No. 15-2364

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA,
on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

v.

NEW PRIME, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Massachusetts

District Court Case No. 1:15-cv-10603-PBS
The Honorable Patti B. Saris, Chief District Judge

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED

1. Given that the district court could only compel arbitration if the Federal Arbitration Act authorized it to do so, did the court correctly hold that it had to determine whether the Act applied before it could compel arbitration?
2. Does the Federal Arbitration Act's exemption for transportation workers' "contracts of employment" apply to all transportation workers, including independent contractors, because at the time the Act was passed, the term "contract of employment" was consistently understood to apply to *any* worker's agreement to perform work—or should the Act be understood to incorporate a specialized meaning of the term "contracts of employment" that excludes independent contractors, despite the fact that this specialized meaning was unheard of at the time the FAA was passed and even today remains a minority usage?
3. If the Federal Arbitration Act's exemption for transportation workers does not apply to independent contractors, can an employer prevent the exemption from applying to its workers simply by labelling the workers "independent contractors," even if the workers are not, in fact, independent contractors?
4. Does an arbitration provision that explicitly limits its scope to disputes related to the agreement in which it is contained apply to disputes that are unrelated to

the agreement and arose before the agreement was entered or after the agreement terminated?

STATEMENT OF THE CASE

A. Factual Background

Appellant New Prime, Inc. ("Prime") is a national trucking company that recruits new drivers by advertising a "Paid Apprenticeship" program. Prime App. 183. Prime guarantees that drivers who enroll in this program will earn a minimum of $600 per week—and $700 per week after the first 20,000 miles—while they participate in Prime's on-the-job training. Prime App. 36.[1]

In March 2013, Appellee Dominic Oliveira enrolled in the program. Prime App. 183. But he did not earn the promised minimum income—often he did not even earn minimum wage. In fact, Prime *charges* drivers to apprentice at the company. Prime App. 13, 41.[2]

After a four-day unpaid orientation at Prime's training facility, apprentices drive 10,000 miles alongside experienced Prime drivers. Prime App. 184. They do not get paid for this work. *Id.* Instead, they are given an advance of $200 per week for expenses, which is then subtracted from their future earnings. *Id.* As the district court explained, during this time period, apprentices are "essentially free

[1] This brief refers to Prime's appendix as Prime App.
[2] The company offers to forgive all but $150 of this fee if a driver works for Prime for at least a year. Prime App. 13, 41.

labor": Department of Transportation regulations limit the number of hours any one person may drive in a single stretch, so when a driver switches off with an apprentice, Prime's trucks can remain on the road for longer periods of time. *Id.*

After this initial apprenticeship, apprentices take a commercial driving exam, which permits them to become a "driver trainee." Prime App. 184. Trainees then drive another 30,000 miles, for which they are paid fourteen cents per mile. *Id.* They are not paid for the time they spend loading or unloading cargo or protecting company property. *Id.* From the fourteen cents per mile "driver trainees" earn, Prime deducts the money the company advanced to the drivers during the initial portion of the apprenticeship. *Id.* All told, during his time as a "driver trainee," Mr. Oliveira drove 5,000 – 6,000 miles per week, for which he earned approximately $440 - $480—or about $4 per hour. *Id.* Prime concedes that during this time Mr. Oliveira was an "employee." Appellant Br. 2.

After completing 30,000 miles as a "driver trainee," new hires are required to undergo another week of orientation—again unpaid—before becoming regular Prime drivers. Prime App. 184. Prime drivers are classified as either "company drivers" or "independent contractors." *Id.* Although the work of these drivers is the same, Prime offers drivers a $100 bonus to be labeled an "independent contractor." Prime App. 18, 185.

Once Mr. Oliveira finished his "apprenticeship," he was labeled an "independent contractor." Prime App. 185. Prime instructed him to go to Abacus Accounting, which set up an LLC of which Mr. Oliveira was the sole member, and then to Success Leasing, which leased Mr. Oliveira a truck. Prime App. 185. Success then instructed Mr. Oliveira to Prime's company store to purchase fuel and the equipment needed to do his job—equipment that cost roughly $5,000, which Prime deducted from his paycheck at $75 per week. Prime App. 186. Prime, Abacus, and Success are nominally different companies, but all three are located in Prime's building, and all payments were made to Prime—via deductions from Mr. Oliveira's paycheck—even if they were ostensibly owed to one of these other companies. Prime App. 185.

At Success, Mr. Oliveira was given several documents to sign, including an "Independent Contractor Operating Agreement" with Prime (the "Operating Agreement"). Prime App. 185. He was not permitted to negotiate this agreement, and in fact, he "felt pressure" to sign the documents quickly because Prime already had a load waiting for him outside. Prime App. 18, 186. The Operating Agreement states that its "intent . . . is to establish an independent contractor relationship." Prime App. 93. It provides that Mr. Oliveira agrees to lease the truck he had just leased from Success back to Prime for free for Prime's "exclusive"

use and to drive that truck for Prime, with the rate of payment for such work set by the company. *Id.*[3]

The Operating Agreement also contains an arbitration provision, which, in relevant part, states:

> ANY DISPUTES ARISING UNDER, ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING AN ALLEGATION OF BREACH THEREOF, AND ANY DISPUTES ARISING OUT OF OR RELATING TO THE RELATIONSHIP CREATED BY THE AGREEMENT, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES, INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT.

Prime App. 93. In March 2014, Mr. Oliveira signed a second Operating Agreement, containing an identical arbitration provision and an identical statement that its intent was to create an independent contractor relationship.

[3] The text of the Operating Agreement is a form contract that does not refer to Mr. Oliveira by name. Instead, it refers to the "Contractor" or "You." Mr. Oliveira signed the Agreement on behalf of the LLC Prime had set up for him. Before the district court, Mr. Oliveira argued that only the LLC was bound to the Agreement. The court did not address this argument but assumed that the Agreement bound Mr. Oliveira personally. This brief proceeds on that assumption. But if this Court concludes that the Agreement is not a contract of employment exempt from the FAA, Mr. Oliveira would like the opportunity to raise the issue again before the district court.

Although the Operating Agreements labeled Mr. Oliveira an independent contractor, Prime treated him no differently than a "company driver." Prime App. 18, 186. Prime controlled his schedule. Prime App. 186. It required him to take specific training courses and follow certain procedures. *Id.* It limited which shipments he could take. *Id.* And it set the rate of payment for those shipments. Prime App. 51. Mr. Oliveira worked exclusively for Prime, and in fact, could not possibly work for another company: Prime required him to outfit his truck with a communications and dispatch system that could not be used to take shipments from another company. Prime App. 15, 186. And Prime retained the right to fire Mr. Oliveira without cause. Prime App. 100.

Prime made regular deductions from Mr. Oliveira's paycheck—for "lease payments" on the truck he drove, for the tools Prime required him to buy, and for the fuel required to haul freight. Prime App. 186-87. On several occasions, Mr. Oliveira's paycheck actually reflected a negative balance, despite having spent dozens of hours on the road for Prime. Prime App. 188.

In September 2014, the Operating Agreement terminated. Prime App. 187. The following month, Prime re-hired Mr. Oliveira as a "company driver." *Id.* His work as a "company driver" was no different than his work as an "independent contractor." Prime App. 18. And because Prime continued to deduct from Mr.

Oliveira's paycheck "lease payments" for the truck he drove, Mr. Oliveira was again paid below the minimum wage. Prime App. 187.

B. Procedural History

On March 4, 2015, Mr. Oliveira filed this lawsuit, claiming that Prime violated state and federal law by failing to pay him—and other similarly situated Prime drivers—minimum wage while he was an "apprentice," while he worked pursuant to the "Operating Agreements," and while he worked as a "company driver." Prime App. 2, 26-29. Prime moved to compel arbitration. Prime App. 73. The company argued that the Federal Arbitration Act (FAA) required the court to enforce the arbitration provision in the Operating Agreements and compel Mr. Oliveira to arbitrate all his claims. Prime App. 80.

Mr. Oliveira opposed the motion. First, Mr. Oliveira pointed out that the arbitration provision in the Operating Agreements is explicitly limited in scope to disputes related to those Agreements. Prime App. 130-33. But Mr. Oliveira's claims are not limited to his employment under those agreements; he also brought claims from his employment *before* the Operating Agreements were in effect and *after* the Agreements were terminated. *Id.* By its terms, Mr. Oliveira argued, the arbitration provision in the Operating Agreements does not apply to these claims. *Id.*

Second, Mr. Oliveira argued that the Operating Agreements—and the arbitration provisions they contain—are exempt from the FAA anyway, and so the district court cannot rely on the FAA to compel arbitration of *any* of his claims. Prime App. 169. The FAA, Mr. Oliveira explained, exempts transportation workers' "contracts of employment," and Mr. Oliveira is obviously a transportation worker. *See id.*

The district court denied Prime's motion to compel. Prime App. 201. The court rejected Prime's contention that the arbitration provision in the Operating Agreements necessarily requires arbitration of Mr. Oliveira's claims from before the Agreements were entered or after they were terminated. Prime App. 192-93.

The court also rejected Prime's argument that an arbitrator—and not the court—should decide whether the FAA applied. Prime App. 199-200. If the FAA did not apply, the court explained, the court would lack authority to compel arbitration at all (including arbitration of the question whether the FAA applies). *See id*. Therefore, the court concluded that the question whether the FAA applies was a question the court itself must answer. *See id.*

The court assumed, without analyzing the text or history of the statute, that the FAA's exemption for transportation workers does not apply to independent contractors. Prime App. 190. Therefore, the court concluded that the next step in the litigation was to determine whether Mr. Oliveira was, in fact, an independent

contractor. Prime App. 201. Accordingly, the court permitted the parties to take factual discovery limited to this "threshold question." Prime App. 202.

This appeal followed. Prime App. 203.

RELEVANT STATUTE

This case involves the interpretation of Section 1 of the Federal Arbitration Act, which is entitled "'Maritime transactions' and 'commerce' defined; exceptions to operation of title." 9 U.S.C. § 1. The Section provides:

> "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but 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.

Id.

SUMMARY OF THE ARGUMENT

Prime's motion to compel arbitration—and its argument on appeal—rests on a series of false assumptions. First, Prime assumes that the district court could—and should—have compelled arbitration of the question whether the Federal Arbitration Act applies. But that makes no sense. The FAA is the sole basis for

Prime's motion to compel arbitration—and the sole potential source of authority for the district court to grant that motion. If the FAA does not apply, the court lacks authority to compel arbitration of any question, *including* the question whether the FAA applies. *See infra* pages 12-22.

Second, Prime assumes that the FAA applies in this case. It doesn't. The Act explicitly exempts the "contracts of employment" of transportation workers "engaged in foreign or interstate commerce." 9 U.S.C. § 1. And there is no dispute that Mr. Oliveira—a long-haul trucker—is a transportation worker engaged in interstate commerce. Nevertheless, Prime contends that Mr. Oliveira is not exempt, solely because Prime's Operating Agreements labeled him an independent contractor. But this Court and the Supreme Court have repeatedly held that the legal status of a worker does not turn on how that worker is labeled, but rather on the actual circumstances of his employment. *See infra* pages 39-40.

More importantly, though, it doesn't matter whether Mr. Oliveira was an independent contractor or not, because the FAA's exemption for the "contracts of employment" of transportation workers applies to *all* transportation workers, including independent contractors. The common—and, really, only—meaning of the term "contract of employment" at the time the FAA was passed was an agreement to do work. The term implied nothing about the status of the worker.

The contracts of independent contractors were considered "contracts of employment" just as much as those of other workers. *See infra* pages 23-31.

There is no evidence that Congress intended to enact anything other than this common meaning in the FAA. To the contrary, there is every reason to believe that this meaning is precisely what Congress intended. At the time the FAA was passed, the country had been roiled by years of labor disputes in the transportation industry that had repeatedly disrupted interstate commerce. Congress had passed several statutes regulating transportation workers and their labor dispute resolution, and would go on to pass several more. The point of exempting transportation workers from the FAA—a statute that enables parties to devise their own methods for resolving disputes—was to ensure that Congress could maintain its authority to regulate transportation workers' disputes in an attempt to protect commerce from labor strife. A labor strike does not carry less potential to disrupt commerce if the strikers are independent contractors. The purpose of the transportation worker exemption confirms that it should be interpreted according to its common meaning: that contracts of employment of transportation workers—*all* transportation workers—are exempted. *See infra* pages 31-37.

Finally, Prime assumes that the arbitration provision in the Operating Agreements can be applied to disputes arising from Mr. Oliveira's employment before the Agreements were signed and after they were terminated. But the text of

the provision itself refutes Prime's argument. The arbitration clause explicitly states that it is limited to disputes "arising under, arising out of or related to *this agreement.*" Prime App. 93 (emphasis added). By its terms, then, it doesn't apply to disputes regarding Mr. Oliveira's employment under *other* agreements. *See infra* pages 43-54.

Prime is correct about one thing, however. To decide this appeal, this Court need not determine whether Mr. Oliveira was actually an independent contractor during his employment with Prime. It need only observe that he was a transportation worker engaged in interstate commerce. That is sufficient to exempt him from the Act and therefore to affirm the denial of Prime's motion to compel arbitration.

ARGUMENT

I. The Court, Not an Arbitrator, Must Decide Whether the FAA Applies.

A court cannot compel arbitration under the FAA if the FAA does not apply. With respect to transportation workers, the statute is particularly emphatic: "*[N]othing . . . contained [in the Act] 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). The FAA's provision authorizing district courts to compel arbitration is, of course, "contained" in the Act. *See* 9 U.S.C. § 4. Therefore, it does not apply to transportation workers'

contracts of employment, and courts lack authority under the FAA to compel arbitration pursuant to such contracts. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) (explaining that if a contract is not subject to the FAA, the FAA provides no authority for a court to compel arbitration). Indeed, to rely on the FAA to compel arbitration pursuant to a transportation worker's contract of employment would be to violate the statute's command.[4]

It would seem obvious, then, that to decide whether to grant Prime's motion to compel arbitration, the district court *has* to determine whether the Operating Agreements under which Mr. Oliveira worked are "contracts of employment" of transportation workers within the meaning of the FAA. For if they are, the court would have no authority to compel arbitration. Indeed, Prime, at first, appears to concede the point. *See* Appellant's Br. 14 ("[T]he *district court* must determine whether the [Operating] Agreements are contracts of employment exempt under § 1." (emphasis added)). Nevertheless, later in its brief, Prime argues otherwise.

Confusingly, Prime contends that the district court was required to compel arbitration of the question whether it had authority to compel arbitration. The company notes that its arbitration provision contains a clause—commonly called a

[4] The FAA is not the only possible source of authority under which courts may compel arbitration. But Prime explicitly disavowed reliance on state law or any other source of authority to enforce its arbitration clause, explicitly stating that it seeks to compel arbitration solely under the FAA. *See* Prime App. 157.

delegation clause—which states that disputes about "arbitrability" are themselves required to be arbitrated. The company argues that the parties' dispute about whether Prime's contracts are exempt from the FAA is a dispute about "arbitrability." And therefore, in Prime's view, the court is required to compel arbitration of that dispute.

This argument suffers from an obvious flaw: If the FAA doesn't apply to Prime's contracts, the district court lacks authority to compel arbitration of *any* dispute—including disputes about "arbitrability." *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."). And parties cannot, "through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold." *In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011); *cf. Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (holding that parties may not contract for more expansive judicial review of arbitration decisions than the FAA provides).[5]

[5] The case law Prime cites on delegation clauses is only applicable if the FAA applies. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("The effect of [Section 2 of the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement *within the*

There's a second flaw in Prime's argument. The parties' dispute about whether the FAA applies isn't actually a dispute about "arbitrability." Prime assumes that *every* question that might be antecedent to compelling arbitration is a dispute about "arbitrability." But if that were true, so long as an arbitration contract delegated "arbitrability" disputes to the arbitrator, a district court that lacked subject matter jurisdiction over a dispute would be required to compel arbitration anyway and let the arbitrator decide after the fact whether the court had jurisdiction to issue its order. That can't be right. *See Vaden v. Discover Bank*, 556 U.S. 49, 62-63 (2009) (explaining that a federal court cannot compel arbitration under the FAA unless it has subject matter jurisdiction over the underlying controversy).

As defined by the Supreme Court, a dispute is "arbitrable" if the parties have agreed to submit it to arbitration pursuant to a valid arbitration clause. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). But whether the parties validly agreed to arbitrate a particular claim is an entirely different question than whether the district

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coverage of the Act." (emphasis added)); *accord Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006). Thus, to determine whether the delegation clause here even applies and how it should be interpreted, a court must first determine whether the FAA applies. And to do that, of course, the court must determine whether the Operating Agreements are employment contracts of transportation workers engaged in interstate commerce.

court has the authority to enforce any such agreement under the FAA. *See Van Dusen*, 654 F.3d at 844. Like subject matter jurisdiction, that is an issue the court must decide for itself—before compelling arbitration.

Indeed, the Supreme Court has repeatedly decided for itself disputes about whether a court has authority to compel arbitration, even in cases where the arbitration contract at issue delegated disputes about arbitrability to the arbitrator. For example, in *E.E.O.C. v. Waffle House*, the Supreme Court considered whether a district court should have compelled arbitration of an enforcement action brought by the Equal Employment Opportunity Commission (EEOC) against Waffle House, alleging that the restaurant had discriminated against one of its employees. *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002). Waffle House argued that the court was required to compel arbitration because the employee had signed an arbitration contract requiring the arbitration of all employment-related disputes. *Id.* at 283-84. The Supreme Court disagreed. *Id.* at 285.

The Court held that Waffle House's petition to compel arbitration should be denied because the EEOC was not a signatory to the arbitration contract, and "nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." *Waffle House*, 534 U.S. at 289. Although Waffle House's arbitration contract contained a delegation clause, the Court did not suggest that an arbitrator should decide the issue. *See id.*

at 283 n.1 (reprinting arbitration clause, which required that all employment-related disputes "including whether such dispute or claim is arbitrable" be arbitrated (internal quotation marks omitted)). Instead, it held that because the court lacked authority under the FAA to compel arbitration, the petition to compel should be denied.

Similarly, in *CompuCredit v. Greenwood*, the Supreme Court considered whether the Credit Repair Organizations Act granted consumers the right to bring claims for violation of the Act in court and therefore precluded enforcement under the FAA of an arbitration agreement between the parties in the case. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). Again, although the agreement contained a delegation clause, the Court did not hold that the question whether the FAA applied was an antecedent question of arbitrability to be delegated to the arbitrator. *See* Br. for Petitioners, *CompuCredit Corp. v. Greenwood*, 2011 WL 2533009, at *8 (quoting arbitration provision, including delegation clause). The Court decided for itself whether the FAA applied (and held that it did). *CompuCredit*, 132 S. Ct. at 673.[6]

[6] In addition, there are several cases that do not involve a delegation clause in which the Court has determined for itself whether an arbitration contract is subject to the FAA without ever suggesting that this is a question of arbitrability that may be delegated to an arbitrator. *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) ("Our first question . . . is whether the consulting agreement between F & C and Prima Paint is such a contract [subject to the

The question here is the same as the question in *Waffle House* and in *CompuCredit*: Does the district court have the statutory authority to compel arbitration of this dispute under the FAA? As those cases demonstrate, that is a question for a court—not an arbitrator—to decide.

Indeed, that is precisely the conclusion the Ninth Circuit reached in *Van Dusen*. *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011). In *Van Dusen*, as here, a trucking company sought to compel arbitration of claims its drivers had brought against it for violation of labor laws. *Id.* at 840. And in *Van Dusen*, as here, the drivers argued that the district court lacked authority to compel arbitration because their contracts were employment contracts of transportation workers engaged in interstate commerce and therefore exempt from the FAA. *Id.* Like Prime, the trucking company in *Van Dusen* contended that the district court could not decide whether the FAA applied because that is a question of arbitrability and its contract delegated such questions to the arbitrator. *Id.* at 843. The Ninth Circuit disagreed. *Id.* at 843-45.

FAA]."); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) ("The question presented is whether the parties' debt-restructuring agreement is 'a contract evidencing a transaction involving commerce' within the meaning of the Federal Arbitration Act."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (examining whether Section 1 exempts all employment contracts or just those of transportation workers).

In a careful, well-reasoned opinion, the court held that the district court—not an arbitrator—must decide whether the drivers' contract was exempt from the FAA. The court rejected the trucking company's contention "that contracting parties may invoke the authority of the FAA to" compel arbitration of "the question of whether the parties can invoke the authority of the FAA." *Van Dusen*, 654 F.3d at 844. The company's argument, the court held, "puts the cart before the horse." *Id.* at 844. "[W]here Section 1 [of the Act] exempts the underlying contract from the FAA's provisions," the court explained, a district court "has no authority to compel arbitration" at all. *Id.* at 843.

The *Van Dusen* court found support in the Supreme Court's decision in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). There, the Court held that Section 3 of the FAA, which permits courts to stay proceedings pending the completion of arbitration, only applies to contracts that are subject to the FAA in the first place. *See id.* at 201. And therefore, a district court only has authority to stay a proceeding pending arbitration if the arbitration contract at issue is subject to the FAA. *Id.* So too, the Ninth Circuit held, a district court only has authority to compel arbitration under the FAA if the contract containing the arbitration provision at issue is subject to the FAA. *Van Dusen*, 654 F.3d at 844.

The Ninth Circuit's opinion—which the Supreme Court declined to review—applies with equal force here. *See Swift Transp. Co. v. Van Dusen*, 134 S.

Ct. 2819 (2014) (denying petition for certiorari). As in *Van Dusen*, to require the district court here to compel arbitration of the question whether it has authority to compel arbitration would "put the cart before the horse." In arguing otherwise, Prime cites the Eighth Circuit's decision in *Green v. SuperShuttle*, which held that by delegating questions of arbitrability to the arbitrator, the parties had "agreed to have the arbitrator decide whether the FAA's transportation worker exemption applied." *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

But unlike the Ninth Circuit, which supported its opinion with a careful analysis of the FAA and Supreme Court case law, *Green* provides no explanation whatsoever for its decision. It does not even consider the fundamental problem with requiring a district court to compel arbitration of the question whether it has authority to compel arbitration. Nor does it address the Supreme Court case law demonstrating that whether the FAA applies is a question for the court to decide. Particularly in light of the Ninth Circuit's well-reasoned decision on the same issue, this Court should decline to follow *Green*.

In a last ditch effort to prevent this Court from considering whether the FAA applies, Prime argues that the Court is without power to consider the issue because it might be intertwined with the merits of the dispute. But that's simply not the case. As explained below, the FAA exempts *all* contracts of transportation workers to do work—including those of independent contractors. Therefore, there

is no need for the court to become involved in the merits of the parties' dispute about whether Mr. Oliveira was misclassified as an independent contractor. It need only determine that the plaintiffs here are transportation workers engaged in interstate commerce and that their contracts are contracts to do work. All of these facts are undisputed.

Furthermore, the district court would be required to determine whether the FAA applies to the parties' contract, even if doing so would entail examining some facts that are also relevant to the merits of the case. Prime's contention that courts, in evaluating a motion to compel arbitration, may never rule on an issue that might implicate the merits of a dispute is patently false. Indeed, the Supreme Court itself has expressly rejected this argument. *See Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 209 (1991). In *Litton*, both the merits of the parties' dispute and the determination of whether the parties were required to arbitrate that dispute depended on whether the right asserted in the case "ar[o]se under" an expired collective bargaining agreement. *See id.* at 208-210 & n.4. The dissent argued that the Court should compel arbitration to avoid determining the merits of the dispute. *Id.* at 208. But the majority disagreed. The Court explained: "[W]e must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement," even though that interpretation was dispositive of the

merits of the case. *Id.* at 209; *see also Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 592 (7th Cir. 2001) (resolving dispute about whether party had authority to sign contract, which resolved both the motion to compel arbitration and the merits of the dispute).[7]

Ultimately, Prime's argument about the possibility of excessive entanglement in the merits of the parties' dispute is a policy concern. And a policy concern cannot trump a statute's clear command. In *Waffle House*, the Supreme Court chastised the Fourth Circuit for compelling arbitration based on policy concerns similar to those Prime raises here, rather than abiding by the text of the FAA, which did not authorize the court to compel arbitration. *Waffle House*, 534 U.S. at 290.

The FAA is clear. It does not authorize courts to compel arbitration pursuant to the employment contracts of transportation workers engaged in interstate commerce. Prime's meritless policy concerns cannot override this clear command.

[7] The Court in *Litton* relied on *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), the very case Prime contends supports its argument. *See Litton*, 501 U.S. at 208-09. Prime clearly misunderstands *AT&T Technologies.* The quotation that Prime relies on—that courts may not "rule on the potential merits of the underlying claims"—was an admonition to courts that where a dispute is subject to arbitration, courts must compel arbitration even if they believe that the underlying claims are meritless. *See AT&T Techs.*, 475 U.S. at 649-50; *Paper, Allied-Indus. Chem. & Energy Workers Int'l Union, Local 4-12 v. Exxon Mobil Corp.*, 657 F.3d 272, 276 (5th Cir. 2011) (rejecting an interpretation of *AT&T* similar to Prime's). It had nothing to do with cases where the determination of whether a court may compel arbitration at all implicates the merits of the dispute.

II. The FAA Does Not Apply to the Operating Agreements.

The "contracts of employment" of transportation workers engaged in interstate commerce are exempt from the FAA. *See* 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). There is no dispute that Mr. Oliveira—a long-haul trucker—was a transportation worker engaged in interstate commerce. Prime App. 191 n.3. Nevertheless, Prime contends that the transportation worker exemption doesn't apply to him because the Operating Agreements Prime drafted label him an independent contractor.

But the transportation worker exemption applies to independent contractors. In 1925, when the FAA was passed, the term "contracts of employment" simply meant agreements to do work. It implied nothing about the status of the workers—independent contractors, like all other workers, were understood to labor under "contracts of employment." There is no reason to believe that Congress intended to deviate from this meaning in enacting the FAA. The Operating Agreements are indisputably contracts to do work. They are therefore exempt from the FAA.

A. The Term "Contracts of Employment" Encompasses All Contracts to Perform Work, Including Those of Independent Contractors.

The word "employment" has long been used as a synonym for the word "work"—regardless of the status of the worker. *See, e.g.*, *Webster's Collegiate Dictionary* 329 (3rd ed. 1916) (listing work as a synonym for employment); *id.* at 1100 (offering as one definition of work "employment; occupation"); *infra* page 25.

To be sure, in 1925, as now, there were certain bodies of law in which the term "*employee*" was used as a term of art, with a specific statutory or judicially-created meaning that, in some cases, excluded independent contractors.[8] But these specialized meanings did not extend to other forms of the word "employ." *See infra* notes 10-13. The terms employ, employer, and employment were all regularly used without regard to a worker's status—even in contexts where the law narrowly defined "employees" to exclude independent contractors. *See id.*[9]

[8] Tort law, for example, held that in many instances, employers were not liable for injuries caused to third parties by independent contractors, for such contractors were not under the control of the employer. *See, e.g.*, *Guy v. Donald*, 203 U.S. 399, 406 (1906). Similarly, workers' compensation statutes—laws that compensated workers for injuries on the job—typically did not apply to independent contractors for the same reason. *See, e.g.*, *Clark's Case*, 124 Me. 47 (1924) (collecting cases). As explained below, the FAA had no reason to make such distinctions, and in fact, had every reason to treat all transportation workers the same.

[9] Even the meaning of the word "employee" varied by context—as it does today. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 545 n.29 (1940) (explaining that the term "employees" does not have a single meaning); *Gunnoe v. Glogora Coal Co.*, 93 W. Va. 636 (1923). Where there was no reason to distinguish between different kinds of workers, the word "employee" was—and is—often used to refer to any worker, including independent contractors. *See, e.g.*, *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922) (explaining that in the Transportation Act of 1920, when Congress referred to "railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors); 49 C.F.R. § 390.5 (the term "employee" for purposes of the Motor Carrier Act includes any "driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)").

Thus, independent contractors were consistently characterized as "employed."[10] Those who hired independent contractors were called their "employers."[11] And the work of an independent contractor was called "employment."[12] Indeed, many courts *defined* independent contractors as workers "exercising an independent employment."[13]

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[10] *See, e.g.*, *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("[T]he Court of Common Pleas held that the party employed was an independent contractor."); *Arthur v. Texas & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (referring to "an independent contractor" as "employed . . . to do work upon the freight"); *Woodward Iron Co. v. Limbaugh*, 276 F. 1, 2 (5th Cir. 1921) ("[T]the moving of the coal by tramcars was not included in the work which Waters was employed to do as an independent contractor."); *James Griffith & Sons Co. v. Brooks*, 197 F. 723, 725 (6th Cir. 1912) ("For this purpose the company . . . employed him as an independent contractor."); *The Indrani*, 101 F. 596, 598 (4th Cir. 1900) ("If an independent contractor is employed to do a lawful act, and in the course of the work does some casual act of negligence, the common employer is not answerable." (internal quotation marks omitted)).

[11] *See, e.g., John L. Roper Lumber Co. v. Hewitt*, 287 F. 120, 121 (4th Cir. 1923) ("[W]hen a person contracts with another to do work not in itself a nuisance per se nor unlawful, or attended with danger to others, and not subject to the employer's control or direction, except as to the results to be obtained, the employer is not answerable to a third person for injuries resulting from the negligence of the contractor."); *Pierson v. Chicago, R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) ("An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished."); *Toledo Brewing & Malting Co. v. Bosch*, 101 F. 530, 531 (6th Cir. 1900) ("[T]his right was denied upon the ground that the acts complained of as negligent were those of an independent contractor, for which the defendant, as employer, was not responsible.")

[12] *See, e.g.*, Thomas M. Cooley, *A Treatise on the Law of Torts* 1098 (3rd.ed. 1906); *infra* note 13.

[13] *See, e.g., Prest-O-Lite Co. v. Skeel*, 182 Ind. 593 (1914); *Alexander v. R. A. Sherman's Sons Co.*, 86 Conn. 292, 297 (1912); *Harmon v. Ferguson Contracting*

Unsurprisingly, then, the term "contracts of employment" encompassed the agreements of independent contractors. Sources from around the time the FAA was passed consistently use the term "contract of employment" to refer to the contract under which an independent contractor is employed. *See, e.g.*, *1922 A.L.R.* at 228, 256, 272; Theophilus J. Moll, *A Treatise on the Law of Independent Contractors and Employers' Liability* 48, 58, 334 (1910).

The United States Supreme Court, for example, repeatedly referred to contracts with attorneys, who were undoubtedly independent contractors, as "contracts of employment." *See, e.g.*, *Watkins v. Sedberry*, 261 U.S. 571, 575 (1923); *Calhoun v. Massie*, 253 U.S. 170, 179 (1920) (McReynolds, J., dissenting); *Taylor v. Bemiss*, 110 U.S. 42, 44 (1884).[14]

And courts around the country consistently used the term "contract of employment" to refer to the agreements of independent contractors. *See, e.g.*, *Tankersley v. Webster*, 116 Okla. 208 (1925) ("[T]he contract of employment . . . conclusively shows that Casey was an independent contractor."); *Lindsay v.*

Co., 159 N.C. 22 (1912); *Karl v. Juniata Cty.*, 206 Pa. 633 (1903); *see also General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R.226, 227-232, 243 (1922) [hereinafter *1922 A.L.R.*] (citing numerous cases).

[14] The Supreme Court held, in 1891, that attorneys that are not "in regular and continual service" to their employer—i.e. attorneys hired to litigate a single lawsuit or conduct a particular transaction—are independent contractors. *Louisville, E. & St. LR Co. v. Wilson*, 138 US 501, 505 (1891).

McCaslin, 123 Me. 197 (1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law."); *Waldron v. Garland Pocahontas Coal Co.*, 89 W. Va. 426 (1921) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, the circumstances under which the contract was made and the work was done."); *U.S. Fid. & Guar. Co. of Baltimore, Md., v. Lowry*, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (explaining that whether a person is an independent contractor or employee depends upon whether the "contract of employment" gives the employer the right "to control the manner and continuance of the particular service and the final result"); *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 477 (1919) (explaining that a person working under a "written contract of employment" could be either "an independent contractor or [a] servant," depending on how the work was actually performed); *Hamill v. Territilli*, 195 Ill. App. 174, 176 (Ill. App. Ct. 1915) ("Appellant strongly contends that under the contract of employment Territilli and Scully were independent contractors for whose negligence it was not responsible, while appellee urges the contrary.").

Of particular relevance, the 1926 edition of the American Law Reports makes clear that the term "contract of employment" was used to describe the

agreements under which teamsters—that is, truck (and earlier, wagon) drivers—worked, even if the drivers were independent contractors. Citing several cases from between 1916 and 1925, the Reports state: "When the *contract of employment* is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally, but may employ others to that end and respond to the employer only for the faithful performance of the contract, the employment is generally an independent one." *Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926) (emphasis added).

And indeed, in a 1919 case much like this one, the California Court of Appeal used the term "contract of employment" to refer to an agreement between a truck driver and the coal company for which he worked, where the very question at issue in the case was whether the driver was an independent contractor or a servant of the company. *Luckie*, 41 Cal. App. at 471. The court's analysis in that case is instructive. The driver had leased his truck from the company and agreed to drive for the company for ten hours a day until his lease was paid off. *Id.* at 472. The contract stated that the driver was responsible for gas, oil, repairs, and insurance. *Id.* And it provided that all "responsibility" and liability "for the operation of the truck" was the driver's, not the company's. *Id.* Nevertheless, the court repeatedly characterized the contract as a "contract of employment." *Id.* at 475, 477-79, 481-

82. And, the court held, whether the driver was a servant of the coal company or an independent contractor could not be determined "solely from the written contract of employment," because a worker's status depends on the "true relation" between the worker and his employer, not the terms of the contract. *Id.* at 477, 479. This analysis makes clear the distinction between a worker's contract—which is always a "contract of employment"—and his status—which changes based on the relationship between the worker and the employer and the purposes for which his status is being ascertained.

And while there are numerous cases using the term "contract of employment" to refer to the employment agreements of independent contractors, a Westlaw search reveals not a single case from this time period holding that the contract under which an independent contractor works is *not* "a contract of employment."[15]

[15] Indeed, on the exceedingly rare occasion that someone even tried to make this argument, it was soundly rejected: For example, an architect who had worked for a Minnesota state agency as an independent contractor tried to convince the U.S. Board of Tax Appeals that he didn't have to pay taxes under the Revenue Act of 1926, which exempted state "officer[s] or employee[s]"—an exemption the Board held did not apply to independent contractors. *Johnston v. C.I.R.*, 14 B.T.A. 605, 607 (1928) (internal quotation marks omitted). The architect's argument was that the Minnesota statute authorizing his work provided that the state agency "shall *employ* an architect," and so he must be an "employee" within the meaning of the Revenue Act. *Id.* at 608 (emphasis added) (internal quotation marks omitted). The Board of Tax Appeals disagreed. Referring to the architect's contract with the state as a "contract of employment," the Board held that a person "employed" under such a contract could be *either* an independent contractor *or* an "officer or employee" within the meaning of the Revenue Act. *See, e.g., id*. at 606-609. "To

The use of the term "contract of employment" to refer solely to those agreements with workers whom a particular statute or common law doctrine might define as "employees" is a distinctly modern usage. The first instance of this more narrow usage appears to be in a 1954 New Mexico case—nearly thirty years after the passage of the FAA. *See Nelson v. Eidal Trailer Co.*, 58 N.M. 314, 316 (1954). Even today, this usage is infrequent—and far outstripped by the traditional meaning: an agreement to perform work, regardless of the status of the worker.[16]

Statutory terms are to be interpreted according to their ordinary meaning at the time the statute was passed. *See Perrin v. United States*, 444 U.S. 37, 42

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employ," the Board explained, is a general term, meaning "to make use of the services of; to have or keep at work; to give employment to; [or] to intrust with some duty or behest.'" *Id.* (quoting Webster's New International Dictionary). Any worker can be "employed." *See id.* But the word "employee" has a specific statutory meaning within the Revenue Act. *See id.* Therefore, a worker who is "employed" under a "contract of employment" is not necessarily an "employee" within the meaning of the statute. *See id.*

[16] A Westlaw search for cases that state that an independent contractor's contract is not a contract of employment turns up a couple dozen cases. A search for cases that use the term "contract of employment" in a manner that encompasses the agreements of independent contractors leads to hundreds of results. *See, e.g.*, *Guill v. Acad. Life Ins. Co.*, 935 F.2d 1286 (4th Cir. 1991) ("Academy's employment contracts provide that its agents are independent contractors."); *Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 554-55 (D. Or. 2009); *Smith v. Interactive Fin. Mktg. Grp., L.L.C.*, 79 Va. Cir. 158 (2009); *Larmon v. CCR Enterprises*, 285 Ga. App. 594, 595 (2007).

(1979). The ordinary—really, the only—meaning of the term "contract of employment" at the time the FAA was passed was an agreement to perform work.

B. The Purpose and Historical Context of the FAA's Exemption for Transportation Workers Confirm that the Term "Contracts of Employment" Includes the Contracts of Independent Contractors.

There is no reason to believe that in passing the FAA, Congress used the term "contracts of employment" to mean anything other than its ordinary meaning at the time. To the contrary, the purpose and historical context of the Act confirm that Congress intended to exempt all transportation workers engaged in interstate commerce—including independent contractors. The FAA is not about tort liability or workers' compensation or any other specialized body of law that might have reason to distinguish between different kinds of workers. The FAA is about dispute resolution. And in legislating about dispute resolution, it makes perfect sense that Congress would treat all transportation workers alike.

Beginning in the late nineteenth century, disputes between transportation workers and their employers had repeatedly crippled interstate commerce and endangered the public. During the Pullman Strike of 1894, for example, tens of thousands of workers struck, state and federal troops were called in, violence broke out in several cities, several people were killed, and the railroad system was paralyzed. *See* A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Polit. Econ. 540 (1901); Almont Lindsey, *The Pullman Strike* 335-36 (1942). In 1921, a

nationwide strike by sailors and longshoremen shut down both East and West coast ports for weeks. David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism 1865-1925* 403 (1987). And in 1922, a railroad strike threatened to shut down major industries—coal mines couldn't transport their coal; fruit was rotting because there was no way to get it to market—as 400,000 shopmen refused to work, in part because of the railroads' attempts to avoid federal regulation by using independent contractors. Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 6 (Dec. 1922). And it wasn't only commerce that was endangered: The strike was accompanied by widespread violence, in which numerous workers—and innocent bystanders—were injured or killed. Colin J. Davis, *At Odds: The 1922 National Railroad Shopmen's Strike* 83-84 (1997). And these were not the only incidents of labor unrest. The early twentieth century saw over a hundred strikes, just in the railroad industry alone. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 273 (2003).

Amidst this ongoing strife, Congress repeatedly passed legislation attempting to regulate the transportation industries and erect dispute resolution mechanisms that would obviate the need to resort to strikes. *See, e.g.*, Erdman Act, 30 Stat. 424 (1898); Newlands Act, 38 Stat. 103 (1913); Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456. These statutes demonstrate Congress's

concern with the economic threat posed by continued labor unrest in the transportation industry. They also demonstrate that Congress recognized that the threat was posed by *all* transportation workers, regardless of how they might be labeled. In 1913, for example, Congress passed the Newlands Act, which created a Board of Mediation and Conciliation to mediate railway disputes that "interrupt[ed] or threaten[ed] to interrupt the business of [a railroad] to the serious detriment of the public interest." 38 Stat. 103 (1913). The Act applied broadly to "all persons actually engaged in any capacity in train operation or train service of any description, notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract"—that is, it applied to all railroad workers, including independent contractors. *Id.*

Similarly, the Transportation Act of 1920—which returned the railroads to private operation after they had been nationalized during World War I and set rules for the newly re-privatized industry—was construed to apply to all railroad workers. The Act imposed a "duty" on "all carriers and their officers, employees, and agents, to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials." Transportation Act, 41 Stat. 456. To that end, the statute created a federal Railroad Labor Board to decide labor disputes in the hope of preventing further labor unrest. *See id.*

The Railroad Labor Board made clear that railroads could not circumvent the Transportation Act simply by hiring independent contractors. The Board recognized that "[t]he object of the [Act] was to prevent interruption to traffic, growing out of disputes between carriers and their employees. Such controversies had for years periodically harassed the public, blocked commerce, stagnated business, destroyed property values, and visited great inconvenience and suffering upon millions of people." *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922).[17] Therefore, the Board explained:

> When Congress in this act speaks of railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors in which event the so called contractors and the railway workers might engage in industrial warfare ad libitum.
> . . . .
> A strike by the employees of a contractor or contractor-agent of a carrier would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier.

Id at 337-38.

The Board explicitly distinguished cases which involved "the railroad company's liability for injuries incurred by the contractor's employees." *Indiana*

[17] Because this decision is not available on Westlaw, a copy of the decision is appended to this brief.

Harbor, 3 Dec. U.S. R.R. Lab. Bd. at 338. These cases regulate "the private relations between the employer and the employee," and therefore, the Board concluded, they might have good reason to exclude independent contractors. *See id.* But, the Board explained, the "paramount purpose" of the Transportation Act was "to insure to the *public* . . . efficient and uninterrupted railway transportation by protecting the people from the loss and suffering incident to the interruption to traffic growing out of controversies between the carriers and the employees who do their work." *Id.* at 339 (emphasis added). And, for that purpose, the Board concluded, it was "immaterial" whether a railroad worker was an independent contractor. *Id.* If he had the power to disrupt transportation, he should be subject to the Act.

It was against this backdrop that Congress passed the Federal Arbitration Act. Congress had passed several statutes regulating transportation workers, and it would soon go on to pass several more—including legislation regulating truck drivers and air carriers. *See Circuit City*, 532 U.S. at 121; Motor Carrier Act of 1935, 49 Stat. 543, ch. 498.[18] Congress was clearly "concern[ed] with transportation workers and their necessary role in the free flow of goods." *Circuit*

[18] Congress began considering legislation to regulate motor carriers the same year it passed the FAA. In fact, between 1925 and 1935, Congress considered thirty-four bills, but fierce competition between the interests of railroads and motor carriers kept the legislation from passing until 1935. *See* James C. Nelson, *The Motor Carrier Act of 1935*, 44 J. Pol. Econ., 464-504 (1936).

City, 532 U.S. at 121. And Congress "deem[ed] it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes." *Pennsylvania R. Co. v. U.S. R.R. Labor Bd.*, 261 U.S. 72, 79 (1923). As the Supreme Court has explained, it is "reasonable to assume that Congress excluded" transportation workers "from the FAA"—an Act that requires courts to enforce the dispute resolution mechanisms designed by private parties—"for the simple reason that it did not wish to unsettle [its own] established or developing statutory dispute resolution schemes." *Circuit City*, 532 U.S. at 121. Congress wanted to ensure that transportation workers' disputes were not subject to the whim of private dispute resolution, but instead could be regulated by Congress for the good of the public.

Given that purpose, it would make no sense for Congress to distinguish between independent contractors and other workers. A truck driver (or railroad conductor or sailor) is just as "necessary" to "the free flow of goods"—and just as able to interrupt that "free flow of goods" by striking—if he is an independent contractor as he is if he meets some specialized definition of "employee" used for some other purpose.

Congress meant what it said: "Contracts of employment" of transportation workers are exempt from the FAA. Mr. Oliveira's contract is a contract of employment. The FAA, therefore, does not apply.[19]

C. The Policy Concerns Prime Cites Support the Conclusion that the Transportation Worker Exemption Applies to Independent Contractors

In addition to adhering to the text of the transportation worker exemption and effectuating its purpose, an interpretation of the exemption that applies to all transportation workers—including independent contractors—avoids the policy concerns Prime spends much of its brief worrying about. Because the exemption applies to all transportation workers engaged in interstate commerce, there is no need for a court deciding whether the exemption applies to become involved in the merits of a dispute that turns on whether a worker is misclassified or actually an independent contractor. *Cf.* Appellants' Br. 23-28. Nor does a court need to worry

[19] The case law interpreting Section 1 of the FAA is largely unhelpful. Few courts—and no appellate courts—have considered the meaning of the term "contracts of employment" for purposes of the FAA. And while lower courts are split on whether the term encompasses the agreements of independent contractors, this split is misleading. *Compare, e.g. Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1257-58 (D. Utah 2004) (the transportation worker exemption applies to any agreement to "perform personally, or through other drivers . . . to transport freight on the company's behalf"), *with Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003) (holding that the exemption doesn't apply to independent contractors). The analysis in these decisions is cursory. No court has seriously considered the ordinary meaning of the term "contracts of employment" at the time the FAA passed, let alone the purpose or history of the exemption.

about how to handle an employment relationship that changes over time. *Cf. id.* at 14. Nor would it need to deal with possible discrepancies between one worker and another at the same company. *Cf. id.* at 15-16. To be sure, Prime's concerns are overblown—and they can't, of course, override the text of the statute. But in this case, the text and purpose of the statute, as well as the policy concerns Prime identifies, all point in the same direction: The FAA exempts *all* transportation workers engaged in interstate commerce, regardless of how their employer classifies them.

III. Even if the Term "Contracts of Employment" is Construed to Exclude Independent Contractors, Prime's Motion to Compel Should Still Be Denied.

Despite the common meaning of the term "contracts of employment" and the purpose of the transportation worker exemption—indeed, despite the company's own policy concerns that arise from its interpretation of the Act—Prime baldly asserts that the transportation worker exemption does not apply to independent contractors. It further asserts, again without support, that the Act defines independent contractors based on how a worker is characterized in his employment contract. In Prime's view, if the terms of a worker's contract provide that he is an independent contractor, the transportation worker exemption does not apply—regardless of the actual relationship between the worker and his employer.

There is an obvious problem with this argument (besides the fact that is contrary to the text and purpose of the FAA). It would allow transportation companies to evade the transportation worker exemption entirely. Companies could simply require their workers to sign contracts stating they are independent contractors—regardless of whether they actually are—and thereby subject to the FAA the very workers Congress explicitly sought to exempt. That is, of course, precisely what Mr. Oliveira alleges occurred in this case. And it is what courts and administrative agencies have repeatedly found trucking companies have done in recent years. *See, e.g.*, *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 984 (9th Cir. 2014); *Martins v. 3PD Inc.*, No. CIV.A. 11-11313-DPW, 2014 WL 1271761, at *1 (D. Mass. Mar. 27, 2014); *Green Fleet Sys., LLC & Int'l Bhd. of Teamsters, Port Div.*, 2015 L.R.R.M. (BNA) ¶ 180798 (N.L.R.B. Div. of Judges Apr. 9, 2015).

This Court and the Supreme Court have repeatedly held that the legal status of a worker does not turn on how that worker is labeled, but rather on the actual circumstances of his employment. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) ("[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." (internal quotation marks

omitted)); *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (1950); *De Jesus v. LTT Card Servs., Inc.*, 474 F.3d 16, 23 n.11 (1st Cir. 2007).[20]

Even in the cases Prime itself cites—which (wrongly) assume the transportation worker exemption does not apply to independent contractors—the courts make clear that workers may demonstrate that they were not actually independent contractors, despite assertions to the contrary in their contract. *See Owner-Operator Indep. Drivers Ass'n., Inc. v. United Van Lines, LLC.*, No. 4:06CV219JCH, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006) (providing that "the court should apply the characterization of the relationship described in the agreement" *unless* the worker may "proves to the court" that the characterization is erroneous); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003) (holding the FAA did not apply because the workers had not demonstrated "that the owner-operators who signed the . . . contract at issue should in fact be considered employees based on the terms of the contract *and the circumstances of their working relationship*" (emphasis added)); *Carney v. JNJ Exp., Inc.*, 10 F. Supp. 3d 848, 854 (W.D. Tenn. 2014) (same); *Port Drivers Fed'n 18, Inc. v. All Saints*, 757 F. Supp. 2d 463, 472 (D.N.J.

[20] This was also true during the time period when the FAA was passed. *See, e.g., Carlson v. Indus. Acc. Comm'n*, 213 Cal. 287, 290 (1931) ("Petitioners . . . assert that the issue in this case, and the only issue, is whether the *instrument* in question is a lease. But the real issue, as we have indicated, is whether the *relationship* of the parties was . . . employer and employee.").

2011) (same); *Davis v. Larson Moving & Storage Co.*, No. CIV. 08-1408 JNE/JJG, 2008 WL 4755835, at *6 (D. Minn. Oct. 27, 2008) (similar); *see also Flinn v. CEVA Logistics U.S., Inc.*, No. 13-CV-2375 W BLM, 2014 WL 4215359, at *3 (S.D. Cal. Aug. 25, 2014) (holding that a truck driver was exempt from FAA based on a declaration demonstrating that despite the label in his contract, he was not an independent contractor).[21]

If this Court holds that contrary to the common meaning of the term "contracts of employment," the transportation worker exemption does not apply to independent contractors, then Mr. Oliveira should be given a chance to demonstrate that he was not, in fact, an independent contractor. And, as the district court held, he should be entitled to limited discovery on that point.[22]

Prime's contention that discovery on a motion to compel arbitration is "only" permitted "regarding . . . the making of [an arbitration] agreement"—which Prime defines as "the physical execution" of the agreement—is simply false. *See*

[21] Whether a worker is characterized as an independent contractor depends on the purpose of the characterization. *See supra* note 9. Different tests are applied in different contexts. Prime does not state which test it believes applies for purposes of the FAA. But in none of the common methods for determining whether a worker is an independent contractor do courts merely accept the labels the parties have used in their contract when they conflict with the actual employment relationship. *See supra* pages 39-40.

[22] For example, documents such as company handbooks, memos, and transcripts of communications between dispatchers and the drivers could all serve to demonstrate the control Prime exercised over Mr. Oliveira and therefore undermine Prime's contention that he was an independent contractor.

Appellants' Br. 12. Courts have consistently permitted parties to take discovery regarding factual disputes as to the enforceability of an arbitration clause, even if those disputes are unrelated to the "making" of the provision. For example, courts frequently allow discovery where a plaintiff contends she would be unable to afford the costs of arbitration or that the arbitral forum is biased—contentions that obviously have nothing to do with the making of the arbitration clause. *See, e.g.*, *Blair v. Scott Specialty Gases*, 283 F.3d 595, 609 (3d Cir. 2002) (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000)); *Trombley v. Bank of Am. Corp.*, 636 F. Supp. 2d 151 (D.R.I. 2009); *Keeton v. Wells Fargo Corp.*, 987 A.2d 1118, 1122 (D.C. 2010); *Toppings v. Meritech Mortgage Services, Inc.*, 140 F. Supp. 2d 683, 685 (S.D.W. Va. 2001); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 190, 202 (D. Mass. 1997).

Courts have even ordered discovery regarding the question whether the FAA applies. *See, e.g.*, *Leighton v. Chesapeake Appalachia, LLC*, No. 1:13-CV-2018, 2013 WL 6191739, at *9 (M.D. Pa. Nov. 26, 2013) (providing for "[a] period of discovery. . . on facts that would support whether this case involves interstate commerce and hence that the FAA controls"); *Saneii v. Robards*, 187 F. Supp. 2d 710, 713 (W.D. Ky. 2001) ("If the final resolution of this motion hinged on whether the FAA applies it would be proper to remand this issue for discovery and briefing of the interstate commerce issue."); *Estate of Ruszala ex rel. Mizerak v.*

Brookdale Living Communities, Inc., 415 N.J. Super. 272, 287 (App. Div. 2010) ("The court . . . directed the parties to conduct discovery on issues pertaining to the issue of interstate commerce . . . ." (internal quotation marks omitted)).[23]

If this Court decides that the applicability of the FAA depends on a factual determination of whether Mr. Oliveira was an independent contractor, it should uphold the district court's order denying the motion to compel arbitration without prejudice and allowing limited discovery on that issue.

IV. The Arbitration Provisions in Prime's Operating Agreements Do Not Apply to Mr. Oliveira's Employment Before Those Agreements Began or After They Were Terminated.

Although Mr. Oliveira worked from March 2013 through fall 2014, only his employment contracts from May 2013 through September 2014—the "Operating

[23] This Court has not explicitly addressed when discovery is appropriate regarding a motion to compel arbitration, but on multiple occasions, it has discussed discovery in the context of motions to compel and has never suggested that it is inappropriate—or limited to formation issues. *See, e.g., Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1125 n.10 (1st Cir. 1989) (declining to address district court's denial of a motion to defer decision on whether to compel arbitration pending further discovery not because such discovery was generally impermissible, but because "[t]he motion was not directed at discovery of any facts material to the legal question—whether the FAA preempts the Regulations"); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) (stating that district court correctly refused discovery on costs of arbitration, not because such discovery is unavailable, but rather because the issue was "moot[ ]"); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 19 n.15 (1st Cir. 1999) (noting with apparent approval that "[t]he district court explicitly invited the parties to provide additional briefing and discovery on the particular circumstances of waiver in this case" (internal quotation marks omitted)).

Agreements"—contained an arbitration provision. By its terms, this arbitration provision—which is the same in both Operating Agreements—does not apply to disputes that arose before the Agreements were entered or after they were terminated. The provision requires arbitration of "[a]ny disputes arising under, arising out of or relating to *this agreement*"—i.e. the Operating Agreement. Prime App. 93 (emphasis added).

Mr. Oliveira's disputes before May 2013 and after September 2014 do not arise under, arise out of, or relate to the Operating Agreements. Prime admits that before May 2013, Mr. Oliveira worked as an "employee driver" under an entirely different agreement with Prime, which did not contain an arbitration clause. *See* Appellant's Br. 2. Any employment disputes from that time period, therefore, are related to *that* agreement, not the Operating Agreements. And after September 2014, when the Operating Agreements were terminated, Mr. Oliveira worked as a "company driver," to whom the Operating Agreements indisputably did not apply. Prime App. 187. Disputes from that time period, therefore, cannot be governed by the Operating Agreements—they simply didn't apply. *See Klay v. All Defendants*, 389 F.3d 1191, 1203 (11th Cir. 2004) ("Because arbitration is strictly a matter of contract, we cannot compel arbitration for disputes which arose during time

periods in which no effective contract requiring arbitration was governing the parties.").[24]

This Court has repeatedly rejected attempts to apply arbitration provisions that, like Prime's, explicitly apply only to "this agreement"—i.e. the agreement containing the provision—to disputes unconnected to the agreement in which the provision is contained. *See, e.g., Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 9 (1st Cir. 2004); *Choice Security Systems, Inc. v. AT & T Corp.*, 141 F.3d 1149 (Table), 1998 WL 153254 (1st Cir. Feb.25, 1998) (unpublished). In *Fit Tech*, for example, the parties entered into two "inter-relat[ed]" agreements: a purchase agreement, in which the plaintiffs sold defendants several fitness centers, and an employment agreement, in which the plaintiffs agreed to manage these fitness centers. *Fit Tech*, 374 F.3d at 10. The employment agreement contained an

[24] Both the Supreme Court and this Court have acknowledged this principle in the context of collective bargaining agreements. *See, e.g., Litton*, 501 U.S. at 206; *United Parcel Serv., Inc. v. Union De Tronquistas De Puerto Rico, Local 901*, 426 F.3d 470, 473 (1st Cir. 2005) (a post-termination dispute may only be arbitrated if it "has its real source in the contract"). As explained by the Supreme Court, "an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied." *Litton*, 501 U.S. at 206. Therefore, a dispute brought after a contract terminates may be arbitrated "under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Id.* at 205-06. None of these circumstances apply here.

arbitration clause that applied to "any controversy or claim arising out of or relating to this employment agreement." *Id.* at 4 (brackets and internal quotation marks omitted). Although the purchase agreement not only referenced but *required* the employment agreement, this Court held that the arbitration provision in the employment agreement did not extend to claims of alleged misconduct in purchasing the gym. *See id.* at 9-10. The Court explained that if there hadn't been a case in which employment and purchasing misconduct claims were both at issue, "no one would claim that the [purchasing misconduct claims] involved a claim 'relating to' the employment agreement." *Id.* at 9. "It would be a far more normal use of words," the Court stated, "to say that such a claim was related to the purchase agreement." *Id.*

So too here. If Mr. Oliveira had only brought claims from the time period before or after the Operating Agreements, "no one would claim" that his disputes were related to the Operating Agreements. They couldn't. The Operating Agreements didn't apply then. This analysis doesn't change simply because Mr. Oliveira has *also* brought claims that are related to the Operating Agreements. The arbitration provision still doesn't apply to the unrelated claims.

As this Court stated in *Fit Tech*, "[n]o one can seriously argue that clauses can be plucked at random from one agreement and inserted into [an]other." *Fit Tech*, 374 F.3d at 10. But that's precisely what Prime asks this Court to do. The

company contends that this Court should "pluck" the arbitration provision out of the Operating Agreements and apply it to disputes to which the Agreements don't otherwise apply. *See id.* at 17-18. This suggestion should be rejected out of hand.

Prime's reliance on this Court's decision in *Kristian v. Comcast* is misplaced, for *Kristian* only further undermines the company's argument. *See* Appellant's Br. at 17 (discussing *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006)). In that case, the Court held that Comcast's arbitration clause, which applied to "any claim or dispute related to or arising out of this agreement *or the services provided*," encompassed disputes based on services provided before the agreement was entered. *Kristian*, 446 F.3d at 31(emphasis added). The Court explained that by its terms, Comcast's arbitration provision applied both to disputes related to or arising out of the agreement *and* disputes related to or arising out of the services provided by Comcast (regardless of whether those services also arose out of the particular agreement at issue). *Id.* And, the Court explained, this retroactive effect made sense in the context of the parties' ongoing business relationship—the plaintiff's previous agreement with Comcast contained a similar arbitration provision, so disputes about services previously provided were already required to be arbitrated under that agreement. *See id.* at 34-35. The new arbitration provision, therefore, simply ensured that the parties' contractual obligations remained the same. *See id.*

Importantly, the *Kristian* Court distinguished the language of Comcast's arbitration provision—which applied to "this agreement *or the services provided*" by the defendant—from the language of other provisions that, like Prime's, apply solely to "this agreement." *Kristian*, 446 F.3d at 33 (emphasis added). Provisions like Prime's that apply solely to "this agreement," the Court stated, "specifically *exclud[e]* retroactive effect." *Id.* Under the reasoning of *Kristian*, then, Prime's arbitration provision *does not* apply outside the time period governed by the Operating Agreements in which it is contained. *See id.*

Furthermore, unlike in *Kristian*, Mr. Oliveira's previous contract with Prime did *not* contain an arbitration provision. And there is nothing in the Operating Agreements that "expressly states or remotely intimates that the parties ever contemplated" that the arbitration clause in the Operating Agreements would serve to "radical[ly] . . . renegotiat[e]" the terms of the contract that preceded it. *Choice Sec. Sys.*, 1998 WL 153254, at *1.

Indeed, in *Choice Security Systems*, this Court held that a clause much like Prime's did not have retroactive effect. *Choice Sec. Sys.*, 1998 WL 153254, at *1. In that case, the parties had entered a series of annual contracts, the most recent of which contained an arbitration provision. *See id.* That provision stated that it applied to "all disputes . . . arising out of or relating to the products furnished pursuant to *this Agreement*." *Id.* (emphasis added). Based on this language, the

Court held that the arbitration provision did not apply to claims arising under any of the parties' previous contracts. *Id.* It would make no sense, the Court explained, for the parties to have enacted "so radical a retroactive renegotiation of their earlier agreements" without saying so. *Id.*; *see also Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 373 (6th Cir. 1999) (characterizing as "nonsensical" the "suggest[ion] that [the plaintiff] simply would abandon its established right to litigate disputes arising under [pre-existing] contracts"); *In re Hops Antitrust Litig.*, 655 F. Supp. 169, 172-73 (E.D. Mo. 1987) (rejecting argument similar to Prime's, where "[t]he record reflect[ed] no agreement by the parties to amend earlier contracts to provide for arbitration of disputes").

The other cases Prime cites—two cases involving Merrill Lynch's customer agreement—are similarly unavailing. Merrill Lynch's agreement contained an arbitration clause stating that "any controversy between us *arising out of your business or* this agreement, shall be submitted to arbitration." *Zink v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 13 F.3d 330, 331 (10th Cir. 1993) (internal quotation marks omitted) (emphasis added); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1026 (11th Cir. 1982). Both the Tenth and Eleventh Circuits held that because the clause explicitly applied not just to claims arising out of the agreement, but also to disputes relating to the "business between the parties" more generally, it applied to business between the parties that had occurred before

the agreement. *Belke*, 13 F.3d at 1028; *accord Zink*, 13 F.3d at 332. But unlike Merrill Lynch's arbitration provision, Prime's arbitration clause is limited to disputes related to "this Agreement." It does not permit arbitration of disputes arising out of the business (or employment) of the parties more generally. The Merrill Lynch cases, therefore, are inapplicable. In fact, the Tenth Circuit case, *Zink*, actually cuts against Prime's argument, for in that case, the court confirmed that "disputes arising after the termination of an arbitration agreement are not arbitrable under that agreement." *Zink*, 13 F.3d at 332.

Prime seizes on the fact that its arbitration provision clarifies that the "disputes arising under, arising out of or relating to this agreement, includ[e] . . . disputes as to the rights and obligations of the parties." Appellants' Br. 18 (internal quotation marks omitted). The company argues that all of Mr. Oliveira's claims are disputes as to the "rights and obligations of the parties," and therefore all of his claims must be arbitrated—even those that are indisputably unrelated to the Operating Agreements. *Id.* But the company misinterprets the provision.

The arbitration provision's clarification—that disputes related to the agreement *include* disputes about the parties' rights and obligations—is not a freestanding requirement that Mr. Oliveira and Prime arbitrate any dispute whatsoever over their "rights and obligations," regardless of when the dispute arises or whether it's at all related to the Operating Agreements that contain the

arbitration provision. In Prime's view, if twenty years from now Mr. Oliveira is crossing the street and happens to be hit by a Prime truck, he would be required to arbitrate his claims. That's absurd.

Courts have repeatedly rejected such absurdly broad interpretations of arbitration provisions. *See, e.g.*, *Porter v. Dollar Fin. Grp., Inc.*, No. 2:14-1638 WBS AC, 2014 WL 4368892, at *2 (E.D. Cal. Sept. 2, 2014) ("[R]eading the provision in question as requiring arbitration for all claims, unrelated or not, would render superfluous the other language in the Agreement limiting the scope of arbitration."); *In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253, 1262-63 (S.D. Cal. 2012) (holding that an arbitration provision that purported to apply to "any and all disputes" between the parties would be unconscionable if it truly applied to all disputes, regardless of their relation to the contract within which the arbitration provision was contained). As the South Carolina Supreme Court explained in construing a provision similar to Prime's, "courts generally hold that [even] broadly-worded arbitration agreements apply [solely] to disputes in which a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Aiken v. World Fin. Corp. of S. Carolina*, 373 S.C. 144, 149 (2007).

In *Smith v. Steinkamp*, for example, the Seventh Circuit considered an arbitration provision in a payday lending contract that stated that the disputes to be arbitrated "include[d] without limitation":

> (a) any federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to the [loan-application form], this Agreement [i.e., the loan agreement] (including this arbitration provision and the fees charged), or any prior agreement or agreements between you and us; (b) all counterclaims, cross-claims and third-party claims; (c) all common law claims, based upon contract, tort, fraud, and other intentional torts; (d) any claims based upon a violation of any state or federal constitution, statute or regulation . . . .

Smith v. Steinkamp, 318 F.3d 775, 776 (7th Cir. 2003) (brackets in original) (internal quotation marks omitted). The lender argued that this arbitration provision required any borrower who signed it to arbitrate all of their claims against the lender—even claims that stemmed from a subsequent loan, for which the borrower had not signed an arbitration provision. *Id.* at 777.

Judge Posner, writing for a unanimous panel, rejected the lender's interpretation of the contract. "[I]t is apparent," the Court held, that the clauses stating that "any" claims must be arbitrated "relate back to" the first clause in the arbitration provision, "which limits the duty to arbitrate to disputes arising under 'this Agreement'" or "'prior'" loan agreements. *Smith*, 318 F.3d at 777. The Court explained that "[t]he function of [the latter clauses] is to make clear that neither the legal theory nor the procedural vehicle for a claim . . . is relevant to

arbitrability; all that matters is that the claim arise from either the current loan agreement or a prior loan agreement." *Id.*[25]

Indeed, the court stated, if the requirement to arbitrate any claims against the lender were "read as standing free from [the] loan agreement, absurd," and quite possibly unconscionable, "results [would] ensue." *Id.* at 777-78.; *cf. N. Ins. Co. of New York v. Point Judith Marina, LLC*, 579 F.3d 61, 73 (1st Cir. 2009) (refusing to accept a construction of a contract that would lead to "absurd result[s]"); *Rathbun v. CATO Corp.*, 93 S.W.3d 771, 781 (Mo. Ct. App. 2002) ("The more probable and reasonable of two available constructions should be utilized to the exclusion of one which produces a redundant, illusory, absurd, and therefore unreasonable result." (internal quotation marks omitted)).

Here, it is even more "apparent" than in *Smith* that the arbitration provision applies solely to disputes related to the Operating Agreements. Prime's arbitration provision states that disputes related to the Operating Agreement "*includ[e]*" disputes about the "rights and obligations of the parties." Prime App. 93 (emphasis added). As in *Smith*, it is clear that this clause is not freestanding, but rather serves to clarify that the arbitration provision means to encompass all disputes that are related to the Operating Agreement, regardless of the legal theory or procedural

[25] Here, of course, Prime's arbitration provision does not reference prior agreements. It is, therefore, limited solely to the Operating Agreements in which it is contained.

vehicle through which they are pursued. There is no need to countenance the absurd—and likely unconscionable—results that would follow from Prime's interpretation. As in *Smith*, the plain text of Prime's arbitration provision, "read sensibly and as a whole, with careful attention to the relation among the clauses," makes clear that it applies solely to disputes related to the Operating Agreements. *Smith*, 318 F.3d at 778.

Because Mr. Oliveira's employment claims from before the Operating Agreements were entered and after they were terminated do not relate to those Agreements, the district court correctly held that the arbitration provision does not apply to them.[26]

CONCLUSION

Because the FAA does not apply to Mr. Oliveira's contracts with Prime, regardless of whether he was an independent contractor, this Court should remand the case to the district court with instructions to deny Prime's motion to compel with prejudice. If, however, the Court determines that the FAA's transportation worker exemption does not apply to independent contractors, it should affirm the

[26] Furthermore, Prime does not dispute that while Mr. Oliveira was an "apprentice" (before he signed the Operating Agreements) and a "company driver" (after the Agreements terminated), he was not an independent contractor. *See* Prime App. 191; Appellant Br. 2. If, during those periods, he signed an arbitration clause governing his employment, the FAA would not apply to it. Prime should not be permitted to circumvent Congress's mandate simply by having him sign an arbitration provision at a different time.

district court's denial of the motion to compel without prejudice, allowing the parties to pursue limited discovery into Mr. Oliveira's employment status.

Respectfully submitted,

s/ Jennifer D. Bennett

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties or their counsel of record are registered ECF filers, and they will be served by the CM/ECF system. The following counsel were served with the foregoing document through CM/ECF:

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Attorney for Plaintiff-Appellee

Dated: June 10, 2016

No. 15-2364

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA,
on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

v.

NEW PRIME, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Massachusetts

District Court Case No. 1:15-cv-10603-PBS
The Honorable Patti B. Saris, Chief District Judge

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Opinion.—The employees concede that Mr. Walrath is entitled to seniority as a train dispatcher from November 5, 1900, but contend that by reason of his electing to continue in the carrier's service on the Ontario division in 1908, when the two divisions were created, as herein described, seniority from that date accrued to him on the Ontario division, and that he forfeited the right to exercise seniority on the St. Lawrence division. While it is not shown that Mr. Walrath had the opportunity to elect whether or not he would remain on the Ontario division in 1908, in the opinion of the Labor Board it is reasonable to believe that his continuance in the service on that division until 1913 established the existence of a preference, and, in any event, it established his rights on the Ontario division.

The carrier admits that train dispatchers who were employed prior to 1908 in the dispatching offices located on what are now designated as the St. Lawrence and Ontario division, were not, at the time this dispute arose, accorded the right to exercise seniority on both of said divisions. Furthermore, it is not denied by the carrier that train dispatchers on the St. Lawrence division are not now permitted to exercise seniority rights to positions in the dispatching offices on the Ontario division, or vice versa. The carrier has shown where several transfers of dispatchers between the two divisions have heretofore occurred, but since these transfers were made prior to September, 1908, when the dispatching offices were located on the same division, this evidence is not material.

Decision.—The Labor Board decides that G. B. Walrath, having established seniority rights as a dispatcher on the Ontario division, should not have been permitted to displace train dispatchers in the dispatching office of the St. Lawrence division at Watertown, N. Y., when his position of trainmaster was abolished in March, 1921, and that the dispatchers affected by said displacement shall therefore be restored to their former positions and reimbursed for wage loss sustained, less any amount earned in other employment.

DECISION NO. 982.—DOCKET 850.

Chicago, Ill., May 9, 1922.

Railway Employees' Department, A. F. of L. (Federated Shop Crafts), v. Indiana Harbor Belt Railroad Co.

Question.—Are the contracts which the Indiana Harbor Belt Railroad Co. has let for the operation of its railway shops in violation of the transportation act, 1920, and of the wage and rule decisions of the Railroad Labor Board, and do said contracts remove from under the jurisdiction of the Railroad Labor Board the employees who, under said contractor, are performing shop work for the carrier?

Statement of facts—History of contracts.—The stock of the Indiana Harbor Belt Railroad Co. is owned by four carriers, as follows: New York Central Railroad Co., 30 per cent; Michigan Central Railroad Co., 30 per cent; Chicago, Milwaukee & St. Paul Railway Co., 20 per cent; and Chicago & North Western Railway Co., 20 per cent.

January 1, 1921, the carrier posted a notice that its car-repair shop at Burnham would be shut down January 19, 1921, and on

January 17, 1921, the carrier posted another notice, stating that the Burnham Car Repair Co. would take charge of the work at that point. The parties entered into a contract January 29, 1921, covering the carrier's car-repair work at Burnham and West Hammond.

July 1, 1921, the parties entered into a new contract for Burnham and West Hammond, identical with the first, except that the percentage for compensation of contractor was reduced from 12 per cent to 5 per cent.

On January 19, 17 men were laid off by the carrier.

About January 20, 1921, the Burnham Car Repair Co. took over the car-repair work of the carrier at its rip track at Calumet Park.

On January 28, 1921, the Burnham Car Repair Co. was chartered under the laws of the State of Illinois.

On March 1, 1921, a notice was posted by the carrier at the Michigan Avenue yards at East Chicago, Ind., stating that, "effective five days from date, this company will no longer operate this repair track." July 1, 1921, the carrier entered into a contract with said Burnham Car Repair Co. for the operation of its car shops at Michigan Avenue, Ind.

On March 4, 1921, another notice was posted at the Michigan Avenue yards, headed "Burnham Car Repair Co., Michigan Avenue repair yards; John W. Jaranowski, president; Charles O. McCoy, treasurer," stating that, "effective Monday, March 7, this repair facility will be taken over by the Burnham Car Repair Co.," and signed "Burnham Car Repair Co., John W. Jaranowski."

March 30, 1921, application was made by the Burnham Car Repair Co. to the secretary of state of Indiana for a license to operate as a foreign corporation in Indiana, which license was granted April 2, 1921.

March 7, 1921, 21 employees at Michigan Avenue yards were discharged, leaving only 2, who left in a few days.

About March 23, 1921, the Burnham Car Repair Co. extended its operations to include the Blue Island car shops of the carrier.

On the 1st day of July, 1921, the carrier and said Burnham Car Repair Co. entered into another contract covering the Blue Island shops, identical with that of March 23, except that the percentage of compensation to the contractor was changed from 12 per cent to 5 per cent.

On April 2, 1921, the carrier contracted to said Burnham Car Repair Co. its car-repair work at West Gibson, Ind.

About March 29, 1921, a notice was posted by the carrier at Norpaul car-repair yards to the effect that the carrier would discontinue the operation of the yards on April 2.

Subsequently said yards were operated by J. H. Van Natte, who was prior thereto an employee of the company. He operated these yards only a few weeks and then returned to the employ of the carrier. His contract contained a clause providing for its termination by either party on 10 days' notice.

Under date of September 16, 1921, the carrier entered into an agreement with the Burnham Car Repair Co. by which said company contracted to do all the carrier's car-repair work at Blue Island, Michigan Avenue, West Gibson, Gibson Transfer, Calumet Park, Norpaul, and Argo.

This contract evidently superseded all the above-mentioned prior car-repair contracts between said parties, and contained a number of new provisions, but in its main features is the same as its predecessors. It covers all the car-repair work on said railroad.

It is in the words and figures following:

Copies for
G H
O G
G C W & M
W H McG
W M McM
E M W
R J A

Please sign receipt and return to me.
W. M. O'Brien.
Auditor.

I H B RR Co.
No. 1472

BURNHAM CAR REPAIR CO.

Car Repairs

Blue Island, Michigan Ave., W. Gibson, Gibson Transfer, Calumet Park, Norpaul, and Argo

SEPTEMBER 16, 1921.

This agreement, made this 16th day of September, 1921, by and between the Indiana Harbor Belt Railroad Company, hereinafter called the "railroad," and Burnham Car Repair Co., hereinafter called the "car company."

In consideration of the mutual covenants and conditions hereinafter set forth, the parties hereto do agree as follows:

1. The car company agrees to make repairs at Blue Island, Ill., Michigan Avenue, Ind., West Gibson, Ind., Gibson Transfer (L. C. L.), Ind., Calumet Park, Ill., Norpaul, Ill., and Argo, Ill., in accordance with instructions of the railroad's foreman, such cars as the railroad may desire to have repaired. The car company agrees to make any repairs that the railroad may require it to make in its various yards, and agrees further to furnish such men for wrecking service as the railroad may call for. The railroad's foreman shall designate the work to be done by the car company on each car, and no repairs shall be made except as authorized by the railroad's foreman. All repairs shall be made in a manner satisfactory to the foreman of the railroad. Upon completion of repairs as ordered, the railroad foreman shall certify therefore as to quality, quantities, sizes and weights of materials used in said repairs. The railroad foreman shall have no authority to change this agreement, waive any of its provisions or permit any act or practice inconsistent therewith.

2. Tools, shop machinery, equipment and supplies necessary to carry on the repair work for the railroad shall be furnished by the railroad.

3. The car company may use the shops, machinery and equipment of the railroad located at Blue Island, Ill., Michigan Avenue, Ind., West Gibson, Ind., Gibson Transfer (L. C. L.), Ind., Calumet Park, Ill., Norpaul, Ill., and Argo, Ill., in making such repairs for the railroad and in making repairs for others, but repairs of the railroad shall at all times be given preference.

4. The railroad will maintain and own the material stock. It being understood that material on hand at Blue Island, Ill., Michigan Avenue, Ind., West Gibson, Ind., Gibson Transfer (L. C. L.), Ind., Calumet Park, Ill., Norpaul, Ill., and Argo, Ill., will be subject to supervision and inspection by the railroad storekeeper. As additional material is required requisitions will be made by the car company on a form to be prescribed and furnished by the railroad, such requisitions to be approved by the railroad master car builder. Monthly disbursement statement of material used will be prepared from the stock books as instructed by the master car builder.

5. Repair cards covering shall be made by the car company in accordance with A. R. A. rules which among other things provides for a separate and individual card for each car repaired. Such repair cards for cars on which the repairs are completed shall be forwarded daily to the railroad master car builder at Gibson, Ind.

6. All scrap and reclaimed material other than lumber shall be separately listed on the bill for the car from which obtained and except as the railroad's representative shall designate it for use in these repairs, shall be returned by the car company to the railroad loaded on cars and shipped as directed by the railroad master car builder. The railroad may require the car company to

use salvage lumber in making certain repairs: namely, sound sills for splicing and second sheathing for roofs and patching, as may be directed by the railroad inspector.

7. Applied labor charged shall be in accordance with approved schedule of piecework rates of pay as effective January 1, 1921, which is attached and made a part hereof, and such additional schedules as may be hereafter approved by the railroad and accepted in writing by the car company, such schedules finally approved and accepted in writing to become a part of this contract.

8. The car company shall pay for all labor and supervision furnished by it in performing work for the railroad hereunder. As compensation for the work performed for the railroad hereunder, the railroad shall pay to the car company the actual cost of all labor engaged in performing work for the railroad, plus 5 per cent of the actual cost of said labor. The car company shall keep accurate account of all such expenditures and shall keep and furnish such other records, reports, and accounts as the railroad may require. The railroad shall have access at all reasonable times to the reports, records, and accounts of the car company for the purpose of determining the accuracy of its charges. The car company shall promptly, after the close of each calendar month, render, in the form prescribed by the master car builder of the railroad, a bill for the work on all cars completed and accepted by the railroad foreman during said month, and if correct, the railroad shall pay said bills within 30 days after the receipt of the same. The compensation as hereinbefore provided shall be accepted by the car company in full payment for work performed for the railroad under this contract.

9 The men in the employ of the car company will be required to familiarize themselves with the operating rules of the railroad in so far as pertaining to locking of switches, blue flag, and light protection and safety rules generally that are now in effect or that may hereafter become effective of which due and timely notice will be given.

10. The railroad company shall indemnify and save harmless the car company from any and all claim or claims for injury to or death of persons in any way arising or growing out of the car repair work performed by said car company for the railroad hereunder, whether such injury or death shall be due to the negligence of the car company or otherwise. If any suit be commenced against the car company separately or against the railroad and car company jointly upon any claim or claims in respect to which the railroad company has herein agreed to indemnify and save harmless the said car company, then the railroad company shall upon notice of the pendency of such suit assume the defense of such suit and save the said car company harmless from all loss and from all cost by reason thereof.

11. The car company shall not be charged for the use of the railroad's tools, shops, machinery, equipment, or other facilities of the railroad while making repairs for the railroad, but the car company shall pay the railroad for the use of said tools, shops, machinery and equipment or other facilities of the railroad while making repairs for others than the railroad, amounts to be agreed upon by the railroad and the car company. If, at any time, the parties hereto are unable to agree upon amounts to be charged the car company for the use of the tools, shops, machinery, and equipment or other facilities of the railroad, said amount shall be determined by three arbitrators, one to be chosen by the railroad, one by the car company, and one by the two so chosen. If the arbitrators chosen by the parties hereto are unable to agree upon the third arbitrator, then the third arbitrator shall be appointed by any judge of a court of record in Cook County, Ill.

12. The car company shall furnish in form satisfactory to the railroad a bond for an amount of $15,000 conditioned for the faithful performance by the car company of this agreement, and indemnifying the railroad against any liens on account of work performed by the car company.

13. This agreement may be terminated by either party hereto by giving 60 days' written notice to the other party.

INDIANA HARBOR BELT RAILROAD CO.,
By GEORGE HANNAEUR,
BURNHAM CAR REPAIR CO.,
By JOHN W. JARANOWSKI.

Dispute arising from contracts.—Following the action of the carrier in contracting the car-repair work at Burnham, the grievance committee of the Brotherhood Railway Carmen of America,

representing the carmen employees, held a conference January 21, 1921, with the master car builder of the carrier. At this conference the action of the carrier in discharging its employees and contracting its shop work at Burnham was discussed, and the minutes of the conference, signed by both parties, contain this statement:

> It was explained to the committee that this action was brought about by contract having been executed as between this company and the Burnham Car Repair Co., which contract specifies that they are to take over and operate this shop and facility.

As the other contracts hereinbefore referred to followed in rapid sequence, many communications were addressed to the carrier by the representatives of the various classes of employees concerned, asking for conferences in which to consider the grievances of the employees arising from their discharge and from the arbitrary setting up by the carrier of new wages and working conditions by virtue of said contracts.

The carrier declined to hold any further conference with the representatives of the employees on the ground that it no longer had a car department, that the shop employees were the employees of the contractor and not of the carrier, and that said employees were not subject to the provisions of the transportation act, 1920.

Pursuant to the dispute which arose in the one conference held as aforesaid, and to the various refusals of the carrier to hold further conferences, the employees through their system federation filed two ex-parte disputes with the Railroad Labor Board, involving the questions herein considered. Operations under these contracts generated several incidental disputes, but they are all dependent on the one main question.

Opinion.—The employees contend:

(1) That the contracts involved herein are not in good faith, but are mere subterfuges, designed to evade the provisions of the transportation act and the decisions of the Railroad Labor Board; and

(2) That, even if the contracts are in good faith, they are in violation of the transportation act and in conflict with the decisions of the Railroad Labor Board.

The board is of the opinion that the employees failed to substantiate their contention that the contracts are actually fraudulent, and that they are mere subterfuges contrived to evade the transportation act. Obviously they do evade the act, but the carrier contends that it is a lawful evasion.

This contract system is not an innovation recently born of the desire to circumvent the transportation act. It existed long before the transportation act was ever dreamed of. In fact, it was practiced as far back as 1855 on the Philadelphia, Wilmington & Baltimore Railroad and it is pertinent to note that the actual operation of the trains on this road was let by contract.

This leads up to the remaining and principal issue in this case—namely, had the carrier the right to enter into such contracts as takes this class of employees from under the application of the transportation act and the jurisdiction of the Railroad Labor Board?

No more important dispute has ever come before the Labor Board for adjudication. It goes to the vitals of the transportation act. If the carrier can legally do the thing which has been done under

these contracts, then the entire transportation act can be nullified and the will of the Congress of the United States set at naught. If one class of employees can thus be taken from under the application of the act, there is no sound reason why each and every railroad employee in the United States can not be given like treatment. One class of employment lends itself as readily to this method as another. Contracts have been recently entered into by various carriers, purporting to turn over to so-called independent contractors the work of the following classes of employees.

(1) The six shop crafts, (2) the maintenance of way employees, (3) certain employees embraced in the clerks' organization, (4) the firemen and oilers, (5) the hostlers, embraced in the engine service, and (6) the signal department employees.

It is intimated by the carrier that, perhaps, the actual operation of the trains could not be let to an independent contractor, because that would be a violation of the carrier's charter; that it would not be permitted to transfer the very power for the exercise of which it had been created, unless it delegated it to another common carrier. This is not a clear distinction, for the carrier in such a case would still be answerable to the public for the performance of its functions as a common carrier, and would not have contracted away this responsibility. It would merely have changed its method of paying its transportation employees, as it has its shop employees in the case under consideration.

The object of the transportation act was to prevent interruption to traffic, growing out of disputes between carriers and their employees. Such controversies had for years periodically harassed the public, blocked commerce, stagnated business, destroyed property values, and visited great inconvenience and suffering upon millions of people. At a time when our country was in no condition to undergo further repetitions of such unfortunate experiences and when they were possible on a much larger scale than ever before, Congress endeavored to provide a method for the adjustment of railway labor troubles. In the transportation act, 1920, the Government enjoins upon all carriers, and their officers, employees, and agents, the duty to "exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier, growing out of any dispute between the carrier and the employees or subordinate officials thereof." Elaborate provisions are made in this act for conferences between the parties for the settlement of disputes and, in the event of a failure to agree, for the hearing and decision of them by adjustment boards and by the Railroad Labor Board.

When Congress in this act speaks of railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare ad libitum.

In other words, Congress did not say to the carriers, "you must not precipitate trouble by the adoption of arbitrary measures with your

employees, but you may delegate to a contractor the power to violate and annul all your agreements, and if it happens to result in an interruption to traffic, the public will be deprived of such protection as the transportation act could give." As a matter of fact, that is practically the sole effect of the contracts involved in this case.

A strike by the employees of a contractor or contractor-agent of a carrier would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier.

To the outside observer, and so far as the public is concerned, the car-repair department of this carrier has undergone no real change. The carrier's own shops along its own lines are maintaining the carrier's car equipment exactly as they did before these contracts were made. Very largely, the carrier's same foremen and inspectors are in charge and its same careful supervision is being exercised. The carrier is furnishing all the necessary material from its own stores and supply houses as it did before. The employees of the contractor are riding the carrier's shop train gratis from their homes to their work just as they did before, except that no passes are issued to them for fear of violating the law. When a wreck occurs anywhere on the carrier's property the employees of the contractor go out and look after it. The employees of the contractor are required to familiarize themselves with the operating rules of the railroad pertaining to safety. The carrier is carrying accident insurance on the contractor's employees. The carrier's tools, machinery, and equipment are all being used in the operation, and the contractor had none of his own. The contractor has no leasehold on the plant or shops of the carrier. The carrier says it is free to do any of its work anywhere else, as it sees fit. On 60 days' notice, either party can terminate the contract. The contractor does not even have any control over the wages paid the employees. The contract contains the carrier's ready-made piecework schedule, which the contractor must use.

There need be no misunderstanding of this situation. The contractor performs only one useful function in this operation—he is the medium or channel through which the piecework system was substituted for the lawfully established wage scale. The contractor's compensation for this is 5 per cent of the amount of the pay roll, and the rate of pay is carefully limited by the piecework provisions in the contract. The contractor takes absolutely no risk.

The carrier was a party to Decisions Nos. 2 and 147 of the Railroad Labor Board, fixing wages for this class of employees. The carrier put into effect both of these decisions.

In the able brief of the carrier's counsel, several decisions of Federal courts are cited which construe contracts more or less similar to those involved herein and which define and construe the relationship of the railroad company, the contractor, and those who work for the contractor.

These cases involve the question of the railroad company's liability for injuries incurred by the contractor's employees, usually under the Federal employers' liability act.

None of these cases are in point here; because a different principle and a different statute are involved. The principle involved in all those cases is the duty and responsibility of the employer to the employee. The Federal employers' liability act has for its purpose the compensation of employees injured in the service of the employer.

That statute affected only the private relations between the employer and the employee. Naturally, it sought no purpose and contained no provision that could be construed as a denial of the carrier's right to contract its work and relieve itself of liability for injury to employees and others.

On the other hand, the transportation act was not enacted primarily for the protection of the rights of either carrier or employee, except in so far as such protection was involved in the paramount purpose of the act; that is, to insure to the public, as far as possible, efficient and uninterrupted railway transportation by protecting the people from the loss and suffering incident to the interruption to traffic growing out of controversies between the carriers and the employees who do their work. This act is the congressional assertion of a public right.

It may seem immaterial to the public what method or arrangement the carrier adopts to secure the performance of the work essential to its operation. But it is immensely important to the public that this work be carried on in a peaceful and orderly manner. It may seem immaterial to the public for the carrier to contract any of its work. But it is important if by such contract the carrier seeks to remove its employees from under the application of a law which the people have enacted for the purpose of maintaining industrial peace on the railways. There is a public interest in the carrier's methods greater than may appear on the surface. The contracts herein involved violate the spirit and purpose of the transportation act, and in effect set aside the wage decisions of the Railroad Labor Board to which the carrier was a party and which the carrier put into effect.

To all intents and purposes, the contractor's operations constitute a department of the carrier, with a piecework system which has been forced upon the men by the discharge of some and the dread of discharge and unemployment of others, and which has never been submitted to the Railroad Labor Board in the form of a dispute, as a compliance with the statute requires. The contractor is, in effect, merely an agent of the carrier.

The board can understand how the carrier reached the conclusion that it had the right to make such contracts, because somewhat similar ones had been made through a long course of years; but those precedents have been robbed of their potency by the enactment of the transportation act, which the courts of the country, without exception so far, have declared to be constitutional.

Decision.—The Railroad Labor Board therefore decides:

(1) That the various contracts entered into between the Indiana Harbor Belt Railroad Co. and the Burnham Car Repair Co. for the operation of its railway shops, and particularly the one bearing date of September 16, 1921, are in violation of the transportation act, 1920, in so far as they purport or are constructed by the carrier to remove said employees from the application of said act, and that those provisions of the contracts affecting the wages and working rules of said employees are in violation of Decisions Nos. 2, 119, and 147 of the Railroad Labor Board.

(2) That the shop employees of said contractor are under the jurisdiction of the Railroad Labor Board and subject to the application of the transportation act, 1920, and Decision No. 147.

(3) The carrier is directed to take up with any employee the matter of reinstatement upon the application of the interested employee or his representative.

This decision rests upon the facts of this particular case, and the decision of each of the other contract cases pending before the Labor Board will rest upon its own facts and the general principles herein declared.

DECISION NO. 983.—DOCKET 1099.

Chicago, Ill., May 15, 1922.

Order of Railroad Telegraphers v. Southern Pacific Lines in Texas and Louisiana.

Question.—Request that nontelegraph agency at Ellinger, Tex., be classified as telegraph agency and that the employee holding position be reimbursed for difference between the rate of pay he has received and the rate of pay claimed for the position under classification requested by employees, retroactive to March 1, 1920.

Statement.—The agency at Ellinger, Tex., is classified and paid as a nontelegraph agency.

The employees state that a check of the business handled over the telephone by the agent at this station developed that during the period April 5, 1919, to February 28, 1921, there was handled an average of 73 railroad telegrams and 36 commercial telegrams per month. The employees contend that the agent handles matters of record over the telephone and that he should be classified as agent-telegrapher and that the employee holding the position from March 1, 1920, be reimbursed for the difference in the wages he has received and the wages he would have received under the classification claimed by the employees.

The carrier states that Ellinger, Tex., is a small nontelegraph station located on the LaGrange branch of the Houston operating division, on which branch the service is taken care of by a mixed train which makes a round trip daily. The carrier states that there is a short-distance telephone from Ellinger to Glidden, Tex., which the agent at Ellinger uses to place orders with the operator for cars and for transmission of his daily yard report. This it is claimed involves about six or eight telephone calls per day and avoids the necessity of transmitting the information by mail as is done at other nontelegraph agencies. The rate of pay at this station on January 1, 1918, was $60 per month and it was classified under Addendum No. 2 to Supplement No. 13 to General Order No. 27 of the United States Railroad Administration as a nontelegraph agency.

The carrier further states that the agent is not required to use the telephone in connection with train movements; that, in fact, there are no wires for this purpose in the station; and that the telegraph company has made arrangements with the agent to handle the telegraph business by telephone with their office at Columbus, Tex., for which the agent is allowed a commission.

The carrier contends that during the month of June, 1921, negotiations were conducted with the general committee representing teleg-