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1st Circ. Says Amazon Delivery Drivers Don't Have To Arbitrate

By **Linda Chiem**

Law360 (July 17, 2020, 8:32 PM EDT) -- The First Circuit on Friday handed a big win to Amazon delivery drivers, saying they are transportation workers engaged in interstate commerce even if they only make deliveries in one state, clearing a path for their legal disputes to play out in court instead of private arbitration.

A three-judge panel of the appeals court affirmed U.S. District Judge Timothy S. Hillman's **August 2019 decision** rejecting a bid by Amazon.com Inc. and Amazon Logistics Inc. to force Bernard Waithaka to arbitrate his proposed class claims seeking unpaid wages and unreimbursed expenses.

Even as a so-called last-mile driver who made purely local or intrastate deliveries in Massachusetts as part of the Amazon Flex program, Waithaka fit the definition of a transportation worker engaged in interstate commerce who is exempt from the Federal Arbitration Act, according to the panel.

Section 1 of the FAA exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." But the statute doesn't define the phrase "engaged in foreign or interstate commerce" or identify which "class[es] of workers" count toward the exemption.

The First Circuit refused to embrace Amazon's **narrow interpretation** of the exemption, saying it wasn't meant to exclude entire categories of workers in the transportation industry just because those workers might not have physically crossed state lines.

"In sum, we reject Amazon's cramped construction of Section 1's exemption for transportation workers," Senior Circuit Judge Kermit V. Lipez wrote for the panel.

"The original meaning of the phrase 'engaged in interstate commerce,' revealed by the [Federal Employers' Liability Act] precedents, and the text, structure, and purpose of the FAA all point to the same conclusion: Waithaka and other last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers 'engaged in interstate commerce,' regardless of whether the workers themselves physically cross state lines," Judge Lipez said in the ruling. "By virtue of their work transporting goods or people 'within the flow of interstate commerce,' Waithaka and other AmFlex workers are 'a class of workers engaged in interstate commerce.'"

Using the U.S. Supreme Court's 2001 decision in Circuit City Stores Inc. v. Adams as guideposts, the First Circuit's 55-page opinion dove into what it meant to be "engaged in" interstate commerce when the FAA was enacted in 1925. The panel analyzed numerous Federal Employers' Liability Act cases going back a century, focused on the ones involving railroad workers who were themselves transporting goods that were moving between states, and determined that "even if the workers were responsible only for an intrastate leg of that interstate journey [they] were understood to be 'engaged in interstate commerce' in 1925," according to the decision.

Massachusetts driver Waithaka kicked off his proposed wage and hour class action in 2017 alleging Seattle-based Amazon misclassified delivery drivers as independent contractors so the company would not have to supply vehicles or cover expenses necessary for drivers to perform their jobs, such as insurance, gas, phone and data charges.

Amazon countered that as an independent contractor, Waithaka agreed to arbitrate any claims against the company, and his contract is governed by Washington law.

With the FAA rendered inapplicable to the dispute, the First Circuit had to smooth out whether Amazon's arbitration and class waiver provisions could still be enforced under Washington law or Massachusetts law.

But even if Washington law would allow the class waiver provision, Massachusetts law would override the

contractual choice of Washington law as being "contrary to the commonwealth's fundamental public policy," which is more favorable to employees and consumers bringing classwide claims, according to the First Circuit.

"Under Massachusetts law, the class waiver provisions would be invalid. Because the agreement stipulates that the class waiver provisions cannot be severed from the rest of the dispute resolution section, the arbitration provision would be similarly unenforceable," the panel held.

Waithaka's attorney, Shannon Liss-Riordan of Lichten & Liss-Riordan PC — who is also representing plaintiffs in a similar case known as Rittmann v. Amazon that's **pending in the Ninth Circuit** — told Law360 on Friday that this is a "fantastic decision and also could have huge repercussions on a number of other cases that we're actively litigating, notably including Uber, Lyft, GrubHub."

"The court agreed wholeheartedly with our arguments that workers don't need to cross state lines themselves in order to be engaged in interstate commerce and that the transportation worker exemption still applies even to drivers who are on the last leg of a journey. So that was significant," she said. "And the court said that just because arbitration agreements are supposed to be analyzed with a pro-arbitration bent, that doesn't mean the courts can ignore congressional language in the statute at the time it was enacted."

Counsel and press representatives for Amazon did not immediately respond to requests for comment Friday.

The First Circuit panel had signaled during **oral arguments** in February that Amazon's size, scope and global reach factored heavily into whether its local delivery drivers are transportation workers **exempt from arbitration**.

Amazon had staunchly argued that the activities of the workers themselves are the crux of the exemption, without consideration of the geographic footprint and nature of the business for which they work.

But the First Circuit said Friday that "the nature of the business for which a class of workers perform their activities must inform that assessment."

"After all, workers' activities are not pursued for their own sake," the panel said.

Amazon had insisted that even if the FAA didn't apply, then state law required that its arbitration agreement be enforced. The company slammed the district court's reliance on the Massachusetts Supreme Judicial Court's 2009 decision in Feeney v. Dell Inc., which determined that Massachusetts public policy opposed enforcement of arbitration agreements with class action waivers because of the commonwealth's "strong public policy in favor of the aggregation of small consumer protection claims."

After Feeney was decided, the U.S. Supreme Court held in 2011's AT&T Mobility LLC v. Concepcion that the FAA preempted California's rule that class waivers in arbitration agreements were unconscionable. The Massachusetts court then clarified in 2013's Machado v. System4 LLC that Feeney "survives Concepcion to the extent that a consumer plaintiff can demonstrate that he or she effectively cannot pursue a claim against a defendant in individual arbitration according to the terms of the arbitration agreement."

U.S. Circuit Judges Jeffrey R. Howard, Kermit V. Lipez and O. Rogeriee Thompson sat on the panel for the First Circuit.

Waithaka is represented by Harold L. Lichten, Shannon E. Liss-Riordan and Adelaide H. Pagano of Lichten & Liss-Riordan PC.

Amazon is represented by David B. Salmons, Michael E. Kenneally, James P. Walsh Jr. and Noah J. Kaufman of Morgan Lewis & Bockius LLP.

The appellate case is Bernard Waithaka v. Amazon.com Inc. et al., case number 19-1848, in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Chris Villani. Editing by Janice Carter Brown.