application for employment. Circuit City signed the DRA. In November 1995, Adams was hired by Circuit City as a sales counselor in Circuit City's Santa Rosa store. Adams was employed by Circuit City in that capacity until he resigned his employment on Nov. 30, 1996.

On Nov. 26, 1997, Adams sued Circuit City in a California Superior Court for a variety of employment-related claims—employment discrimination, state common law wrongful discharge, and intentional infliction of emotional distress. On Dec. 5, 1997, Adams also sought arbitration, submitting to Circuit City an Arbitration Request Form that described the dispute he wished to have decided by an arbitrator in the same terms as the cause of action contained in his lawsuit. On Jan. 21, 1998, Adams filed an amended complaint in his court case incorporating a request for declaratory relief with respect to his rights and obligations under the DRA. Specifically, Adams sought a court order that the DRA was not enforceable against him on various legal grounds. In response, Circuit City filed a Petition to Stay State Court Action and to Compel Arbitration in the United States District Court for the Northern District of California. On May 1, 1998, the District Court granted the petition and entered an Order Staying State Court Action and Compelling Arbitration (unpublished opinion). Respondent appealed the District Court's Order to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that the Federal Arbitration Act was not applicable to this case. 194 F.3d 1070 (9th Cir. 1999). The court began its analysis by referencing its recent decision in *Craft v. Campbell Soup Co.,* 177 F.3d 1083 (9th Cir. 1999), in which the court held that the exclusion found in section 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign and interstate commerce" must be read to exclude from the coverage of the FAA all contracts of employment. The Ninth Circuit also reasoned that because the DRA was a condition precedent to Adams's employment, the DRA was part of the employment contract. Therefore, the Ninth Circuit reversed the district court's order compelling arbitration and remanded the case for dismissal because of a lack of federal authority. Circuit City filed a timely petition for a writ of certiorari. On May 22, 2000, the Supreme Court granted Circuit City's petition. *Circuit City Stores, Inc. v. Adams,* 120 S.Ct. 2004.

The Ninth Circuit is the only circuit to support a broad interpretation of the exclusion clause that would exclude all employment disputes from FAA coverage. Eleven other circuits have narrowly construed the exclusion. *See Dickstein v. DuPont,* 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees ... involved in, or closely related to, the actual movement of goods in interstate commerce"); *Erving v. VA. Squires Basketball Club,* 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive interpretation to the exclusionary language of [FAA] Section 1"); *Great W. Mortgage Corp. v. Peacock,* 110 F.3d 222, 227 (3d Cir.) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels of commerce itself"), *cert. denied,* 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.,* 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have informally reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this section 1 exemption"); *Rojas v. TK Communications, Inc.,* 87 F.3d 745, 748 (5th Cir. 1996) ("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading"); *Asplundh Tree Expert Co. v. Bates,* 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are"); *Matthews v. Rollins Hudig Hall Co.,* 72 F.3d 50, 53 n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers ..."); *Patterson v. Tenet Healthcare, Inc.,*113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce"); *McWilliams v. Logicon, Inc.,* 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of

(Continued on Page 78)

employees actually engaged in the channels of interstate commerce"); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the court) (narrow construction of FAA § 1 exclusion "accords with the statute's text and history"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA excludes from the FAA only the employment contracts of workers engaged in the transportation of goods in commerce").

Case Analysis

The Federal Arbitration Act was originally enacted in 1925 and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by the American courts, and to place arbitration agreements upon the same footing as other contracts.

Section 2 of the FAA is the scope provision. It provides in relevant part: "A written provision in any maritime transaction or a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

On the other hand, section 1 of the FAA, which contains the statutory definitions, states 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 (emphasis added). In other words, section 2 validates arbitration clauses in contracts "involving commerce," and section 1 excludes from FAA coverage contracts of seamen, railroad employees, or any other class of workers "engaged in" foreign or interstate commerce. The exclusionary language clearly eliminates from the potential reach of the FAA all contracts of employment of seamen as a class and all contracts of railroad employees as a class. The issue in dispute is whether the final phrase of the section 1 exclusion further eliminates from the potential reach of the FAA the employment contracts of all other workers in interstate commerce, or only the contracts of the limited subclass of workers who transport goods in interstate commerce.

Petitioner believes that the narrow construction of section 1 is the correct construction. Petitioner argues it is a fundamental proposition that in a federal statute regulating interstate commerce, any words modifying the term "commerce" are critical to interpreting the precise scope of the statute. Sections 1 and 2 of the FAA each use a different modifier. Section 1 excludes only employment contracts of workers "engaged in" interstate commerce. Section 2 includes within the coverage of the FAA all transactions "involving commerce." The modifiers are obviously different. Petitioner believes the modifier in section 2's scope section ("involving" commerce) is broader than the modifier in section 1's exclusion clause ("engaged in" commerce). Petitioner asserts that in contrast to section 2's broad modifier, the section 1 qualifier "engaged in" commerce, is ordinarily understood to signify some active and direct involvement in the conduct of interstate commerce. In common usage, a worker is "engaged in" interstate commerce when he is actively employed in the actual transporting of interstate commerce, and not simply when his job might have some attenuated or passive connection to interstate commerce. In other words, the coverage of the FAA should be broadly interpreted under section 2, and the exclusion of coverage should be narrowly construed under section 1. This "broad inclusion/narrow exclusion" approach is completely consistent with the federal policy favoring arbitration agreements advanced by the FAA.

Petitioner asserts the rule of *ejusdem generis* supports a narrow construction of section 1. The rule of *ejusdem generis* provides that in construing a statute, the meaning of general terms that follow specific ones should be limited to "matters similar to those specified." The section 1 reference to contracts of workers "engaged in" interstate commerce does not stand alone. It follows immediately upon the identification of two other specific types of employment contracts excluded from coverage—contracts of seamen and contracts of railroad employees. Seamen and railroad employees are alike in that they are both a class of workers "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." Taking a cue from the specific mention of those two classes of workers, the remaining general category surely refers to those "other workers" who also are actually engaged in the movement of goods in interstate commerce.

Petitioner asserts that the Ninth Circuit's broad construction of the exclusionary clause ignores the well-established rule of statutory construction that a court should avoid a construction that renders words in a statute surplusage. A broad construction excludes all employment contracts. It is argued

that such a broad construction renders useless the statutory language in section 1 of "seamen" and "railroad employees." The only way to give meaning to all these terms—seamen, railroad employees, and other workers engaged in interstate commerce—is by reference to what all these have in common—direct involvement in the interstate transportation of goods.

Despite respondent's assertions to the contrary, petitioner believes that the legislative history to section 1's exclusionary clause is scant and murky. The bill that became the FAA was drafted by the American Bar Association's Committee on Commerce, Trade and Commercial Law. The original draft of the bill did not contain the exclusion that later became a part of section 1, and very little official discussion of the origin of the exclusion exists. The best indication of the impetus for the exclusion appears in a report of the ABA Committee that indicates that the exclusionary clause was added to overcome the specific objection of the seamen's union. The legislative history does not explain the expansion of the exclusionary clause to include railroad workers or other workers engaged in interstate commerce. Therefore, petitioner concludes that the legislative history is not instructive, nor supportive of a broad interpretation of the exclusionary clause. In fact, petitioner argues that the scant legislative history would support a narrow construction of section 1 because the genesis of the exclusion was in response to a specific objection from a narrow class of workers involved in the transportation of goods in interstate commerce.

Petitioner contends that a narrow construction of the exclusionary clause more aptly effectuates the underlying purpose of the FAA. By enacting the FAA, Congress articulated a liberal policy in favor of arbitration. This federal policy in favor of arbitration should guide the Court's resolution of interpretive issues under the FAA. By reading the FAA section 1 exclusion narrowly, the Court would be promoting a broad application of the FAA. Conversely, an expansive reading of the section 1 exclusion would remove from the scope of the FAA nearly all arbitration agreements between employers and employees. The net effect would be a dramatic reduction in the coverage of the FAA. Clearly, a narrow construction of the exclusionary clause is more consistent with congressional intent to favor arbitration in employer-employee disputes.

Finally, petitioner asserts that the Ninth Circuit's broad construction of the exclusionary clause cannot be reconciled with 50 years of contrary jurisprudence. In 1953, the Third Circuit was the first circuit court to analyze section 1's exclusionary clause. *Tenney Engineering v. United Elec. & Mach. Workers of America,* 207 F.2d 450 (3rd Cir. 1953). The Third Circuit held that Congress intended to limit the FAA section 1 exclusion to the two groups of transportation workers as to which special arbitration legislation already existed, and they rounded out the exclusionary clause by excluding all other similar classes of workers. Since 1953, 10 other circuit courts have reached the same conclusion that the exclusionary clause must be narrowly construed. The Ninth Circuit stands alone in its broad construction of the exclusionary clause and is contrary to the great weight of 50 years of well-established authority.

Respondent believes the legislative history is very useful in interpreting the scope of the exclusionary clause. Respondent asserts that a review of the legislative history clearly establishes that the FAA was created to be a "commercial arbitration act," not an "industrial arbitration act." The sponsors of the FAA (ABA Committee on Commerce, Trade and Commercial Law) and the members of Congress who spoke and supported its passage stated that it was a commercial arbitration bill intended to deal with disputes arising out of commercial transactions. The legislative history does not contain a single reference suggesting that the FAA was intended to cover employment disputes. In fact, respondent indicates that labor did object to the inclusion of workers' contracts in the FAA, which precipitated the insertion of the section 1 exclusionary clause. Against that background, respondent concludes that the only rational reading of section 1 is that Congress intended to exclude all contracts of employment from coverage.

Respondent also asserts that a broad construction of the exclusionary clause was specifically intended by Congress's use of the term "engaged in commerce." The statutory language identifies the class of excluded workers as those "engaged in commerce." In its early-twentieth century commerce clause cases, the Supreme Court used the phrase "persons engaged in commerce" to describe the entire class of persons constitutionally subject to the commerce power. *See Second Employers Liability Cases (Mondou v. New York, N.H.R. Co.),* 223 U.S. (1912). Against that jurisprudential background, in 1925 Congress was accustomed to invoking its full commerce power through the statutory term "engaged in commerce." For example, the Federal Employers' Liability Act, the Safety Appliance Act, and several provisions of the Clayton Act used the phrase "engaged in" to identify broad classes of persons and companies cov-

(Continued on Page 80)

ered by each statute. The FAA's section 1 exclusion is a contemporary of those statutes. In 1925, the term "engaged in" commerce was understood to state the full reach of the commerce power with regard to workers. Therefore, Congress's use of that phrase in section 1 evidences its intent to exclude all employment contracts that it could constitutionally reach. A broad reading of the exclusionary clause is thus consistent with Congress's intent.

From a historical context, respondent argues that a narrow reading of section 1 cannot be squared with a broad reading of section 2. First, respondent notes that the phrase "involving commerce" in section 2 was not a commerce clause term of art in 1925, much less a term with an established broad meaning. The phrase "involving commerce" had never been used in a commerce clause provision prior to 1925 and has never been used since. Also, the term "involving commerce" is not defined in the FAA to have any special meaning. In the common parlance of 1925, "involving" and "engaged" were used as synonyms. Dictionaries of the period defined "engaged" as "involved" and defined "engage" as to "involve oneself" or to "become involved." Understood in this historical context, Congress thus used the term "involving commerce" to express the same commerce power reach as the term of art "engaged in commerce." Therefore, Sections 1 and 2 should both be accorded a broad construction, not a broad/narrow construction as suggested by petitioner.

Respondent also contends that petitioner's construction—to broadly construe section 2 and narrowly construe section 1—is a paradox. Petitioner's construction of the section 1 exclusion as being limited only to transportation-of-goods-in-commerce workers cannot be supported. First, respondent notes that there is nothing in the legislative record or in logic that would explain *why* Congress would have singled out only the employment contracts of transportation-of-goods-in-commerce workers to be excluded. Second, under petitioner's reading of section 1, those employment contracts *most* involving interstate commerce, and thus most assuredly within the commerce clause power in 1925 (*viz.*, contracts of employees engaged in interstate transportation), are *excluded* from FAA coverage while those employment contracts having a *less* direct and less certain connection to interstate commerce would come *within* the act's affirmative coverage. Limiting coverage to those contracts *least* evidently within the reach of the federal constitutional authority justifying federal regulation is so anomalous that the Supreme Court should not attribute such an intent to Congress without the clearest evidence.

Respondent argues that petitioner's *ejusdem generis* argument is refuted by the express language of the exclusionary clause. The exclusionary clause references "any other class of workers." This language is a term of breadth, not a term of limitation. The respondent asserts that when Congress uses the phrase "any other" to describe a residual category, it does so to indicate that the category stands on its own, unlimited by reference to prior statutory terms. *See Harrison v. PPG Industries, Inc.,* 446 U.S. 578 (1980). Therefore, in the absence of legislative history to the contrary, the phrase "any other" in the exclusionary clause must be construed to mean broadly what it says—"any other." Any attempt to limit the breadth of the specific language by an *ejusdem generis* argument directly contradicts the express statutory language.

Finally, the respondent contends that this case is as much about federalism and the states' power to regulate workers' contracts as it is about the enforceability of employment arbitration provisions. Regulation of the individual employer-employee relationship has long been the province of the states. Generally, Congress is not presumed to have intended to displace state law, absent a clear statement to the contrary. Similarly, the Supreme Court starts with the assumption that the historic police power of the states is not to be superseded absent a clear mandate from Congress. A statutory construction that Congress preserved the states' authority to regulate individual employment contracts will allow the states to decide issues of enforceability and procedure under their own laws pursuant to their own policies. An expansive interpretation of the exclusionary clause will preserve the states' traditional role in resolving employer-employee disputes.

Numerous *amicus* briefs were filed in this case. Those briefs in support of the petitioner offer a number of policy reasons to support a narrow construction of the exclusionary clause. First, they argue that the use of arbitration has become firmly entrenched in our country's workplace culture and should be encouraged. Second, multistate employers need uniform policies that would be available under the FAA. State arbitration laws are not uniform and vary dramatically from state to state. Third, a broad construction of the exclusionary clause would add thousands of employer-employee disputes to an already clogged and overburdened court system. The applicable axiom is "Justice delayed is Justice denied." And finally, it is in the best interest of employees,

employers, and society to resolve employer-employee disputes in an expeditious, fair, and cost-effective process. It has been estimated that arbitration results in a 50 percent cost saving for the parties and that the average arbitration involves 8.6 months as compared to 3–5 years in court.

Similarly, the *amicus* briefs in support of the respondent offer a number of policy reasons to support a broad construction of section 1's exclusion. They argue that employers use arbitration to cause employees to forgo substantive rights. Where the equality of bargaining power in the employer-employee relationship is totally lacking, employers often include unfair or oppressive provisions in the arbitration agreement that penalize the employee. The employee may first be required to litigate the unfair or oppressive arbitration clause and then address the merits of the employee's claim. The net effect is to place the employee at a considerable disadvantage in obtaining a fair resolution to his claim. Also, they assert that the states should not be divested of their traditional role as the principal protector of the rights of workers. Absent a clear congressional intent to preempt, one established principle of federalism is to disfavor the displacement of traditional areas of state law, such as employment.

Significance

The expanding use of arbitration to resolve conflicts has had a dramatic impact on dispute resolution in the United States. Arbitration is understood to be a much faster and less expensive process for resolving disputes than litigation in the courts. It has been estimated that on average arbitration is one-half the cost and takes one-quarter the time to proceed through trial. In addition, another significant advantage of arbitration is that appeals are relatively rare.

The employer-employee relationship is one of the cornerstones of our country. Numerous disputes arise in the employment relationship. A few examples are wrongful discharge, claims of discrimination, and issues of contract interpretation. Many employers have selected arbitration under the FAA as the preferred mechanism to resolve these workplace disputes. Section 1 of the FAA, however, contains an exclusion clause that excludes certain specified contracts from FAA coverage. A broad interpretation of the clause will exclude disputes arising from all employment contracts from arbitration under the FAA. Claimants/employees would, therefore, be free to pursue their employment-related claims in state court. A narrow interpretation of the clause would exclude only a small class of workers in interstate commerce from coverage under the FAA. The vast majority of employer-employee disputes would continue to be eligible for arbitration under the FAA. The dynamics of dispute resolution between employers and employees may be vastly altered by the Supreme Court's decision.

Attorneys for the Parties

For Circuit City Stores, Inc. (David E. Nagle (804) 343-4077)

For Saint Clair Adams (Michael Rubin (415) 421-7151)

Amicus Briefs (as of Oct. 6)

In Support of Circuit City Stores, Inc.

The Council for Employment Law Equity (Garry G. Mathiason (202) 842-3400)

Texas Employment Law Council (W. Carl Jordan (713) 758-2258)

Chamber of Commerce of the United States of America (Lawrence Z. Lorber (202) 416-6800)

Employers Group (Daniel H. Bromberg (202) 879-3939)

In Support of Saint Clair Adams

The National Academy of Arbitrators (David E. Feller (510) 642-0629)

American Association of Retired Persons (Thomas W. Osborn (202) 434-2060)

The Association of Trial Lawyers of America (Jeffrey Robert White (202) 965-3500)

Brief of Law Professors (David S. Schwartz (608) 262-2240)

Brief of Division of Labor Standards Enforcement, Department of Industrial Relations, State of California (William A. Reich (805) 654-4647)

Lawyers' Committee for Civil Rights Under Law, NAACP Legal Defense and Educational Fund, Inc., National Association for the Advancement of Colored People, Mexican American Legal Defense and Educational Fund, National Partnership for Women & Families, National Women's Law Center, and New Legal Defense and Education Fund (Paul W. Mollica (312) 263-0272)

United States (Seth P. Waxman, Solicitor General, U.S. Department of Justice (202) 514-2217)