No._____

In The Supreme Court of the United States

SOUTHWEST AIRLINES CO.

Petitioner,

v.

LATRICE SAXON

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA does not 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. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court held that Section 1 applies only to interstate "transportation workers." The Court did not define the term "transportation worker."

In the 20 years since *Circuit City*, the lower courts have struggled to apply its holding consistently, leading to divergent results in similar cases. This case exemplifies the inconsistency and creates a clear conflict of authorities. The Seventh Circuit held that a Ramp Agent Supervisor with Southwest Airlines Co., who supervises employees who load and unload baggage from airplanes and assists with such duties, but does not physically transport people or goods, is a "transportation worker" exempt from the FAA. That directly conflicts with *Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207 (5th Cir. 2020), where the Fifth Circuit held that an airline worker with identical responsibilities was *not* a "transportation worker" and was thus subject to the FAA. The question presented is:

Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate "transportation workers" exempt from the Federal Arbitration Act.

PARTIES TO THE PROCEEDING

All parties to the proceeding are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Southwest Airlines Co. is a publicly-held corporation and has no parent corporation. PRIMECAP Management Company has filed a Form 13G with the Securities and Exchange Commission stating that it beneficially owns more than 10% of the shares of Southwest Airlines Co. No other entity has reported holdings of over 10% of Southwest Airlines Co.

RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *Saxon v. Southwest Airlines Co.*, No. 1:19-cv-00403 (N.D. Ill.) (judgment entered October 8, 2019).

- *Latrice Saxon v. Southwest Airlines Co.*, No. 19-03226 (7th Cir.) (judgment entered March 31, 2021, motion to stay the mandate denied April 23, 2021).

There are no additional proceedings in any court that are directly related to this case.

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INTRODUCTION

This case presents the Court with an opportunity to resolve a widening and problematic split of authority that has undermined national uniformity in the enforceability of arbitration agreements. Section 1 of the FAA provides an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court held in *Circuit City* that the Section 1 exemption is to be read narrowly, so that it applies only to "transportation workers" who are actually "engaged in" foreign or interstate commerce. Although the Court recently decided how the Section 1 exemption relates to employment contracts, it has so far declined to define what types of employees qualify as transportation workers subject to the exemption. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019).

This lack of guidance has led to a clear split of authority among the Circuits and profound confusion in the federal lower courts over which types of workers are transportation workers. In this case, the Seventh Circuit held that Ms. Saxon (the Plaintiff-Respondent), a Ramp Agent Supervisor for Southwest who occasionally loads and unloads passenger baggage from airplanes, is a transportation worker exempt from the FAA. According to the Seventh Circuit, any worker who "load[s] or unload[s] cargo onto a vehicle so that it may be moved interstate" is

an exempt transportation worker, regardless of whether they personally transport the goods. App., *infra*, 10a. In contrast, the Fifth Circuit held last year that an airport agent supervisor who shared nearly identical duties with Ms. Saxon, including occasionally handling baggage at the airport, was *not* a transportation worker. *Eastus*, 960 F.3d at 212. As the Fifth Circuit explained, "[l]oading or unloading a [vehicle] with goods prepares the goods for or removes them from transportation" but is not itself transportation. *Id*. These decisions directly conflict and, without correction, create competing and irreconcilable definitions of the term "transportation worker."

The confusion among the Circuit courts about the definition of a transportation worker is not limited to cases involving airline employees. It arises in multiple scenarios, particularly in cases involving workers who perform purely intrastate transportation of people or goods. For example, the First and Ninth Circuits have held that so-called "last-mile" delivery drivers, who make intrastate deliveries of goods that have previously traveled interstate, are exempt transportation workers. *See Romero v. Watkins & Shepard Trucking, Inc.*, No. 20-55768, 2021 WL 3671380 (9th Cir. Aug. 19, 2021) (finding delivery driver of interstate goods exempt); *see also Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020) (finding last-mile delivery driver exempt); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020) (same). Yet local food delivery and

rideshare drivers who transport people and goods that have traveled interstate are *not* exempt. *See Capriole v. Uber Technologies, Inc.*, No. 20-16030, 2021 WL 3282092 (9th Cir. Aug. 2, 2021) (Uber driver not exempt); *see also Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020) (local food delivery driver not exempt); *In re Grice*, 974 F.3d 950 (9th Cir. 2020) (Uber driver not exempt).

Despite general confusion among the Circuits, though, it was not until the Seventh Circuit's decision in *Saxon* that a clear split emerged. For the first time, in this case, a court decided that a transportation worker need not actually transport goods *at all*, even intrastate, to qualify for exemption under Section 1. The Seventh Circuit held that "[t]he act of loading cargo onto a vehicle to be transported interstate is *itself* commerce," and that any performance of "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate… is *actual* transportation." App., *infra*, 2a, 10a (emphasis added). The Seventh Circuit is the only Circuit to expand the exemption to such a wide-ranging class of workers, and it is now in direct conflict with the Fifth Circuit.

This sweeping decision poses a substantial risk of damage to the smooth operation of our transportation infrastructure by undermining national uniformity in employer-employee relations. Companies that operate nationwide rely on the purpose of the FAA—efficient and uniform

enforcement of individualized arbitration—in establishing arbitration agreements with their employees across states. Indeed, in enacting the FAA, Congress recognized that "arbitration had more to offer than courts… not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Yet within the Seventh Circuit's jurisdiction, workers who agree to arbitrate their employment-related claims may still be exempt from arbitration under the FAA if they fit within *Saxon*'s expanded transportation worker definition. This approach will allow a much larger group of workers to seek exemption nationwide, flipping the FAA's liberal policy of enforcing arbitration agreements on its head. *Saxon*'s expanded transportation worker definition also conflicts with the purposes of other existing dispute resolution laws, such as the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, which favors alternative dispute resolution for covered workers' disputes to reduce the risk of disruption to the nation's transportation network.

Without the Court's intervention, identical lawsuits filed by identically situated employees will be treated differently depending on where the parties initiate suit. The result will be a Circuit-by-Circuit, state-by-state, worker-by-worker inquiry in every case. This outcome creates not only inconsistency but also uncertainty, which the Circuit courts are unable to resolve.

This case is an excellent vehicle to address the widening Circuit split over who is a transportation worker exempt from the FAA, and the Court should consider it immediately.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is published at 993 F.3d 492 (7th Cir. 2021). The order of the district court granting petitioner's motion to compel arbitration (App., *infra*, 22a-43a) is unreported.

JURISDICTION

The court of appeals filed its opinion and judgment on March 31, 2021. App., *infra*, 1a. Pursuant to this Court's Order of July 19, 2021 relating to COVID-19, this petition is due 150 days after the date of the lower court's judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides, in relevant part:

> "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.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 151a of the Railway Labor Act, 45 U.S.C. § 151a, provides, in relevant part:

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein…; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 152, *First*, of the Railway Labor Act, 45 U.S.C. § 152, provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT

A. Background on the FAA and the Section 1 Exemption

The FAA was enacted in 1925 to codify a broad federal policy favoring arbitration. *Epic Sys.*, 138 S. Ct. at 1621. The Section 1 exemption covers a limited group of employees (seamen, railroad employees, and "any other class of workers engaged in foreign or interstate commerce") who, at the time of enactment, were already covered by "established or developing statutory dispute resolution schemes." *Circuit City*, 532 U.S. at 121. Congress did not intend to leave transportation workers without alternative dispute resolution mechanisms. Rather, it expected them to

engage in arbitration governed by other federal dispute resolution laws, such as the RLA.

Because the exemption is contained "in a statute that seeks broadly to overcome judicial hostility to arbitration agreements," this Court held in *Circuit City* that it should be narrowly construed and the residual clause ("any other class of workers engaged in foreign or interstate commerce") "should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 115, 118. That is to say, the residual clause exempts only workers who are strictly analogous to seamen and railroad employees, a category of employees the Court described as "transportation workers." *Id*. at 121.

This Court has twice construed the Section 1 exemption—in *Circuit City* and *New Prime*—but it has not yet explained which types of workers qualify. In *Circuit City*, the Court clarified the exemption's narrow application to "transportation workers." *Id.* at 118. In *New Prime*, the Court explained that the exemption applies to contracts between employers and independent contractors, but it did not have the opportunity to define a transportation worker. *See New Prime*, 139 S. Ct. at 539 ("Happily, everyone before us agrees that Mr. Oliveira qualifies as a worker engaged in interstate commerce."). As the Seventh Circuit's decision in *Saxon* illustrates, this hole in the Court's jurisprudence has led to considerable confusion.

B. Facts and Procedural History

Southwest Airlines Co. is America's largest passenger airline, operating in more than 100 cities across the country. Ms. Saxon is a Ramp Agent Supervisor for Southwest at Chicago's Midway Airport. App, *infra*, 2a-3a. She supervises, trains, and assists a team of Ramp Agents who load and unload passenger baggage from airplanes, and according to an affidavit she filed in the district court, she handles baggage on occasion. *Id*. She does not physically transport goods, supervise others who physically transport goods, or direct where goods should be transported. *Id.* at 36a (finding "Plaintiff does not herself transport anything"). She does not transport cargo across state lines, or even locally. *Id.* at 39a ("Plaintiff herself does not transport cargo at all (even intrastate)…"). At most, she sometimes loads and unloads baggage and supervises others who do the same. *Id.* at 38a.

Ms. Saxon and Southwest entered into an agreement to arbitrate wage disputes arising out of her employment. *Id*. at 3a. Despite that agreement, Ms. Saxon filed a putative collective action against Southwest under the Fair Labor Standards Act, arguing she need not honor her arbitration agreement because she is a "member of a class of workers engaged in foreign or interstate commerce" and exempted by Section 1 of the FAA. *Id.*

After Ms. Saxon filed her putative collective action, Southwest moved to dismiss the suit in favor

of arbitration. *Id.* at 26a. Ms. Saxon argued that she is a transportation worker exempt from arbitration under the FAA because she is responsible for loading and unloading goods for transportation. *Id.* at 29a. Southwest countered that she falls outside the Section 1 exemption because she does not personally move goods across state lines or manage those who do. *Id.* at 29a-30a. Provisions in the collective bargaining agreement restrict her ability to load and unload goods, which she may do on only a minimal basis. *Id.* at 23a-24a (explaining that Ms. Saxon's duties as a Ramp Agent Supervisor are restricted pursuant to a collective bargaining agreement with Southwest that limits her ability to perform Ramp Agent duties, including loading and unloading baggage).

The district court agreed with Southwest. After acknowledging a divergence among the federal courts, the district court held that "the linchpin for classification as a transportation worker … is actual transportation, not merely handling goods." *Id.* at 37a. The court drew a distinction between "nonexempt workers who handle goods in service of transportation (warehousemen, stevedores, and porters)" and "exempt workers who actually transport [goods] by navigating the channels of interstate commerce (truckers, seamen, and railroadsmen, respectively)." *Id.* at 38a. After finding that Ms. Saxon "did not physically transport goods at all, let alone out-of-state," the court held that she does not qualify for the exemption. *Id.* at 39a. The court noted the "growing consensus that handlers are not

transportation workers" and explained that such an interpretation was consistent with the "federal policy favoring arbitration agreements." *Id.* at 39a-40a (cleaned up).

Ms. Saxon appealed, and the Seventh Circuit reversed. *Id.* at 2a. The court explained that a worker's exemption under Section 1 hinges on "whether the interstate movement of goods is a central part of the class members' job description." *Id.* at 9a (citing *Wallace*, 970 F.3d at 801). In answering that question, the court found that any performance of "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate… is actual transportation," even if the worker does not actually transport the goods. *Id.* at 10a. Further, the court determined that "[t]he act of loading cargo onto a vehicle to be transported interstate is itself commerce," explaining that "cargo-loading work is interstate or foreign commerce." *Id.* at 2a, 10a. As such, the court held that "cargo loaders generally are a class of workers engaged in the actual transportation of goods," and supervisors who occasionally load and unload passenger baggage "in turn, are airplane cargo loaders and members of that class, and thus engaged in commerce for purposes of § 1." *Id.* at 12a.

The Seventh Circuit denied Southwest's request to stay issuance of the mandate pending the filing of a petition for certiorari with the Court. This petition followed.

REASONS FOR GRANTING THE PETITION

There are three reasons the Court should immediately review the Seventh Circuit's decision. *First*, the Seventh Circuit's decision in *Saxon* creates a clear split with the Fifth Circuit regarding identical workers, and it highlights deep confusion among the Circuit courts over who qualifies as an exempt transportation worker under Section 1 of the FAA. *Second*, the Seventh Circuit's decision is inconsistent with this Court's existing precedent interpreting the FAA and limiting the Section 1 exemption to those workers who actively move goods in interstate commerce. *Third*, the split created by the Seventh Circuit's decision undermines national uniformity in resolving workplace disputes by frustrating the FAA's liberal federal policy enforcing arbitration and misunderstanding the purposes of other federal dispute resolution regimes, such as the RLA.

A. *Saxon* Deepens the Divide Among the Circuits Over Who Qualifies As a "Transportation Worker."

1. *Saxon* Created a Clear Split with *Eastus*.

Saxon and *Eastus* share nearly identical facts. Ms. Saxon, as noted, is a Ramp Agent Supervisor. Her primary job is to oversee Ramp Agents who load and

unload baggage onto airplanes; she also testified in the district court that she occasionally performs that work herself (though Southwest contests this, and the collective bargaining agreement applicable to Southwest Ramp Agents restricts her ability to do so). The *Eastus* plaintiff had a very similar job: she was a ticketing agent supervisor for Lufthansa at the George Bush Intercontinental Airport in Houston. Her primary job duty, like Ms. Saxon, was supervising agents who handled passenger baggage at the gate; she also sometimes performed that work herself. *Eastus*, 960 F.3d at 212. Both plaintiffs had signed binding arbitration agreements as a condition of their employment, but both sued their employers in federal court. Both airlines moved to compel arbitration; both plaintiffs opposed, arguing that they were exempt from the FAA under Section 1. Yet the Fifth and Seventh Circuits resolved these two identical cases in opposite ways.

The Fifth Circuit held that the supervisor was *not* a transportation worker under *Circuit City* and therefore did not fit within the Section 1 exemption. *Id.* at 207. The court held that "loading and unloading airplanes" with passengers and goods does not trigger the exemption because workers who perform such activities are not "engaged in an aircraft's actual movement in interstate commerce." *Id.* at 212. In reaching its decision, the court explained that the "key question" turns on the type of work that the worker was hired to perform. *Id.* at 209. In answering this question, the Fifth Circuit analyzed whether the

worker's "job required her to engage in the movement of goods in interstate commerce" or engage in the "aircraft's actual movement in interstate commerce." *Id.* at 210, 212 (internal citation omitted). The court held the supervisor's occasional handling of passenger baggage "could at most be construed as loading and unloading airplanes." *Id.* at 212. Ultimately, the Fifth Circuit determined that "[l]oading or unloading a [vehicle] with goods prepares the goods for or removes them from transportation" but is not itself transportation. *Id.* Because the supervisor was not actually engaged in moving goods in interstate commerce, the exemption did not apply to her. *Id.*

Less than a year later, the Seventh Circuit reached the exact opposite conclusion by deciding that Ms. Saxon *is* a transportation worker under *Circuit City* and therefore *is* exempt from the FAA. *See* App., *infra*, 1a-21a. Noting "the lack of guiding authority" from this Court, the Seventh Circuit's holding is broad enough to include as a transportation worker any employee who occasionally loads or unloads goods, or the supervisor of that employee, regardless of whether she is actually engaged in transporting those goods interstate. *Id.* at 7a. According to the Seventh Circuit, "[t]he act of loading cargo onto a vehicle to be transported interstate is itself commerce," and any performance of "[l]oading and unloading cargo onto a vehicle so that it may be moved interstate… is actual transportation." *Id.* at 2a, 10a. In direct conflict with *Eastus*, the Seventh Circuit explained that "cargo-loading work is

interstate or foreign commerce," and "cargo loaders generally are a class of workers engaged in the actual transportation of goods." *Id.* at 10a, 12a. Further, the court held that supervisors who occasionally load and unload passenger baggage "in turn, are airplane cargo loaders and members of that class, and thus engaged in commerce." *Id.* at 12a.

The striking disparity between the outcomes in *Saxon* and *Eastus*—in which the exact same type of worker was found exempt by one court and not exempt by the other—is remarkable. Without the Court's intervention, these two Circuits (inevitably joined by others on either side) will continue to produce irreconcilable results that further deepen this Circuit split.

2. *Saxon* Exacerbates Existing Confusion Among the Circuits.

Saxon exacerbates existing disagreement among the Circuit courts over what type of worker qualifies as a transportation worker under *Circuit City*. There are a few types of workers the courts largely agree are exempt. Interstate truck drivers, for example, who physically transport goods across state lines, are generally recognized as transportation workers. *See, e.g.*, *Wallace*, 970 F.3d at 802 (describing interstate truckers as "easy" to identify as transportation workers); *New Prime*, 139 S. Ct. at 539 (observing that interstate truckers plainly fit within the exemption); *Int'l Bhd. of Teamsters Local Union*

No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 956 (7th Cir. 2012) (holding that cement truck drivers were part of the class of interstate truckers because they hauled deliveries across state lines); *but see Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288-90 (11th Cir. 2005) (holding that a furniture salesperson who occasionally delivered furniture to out-of-state customers was not exempt because delivery was incidental to sale). Other types of workers, however, present a more difficult determination.

The First and Ninth Circuits have recently held that so-called "last-mile" delivery drivers who make intrastate delivery of goods traveling interstate, but play no part in transporting those goods across state lines, are transportation workers. In *Rittmann*, the Ninth Circuit explained that last-mile drivers complete the final leg of a good's continuous interstate journey, and their primary job is completing the interstate deliveries of goods sold within the channels of commerce. *See* 971 F.3d at 917-18 (finding that "Amazon's business includes not just the selling of goods, but also the delivery of those goods."). According to the Ninth Circuit, "[t]he interstate transactions between Amazon and the customer do not conclude until the packages reach their intended destinations." *Id.* at 916. The final deliveries of the goods, then, are "indisputably part of the stream of commerce," to which the exemption applies. *Id.*; *see also Romero*, 2021 WL 3671380 at *3 (applying *Rittman* and affirming "that delivery drivers who are engaged in the movement of goods in interstate

commerce fall within the FAA's transportation worker exemption, even if the drivers themselves do not cross state lines" (internal citation omitted)). In *Waithaka,* the First Circuit came to the same conclusion, finding "the exemption encompasses the contracts of transportation workers who *transport* goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work." 966 F.3d at 13 (emphasis added).

However, the Seventh and Ninth Circuits have declined to extend the exemption to rideshare and local food delivery drivers, even if the people or goods being transported have crossed state lines. In *Capriole*, the Ninth Circuit "join[ed] the growing majority of courts holding that Uber drivers as a class of workers do not fall within the interstate commerce exemption from the FAA." 2021 WL 3282092 at *5 (internal citation omitted). The court explained that rideshare drivers, even those who occasionally cross state lines, "are not engaged in interstate commerce because their work predominantly entails intrastate trips." *Id.* at *8 (rideshare drivers are not exempt "even though some Uber drivers undoubtedly cross state lines in the course of their work"). The court relied on its earlier decision in *In re Grice*, which expressly rejected the argument that the exemption covers all "workers who, like [the Uber driver], provide transportation services to persons or goods traveling across state lines," because that interpretation would sweep in all sorts of workers

who are not actually engaged in interstate commerce. 974 F.3d at 958. Likewise, the Seventh Circuit in *Wallace* declined to extend the exemption to local food delivery drivers who deliver food that may have, at some point, shipped internationally or across state lines. *See* 970 F.3d at 802.

For years, there has been confusion over whether to extend the exemption to workers who merely handle goods, including those who load and unload goods at a central location. *See* App., *infra*, 36a-38a (collecting cases). Prior to *Circuit City*, the Sixth and Eleventh Circuits held that postal workers as a class are exempt from the FAA, even if the worker merely handles (as opposed to transports) mail. *See Bacashihua v. U.S. Postal Service*, 859 F.2d 402, 405 (6th Cir. 1988); *see also Am. Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 823 F.2d 466, 473 (11th Cir. 1987). Neither case analyzed the exemption under the transportation-worker framework required by the Court's holding in *Circuit City*, and both decisions have since been called into doubt. *See, e.g., Rittman v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196, 1201 (W.D. Wash. 2019) (suggesting that after *Circuit City*, the postal cases are most applicable to postal workers who *actually transport* packages). More recent decisions reflect the understanding that workers who handle goods shipped in interstate commerce but do not actually transport the goods themselves are not exempt. *See Furlough v. Capstone Logistics, LLC*, No. 18-cv-02990-SVK, 2019 WL 2076723, at *7 (N.D. Cal. May

10, 2019) (holding that warehouse worker whose job duties included "loading, unloading, and handling freight" was not a transportation worker); *see also Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952, 958-59 (D. Md. 1994) (finding that warehouse workers who load and unload trucks used to deliver goods in interstate commerce are not exempt). This "trend in the case law reflects a growing consensus" that workers who merely handle goods are not exempt transportation workers. App., *infra*, 39a; *see also id.* at 37a (finding "the linchpin for classification as a transportation worker under *Circuit City* is actual transportation, not merely handling goods"). *Saxon* ends this trend, guiding courts instead in the opposite direction.

Notably, some courts have already considered whether managers or supervisors of workers who transport goods fall under the exemption. In *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004), the Third Circuit explained that supervisors generally are not exempt, but recognized an exception for managers who directly supervise truckers delivering goods interstate. *See id.* at 592-93. In recognizing this exception, the Third Circuit did not intend to create a "slippery slope" that would "lead to the exemption of all management employees," explaining the plaintiff in that case "was a direct supervisor of [truck] drivers that transported packages" and it was "her particular relations to the channels of interstate commerce" that made her a transportation worker. *See id.* at 594 n.2 (internal

citation omitted). The court explicitly limited its holding to exclude warehouse managers who load and unload goods (and are virtually identical to Ms. Saxon) because they do not direct the interstate shipment of goods or manipulate the channels of commerce themselves. *Id.*; *accord Eastus*, 960 F.3d at 207 (supervisor of ticketing agents was not exempt from FAA because she did not actually transport goods or direct aircraft's actual movement in interstate commerce). The Third Circuit's carefully delineated exception for direct managers is meaningless in light of *Saxon*; the Seventh Circuit failed to apply any of the same limiting principles to cargo loader supervisors, choosing instead to embark down the slippery slope.

Before *Saxon*, the First and Ninth Circuits' decisions exempting last-mile drivers represented the outer bounds of Section 1 jurisprudence. The Seventh Circuit's decision in *Saxon*, which applies to "cargo loaders generally," pushes beyond that previous limit and compounds existing confusion among the Circuits, particularly in hard-to-determine cases. Even amidst confusion, the Circuit courts had previously agreed that a transportation worker must perform some transportation herself, even if purely intrastate. The Seventh Circuit's holding in *Saxon* upends this shared assumption and disrupts much of the courts' various approaches by exempting a broad class of workers who do not actually transport anything, even intrastate, but merely oversee those who prepare goods for travel and occasionally prepare

those goods themselves. Absent the Court's review, Circuit confusion will only multiply.

B. *Saxon* Conflicts with This Court's Existing Precedent Interpreting the FAA and Limiting the Section 1 Exemption to Those Workers Who Have an Active Role in Moving Goods Across State Lines.

As this Court recognizes, the FAA "establishes a liberal federal policy favoring arbitration agreements." *Epic Sys.*, 138 S. Ct. at 1621 (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotations omitted). Further, the Court has acknowledged that the FAA's reach is expansive, and it covers nearly all arbitration agreements. *See Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 274 (1995) (describing "the [FAA's] reach expansively as coinciding with that of the Commerce Clause"); *see also Epic Sys.*, 138 S. Ct. at 1621. Specifically, the FAA's coverage includes employment claims where the parties "contracted for arbitration..., specif[ied] the rules that would govern their arbitrations, [and] indicat[ed] their intention to use individualized rather than class or collective action procedures." *Epic Sys.*, 138 S. Ct. at 1621. As the Court has explained, "this much the [FAA] seems to protect pretty absolutely." *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

Yet the Court has noted that Congress drafted the FAA "in response to a perception that courts were

unduly hostile to arbitration." *Id.* In enacting the FAA, "Congress directed courts to abandon their hostility and instead treat arbitration agreements as valid, irrevocable, and enforceable." *Id.* (internal citation omitted). In doing so, Congress demonstrated that "arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Id.* Thus, the FAA "requires courts 'rigorously' to 'enforce arbitration agreements according to their terms.'" *Id.* (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)); *see also id.* at 1620 ("[T]he [FAA] generally requires courts to enforce arbitration agreements as written.").

Because the FAA is a statute seeking to promote arbitration agreements and overcome judicial hostility to arbitration, this Court has "afforded a narrow construction" to the Section 1 exemption. *Circuit City*, 532 U.S. at 118. Accordingly, the Court limits the narrow exemption to workers who take an "active" role in the movement of goods across state lines. *Id.* at 115-16. Nonetheless, the Seventh Circuit erred by giving the provision a broader reading than is supported by the ordinary meaning of the statutory language in light of the statutory structure.

The error arose, in part, because of the Seventh Circuit's misapplication of the *ejusdem generis* canon. This Court has previously held that the canon is instructive in understanding the residual clause of

the Section 1 exemption. *Id.* at 114-115. Put succinctly, the canon holds that where general words ("any other class of workers," in this case) follow an enumeration of two or more specific things (here, "seamen" and "railroad workers"), the "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.*

In *Circuit City*, this Court held that the common characteristic of the "specific" examples in Section 1 was that they were "engaged in" transportation. *Id.* at 121. This was "rational," the Court wrote, because Congress may have intended "to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for" transportation workers. *Id.*

Indeed, as the Court later observed in *New Prime*, "[b]y the time it adopted the [FAA] in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers. And it seems Congress did not wish to unsettle those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate."[1] 139 S. Ct. at 537 (internal citations omitted).

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[1] For example, at the same time Congress was considering the FAA, railway executives and union leaders were drafting what would become the RLA, which (as enacted in 1926) requires

In *Saxon*, the Seventh Circuit explained that its "analysis rest[ed] on the premise that the common characteristics of seamen and railroad employees, for *ejusdem generis* purposes, is their *relationship with* interstate or foreign commerce." App., *infra*, 20a (emphasis added). If the residual clause applies to anyone *related to* interstate commerce—words not actually found in the exemption or in this Court's precedent—it potentially applies to any worker performing any job in the country; an extraordinary result that this Court has previously rejected.

Indeed, it is hard to imagine a more expansive definition of a transportation worker than the one adopted by the Seventh Circuit. In the court's view, handling passengers' personal effects along an interstate journey—even on a limited basis—is enough to make a class of people interstate transportation workers. Nothing material separates Ramp Agents and Supervisors from many other classes of employees who work in or around an airport. For example, curbside agents take luggage from arriving passengers and start the luggage on its

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railway workers and their employers to arbitrate rates of pay and working conditions. *See* 45 U.S.C. § 152. Similarly, by 1925, seamen were organized and had a distinct form of arbitration under the Shipping Commissioners Act of 1872. In fact, at the time of the RLA's inception, the president of the International Seamen's Union lobbied to exempt seamen from the FAA so as not to disrupt established dispute resolution processes. Matthew W. Finkin, *Workers' Contracts under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 284-85 (1996).

journey to the plane. Ticket agents take passengers' luggage and place it on a conveyor belt. Security agents take passengers' luggage, inspect it, and return it to passengers. Are all of these types of employees exempt transportation workers?

The Seventh Circuit's interpretation, which includes people who do not transport anything themselves, creates a line drawing problem. Regardless of where that line is drawn, it is too far in light of this Court's narrow application of Section 1.

C. The Circuit Split Created by *Saxon* Undermines National Uniformity in Resolving Workplace Disputes.

1. The Circuit Split Encourages Inconsistency Among the Circuits in Enforcing Arbitration Agreements.

Arbitration agreements are commonplace among workers in the transportation industry to reduce "costs and delay through litigation," as Congress intended. *Allied-Bruce*, 513 U.S. at 274. In *Concepcion*, this Court warned that fundamentally changing the traditional arbitration process (for example, from bilateral to class arbitration) "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 347-48; *see also Epic Sys.*, 138 S. Ct. at 1623 (confirming the

same). Additionally, this Court has noted that permitting class action mechanisms—even in arbitration—"would take much time and effort, and introduce new risks and costs for both sides." *Epic Sys.*, 138 S. Ct. at 1623. Ultimately, the value that Congress recognized in the arbitration process when enacting the FAA—"its speed and simplicity and inexpensiveness"—would disappear and "arbitration would wind up looking like the litigation it was meant to displace." *Id.*

The uniform enforceability of arbitration agreements is of profound legal and commercial significance, with sweeping implications for employer-employee relations, as well as the judicial system as a whole. (The proper enforcement of arbitration procedures is, in part, why this Court has granted certiorari in 15 cases involving the FAA since 2011.) Yet the Circuit split created by *Saxon* is exactly the result this Court warned against in *Concepcion*. The split discourages the uniform enforcement of individual arbitration, and it allows workers in certain jurisdictions who agreed to individually arbitrate disputes to instead pursue class and collective action litigation—exactly what individual arbitration was "meant to displace." *Id.* In this way, *Saxon* has entirely undermined the FAA's key purpose—uniform enforceability—by splitting from the Fifth Circuit and providing a path other courts may follow to broadly interpret Section 1, disregarding this Court's existing precedent. *See supra*, pp. 22-26.

As a result, Southwest and other employers in the transportation industry will experience a logistical nightmare and substantially increased litigation expenses. Southwest has implemented an arbitration agreement through its Alternative Dispute Resolution Program (the "ADR Program") to resolve employee disputes nationwide quickly and efficiently. The ADR Program applies to more than 14,000 current and former, non-union employees in the United States. Southwest operates in more than 100 cities across the country, which themselves are located within every federal circuit. In the Fifth and Seventh Circuits alone, Southwest has non-union employees at thirteen and four locations, respectively. The vast majority of these non-union employees, like Ms. Saxon, entered into an individual arbitration agreement with Southwest via the uniform ADR Program. After *Saxon*, Southwest will be embroiled in constant contract litigation with its own employees, as it seeks to enforce these mutual arbitration agreements on a Circuit-by-Circuit, state-by-state, worker-by-worker basis, likely with widely varied results.[2]

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[2] There is also the added uncertainty of each state's laws, which vary with respect to arbitration agreement enforcement. *See* Richard C. Reuben, *Public Justice: Toward A State Action Theory of Alternative Dispute Resolution*, 85 Calif. L. Rev. 577, 596 (1997) (noting that all fifty states and the District of Columbia have enacted arbitration statutes); Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and The Federal Arbitration Act*, 22 Harv. Negot. L. Rev. 33, 41-42 (2016) ("[M]any states… have enacted twists on [arbitration] statutes

Virtually every other company that operates nationally will be impacted, too. Like Southwest, other national companies now face uncertainty and unpredictability in their relationships with employees, as well as a nationwide class litigation problem. Suddenly, workers who would otherwise be subject to individual arbitration will attempt to avoid the agreements they voluntarily signed, seeking instead to bring class and collective action claims in courts around the country. Such claims will undoubtedly generate excessive and lengthy litigation regarding whether these workers fall within the Seventh Circuit's broadly expanded transportation-worker definition. These claims may also create labor unrest, as companies will lack the ability to treat employees equally with respect to arbitration, even at the same work location.

The lower courts have "made a labyrinth and got lost in it," *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991), and unless this Court can find a way out, the resulting patchwork jurisprudence will inhibit any employer's attempt to build a functional nationwide alternative dispute resolution program.[3]

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with the more restrictive requirements for arbitration agreements and proceedings.").

[3] Of course, there are other unintended consequences as well. The Seventh Circuit's expanded definition of a transportation worker will give broader effect to state law, a fact that the Seventh Circuit recognized. App., *infra*, 20a-21a ("Saxon could still face arbitration under state law."). Moreover, the split could lead to forum shopping and complicated legal questions where,

This Court alone has authority to resolve lower court confusion stemming from its own prior ruling. Without the Court's guidance, lower courts will continue to misapply the Section 1 exemption in conflicting ways that only serve to undermine the consistent application of the FAA.

2. The Circuit Split Frustrates the Complementary Purposes of the FAA and the RLA.

The RLA was enacted in 1926 and extended to air carriers in 1936. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994). Congress intended the RLA to "promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Id.* at 252; *Bhd. of Locomotive Eng'rs and Trainmen v. Union Pac. R.R. Co.*, 879 F.3d 754, 755 (7th Cir. 2017) (Because "[n]o one wants to see the nation's transportation network brought to a standstill," the RLA was "designed to substitute bargaining, mediation, and arbitration for strikes.").

The stated purpose of the RLA is to "avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. To that end, the RLA "sets up a mandatory arbitral mechanism to handle disputes growing out of grievances or out of the interpretation or application

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like with Saxon's claims, plaintiffs purport to bring nationwide collective action claims involving employees in multiple Circuits.

of agreements concerning rates of pay, rules, or working conditions." *Hawaiian Airlines*, 512 U.S. at 248 (internal citation omitted); *see also* 45 U.S.C. § 152. In view of this important purpose, the RLA contains a "strong preference for arbitration, as opposed to judicial resolution of disputes." *Union Pac.*, 879 F.3d at 755.

The RLA is thus crucial to interstate commerce and the country's transportation network. It also complements the FAA's liberal policy of enforcing arbitration agreements, and the two should be read consistently. As the Court has cautioned, the general rule is to aim for harmony in statutory interpretation. *See Epic Sys.*, 138 S. Ct. at 1624. Applying this concept, federal courts should not interpret the FAA in a manner that conflicts with other federal statutes—here, the RLA. *Id.* ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments…") (internal citation omitted). As this Court has recognized, "allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Id*.

Under the RLA, employers such as Southwest are required to mediate and arbitrate wage disputes involving union-represented employees, without exception. 45 U.S.C. § 152. Lacking an analogous provision applicable to non-union or management

employees such as Ms. Saxon, Southwest has achieved stability in its relationship with such employees by entering into individual arbitration agreements. *Saxon* upends Southwest's purposeful alternative dispute resolution structure, requiring it to treat non-union workers differently, and fomenting claims of unequal application and enforcement among such workers. Further, it is inconsistent to require a carrier such as Southwest to have a uniform set of arbitration procedures for one class of employees under the RLA, while prohibiting it from using arbitration procedures with other, ill-defined classes of employees under the FAA.

Without this Court's review, the Seventh Circuit's decision in *Saxon* will impermissibly allow the narrow exemption provided in Section 1 of the FAA to subsume the key purpose of requiring airlines to engage in alternative dispute resolution under the RLA, potentially disrupting the nation's transportation network due to resulting labor unrest.

CONCLUSION

The Court should take this opportunity to clarify what it meant in *Circuit City* by explaining who is a transportation worker under the FAA's Section 1 exemption rather than allow the split created by the Seventh Circuit's decision in *Saxon* to

deepen. Accordingly, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 19-3226

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LATRICE SAXON, *Petitioners*,
v.

SOUTHWEST AIRLINES CO.,
Respondents.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 19-cv-0403 **-- *Robert M. Dow, Jr.,*** Judge.

ARGUED MARCH 3, 2021 -- DECIDED MARCH 31, 2021

Before MANION, WOOD, and ST. EVE, *Circuit Judges*

ST. EVE, *Circuit Judge*. The Federal Arbitration Act has, since 1925, established a federal policy favoring arbitration. But every policy has its limits. One of the limits Congress placed on the Arbitration Act is an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court and the *ejusdem generis* canon of statutory construction tell us that the last category refers not to all contracts of employment, but only those belonging to "transportation workers." Beyond the two examples the statute provides—seamen and railroad employees—deciding who qualifies as a transportation worker is not always an easy task.

Latrice Saxon is a ramp supervisor who manages and assists workers loading and unloading airplane cargo for Southwest Airlines Company. After she brought a lawsuit against her employer, Southwest invoked the Arbitration Act. Saxon asserted that she was an exempt transportation worker, but the district court found her work too removed from interstate commerce and dismissed the case.

We reverse. The act of loading cargo onto a vehicle to be transported interstate is itself commerce, as that term was understood at the time of the Arbitration Act's enactment in 1925. Airplane cargo loaders, as a class, are engaged in that commerce, in much the way that seamen and railroad employees were, and Saxon and the ramp supervisors are members of that class. It therefore follows that

they are transportation workers whose contracts of employment are exempted from the Arbitration Act.

I.

As a ramp supervisor at Chicago Midway International Airport, Saxon supervises, trains, and assists a team of ramp agents—Southwest employees who physically load and unload planes with passenger and commercial cargo. Ostensibly her job is meant to be purely supervisory, but Saxon's uncontroverted declaration asserts that she and the other ramp supervisors at Midway frequently fill in as ramp agents when they are short on workers. Though the ramp agents are covered by a collective bargaining agreement, supervisors like Saxon are excluded. She, like other excluded Southwest employees, agreed annually as part of her contract of employment—not separately—to arbitrate wage disputes.

Believing that Southwest failed to pay ramp supervisors for overtime work, Saxon nevertheless filed a putative collective action against Southwest under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. Southwest moved to stay the suit pending arbitration, see 9 U.S.C. § 3, or to dismiss it for improper venue in light of Saxon's arbitration agreement, Fed. R. Civ. P. 12(b)(3); *Cont'l Cas. Co. v. Am. Nat. Ins. Co.*, 417 F.3d 727, 733 (7th Cir. 2005). Saxon responded that the Arbitration Act did not apply because she was a member of a "class of workers engaged in foreign or interstate commerce," and therefore exempted by § 1 of the Arbitration Act.

In *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001), the Supreme Court held that the exemption in § 1 applies only to "transportation workers." Relying on *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348, 352 (8th Cir. 2005), Saxon maintained that she was a transportation worker because Southwest was a transportation company, and she was responsible for loading and unloading goods for transportation. Southwest replied that Saxon fell outside the exemption because she did not personally move goods across state lines or manage those who do.

The district court agreed with Southwest. Surveying the limited caselaw, the court determined that the "linchpin" of the transportation-worker definition was "actual transportation, not merely handling goods .... at one end or the other" of a network. In support, it highlighted the exclusion for seamen— a term which it understood not to cover the longshoreman who loaded and unloaded ships—and ex-tended that logic to warehousemen, stevedores, porters, and to Saxon's analogous role as a ramp supervisor. Saxon appealed.

II.

We recently considered the framework of the Arbitration Act and the § 1 exemption in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020). Congress passed the Act in 1925 in response to the general "hostility of American courts to the enforcement of arbitration agreements" and "sought to replace that 'widespread judicial hostility' with a 'liberal federal policy favoring arbitration.'" *Id.* at 799-

800 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Section 1 of the Act represents an outer limit on Congress's favor toward arbitration. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). It provides that "nothing" in the Act shall apply to "contracts of employment" for "seamen," "railroad employees," and a third, residual category, "any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; *Wallace*, 970 F.3d at 799.

The parties do not dispute that Saxon's arbitration agreement is a contract of employment but only whether Saxon is one of the workers exempted. Like the plaintiff in *Wallace*, Saxon does not claim to be a seaman or railroad employee and argues only that she fits in the residual category.

To understand the scope of that category, we explained in *Wallace*, "our inquiry 'begins with the text.'" 970 F.3d at 800 (citing *Ross v.* Blake, 136 S. Ct. 1850, 1856 (2016)). We interpret the words of that text based on their "ordinary ... meaning ... at the time Congress enacted the statute." *New Prime*, 139 S. Ct. at 539 (quoting *Wis. Cent. Ltd v. United States*, 138 S. Ct. 2067,2074 (2018)).

The first textual clue is the phrase "class of workers," which obligates us to focus on the broader occupation, not the individual worker. *Wallace*, 970 F.3d at 800. We therefore ask not whether Saxon is engaged in commerce, but whether a given class of workers is engaged in commerce and whether Saxon is a member of that class. *Id*. at 802.

The second clue is the two enumerated categories of seamen and railroad employees, which provide a gloss on what it means for a class of workers to be "engaged in commerce." *Id.* at 801. Standing alone, the phrase "engaged in commerce" is a term of art with a narrower scope than similar formulations like "involving commerce" or "affecting commerce," though its precise breadth often depends on "statutory context." *Circuit City*, 532 U.S. at 115-18. Under the *ejusdem generis* canon of construction, general words are interpreted to reflect the "common characteristics" of the enumerated categories that precede them. *Ctr. Video Indus. Co. v. Roadway Package Sys., Inc.*, 90 F.3d 185,187-88 (7th Cir. 1996); *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 199 (2012). In *Circuit City*, the Supreme Court used this canon to reject the argument that § 1 exempted all employment contracts. 542 U.S. at 114-15. Instead, the court limited the scope of the residual category to "transportation workers," *id.* at 119, those who are "akin to 'seamen' and 'railroad employees,'" *Wallace*, 970 F.3d at 801. To be engaged in commerce for purposes of § 1, then, is to "perform[] work analogous to that of seamen and railroad employees, whose occupations are centered on the transport of goods in interstate and foreign commerce." *Id.* at 802.

III.

Saxon argues on appeal that ramp supervisors, and cargo loaders more broadly, are transportation workers within the original meaning of § 1 at the time it was enacted in 1925. Almost a century ago, she

insists, those who loaded cargo for interstate transport were recognized to be engaged in commerce. She also draws parallels between her job loading cargo as a ramp supervisor and the 1925 definitions of seamen and railroad employees, which in her view covered boat and train cargo loaders.

A.

Southwest first raises a threshold objection to Saxon's argument: she never made it in the district court. She urged the district court only to follow the Eighth Circuit's *Lenz* decision, which did not emphasize the text of § 1, its original meaning in 1925, or the scope of the two enumerated categories. Southwest contends that Saxon therefore forfeited or waived her arguments, though Saxon insists she generally raised the relevant issues in the district court.

We need not resolve this dispute. Even if Saxon had waived her arguments by failing to present them in the district court, we would still consider them now. We may, in our discretion, forgive waiver or forfeiture in a case that presents a pure question of statutory interpretation that the parties have fully briefed on appeal. *E.g., Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993). We exercise such discretion sparingly, *see In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 714 (7th Cir. 2015), but we would elect to do so here. Saxon presents us with an important and recurring question of statutory interpretation, and the district court itself correctly noted the lack of guiding authority. We

think it better to add what clarity we can than to defer our consideration of these significant issues to a later date.

B.

On appeal, the parties agree that Southwest's business of flying passengers and their baggage (and, to a lesser extent, freight cargo) is in interstate or foreign commerce within the meaning of § 1. Southwest disputed this point in the district court and argued that to be in commerce meant only transport of goods—not primarily people and their effects —but it abandoned that theory on appeal. We have no reason to dispute its concession and accept that the movement of goods accompanying people, just as much as the movement of goods alone, is in interstate commerce. *See Singh v. Uber Techs. Inc.*, 939 F.3d 210, 226 (3d Cir. 2019).

That Southwest is engaged in commerce does not resolve this case. Saxon contends otherwise in her broadest argument, suggesting that the proper class of workers parallel to seamen and railroad employees is "airline employees." She defines that group simply enough: those employed by an airline, a class of which she is obviously a part.

Although this view draws a bright and clear line, it is inconsistent with the text of the residual exemption. The phrase "any other class of workers engaged in foreign or interstate commerce" asks that the class of workers, not their employer, be engaged in commerce. This feature cuts both ways. On the one hand, a transportation worker need not work for a

transportation company. *Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012). But on the other hand, a person does not become a transportation worker just by working for a transportation company. *See Lenz*, 431 F.3d at 351; *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1284 (11th Cir. 2001), *vacated* 294 F.3d 1275 (11th Cir. 2002) (joint stipulation to dismiss); *Cole v. Burns Intl Sec. Servs.*, 105 F.3d 1465, 1469, 1472 (D.C. Cir. 1997). The employer's business might well inform the "ultimate inquiry" whether its employees are engaged in commerce, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 917 (9th Cir. 2020); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 22-23 (1st Cir. 2020), but the employer is not itself the inquiry. Ramp supervisors are not transportation workers just because they work for Southwest.

Instead, to be exempted under the residual clause of § 1, the ramp supervisors must themselves be engaged in interstate or foreign commerce. To resolve that question we ask "whether the interstate movement of goods is a central part of the class members' job description," meaning that the workers are actively occupied in "the enterprise of moving goods across interstate lines." *Wallace*, 970 F.3d at 801-02. This line is not as easy to draw.

Wherever the line may be, though, ramp supervisors fall on the transportation-worker side of it. A central part of their job is the loading and unloading of cargo for planes on interstate and international flights. Although this is officially the role of the ramp *agents*, not the supervisors, Saxon estimates that she and her peers each cover three full

ramp-agent shifts per week. Southwest offered no evidence to contradict this estimate. We need not consider, then, whether supervision of cargo loading alone would suffice. Ramp supervisors and ramp agents alike spend a significant amount of their time engaged in physically loading baggage and cargo onto planes destined for, or returning from, other states and countries, and that cargo-loading work is interstate or foreign commerce.

Southwest argues, and the district court concluded, that loading and unloading cargo is not enough to make a worker engaged in commerce because that phrase refers only to "actual transportation." The premise is correct. "[T]ransportation workers are those who are 'actually engaged in the movement of goods in interstate commerce.'" *Id.* at 801 (citing *Kienstra Precast*, 702 F.3d at 956). We differ, however, in the conclusion. Actual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines. Loading and unloading cargo onto a vehicle so that it may be moved interstate, too, is actual transportation, and those who performed that work were recognized in 1925 to be engaged in commerce. Indeed, one year earlier, the Supreme Court held it was "too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it" and thus a person injured while unloading cargo from a train was employed in commerce. *Balt. & Ohio Sw. R.R. v. Burtch*, 263 U.S. 540, 544 (1924).

The same logic extended to stevedores and longshoremen, the dockworkers who loaded and unloaded ships at port. The Supreme Court in 1928 deemed "[t]he unloading of a ship" to have "direct relation to commerce and navigation," such that a stevedore was within federal maritime jurisdiction. *N. Coal & Dock Co. v. Strand*, 278 U.S. 142, 144 (1928). A decade later the Court reiterated this point in stronger terms: "*No one* would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel." *Puget Sound* Stevedoring *Co. v. State Tax Comm'n*, 302 U.S. 90, 92 (1937) (emphasis added). The Court recognized that the work the crew was engaged in—loading and unloading a vessel—was itself interstate or foreign commerce. *Id.* at 94; *see also Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427 (1947) ("The transportation in commerce, at the least, begins with loading and ends with unloading."). A cargo loader may not herself cross the state border, but without her work, neither would the goods in her care. She is an essential part of the enterprise of transporting goods between states and countries.

Southwest points out that the Supreme Court overruled these stevedoring cases in *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978). The Court did not, however, abrogate its holdings that stevedores were engaged in commerce, let alone imply the cases were wrong when decided. Originally, because stevedoring was commerce, the Court held it was *per se* unconstitutional for states to tax that work. *Puget Sound*, 302 U.S. at 94. Forty years later the Court

eliminated this *per se* prohibition of taxation. *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. at 748-50. It reaffirmed, however, that stevedoring was commerce, and, the court presumed, commerce in the sense of "movement" and "transport," as distinct from "commerce that does not move goods." *Id.* at 748.

We are thus left with the firm conviction that cargo loaders generally are a class of workers engaged in the actual transportation of goods. Ramp supervisors who also load and unload cargo in the manner Saxon attests, in turn, are airplane cargo loaders and members of that class, and thus engaged in commerce for purposes of § 1.

C.

A comparison to the enumerated categories of seamen and railroad employees in § 1 further supports our conclusion that a ramp supervisor falls within the residual clause and is a transportation worker like them.

1.

Regarding seamen, we again agree with the district court and Southwest's premise, but not their conclusion. The term "seaman" is a term of art that excludes the stevedores, longshoremen, and land-based dockworkers to whom we just compared ramp supervisors. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342, 348 (1991). The distinction is quite literal thanks to a quirk from 1927: "seaman" is statutorily defined by its exclusion from the Longshoremen's and Harbor Workers' Compensation

Act, Pub. L. No. 69-803, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950). *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-56, 358-59 (1995).

Saxon argues that seamen meant something different two years earlier, in 1925, and then included dockworkers. This is partially correct. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52 (1926), did hold that a stevedore was a seaman for purposes of the Jones Act, Pub. L. No. 66-261 § 31, 41 Stat. 988, 1006 (1920) (codified as amended at 46 U.S.C. §§ 30101¬30106), which provides a claim in negligence for injured seamen. The Compensation Act abrogated that holding, but even at the time *Haverty*'s reasoning applied *only* to the Jones Act. The Court acknowledged that "for most purposes, as the word is commonly used, stevedores are not 'seamen.'" *Haverty,* 272 U.S. at 52. Because stevedores and seamen performed similar tasks, the Court inferred that Congress wanted them to receive the same protections, regardless of job title. *Id.; see also Uravic v. F. Jarka Co.*, 282 U.S. 234, 239 (1931) (explaining that *Haverty* did not "say or mean that stevedores are to be regarded as seamen" only that they are "given the rights of seamen"). There was and remains a "fundamental distinction" between seamen and land-based workers. *See Chandris*, 515 U.S. at 358.

A distinction, even a fundamental one, does not necessarily mean a difference. Saxon does not purport to be a seaman but to perform work sufficiently analogous to seamen to infer she is engaged in commerce like them. Southwest gives us no reason to believe the distinction between seamen and longshoremen rests on their relation to commerce.

Instead, it is typically justified by the unique hazards that seamen face on the open seas. *See Chandris*, 515 U.S. at 354-55. So *Haverty*'s extension of the seaman's protections to stevedores was questionable, but its broader point remains valid. Seamen, stevedores, and longshoremen performed similar—even if not identical—work. Other cases contemporary to the Arbitration Act also carried this theme and recognized that the crew of the ship had historically performed the specialized work of the stevedore and longshoreman. *See Puget Sound*, 302 U.S. at 92; *Atlantic Transp. Co. of W. Va. v. Imbrovek*, 234 U.S. 52, 62 (1914). Given this similarity in their work we see no reason to infer that Congress's express inclusion of seamen in § 1 leads to an implied exclusion of longshoremen or other cargo loaders like them. They are all workers engaged in interstate or foreign commerce, even if they are not the same class.

Southwest urges us to follow the Fifth Circuit, which, in *Eastus v. ISS Facility Services, Inc.*, 960 F.3d 207 (5th Cir. 2020), noted the parties' agreement that longshoremen were not an exempted class of workers. *Id.* at 211-12. The appellant, Heidi Eastus, supervised and assisted airport ticketing and gate agents who placed passengers' baggage on conveyor belts to be screened and loaded. *Id.* at 208. Because her work could "at most be construed as loading and unloading airplanes," she resembled more a longshoreman than a seaman, so the court held she was also not exempt. *Id.* at 212.

Saxon does not make the same concession as in *Eastus*, and without that starting point, we do not think its logic directly applies here. *Eastus* addressed

little of the history that we have covered. Instead, its analysis rested on a decision interpreting the term "seaman" under § 1 and expressly disclaiming reliance on the residual clause. *See Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 394 (5th Cir. 2003). Longshoremen may not belong to the enumerated class of seamen, but it cannot follow that one is not a transportation worker just because she is not a seaman. The residual clause must have some content beyond just the enumerated categories, lest we read it out of the statute entirely. Excluding all cargo loaders also conflicts with the Third Circuit's established interpretation of § 1 through railroad law, as we explore further below. We express no opinion on whether Eastus herself was a transportation worker—she did not personally load and unload cargo, and so was at least one step removed from either longshoremen or ramp supervisors like Saxon.

2.

Even if a gap existed in the analogy between seamen and cargo loaders, we still must compare ramp supervisors to the other enumerated category, railroad employees. One complicating matter is that, unlike seaman, "railroad employee" is not a term of art with any settled meaning. The Supreme Court has noted only that the term "may have swept more broadly at the time of the Act's passage than might seem obvious today." *New Prime*, 139 S. Ct. at 543.

In the absence of other guidance, Saxon proposes the term should be understood by its plain meaning—those employed by a railroad, obviously including porters and other train cargo loaders. She

also supports a broad construction by pointing to the Transportation Act of 1920, tit. III, Pub. L. No. 66-152, 41 Stat. 456, 469 (repealed 1926), which established a Railroad Labor Board to resolve disputes between railroads and their employees, including train cargo loaders but also clerks and janitors only tangentially related to transportation. *E.g., Bhd. of Ry. & S.S. Clerks v. Erie R.R.*, Decision No. 1210, 3 R.L.B. 667, 667 (1922); *see also Ry. Emps.' Dept. v. Ind. Harbor Belt R.R.*, Decision No. 982, 3 R.L.B. 332, 337 (1922) (defining "employee" broadly to mean "those engaged in the customary work directly contributory to the operation of the railroads"). These possibilities, however, too closely resemble the employer-based reasoning that we have already said is incompatible with the residual clause, and so have limited utility in interpreting that clause, whatever merit they may have for the enumerated category of railroad employees.

We need not rest on these broad definitions, though, because cargo loaders fit within a narrower class of railroad employees defined by their relation to commerce. The Federal Employers' Liability Act (FELA), Pub. L. No. 60-100, § 2, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60), allowed railroad workers injured while "employed ... in ... commerce" to sue the railroad for negligence. Considering the substantial overlap between this formulation and § 1 of the Arbitration Act, the Third Circuit—applying the same *ejusdem generis* reasoning that the Supreme Court later adopted in *Circuit City*—first relied on FELA caselaw to inform its interpretation of § 1 decades ago. *See Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of*

Am., Local 437, 207 F.2d 450, 452-53 (3d Cir. 1953) (en banc).

The FELA cases identify at least two general categories of workers employed in interstate commerce, beyond the obvious worker who physically crosses state lines. The first category included those who worked on an intrastate leg of an interstate journey. *See, e.g., Phila. & Reading Ry. v. Hancock*, 253 U.S. 284, 285-86 (1920). The First and Ninth Circuits recently relied on this line of cases to conclude that so-called "last mile" delivery drivers fit within the § 1 exemption. *See Rittmann*, 971 F.3d at 912; *Waithaka*, 966 F.3d at 20-21. Ramp supervisors and cargo loaders do not resemble this category, so we have no need to decide whether we agree with that position today.

Cargo loaders fit cleanly into the second category—those whose work was "so closely related to [interstate transportation] as to be practically a part of it." *Shanks v. Del., Lackawanna & W.R.R.*, 239 U.S. 556, 558 (1916). As we have already noted, the Court held in 1924 that it was "too plain to require discussion that the loading or unloading of an interstate shipment" sufficed for a worker to fit within this category. *Burtch*, 263 U.S. at 544. Although the First Circuit has expressly reserved the question, *Waithaka*, 966 F.3d at 20 n.9, 22 n.10, the Third Circuit has consistently held that workers are exempt under § 1 if they are so closely related to transportation as to be part of it. *See Singh*, 939 F.3d at 226; *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004); *Tenney Eng'g*, 207 F.2d at 453.

Southwest does not dispute that train cargo loaders were "employed in commerce" for FELA purposes in 1925. It protests only that we should not rely on FELA to interpret the Arbitration Act. FELA is construed liberally to effect a remedial purpose, it insists, but the Arbitration Act has no remedial purpose. Its purpose is to favor arbitration. Otherwise, Southwest fears a slippery slope—excluding ramp supervisors could eventually lead to excluding ticket and gate agents, security guards, taxi drivers, and airport vendors all on the ground that each supports the work of the airline.

We find neither of these objections compelling. Southwest has given us no reason to believe that FELA's remedial purpose influenced the extension of its protections to cargo loaders. *See Rittmann*, 971 F.3d at 912 n.2 (same for workers on intrastate portions of interstate journeys); *Waithaka*, 966 F.3d at 22 (same). The Supreme Court in *Burtch* did not just say cargo loaders were employed in commerce but that it was "too plain to require discussion" that they "fully satisfy" that test. 263 U.S. at 544. To exclude all cargo loaders, then, we would have to abandon any comparison to FELA whatsoever—without an alternative, narrower proposal from Southwest by which to compare unenumerated workers to railroad employees—and put ourselves in conflict with the Third Circuit's approach and in tension with the First and Ninth Circuits' interpretation of § 1. Cargo loaders are a relatively easy question under FELA, so we do not see a need, in this case, to go as far as the Ninth Circuit and hold that FELA's remedial purpose affected only its definition of negligence. *Rittman*, 971 F.3d at 912 n.2. Nor do we foreclose the possibility

that some workers who were "employed in commerce" for FELA purposes in 1925 are not "engaged in commerce" for purposes of the Arbitration Act. If those workers exist, they were not cargo loaders.

For similar reasons, we do not see this as the start of a slippery slope. For one, much of Southwest's fear rests on FELA decisions after 1939, when Congress loosened the "employed in commerce" test. *See S. Pac. Co. v. Gileo*, 351 U.S. 493, 498-99 (1956). Later decisions thus shed little light on what it meant to be engaged in commerce in 1925. In any event, Southwest does not suggest transportation workers are limited to those who physically cross state lines and we do not think such a limitation could be supported. The loading of goods into a vehicle traveling to another state or country is the step that both immediately and necessarily precedes the moment the vehicle and goods cross the border. To say that this closely related work is interstate transportation does not necessarily mean that the work of a ticketing or gate agents (like in Eastus) or others even further removed from that moment qualify too. We say this not to prejudge future cases, but only to reiterate that a transportation worker "must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Wallace*, 970 F.3d at 802. Whether the goods have been or ultimately will go to another state or country is not important except to the extent the class of workers directly progresses them on that journey. Airplane cargo loaders like Saxon are essential to that progress in a way distinct even from other airline employees.

3.

The foregoing analysis rests on the premise that the common characteristics of seamen and railroad employees, for *ejusdem generis* purposes, is their relationship with interstate or foreign commerce. Southwest offers a different view. It asserts that the link between seamen and railroad employees is that both were subject to alternative dispute-resolution schemes in 1925. The purpose of the § 1 exemption in the Arbitration Act, it contends, was to avoid conflict with such schemes, including the Railway Labor Act. *See Circuit City*, 552 U.S. at 120-21 (calling this purpose a "permissible inference"). Because Saxon, as a supervisor, is not covered by the Railway Labor Act (and certainly would not have been in 1925, a year before it existed and a decade before it extended to airline workers), Southwest contends that she cannot be exempt from the Arbitration Act.

The critical flaw with this argument is that the text of § 1 does not tie exemption to any other law. The text directs us to ask whether the class of workers is engaged in commerce. Even if Southwest correctly identifies the purpose of § 1, "[p]urpose cannot override text." *Waithaka*, 966 F.3d at 25 (citing *New Prime*, 139 S. Ct. at 543). If Congress intended to exempt only workers covered by dispute-resolution schemes in 1925, it could have enumerated them and skipped the residual exemption entirely. *See id.*

The consequences of excluding Saxon despite the absence of some other federal arbitration scheme are not nearly as dire as Southwest predicts. It insists that our holding will create a subset of workers "completely unable to agree to arbitration." But Saxon

could still face arbitration under state law or through an agreement outside of her contract of employment. All we decide today is that the Federal Arbitration Act's policy favoring arbitration does not extend to Saxon's contract of employment under the plain text of § 1. The exemption in 9 U.S.C. § 1 reflects a limit Congress placed on its otherwise liberal favor toward arbitration, and we are obligated to respect that limit before enforcing the Arbitration Act. *New Prime*, 139 S. Ct. at 543.

IV.

Because we conclude that airplane cargo loaders are a class of workers engaged in commerce and Saxon is a member of that class, it follows that she is a transportation worker whose contract of employment is exempt from the Federal Arbitration Act. We therefore reverse the district court's judgment compelling arbitration and remand for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LATRICE SAXON, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiff,
v.

SOUTHWEST AIRLINES CO.,

Defendant.

Case No. 19-cv-0403
Robert M. Dow, Jr., Judge.

MEMORANDUM OPINION AND ORDER

Plaintiff Latrice Saxon brings a putative collection action brought pursuant to the Fair Labor Standards Act. Before the Court is Defendant Southwest Airline's motion to dismiss for improper venue, arguing that Plaintiffs case must be arbitrated. [13]; see also [27]. For the reasons set forth below, Defendant's motion to dismiss is granted and this civil case is terminated.

I. Background

This case arises out of a putative collective action brought pursuant to the Fair Labor Standards Act, 29 U.S.C. §201 *et seq*. Before the case can proceed to the merits, however, the Court must first determine the threshold issue of whether the case must be dismissed in favor of arbitration. Both the details of Plaintiff's job responsibilities and the procedural history are provided for context.

A. Job Duties

Plaintiff Latrice Saxon is a "non-exempt ramp supervisor" for Defendant Southwest Airlines at Midway International Airport. [1, ¶¶8, 10.][1] The listed duties of Ramp Supervisors include (but are not limited to): assigning subordinate "Ramp Personnel" to various tasks and monitoring their work flow; training "Ramp Agents;" and "determin[ing] that aircraft are properly serviced and provisioned prior to departure." [27-2 at 2.] The Ramp Supervisor position also requires that supervisors "be able to lift and move items of 70 pounds and/or more on a regular basis and repetitively lift weights of 40 to 50 pounds on raised surfaces." [27-2 at 3.]

Ramp Supervisors, such as Plaintiff, "are restricted from performing Ramp Agent duties because of the collective bargaining agreement ("CBA") between [Defendant] and Transportation

[1] Through the briefing and attached materials, the position is referred to as "Ramp Supervisor," "Ramp Agent Supervisor," and various permutations thereof. The Court infers that these are all the same position of "Ramp Supervisor."

Workers Union [] Local 555." [27-1, ¶5.] Ramp Agents' primary duties include loading and unloading baggage and guiding planes to gates. *Id.* The restriction on Supervisors' ability to perform Agent tasks is not, however, absolute. Supervisors are tasked with overseeing Ramp Agents and "may continue to perform covered work [*e.g.,* loading baggage] while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the workforce." [27-1 at 3.] Moreover, although Ramp Supervisors may not preempt Agents for shifts, Agents may give their shifts to Ramp Supervisors in certain circumstances. [*Id.*] Thus, though Ramp Supervisors' ability to perform Agents' tasks (most importantly handling baggage) is "restricted," [27-1, ¶ 5], this restriction is not a complete bar.

In fact, Plaintiff alleges that she regularly "fill[s] in for Ramp Agents at least three out of the five days each week" that she works. When she "step[s] into the shoes of the Ramp Agents," Plaintiff "perform[s] the Ramp Agents' duties of loading and unloading the goods and cargo from Southwest planes."[2] Plaintiff further explained that in addition to

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[2] Defendant contends that "Ramp Agent Supervisors" are restricted from performing Ramp Agent duties. [27 at 6.] As explained above, however, this restriction is not absolute, and according to Defendant's own documentation, Supervisors may perform Ramp Agent duties in limited circumstances. To the extent that there is a factual dispute as to whether Plaintiff has handled luggage and freight in her role as Ramp Supervisor, for purposes of this motion the Court assumes that she has done so. Her affidavit is contradicted, and the materials that Defendant

passengers' personal luggage, Southwest ships (and she has handled) other freight. *[Id,* ¶ 6-7.] Defendant concedes that it ships freight but argues that most of the goods shipped in its planes' cargo holds are passenger luggage. [27-1, ¶ 6 ("[T]he ratio of passenger baggage to freight cargo at Midway was 10:1. This means that Midway Ramp Agents handled ten (10) times more baggage than they handled freight in 2018").] In addition to customer baggage and air freight, Defendant also apparently ships "air mail, ballast, and Company materials." [27-1 at 13.] The Court infers that when Supervisors "step into the shoes" of Agents, they also load and unload this cargo, see [28-1, ¶¶ 3-5], but neither side has offered any evidence or assertion as to what proportion of cargo is comprised of these items.

There is one further important difference between Ramp Agents and Ramp Supervisors—the former are included in a CBA; the latter are not. [27-2 at 10, 13.] Thus, according to the terms of Plaintiff's employment, she must individually arbitrate in cases such as this through a process of Alternative Dispute Resolution (ADR). See generally [14-5].

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has attached to their supplemental briefing show that Ramp Supervisors may perform Ramp Agent duties (albeit in limited circumstances). Moreover, the job description for Ramp Supervisor requires that employees be able to, for example, "repetitively lift weights of 40 to 50 pounds on raised surfaces." This requirement would be inexplicable and superfluous if Ramp Supervisors did not have to "step into the shoes" of Agents and load and unload cargo.

B. Procedural History

Plaintiff filed a putative collective action lawsuit against Defendant, alleging a violation of the FLSA for failure to pay overtime wages. [1, ¶¶ 28-45.] Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue or in the alternative to stay proceedings pursuant to 9 U. S.C. § 3. See generally [14]. Defendants alleged that Plaintiff had signed a binding arbitration agreement, valid under Illinois law, that required her to individually arbitrate all wage and hour related claims against Defendant. [*Id.*] Because this suit was within the scope of that ADR Agreement, they argue, she must submit to arbitration. See *[id];* see also generally [14-5 (providing documentation of Plaintiff's submission to ADR Agreement)].

Plaintiff conceded that she signed the ADR Agreement, and that if the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.,* applies to her, ADR would be the proper venue for this suit. See [25-1 at 2]. Therefore, the only threshold issue is whether she is exempt from the FAA under § 1. [*Id.*]. The Court authorized limited discovery into Plaintiff's job duties for the sole purpose of determining whether this Court is the proper venue for the FLSA action. [25-1, 7]; [26].

II. Legal Standard

A motion seeking dismissal pursuant to an arbitration agreement is best "conceptualized as an objection to venue, and hence properly raised under 12(b)(3) * * *." *Automobile Mechanics Local 701*

Welfare and Pension Funds v. Vanguard Car Rental USA, Inc., 502 F.3d 740, 746 (7th Cir. 2007). The Seventh Circuit has instructed that all facts be construed and all reasonable inferences be drawn in favor of the plaintiff. *Faulkenberg v. CB Tax Franchise Systems, LP,* 637 F.3d 801, 806 (7th Cir. 2011); see also *Jackson v. Payday Financial, LLC,* 764 F.3d 765, 773 (7th Cir. 2014). In contrast to the familiar Rule 12(b)(6) motion, "[w]hen ruling on a motion to dismiss for improper venue, the district court is not obligated to limit its consideration to the pleadings [or to] convert the motion to one for summary judgment if the parties submit evidence outside the pleadings." *Faulkenberg,* 637 F.3d at 809-10 (7th Cir. 2011). "The party opposing arbitration has the burden of establishing why the arbitration provision should not be enforced." *Wallace v. Grubhub Holdings Inc.,* 2019 WL 1399986, *2 (N.D. Ill. Mar. 28, 2019) (citing *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 91-92 (2000)).

III. Discussion

Preliminarily, the Supreme Court has explained time and again that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.,* "establishes 'a liberal federal policy favoring arbitration agreements.'" *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612, 1621 (2018) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983)); accord, *e.g., American Exp. Co. v. Italian Colors Restaurant,* 570 U.S. 228, 243-44 (2013) ("[The FAA] reflects a federal policy favoring actual arbitration * * *."); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 345 (2011)

("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration."); *Circuit City,* 532 U.S. at 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26 (1991) ("[I]t should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.") (quotation marks and citation omitted); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 (1967) (noting "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts"). Thus, absent a clear statutory exception to the arbitrability of Plaintiff's claim, the Court must "respect and enforce agreements to arbitrate[.]" See *Epic Systems,* 138 S. Ct. at 1621.

> Section 2 of the FAA defines the class of arbitrable cases; it provides:
>
> > A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon

> such grounds as exist at law or in equity for the revocation of any contract.

The Supreme Court has held that employment contracts are contracts "evidencing a transaction involving commerce." *Circuit City,* 532 U.S. at 113 (discussing *Gilmer,* 500 U.S. 20). Thus, Plaintiff's signed arbitration agreement is "valid, irrevocable, and enforceable" under § 2 unless an exception applies.

Plaintiff argues the signed arbitration agreement is unenforceable because she falls under an exception in § 1 of the FAA.[3] In relevant part, § 1 reads: "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." Otherwise valid agreements to arbitrate cannot be enforced if part of a contract of employment with an enumerated worker. See *New Prime,* 139 S. Ct. at 539. Plaintiff acknowledges that she is neither a seafarer nor railroad employee but argues that she is "engaged in foreign or interstate commerce." See 9 U.S.C. § 1. In support, she points to her handling of baggage, freight, and other goods shipped interstate; her supervision of these shipments; and the fact that Defendant is an airline. Defendant counters that it is

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[3] The parties do not dispute, and the Court need not address, the question of arbitrability of arbitrability. As the Supreme Court recently held, "a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019).

not, in fact, a transportation company; Plaintiff never personally transports goods interstate; and exceptions to the FAA should be applied narrowly.

Notwithstanding the broad language in the residual clause to § 1 of the FAA, the Supreme Court has adopted a narrow construction of "engaged in foreign or interstate commerce." *Circuit City,* 532 U.S. at 109. It arrived at this conclusion by employing the *ejusdem generis* canon of statutory construction, which instructs that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at 115-16 (quotation marks and citations omitted). Because "engaged in interstate commerce" is preceded by references to specific occupations within the transportation industry, the Court reasoned that "Section 1 exempts from the FAA only contracts of employment of transportation workers." *Id.* at 119. The Supreme Court further elaborated that "transportation workers" could be "defined, for instance, as those workers 'actually engaged in the movement of goods in interstate commerce.' *Id.* at 112 (quoting *Cole v. Burns Intern. Sec. Services,* 105 F.3d 1465, 1471 (D.C. Cir 1997) (collecting cases)); see also *id.* at 134-35 (Souter, J., dissenting) ("A majority of this court now puts its *imprimatur* on the majority view among the Courts of Appeals."); *International Broth. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC,* 702 F.3d 954, 956 (7th Cir. 2012) (employing the Supreme Court's illustrative definition); but see *Singh v. Uber Technologies Inc.,* F.3d, 2019 WL 4282185 at *9 (3d Cir. Sept. 11, 2019) (describing this definition as

illustrative dicta). Although the Supreme Court recently interpreted the § 1 exemption, it did not have occasion to clarify the definition of "transportation worker." See *New Prime,* 139 S. Ct. at 539.

As one court has observed, "[i]n the 18 years since the Supreme Court decided *Circuit City,* state and federal courts have grappled with these unresolved issues, but 'little consensus has been realized.'" *Muller v. Roy Miller Freight Lines, LLC,* 246 Cal.Rptr.3d 748, 753-757 (Cal. Ct. App. 2019) (collecting cases and quoting *Kowalewski v. Samandarov,* 590 F. Supp. 2d 477,482 (S.D.N.Y. 2008)). However, the cases examining the definition of "transportation worker" have identified several rules-of-thumb to guide decision-making. Although the case at bar defies easy categorization, these rules-of-thumb illuminate the outer bounds of the term "transportation workers."

"If there is one area of clear common ground among the federal courts to address this question, it is that truck drivers—that is, drivers actually involved in the interstate transportation of physical goods—have been found to be 'transportation workers' for purposes of the residuary exemption in Section 1 of the FAA." *Kowalewski*, 590 F. Supp. 2d at 483 (collecting cases). The Seventh Circuit recently confirmed this consensus, even as applied in a borderline case. See *Kienstra*, 702 F.3d at 957. In *Kienstra*, the plaintiffs worked at a cement company, not a trucking company, and, when they did deliver goods, they did so almost exclusively intrastate. Id. But, because the truckers made "a few dozen" interstate trips out of "1500 to 1750 delivers each

year" they were interstate transportation workers for the purposes of § 1 of the FAA. *Id*. at 958; but see *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289-90 (11th Cir. 2005) (explaining that an accounts manager who made incidental deliveries across state lines is no more a transportation worker than "a pizza delivery person who delivered pizza across a state line to a customer in a neighboring town").[4] Here, Plaintiff does not assert in the complaint that she personally transported goods across state lines, so she does not

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[4] Defendant argues that one component of the test for "transportation worker" under *Circuit City* includes whether the worker is employed "in an industry that *primarily* involves the actual, physical movement of goods through interstate commerce." [27 at 1 (citing *JetBlue Airways Corp. v. Stephenson*, 2010 WL 6781684, *2 (N.Y. Sup. Ct. Nov. 22, 2010) (emphasis in original).] Defendant further contends, again relying on *JetBlue*, that passenger airlines that also carry cargo, such as Defendant, are solely in the "passenger airline industry." [27 at 2 (citing *JetBlue*, 2010 WL 6781684 at *2).] In other words, *JetBlue* discounted the fact that JetBlue Airlines shipped a small amount of freight and concluded that transporting passengers is not commerce. *JetBlue*, 2010 WL 6781684 at *3. Preliminarily, the New York State trial court's unpublished opinion is hardly the only word on the matter. See, *e.g.*, *Singh*, 2019 WL 4282185 at *7-12 (explaining that Uber drivers may be "transportation workers" within § 1 of the FAA); *id*. at *15-16 (Porter, J., concurring) (stressing that there is no "goods-passengers distinction" in § 1 of the FAA). But even if the Court found *JetBlue's* reasoning persuasive, however, the Court is bound by the Seventh Circuit's holding in *Kienstra*. Although the workers in *Kienstra* were primarily employed in the cement industry, the Seventh Circuit still found them to be transportation workers. Likewise, the Seventh Circuit found that infrequent interstate deliveries of goods were enough to trigger the exception in § 1, contradicting *JetBlue's* reasoning regarding the proportion of activity directed toward interstate commerce.

automatically qualify as a transportation worker under *Kienstra*.

There is also a broad consensus that drivers who make intrastate deliveries of locally produced goods are exempt from the FAA. In other words, pizza-delivery drivers and the like are not transportation workers because no part of their work touches interstate commerce. *E.g., Wallace v. Grubhub Holdings Inc.,* 2019 WL 1399986, *3 (N.D. Ill. March 28, 2019) (drivers who deliver prepared meals from restaurants intrastate are not transportation workers); *Lee v. Postmates Inc.,* 2018 WL 6605659, *7 (N.D. Cal. Dec. 17, 2018) (same); *Magana v. DoorDash, Inc.,* 343 F. Supp. 3d 891, 899-900 (N.D. Cal. 2018) (same); *Levin v. Caviar, Inc.,* 146 F. Supp. 3d 1146, 1152-54 (N.D. Cal 2015) (same). These cases are also inapplicable to the instant dispute, for Plaintiff *does* handle at least some goods that are in interstate commerce. For example, the Ramp Supervisors at Midway airport handle air freight for interstate shipment. [28-1, ¶¶ 4-6]; see also [27-1 at 13].

Finally, merely working in a transportation-adjacent industry or position—without transporting or handling goods or directing those who do—is not enough to qualify any employee as a transportation worker. For example, in *Borgonia v. G2 Secure Staff,* the plaintiff worked as a contractor at San Francisco International Airport performing the following duties: "security screener, wheelchair agent, and dispatcher." 2019 WL 1865927, *1 (N.D. Cal. Apr. 25, 2019). The plaintiff was not deemed to be a transportation worker because he did not handle

goods in interstate commerce or transport anything. *Id.* at *4. Some courts have found an exception to this rule where the worker in question personally directs transportation workers engaged in interstate travel. Compare *Lenz v. Yellow Transp., Inc.,* 431 F.3d 348, 353 (8th Cir. 2005) (concluding that a customer service representative for trucking company was not a transportation worker after considering multifactor balancing test); *Lorntzen v. Swift Transp., Inc.,* 316 F. Supp. 2d 1093, 1096-97 (D. Kansas 2004) (explaining that a "Safety Compliance Assistant" for a trucking company is not a transportation worker); *Cole v. Burns Intern. Sec. Services,* 105 F.3d 1465, 1471 (D.C. Cir. 1997) (holding that a security guard at an train hub was not a transportation worker), with *Zamora v. Swift Transp. Corp.,* 2008 WL 2369769, *7-9 (reasoning that a manager who personally monitors and directs interstate truckers is a transportation worker); *Palcko v. Airborne Express, Inc.,* 372 F.3d 588, 593-94 (3d Cir. 2003) (same). Here, Plaintiff does not merely work alongside those who touch interstate commerce—she handles goods herself. Plaintiff's role as a supervisor is discussed below.

In contrast to the aforementioned fact patterns, the courts are split about two classes of workers who handle goods that have traveled interstate, but whose scope of work is entirely intrastate. The first scenario concerns drivers who make intrastate deliveries of goods that have been shipped from out of state. Although most of the courts to consider these "last-mile" delivery arrangements conclude that intrastate delivery people to be transportation workers, some cases hold otherwise. Compare, *e.g., Waithaka v. Amazon.com, Inc.*, ____ F.

Supp. 3d ____, 2019 WL 3938053, *4 (D. Mass. Aug. 20, 2019) (holding that "last-mile" delivery drivers for Amazon are transportation workers); *Rittman v. Amazon.com, Inc.,* 383 F.Supp.3d 1196, 1201-02 (W.D. Wash. 2019) (same); *Muller v. Roy Miller Freight Lines, LLC,* 246 Cal.Rptr.3d 748, 758-59 (Cal. App. Ct. 2019) (holding that driver who made intrastate deliveries of goods that originated almost exclusively out of state is a transportation worker); *Nieto v. Fresno Beverage Co., Inc.,* 245 Cal.Rptr.3d 69, 76-77 (Cal. App. Ct. 2019) (same); *Ward v. Express Messenger Systems, Inc.,* No. 17-cv-2005-NYW, *10-11 (D. Colo. Jan. 28, 2019) (order denying motion to compel arbitration) (explaining that intrastate deliveries of material shipped interstate by Amazon, Staples and various pharmaceutical companies qualified as interstate commerce); *Diaz v. Michigan Logistics,* 167 F.Supp.3d 375, 380 n.3 (E.D.N.Y. 2016) (opining in dicta that "Plaintiffs sufficiently allege that they were engaged in interstate transportation, notwithstanding that they did not actually drive across state lines, as Plaintiffs were directly responsible for transporting and handling automotive parts that allegedly moved in interstate commerce—the heart of Defendants' business."); *Christie v. Loomis Armored US, Inc.,* 2011 WL 6152979, *3 (holding that driver who makes intrastate deliveries of currency is a transportation worker), with *Bonner v. Michigan Logistics Incorporated,* 250 F. Supp.3d 388, 397 (D. Ariz. 2017) (assuming that deliveries must cross state lines); *Vargas v. Delivery Outsourcing, LLC,* 2016 WL 946112, *4-5 (N.D. Cal. Mar. 14, 2016) (discussing *Kienstra* and concluding that a driver who makes intrastate deliveries of lost or delayed airline luggage

is not a transportation worker).[5] Unlike these cases, in which the workers all indisputably *transported* goods, here Plaintiff does not herself transport anything.

The next scenario—and the one that is most relevant here—concerns workers who load and unload packages in a central hub. The courts to have considered these scenarios have reached split decisions. The Sixth and Eleventh Circuits have concluded that postal workers as a class fall within the FAA's exemption for workers engaged in interstate commerce, seemingly regardless of whether the workers in question transport (as opposed to merely handle) mail. But both of these

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[5] In *Muller*, the California Court of Appeal attempted to harmonize these holdings by explaining that there is a difference between "truckers," "whose primary purpose is to continue the flow of interstate commerce by transporting out-of-state freight and cargo," and "delivery" drivers, who have a solely local focus. *Muller*, 246 Cal. Rptr. 3d. at 758. Other courts have distinguished *Vargas* by noting that "luggage, however, 'was not a 'good' to be delivered until it was delayed or lost by the airline and then discovered when it was already intrastate. Much like a food delivery service, a luggage delivery service is not engaged in interstate commerce because it is not in the business of shipping goods across state lines, even though it delivers good that once travelled interstate." *Waithaka*, 2019 WL 3938053 at *3 (quoting *Rittman*, 383 F. Supp. 3d at 1200). In other words, *Vargas* looks more like *Borgonia* or *Grubhub* than an interconnected interstate delivery service. And *Bonner's* factual analysis is so bare bones that it is difficult to discern whether the drivers are better categorized as drivers delivering locally produced goods or part of a chain or interstate truckers. See *Bonner*, 250 F. Supp. 3d at 397. Regardless, because Plaintiff is not a last-mile driver, the Court need not delve too deeply into each of these outliers.

cases predate *Circuit City* and neither case uses the "transportation worker" framework. *Bacashihua v. U.S. Postal Service,* 859 F.2d 402, 405 (6th Cir. 1988) ("If any class of workers is engaged in interstate commerce, it is postal workers."); *American Postal Workers Union, AFL-CIO v. U.S. Postal Service,* 823 F.2d 466, 473 (11th Cir. 1987) ("It seems to us that, if any workers are actually engaged in interstate commerce, the instant postal workers are.") (internal quotations and citation omitted). More recent decisions, however, generally have concluded that workers who handle goods shipped in interstate commerce—but do not transport goods themselves—are *not* exempt from the FAA under § 1. *Furlough v. Capstone Logistics, LLC,* 2019 WL 2076723, *7 (N.D. Cal. May 10, 2019) (holding that warehouseman whose job duties included "loading, unloading, and handling freight; communicating with drivers; and monitoring conditions on the docks" was not a transportation worker); *Kropfelder v. Snap-On Tools Corp.,* 859 F. Supp. 952, 958-59 (D. Md. 1994) (concluding that warehousemen who load and unload trucks used to deliver goods in interstate commerce are not transportation workers).[6]

Taken together, these two lines of cases suggest that the linchpin for classification as a "transportation worker" under *Circuit City* is actual transportation, not merely handling goods. That is, workers who transport goods intrastate as part of an interstate Pony-Express style network may be transportation

[6] Another possible explanation for the divergent holdings is simply that postal work is *sui generis*. See *Lorntzen*, 316 F. Supp. 2d at 1097 (distinguishing postal cases from *Kropfelder*).

workers, but those who merely handle those goods at one end or the other are not. Moreover, the distinction between transporting goods and merely handling them is borne out by the other categories of exempt workers enumerated in § 1. For example, though seamen's contracts of employment are exempt from the FAA, grounds crew such as longshoremen are not considered seamen. *McDermott Intern., Inc. v. Wilander,* 498 U.S. 337, 348 (1991) ("Whether under the Jones Act or general maritime law, seamen do not include land-based workers[]" such as stevedores and longshoremen.); see also *Brown v. Nabors Offshore Corp.,* 339 F.3d 391, 393, 395 (5th Cir. 2003) (holding that the definition of "seaman" in the Jones Act should be used to determine § 1 exemptions from the FAA); see also *Veliz,* 2004 WL 2452851, at *4 (explaining that the legal definitions of seamen and railroad employees require, respectively, an "employment-related connection to a vessel *in navigation"* or *"navigation* of a vessel, *i.e.,* transportation") (quotation marks and citation omitted) (emphasis added). In other words, courts have begun to materially distinguish between nonexempt workers who handle goods in service of transportation (warehousemen, stevedores, and porters) and exempt workers who actually transport them by navigating the channels of interstate commerce (truckers, seamen, and railroadsmen, respectively).

The case at bar is virtually indistinguishable from the cases holding that merely loading and unloading goods is not "transportation" work. Here, Plaintiff's job duties at most include loading and unloading some cargo from Defendant's planes, along with supervising that task. The case is thus identical

to *Furlough* and *Kropfelder,* both of which concluded that warehouse managers who loaded and unloaded cargo and generally managed warehouse logistics were not transportation workers. As in those cases, Plaintiff herself does not transport cargo at all (even intrastate) and is therefore not a transportation worker. Accordingly, the FAA does not exempt Plaintiff and she therefore must arbitrate her claim.

This conclusion is informed by three additional factors. First, as explained above, the Seventh Circuit places great weight on whether the worker in question actually transported goods across state lines. *Kienstra,* 702 F.3d at 957-58. The procedural history of *Kienstra* further underscores the importance of interstate travel. When the case originally reached the Seventh Circuit, it was unclear whether the truckers had crossed state lines. *Id.* at 956. Because the panel felt that it might lack jurisdiction on that basis, it issued a limited remand to determine whether the truckers did, in fact, transport goods interstate. *Id.* at 955-956. Here, the record is clear that Plaintiff did not physically transport goods at all, let alone out-of-state.

Second, the trend in the case law reflects a growing consensus that handlers are not transportation workers. As explained above, the two cases going the opposite direction both failed to use the "transportation worker" framework, and their holdings have been called into doubt. *Bacashihua,* 859 F.2d at 405; *American Postal,* 823 F.2d at 473; see also *Veliz,* 2004 WL 2452851, *6 ("[I]t is unclear to what degree these cases remain good law."); *cf.* also *Rittman,* 383 F. Supp. 3d at 1201 n.4 (suggesting that

after *Circuit City,* the postal cases are most applicable to postal workers who personally transport packages).

Finally, the Court is mindful of the "liberal federal policy favoring arbitration agreements." *Epic Systems,* 138 S.Ct. at 1621 (quotation marks and citation omitted). As far back as 1983, the Supreme Court explained that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone,* 460 U.S. at 24-25. Since then, the Supreme Court has reiterated the importance of respecting valid arbitration agreements, particularly in the employment context. *Epic Systems,* 138 S. Ct. at 1621; *Circuit City,* 532 U.S. at 123.

The Court is unconvinced by Plaintiff's arguments to the contrary. First, Plaintiff points to the non-exhaustive eight-factor test applied by the Eighth Circuit in *Lenz,* arguing that these factors show that Plaintiff is a transportation worker. [28 at 3-8 (discussing *Lenz,* 431 F.3d at 352).] But the Seventh Circuit has not adopted this test and other courts have noted that these eight factors were tailored to the facts in *Lenz* and have limited applicability in other contexts. See *Kowalewski,* 590 F. Supp. 2d at 482 n.3; *cf. Singh,* 2019 WL 4282185 at *10 n.8. Moreover, although many of these factors have informed the Court's decision-making, *Lenz* provides no framework for how to weigh each factor and little guidance regarding application. In fact, the *Lenz* court considered the physical transportation of

goods to be of paramount importance and applied its factors with that in mind.[7] *Lenz,* 431 F.3d at 352-53.

Next, Plaintiffs quote half of another court's summary of *Kienstra* (until the word "but") to suggest that the Seventh Circuit is indifferent to interstate transportation when determining whether someone is a transportation worker. [28 at 12 (quoting *Wallace,* 2019 WL 1399986, *3).] As explained above, however, the holding, reasoning, and procedural history of *Kienstra* strongly suggest that, at the very least, whether a worker crossed state lines is a very important factor. See *Vargas,* 2016 WL 946112, at *4. And there is nothing in *Kienstra* suggesting that workers who do not transport anything are "transportation workers."

Likewise, Plaintiff does not fall under an exception for managers recognized by the Third Circuit. See *Palcko,* 372 F.3d 592-93; see also *Zamora,* 2008 WL 2369769 at *8-9 (discussing *Palcko).* The plaintiff in *Palcko* was a manager who supervised and directed truckers who delivered goods interstate. *Id.* at 590. She did not, however, handle goods or travel interstate herself. *Id.* at 593. The Third Circuit reasoned that because the manager directly manipulated the channels of interstate commerce,

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[7] For example, the first *Lenz* factor is "whether the employee works in the transportation industry." *Id.* at 352. While the employee in *Lenz* clearly worked in the transportation industry for a trucking company, the Eight Circuit held this factor against him because "he never directly transported goods in interstate commerce." *Id.* So too here—even granting that Plaintiff worked in the transportation industry, she has "never directly transported goods in interstate commerce," so this factor weighs against her. Contra [28 at 1].

she was a transportation worker under § 1 of the FAA. *Id.* at 593-594.[8] Although Ramp Supervisors (such as Plaintiff) supervise employees, they do not direct the interstate shipment of goods or manipulate the channels of commerce themselves (by, for example, directing specific pilots to fly specific routes with specific goods in tow) and therefore are not transportation workers under this exception. See generally [27-2]. Moreover, *Palcko* explicitly limited its holding to exclude warehouse managers who load and unload goods; as explained above, such warehouse employees are virtually indistinguishable from the Ramp Supervisors in the instant case. *Palcko*, 372 F.3d at 594 n.2 (distinguishing *Kropfelder*).

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss [13] is granted, and Plaintiff's claims must be arbitrated. Civil case terminated.

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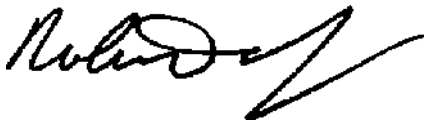
[8] The case in *Zamora* is quite similar, insofar as the manager was found to be a transportation worker because she monitored truckers' routes, mileage, and cargo, and directed their movements. *Zamora*, 2008 WL 2369769 at *1. *Zamora* is further distinguishable from this case because the manager at issue occasionally drove for the employer. *Id.* at *7. Under *Kienstra*, that may be enough, on its own, to qualify the manager as a transportation worker.



Dated:

October 8, 2019

Robert M. Dow, Jr.
United States District Judge