

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of December, two thousand twenty-four.

Present:

Dennis Jacobs,
Maria Araújo Kahn,
Circuit Judges,
Diane Gujarati,
*District Judge.**

Neal Bissonnette, on behalf of himself and all others similarly situated, and
Tyler Wojnarowski, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

v.

ORDER
20-1681

LePage Bakeries Park St., LLC, C.K. Sales Co., LLC, and
Flowers Foods, Inc.,

Defendants-Appellees,

On April 12, 2024, the Supreme Court issued an opinion holding that “[a] transportation worker need not work in the transportation industry to fall within the exemption from the [Federal Arbitration Act (“FAA”)] provided by § 1 of the Act,” and vacated this Court’s prior holding to the contrary. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 256 (2024). The Supreme Court then remanded for further proceedings consistent with its opinion. *Id.* The Supreme Court, however, “express[ed] no opinion on any alternative grounds in favor of arbitration raised below, including [(1)] that petitioners are not transportation workers and [(2)] that petitioners are not ‘engaged in foreign or interstate commerce’ within the meaning of §1

* Judge Diane Gujarati, of the United States District Court for the Eastern District of New York, sitting by designation.

because they deliver baked goods only in Connecticut.” *Id.*; see also *id.* at 252 n.2 (stating that “[w]e do not decide” these two issues).

Those alternative grounds are direct references to the two-pronged test set out by the Supreme Court in *Southwest Airlines Co. v. Saxon* to determine whether workers fall within the FAA § 1 exemption. See 596 U.S. 450 (2022). First, a court must define the relevant “class of workers” to which the plaintiffs belong. See *id.* at 455. Specifically, a court must determine if plaintiffs’ responsibilities are those of transportation workers. Second, a court must answer whether the defined class of workers is engaged in foreign or interstate commerce. See *id.*

After receiving the Supreme Court’s judgment on May 14, 2024, this Court ordered supplemental briefing addressing “the impact of the Supreme Court’s decision and any remaining issues, including the two issues the Court explicitly preserved.” Order, *Bissonnette v. LePage Bakeries Park St., LLC*, No. 20-1681 (2d Cir.), ECF No. 219. This Court also requested that the parties brief “the propriety of remand to the district court.” *Id.* We then heard oral argument on November 13, 2024. See *id.* at ECF No. 264. This Court now VACATES the district court’s order dismissing the case in favor of arbitration and REMANDS to the district court for further proceedings consistent with this order.

As to the first *Saxon* prong, we note that the district court did not have the benefit of *Saxon* and its progeny when reaching its now-vacated decision that Plaintiffs are not transportation workers. On remand, the court should look toward “the actual work that the members of the class, as a whole, typically carry out.” *Saxon*, 596 U.S. at 456. As the Supreme Court made clear, whether Plaintiffs work in the transportation industry is not dispositive. Nor is it dispositive whether the class members have other duties; after all, the Supreme Court determined in *Saxon* that a ramp supervisor who frequently filled in as a ramp agent to load and unload cargo from airplanes that travel in interstate commerce was a transportation worker for purposes of the FAA exemption. *Id.* at 454, 463. Relevant evidence may include these facts as well as the parties’ agreements, declarations, and any other evidence tending to show Plaintiffs’ actual duties.

As to the second *Saxon* prong, we note that the district court never reached whether the class of workers that Plaintiffs belong to is engaged in interstate commerce. Nor did it have the opportunity to answer this question in light of *Saxon* and its progeny. Accordingly, the district court should now consider the arbitrability of Plaintiffs’ claims in light of intervening case law holding that the § 1 exemption depends on whether the transportation worker “play[s] a direct and ‘necessary role in the free flow of goods’ across borders.” *Bissonnette*, 601 U.S. at 256 (quoting *Saxon*, 596 U.S. at 458).

In answering this question, the district court should be mindful of whether the goods that Plaintiffs are involved in transporting “moved in a continuous interstate journey or as part of multiple independent transactions.” *Brock v. Flowers Foods, Inc.*, 121 F.4th 753, 762 (10th Cir. 2024). Other circuits have looked to the following factors to determine if a transportation worker’s “intrastate route formed a constituent part of the goods’ interstate journey or an entirely separate local transaction: (1) the buyer-seller relationship between [Flowers and Plaintiffs]; (2) the buyer-

seller relationship between [Plaintiffs and Plaintiffs’ customers], and (3) the buyer-seller relationship, if any, between [Flowers and Plaintiffs’ customers].” *Id.* at 764. We agree with the Tenth Circuit that the third factor is “key to whether the interstate leg of the goods’ journey and [Plaintiffs’] intrastate delivery of the goods form one continuous interstate journey.” *See id.*¹ Relevant evidence for this inquiry may include, *inter alia*, the terms of the distributor agreement and any other evidence relating to the destination for which particular goods are earmarked at various times in their transport across state lines; whether and when the goods “come to a permanent rest within the state”; any representations by the parties as to nature of the transportation workers’ intrastate route as part of a continuous interstate journey;² and whether any such representations are binding, preclusive, or effect estoppel. *See id.* (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935)).

Accordingly, this Court VACATES the district court’s order and REMANDS for further proceedings consistent with this order. If there is a subsequent appeal, the case will be assigned to this Panel.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

¹ The First, Ninth, and Tenth Circuits have all held post-*Saxon* that “drivers who make the last intrastate leg of an interstate delivery route . . . are directly engaged in interstate commerce.” *Brock*, 121 F.4th at 762; *see also Carmona Mendoza v. Domino’s Pizza, LLC*, 73 F.4th 1135, 1138 (9th Cir. 2023) (affirming pre-*Saxon* precedent holding the same); *Fraga v. Premium Retail Servs., Inc.*, 61 F.4th 228, 234–35 (1st Cir. 2023) (same). The Fifth Circuit has reached the opposite conclusion. *See Lopez v. Cintas Corp.*, 47 F.4th 428, 432–33 (5th Cir. 2022). We express no opinion as to the validity or applicability of the “last-mile driver” doctrine.

² Plaintiffs’ counsel noted at oral argument and in their Brief that, in order to qualify for the Motor Carrier Act’s exemption from overtime pay requirements under the Fair Labor Standards Act (“FLSA”), Flowers represented to the Fifth Circuit that the intrastate routes of its independent distributors were part of its goods’ continuous interstate journey. *See* Brief of Plaintiffs-Appellants Regarding Further Appellate Proceedings, *Bissonnette v. LePage Bakeries Park St., LLC*, No. 20-1681 (2d Cir.), ECF No. 224 at 13–14 (quoting Brief of Appellees, *Ash v. Flowers Foods Inc.*, No. 23-30356 (5th Cir.), ECF No. 45 at 12)). Arbitration was not an issue in the Fifth Circuit case. *See* Brief of Appellees, *Ash*, No. 23-30356, ECF No. 45 at 18 n.2. Thus, Flowers appears to characterize its independent distributors as engaging in intrastate commerce to compel arbitration under the FAA, yet ultimately characterizes the same routes as interstate commerce to avoid liability under the FLSA. We express no opinion as to how the different statutory schemes might affect application of our estoppel case law.