490 Mass. 352
Supreme Judicial Court of Massachusetts,
Suffolk.

Veronica ARCHER [1] & others [2]
v.
GRUBHUB, INC.

SJC-13228
|
Argued May 2, 2022
|
Decided July 27, 2022

Synopsis

Background: Former food delivery drivers brought putative class action against employer, alleging violation of wage act, tips act, minimum wage act and retaliation. The Superior Court Department, Suffolk County, Brian A. Davis, J., 2021 WL 832132, denied employer's motion to compel arbitration. Employer appealed, and case was transferred from the Appeals Court.

Holdings: The Supreme Judicial Court, Wendlandt, J., held that:

as matter of first impression, drivers did not belong to "class of workers engaged in foreign or interstate commerce," and thus were not exempt from arbitration under FAA;

drivers had reasonable notice of arbitration agreement, and thus binding agreement existed; and

employer did not waive right to enforce arbitration agreement.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration.

****1027** Federal Arbitration Act. Arbitration, Arbitrable question, Waiver. Interstate Commerce. Food. Statute, Construction. Contract, Arbitration. Practice, Civil, Waiver. Waiver.

CIVIL ACTION commenced in the Superior Court Department on October 21, 2019.

A motion to compel arbitration was heard by Brian A. Davis, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Attorneys and Law Firms

The following submitted briefs for amici curiae:

Theanne Evangelis, of California (Blaine H. Evanson, of California, & Joshua M. Wesneski, of the District of Columbia, also present) for the defendant.

Eric R. LeBlanc, Cambridge, for the plaintiffs.

Ben Robbins & Daniel B. Winslow for New England Legal Foundation.

Lee Dawn Daniel, Northampton, Thomas R. Murphy, Salem, & Patrick M. Groulx, Somerville, for Massachusetts Academy of Trial Attorneys.

Maura Healey, Attorney General, & Tallulah Q. Knopp, Assistant Attorney General, for Attorney General.

Rohit K. Singla, of California, Rachel G. Miller-Ziegler, of the District of Columbia, & Elaine J. Goldenberg for Lyft, Inc.

Mason A. Kortz for Jonathan Askin & others.

Jennifer B. Dickey & Jonathan D. Urick, of the District of Columbia, Mark C. Fleming, & Charles C. Kelsh for Chamber of Commerce of the United States of America.

Robert F. Friedman, of Texas, Julie M. McGoldrick, of California, & Francis J. Bingham for DoorDash, Inc., & another.

Shannon Liss-Riordan & Adelaide H. Pagano for Massachusetts Employment Law Association.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Opinion

WENDLANDT, J.

***353** In this case, we consider whether delivery drivers, who delivered takeout food and various prepackaged goods from local restaurants, delicatessens, and convenience stores to Grubhub, Inc. (Grubhub), customers within the Commonwealth, fall within a residual category of workers -- namely, "any other class of workers engaged in foreign or interstate commerce" -- who, like "seamen" and "railroad employees," are exempt from arbitration pursuant to § 1 of the Federal Arbitration Act (FAA). 9 U.S.C. § 1. We join the numerous courts that have addressed the same question in their respective jurisdictions and conclude that they are not. Further concluding that the arbitration agreements between the plaintiff drivers and Grubhub are binding, we reverse the Superior Court judge's denial of Grubhub's motion to compel arbitration and to dismiss the plaintiffs' complaint. [3]

****1028** 1. Background. a. Facts. The following facts generally are undisputed.

The plaintiffs are former delivery drivers for Grubhub, an online ordering and delivery marketplace that connects customers with local restaurants through its website and mobile application. The plaintiffs [4] delivered takeout meals and prepackaged items, such as a bottle of soda or a bag of potato chips, from local ***354** restaurants, delicatessens, and convenience stores to local customers. The plaintiffs all worked in Massachusetts and did not cross State lines in their work for Grubhub.

In February 2017, Grubhub distributed an arbitration agreement entitled "Mutual Agreement to Arbitrate Claims" to its drivers, including the plaintiffs, through an online portal. To access the agreement, the plaintiffs had to activate a hyperlink entitled "Arbitration Agreement," and then had the option to select either an icon to view the text of the agreement or the document title to navigate to the signature page. [5] The signature page required the plaintiffs to acknowledge that they "read, understand, and/or agree to be bound by the terms" of the agreement, and indicated below the signature line that the document was an "arbitration agreement." The plaintiffs each signed the agreement electronically before the end of March 2017.

The arbitration agreement included a provision requiring the plaintiffs to submit all "past, present or future" disputes "arising out of or related to [e]mployee's ... employment and/or separation of employment," including "any claims based upon or related to ... retaliation ... [and] wages or other compensation," to final and binding arbitration. It further provided that the terms of the

agreement were governed by the FAA and included a class action waiver stating that "[t]here will be no right or authority for any dispute to be brought, heard, or arbitrated as a class action."

b. Procedural history. In October 2019, the plaintiffs, on behalf of themselves and others similarly situated, commenced the present action against Grubhub in the Superior Court, alleging that Grubhub violated the wage act, G. L. c. 149, §§ 148 and 150; the tips act, G. L. c. 149, § 152A; and the minimum wage act, G. L. c. 151, § 7; and that Grubhub unlawfully retaliated against drivers who complained about their wages in violation of G. L. c. 149, § 148A.

In May 2020, Grubhub filed a motion to compel arbitration and to dismiss the complaint, asserting that each plaintiff had entered into an agreement to arbitrate, which was enforceable under the ***355** FAA.[6] ****1029** Following a hearing, a Superior Court judge denied Grubhub's motion. The judge found that the plaintiffs entered into the arbitration agreement; however, the judge concluded that the plaintiffs, by virtue of their transportation and delivery of prepackaged food items, some of which were manufactured outside Massachusetts, fell within the definition of "any other class of workers engaged in foreign or interstate commerce" who are exempt from arbitration under § 1 of the FAA. Grubhub appealed, and we transferred the case sua sponte from the Appeals Court.

2. Discussion. We review both the denial of a motion to compel arbitration and the denial of a motion to dismiss de novo. See Battle v. Howard, 489 Mass. 480, 487, 185 N.E.3d 1 (2022); Landry v. Transworld Sys., Inc., 485 Mass. 334, 337, 149 N.E.3d 781 (2020).

a. FAA. Enacted in 1925 in "response to [the] hostility of American courts to the enforcement of arbitration agreements," Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (Circuit City), the FAA evinces a "liberal federal policy favoring arbitration" (citation omitted), AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and requires "courts 'rigorously' to 'enforce arbitration agreements according to their terms,' " Epic Sys. Corp. v. Lewis, —— U.S. ——, 138 S. Ct. 1612, 1621, 200 L.Ed.2d 889 (2018), quoting American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 233, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013). Thus, in general, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

As sweeping as the FAA is, however, it is not unqualified. See Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 800 (7th Cir. 2020). Relevant to the present appeal, § 1 of the FAA provides 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. Thus, the FAA exempts two enumerated categories of workers ("seamen" and "railroad employees") and a residual category ("any other class of worker engaged in foreign or interstate ***356** commerce") from compelled arbitration. See New Prime Inc. v. Oliveira, —— U.S. ——, 139 S. Ct. 532, 537, 202 L.Ed.2d 536 (2019). The plaintiff drivers insist that they fall within the residual category because they are transportation workers who transport and deliver goods, such as prepackaged chips or soda, in the flow of interstate commerce.

b. Construction of § 1 residual category. As with any question of statutory interpretation, our inquiry as to the meaning of the residual clause of § 1 begins with the words of the statute itself. See Ross v. Blake, 578 U.S. 632, 638, 136 S.Ct. 1850, 195 L.Ed.2d 117 (2016); Patel v. 7-Eleven, Inc., 489 Mass. 356, 362, 183 N.E.3d 398 (2022), citing Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712, 89 N.E.3d 460 (2018). We consider the words of the statute "in connection with the cause of its enactment, ... to the end that the purpose of its framers may be effectuated." ****1030** Boston Police Patrolmen's Ass'n, Inc. v. Boston, 435 Mass. 718, 720, 761 N.E.2d 479 (2002), quoting O'Brien v. Director of the Div. of Employment Sec., 393 Mass. 482, 487-488, 472 N.E.2d 253 (1984). See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7, 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011) (considering language of statute "in conjunction with the purpose and context").

With these principles in mind, we consider initially that the operative unit of the residual category of workers in § 1 is a "class of workers." See Wallace, 970 F.3d at 800. See also Southwest Airlines Co. v. Saxon, —— U.S. ——, 142 S. Ct. 1783,

1788, 213 L.Ed.2d 27 (2022). Thus, in determining whether the exemption applies, the question is not whether any individual worker was engaged in interstate commerce, but whether the class of workers to which the individual belonged was engaged in interstate commerce. "[A] member of the class qualifies for the exemption even if [he or] she does not personally 'engage in interstate commerce' " so long as the class to which he or she belongs is engaged in interstate commerce. Wallace, supra, quoting Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988). "By the same token, someone whose occupation is not defined by its engagement in interstate commerce does not qualify for the exemption just because [he or] she occasionally performs that kind of work." Wallace, supra. Thus, the fact that the plaintiffs here did not cross State lines in their work for Grubhub is not dispositive; the relevant question is whether the class of workers to which the plaintiffs belonged was engaged in interstate commerce. The relevant "class of workers" is defined by the work the workers do –- here, there is no dispute that the plaintiffs delivered food from local restaurants, delis, and convenience stores to Grubhub customers in the Commonwealth. See Southwest Airlines Co., supra.

***357** In addressing this question, we do not write on a blank slate. The United States Supreme Court has instructed that the construction of the residual clause is governed by the application of the maxim ejusdem generis -- a canon of statutory construction that provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Circuit City, 532 U.S. at 114-115, 121 S.Ct. 1302. Pursuant to the canon, the Court concluded that the residual clause's scope is "controlled and defined by reference to" the specifically enumerated categories of workers directly preceding it -- namely, seamen and railroad employees. Id. at 115, 121 S.Ct. 1302. See Wallace, 970 F.3d at 801 ("Far from being superfluous, the enumerated categories play a key role in defining the scope of the residual clause ..."). Applying this rule, [7] together with the purpose of the FAA to overcome judicial hostility to arbitration agreements, the Court in Circuit City rejected the argument that the residual clause extended to exempt a broad category of workers under all contracts of employment, and instead limited the residual clause to "transportation workers" actually engaged in the movement of goods in interstate commerce. Circuit City, supra at 112, 118-119, 121 S.Ct. 1302. See Southwest Airlines Co., 142 S. Ct. at 1789-1790.

To determine whether the plaintiff Grubhub drivers are transportation workers ****1031** actually engaged in the movement of goods in interstate commerce, as required by the residual clause of § 1, we again find guidance in Federal jurisprudence. Addressing the scope of the residual clause, Federal courts first "consider whether the interstate movement of goods is a central part of the class members' job description." Wallace, 970 F.3d at 801 & n.2 (listing Federal appellate cases emphasizing that "transportation workers" under § 1 residual clause are those "actually engaged in the movement of goods in interstate commerce" [citation omitted]). Compare New Prime Inc., 139 S. Ct. at 536, 539 (observing that driver for interstate trucking company was transportation worker), with Hill v. Rent-a-Center, Inc., 398 F.3d 1286, 1289-1290 (11th Cir. 2005) (account manager who "incidentally transported ***358** goods interstate as part of [his] job" was not transportation worker under § 1). Second, if such a class exists, Federal courts consider whether the plaintiff is a member of it. See Wallace, 970 F.3d at 802. Compare International Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012) (truckers making deliveries across interstate lines were part of class of interstate truckers), with Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351-352 (8th Cir. 2005) (customer service representative employed by transportation company "with duties only tangentially related to movement of goods" was not member of relevant class of transportation workers). The inquiry is "focused on the [class of] worker[s'] active engagement in the enterprise of moving goods across interstate lines." Wallace, supra. See Southwest Airlines Co., 142 S. Ct. at 1790 ("Put another way, transportation workers must be actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce").

It is instructive that, on nearly identical facts to those in the present case, the United States Court of Appeals for the Seventh Circuit concluded that Grubhub drivers were "transportation workers," [8] but not engaged in interstate commerce as required by the residual clause. See Wallace, 970 F.3d at 801-802. The court rejected the same argument the plaintiffs here make -- that they fell within the residual clause because they delivered goods (such as a package of potato chips) that have moved across State or national lines. Id. at 802. The court explained that the focus on where the goods have been ignored the "governing framework" of the § 1 inquiry; instead, the court concluded, the residual clause exemption requires that the class of workers "must be connected not simply to the goods, but to the act of moving those goods across state or national borders. Put differently,

a class of workers must themselves be 'engaged in the channels of foreign or interstate commerce.' " Id., quoting McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998). Thus, the court determined that, although Grubhub drivers transported goods that "may travel across several states before landing in a meal prepared by a local restaurant and delivered by a Grubhub driver," they did not fall within the residual clause because they were not "connected ... to the act of moving those goods across state or ***359** national borders." Wallace, supra.

Notably, all courts that have considered the applicability of the residual clause to delivery drivers similar to the plaintiff delivery drivers in this case have reached the same conclusion. See Singh v. Uber Techs., Inc., 939 F.3d 210, 220 (3d Cir. 2019) (residual ****1032** clause "only includes those other classes of workers who are 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" [quotation and citation omitted]); Immediato v. Postmates, Inc., U.S. Dist. Ct., No. 20-12308-RGS, 2021 WL 828381 (D. Mass. Mar. 4, 2021) (delivery drivers delivering merchandise from local retailers and restaurants were not engaged in interstate commerce); Grice v. Uber Techs., Inc., U.S. Dist. Ct., No. CV 18-2995 PSG (GJSx), 2020 WL 497487 (C.D. Cal. Jan. 7, 2020) (drivers were not "engaged in interstate commerce" where they never crossed State lines and were not carrying goods that were in continuous movement throughout streams of interstate commerce); Austin v. DoorDash, Inc., U.S. Dist. Ct., No. 1:17-cv-12498-IT, 2019 WL 4804781 (D. Mass. Sept. 30, 2019) (driver not engaged in interstate commerce because "the final destinations from the vantage point of the interstate food distributors are the restaurant where [p]laintiff picks up orders, and not the customers to whom he makes deliveries"); Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 899 (N.D. Cal. 2018) (compelling arbitration because delivery driver was not "engaged in interstate commerce"); Lee v. Postmates Inc., U.S. Dist. Ct., No. 18-cv-03421-JCS, 2018 WL 4961802 (N.D. Cal. Oct. 15, 2018) ("The [c]ourt is aware of no authority holding that couriers who deliver goods from local merchants to local customers are engaged in ... interstate commerce within the meaning of § 1 of the FAA merely because some such deliveries might include goods that were manufactured out of [S]tate ..." [quotation omitted]); Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1153-1155 (N.D. Cal. 2015) (local delivery driver not "engaged in interstate commerce").

Despite this uniform wave of authority, the plaintiffs urge us to conclude that they are like the "last-mile delivery workers who haul goods on the final legs of interstate journeys," and thus are "engaged in ... interstate commerce, regardless of whether the workers themselves physically cross state lines." Waithaka v. Amazon.com, Inc., 966 F.3d 10, 26 (1st Cir. 2020), cert. denied, —— U.S. ——, 141 S. Ct. 2794, 210 L.Ed.2d 928 (2021). See Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915 (9th Cir. 2020), cert. denied, —— U.S. ——, 141 S. Ct. 1374, 209 L.Ed.2d 121 (2021) (holding Amazon drivers at end of network of drivers engaged to ***360** deliver goods through interstate channels were exempt from FAA even if they did not cross State lines). We decline this invitation.

Significantly, in the "last-mile driver" cases, from the moment the goods entered "the flow of interstate commerce," the goods were always "destined for" the customers to whom the last-mile drivers made deliveries. Waithaka, 966 F.3d at 13, 20. The last leg of the trip, even if it involved only a trip from the in-State warehouse to the in-State consumer, was a part of the ongoing and continuous nature of the interstate transit of the good to the customer who ordered it and thus brought the last mile drivers within § 1. Id. at 20-21.

By contrast, at the moment the goods at issue here entered the flow of interstate commerce, the destination was not the address of the Grubhub customer ordering the takeout food or convenience items for delivery. At most, the goods were destined for the local restaurants, delicatessens, and convenience stores that ordered them. Any subsequent journey taken by the goods in the hands of the Grubhub drivers, as part of the takeout meal, was not part of the ongoing and continuous interstate transmission of these ****1033** goods.[9] Cf. Cunningham v. Lyft, Inc., 17 F.4th 244, 250-251 (1st Cir. 2021) (drivers for Lyft, who transported passengers to and from Logan Airport, were not engaged in interstate commerce because such trips were "not an integral part of interstate transportation" [citation omitted]). Thus, as in Wallace, the plaintiffs do not fit within the narrowly defined class of workers engaged in interstate commerce; they were not "connected ... to the act of moving ... goods across [S]tate or national borders." Wallace, 970 F.3d at 802. Rather, they transported goods that had already completed the interstate journey by the time the goods arrived at the restaurant, delicatessen, or convenience store to which they were sent; as such, the plaintiffs are dissimilar to the ***361** railroad workers, seamen, or the other limited, interstate class of workers contemplated by Congress

when enacting § 1 of the FAA. Therefore, the plaintiffs do not fall into the § 1 exclusion for "any other class of workers engaged in foreign or interstate commerce" and are subject to the FAA.

c. Validity of contract. The plaintiffs next argue that Grubhub failed to demonstrate that a binding arbitration agreement exists between the parties, asserting that they could not have assented to the agreement because Grubhub did not reasonably communicate the agreement to the plaintiffs, and that they did not reasonably assent to the agreement because the signature page used language that the drivers "read, understand, and/or agree to be bound by the terms" of the agreement. Grubhub argues that the opportunity to review the agreement before signing constituted sufficient notice, and that the plaintiffs manifested their assent to the arbitration agreement.

Whether a valid contract was formed is governed by Massachusetts law. See Kauders v. Uber Techs., Inc., 486 Mass. 557, 571, 159 N.E.3d 1033 (2021). "[T]he fundamentals of online contract formation should not be different from ordinary contract formation." Id. "[F]or there to be an enforceable contract, there must be both reasonable notice of the terms and a reasonable manifestation of assent to those terms." Id. at 572, 159 N.E.3d 1033. "Actual notice will exist where the [party] has reviewed the terms." Id. Where, as here, there is a dispute whether the drivers actually reviewed the agreement, a court must evaluate "the totality of the circumstances ... [to] determin[e] whether reasonable notice has been given." Id. at 573, 159 N.E.3d 1033.

Reasonable notice of a contract's terms exists even if the party did not actually view the agreement, so long as the party had an adequate opportunity to do so. See Kauders, 486 Mass. at 574, 159 N.E.3d 1033 ("clickwrap" agreements, where user "expressly and affirmatively manifests assent to an online agreement by clicking or checking a box that states that the user agrees to the terms and conditions," "are regularly enforced"); ****1034** Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565, 576, 987 N.E.2d 604 (2013), S.C., 478 Mass. 169, 84 N.E.3d 766 (2017), cert. denied, —— U.S. ——, 138 S. Ct. 1327, 200 L.Ed.2d 526 (2018) ("forum selection clauses have almost uniformly been enforced in clickwrap agreements"); Emmanuel v. Handy Techs., Inc., 992 F.3d 1, 7-10 (1st Cir. 2021) (applying Massachusetts law to conclude that employee of application-based cleaning services company had reasonable notice of arbitration provision in application's terms of use, even though she ***362** chose not to review it, because she had adequate opportunity to do so); Wickberg v. Lyft, Inc., 356 F. Supp. 3d 179, 183 (D. Mass. 2018) ("These online agreements -- where a user selects 'I agree' without necessarily reviewing the contract -- are typically called 'clickwrap' agreements, and are generally held enforceable"); Bekele v. Lyft, Inc., 199 F. Supp. 3d 284, 295-296 (D. Mass. 2016), aff'd, 918 F.3d 181 (2019) ("Massachusetts courts have routinely concluded that clickwrap agreements -- whether they contain arbitration provisions or other contractual terms -- provide users with reasonable communication of an agreement's terms"). "This is an objective test: the sufficiency of the notice turns on whether, under the totality of the circumstances, the employer's communication would have provided a reasonably prudent employee notice of the waiver [of the right to proceed in a judicial forum]" (quotation and citation omitted). Bekele, supra at 295. So long as the party is required to make some indication of assent, such as selecting "I agree" or "I accept," the fact that the party chooses not to read the agreement does not render it unenforceable. See Kauders, supra at 579-580, 159 N.E.3d 1033. Compare Cullinane v. Uber Techs., Inc., 893 F.3d 53, 62 (1st Cir. 2018) (holding Uber's user agreement was not reasonably communicated where Uber did not require users to mark box stating they agreed to set of terms before continuing to next screen, and instead simply displayed notice of deemed acquiescence and link to terms).

It is undisputed that the plaintiffs were required to provide their electronic signature on a page that stated: "By providing your Electronic Signature and clicking 'E-Sign,' you are acknowledging that you have read, understand, and/or agree to be bound by the terms of any content or document(s) provided here within." The plaintiffs were also specifically informed that they were signing an arbitration agreement, both on the page preceding the signature page and on the signature page itself. Accordingly, the plaintiffs had reasonable notice of the arbitration agreement.

The plaintiffs' reliance on the use of "and/or" on the signature page fares no better. The "and/or" connector did not obscure the fact that the driver would be bound to the terms of the agreement. See Kauders, 486 Mass. at 580, 159 N.E.3d 1033 (acknowledging that affirmative language such as "I agree," as opposed to use of ambiguous word "DONE," manifests assent). The use of "and/or" does not render the "connection between the action" -- that is, indicating assent to the agreement through

a checkbox and signature acknowledging the terms -- "and the terms" of the agreement so indirect or ***363** ambiguous that the agreement cannot be enforced. See id.

d. Waiver of right to enforce. The plaintiffs also maintain that Grubhub waived any right to enforce the agreement by delaying in providing the arbitration agreement to the plaintiffs prior to the filing of the complaint. Grubhub contends that it did not waive its right to compel arbitration, as it made clear from the outset of the litigation that it wanted to proceed to arbitration and moved to compel arbitration before engaging in litigation. ****1035** Cf. Rankin v. Allstate Ins. Co., 336 F.3d 8, 12-13 (1st Cir. 2003) (party waived right to enforce arbitration agreement when it waited to move to compel arbitration "until after discovery had closed and the long-scheduled trial date had almost arrived"). Because Grubhub timely filed its motion to compel arbitration in response to the plaintiffs' complaint, it did not waive its right to enforce the arbitration agreement. [10]

3. Conclusion. For the foregoing reasons, the Superior Court judge's order denying Grubhub's motion to compel arbitration and to dismiss the plaintiffs' complaint is reversed, and the case is remanded for the entry of an order compelling arbitration and dismissing the complaint.

So ordered.

All Citations

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Footnotes

1 Individually and on behalf of all others similarly situated.

2 Andrea Krautz, Paul Girouard, and Patrick Lee, individually and on behalf of all others similarly situated.

3 We acknowledge the amicus briefs submitted by the New England Legal Foundation; Lyft, Inc.; Jonathan Askin, Vivek Krishnamurthy, Christopher Morten, and Jason Schultz; the Chamber of Commerce of the United States of America; DoorDash, Inc., and Uber Technologies, Inc.; and the Massachusetts Employment Law Association; and the amicus letters submitted by the Massachusetts Academy of Trial Attorneys and the Attorney General.

4 Veronica Archer worked for Grubhub from September 2016 to July 2019, Paul Girouard from February 2017 to May 2019, Andrea Krautz from January 2016 to September 2019, and Patrick Lee from January 2016 to June 2019.

5 The parties dispute whether the plaintiffs would have had to view the document containing the text of the agreement before proceeding to the signature page. A senior vice-president of Grubhub attested that, once the plaintiffs gained access to the portal, they were directed to a list of documents that included the arbitration agreement. They could then "click the 'view' icon located directly to the right of the document to open a copy" of the agreement, and they "could also click the title of the document to proceed to an acknowledgement page" for their electronic signature.

6 Prior to the filing of the complaint, the plaintiffs sought copies of their personnel records, including the arbitration agreement. After initially declining to produce the agreement and after the plaintiffs secured the involvement of the Attorney General, Grubhub produced a 2015 version of the agreement. Subsequently, and in connection with its motion, Grubhub produced the correct agreement from 2017, explaining that it had previously produced the 2015 version in error.

7 The Court explained that the phrase "engaged in interstate commerce" as used in the residual category of § 1 is a narrow term of art, which is much less expansive than the phrase "involving commerce" used elsewhere in the FAA. Circuit City, 532 U.S. at 115-116, 121 S.Ct. 1302. See Southwest Airlines Co., 142 S. Ct. at 1789-1790.

8 Grubhub does not dispute that the plaintiffs were "transportation workers." See New Prime Inc., 139 S. Ct. at 536, 539. Compare Lenz, 431 F.3d at 351-352; Hill, 398 F.3d at 1289-1290.

9 The Supreme Court recently concluded that airplane cargo loaders who "physically load and unload cargo on and off planes traveling in interstate commerce" are "directly involved in transporting goods across state or international borders" such that they fall within § 1. Southwest Airlines Co., 142 S. Ct. at 1789. In the case of cargo loaders, "[t]here could be no doubt that [interstate] transportation [is] still in progress" when the worker loads or unloads cargo that has not yet reached its destination. Id. at 1790, quoting Erie R.R. Co. v. Shuart, 250 U.S. 465, 468, 39 S.Ct. 519, 63 L.Ed. 1088 (1919). The Court acknowledged that "the answer will not always be so plain when," as here, "the class of workers carries out duties further removed from the channels of interstate commerce," and did not address the question posed by the present case or other cases concerning food delivery drivers. Southwest Airlines Co., 142 S. Ct. at 1789 n.2.

10 Following oral argument in this case, the plaintiffs pointed to a recent United States Supreme Court decision, Morgan v. Sundance, Inc., —— U.S. ——, 142 S. Ct. 1708, —— L.Ed.2d —— (2022), to support the proposition that a waiver of the right to arbitrate need not be conditioned on a showing of prejudice by the party opposing arbitration. Id. at 1713. Nothing in that decision, however, supports the conclusion that a party waives its right to arbitration when it fails to provide documents prior to the commencement of the lawsuit. Indeed, the defendant in Morgan engaged in litigation for nearly eight months before moving to compel arbitration, id. at 1711, whereas here, Grubhub moved to compel arbitration before engaging in any litigation.