FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEJANDRO ROMERO, on his own behalf and on behalf of all other persons similarly situated, *Plaintiff-Appellant*, v. WATKINS AND SHEPARD TRUCKING, INC., a Montana corporation; SCHNEIDER NATIONAL CARRIERS, INC., a Nevada corporation, *Defendants-Appellees.*	No. 20-55768 D.C. No. 5:19-cv-02158-PSG-KK OPINION

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, Chief District Judge, Presiding

Argued and Submitted July 6, 2021
Pasadena, California

Filed August 19, 2021

Before: D. Michael Fisher,* Paul J. Watford, and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Fisher

SUMMARY**

Arbitration

In a case in which Alejandro Romero filed a putative class action suit claiming Watkins & Shepard Trucking did not give him and other ex-employees advance notice of termination as the federal and California WARN acts require, and in which the district court granted Watkins's motion to compel individual arbitration of Romero's claims, the panel affirmed the district court's ruling that the Federal Arbitration Act (FAA) does not apply to a stand-alone binding arbitration agreement in which Romero waived his right to bring a class action.

The panel held that the district court correctly concluded that Romero, a truck driver who did not himself cross state lines but delivered goods that had once crossed state lines, fell within FAA § 1's exemption for transportation workers engaged in interstate commerce. The panel held that the district court also correctly ruled that the exemption cannot be waived by private contract.

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel affirmed on the remainder of issues in a concurrently filed memorandum disposition.

COUNSEL

Eric A. Panitz (argued), Panitz Law Group APC, Cerritos, California, for Plaintiff-Appellant.

Matthew A. Fitzgerald (argued), McGuireWoods LLP, Richmond, Virginia; Matthew C. Kane, Sabrina A. Beldner, and Amy E. Beverlin, McGuireWoods LLP, Los Angeles, California; for Defendants-Appellees.

OPINION

D.M. FISHER, Circuit Judge:

Plaintiff-appellant Alejandro Romero was laid off by his employer, Watkins & Shepard Trucking. He filed a putative class action suit, claiming Watkins did not give him and other ex-employees advance notice as the federal and California WARN Acts require. Romero, however, had agreed to a binding arbitration agreement, which waived his right to bring a class action. Watkins moved to compel individual arbitration of Romero's claims. The district court granted the motion and Romero now appeals. In this opinion, we address just one issue. We affirm the district court's ruling that the Federal Arbitration Act's ("FAA") § 1 exemption of employment contracts for transportation workers applies and cannot be waived by private contract. In a memorandum disposition filed concurrently with this opinion, we affirm on the remainder of the issues.

BACKGROUND

I. Factual History

Romero was a delivery truck driver employed by Watkins & Shepard Trucking and its parent, Schneider National Carriers, Inc. (collectively, "Watkins") from 1997 to 2019. Watkins operated an interstate trucking business, and Romero's job was to deliver furniture and carpet to retail stores in California. The product often originated from outside of the state, but Romero made deliveries only within California.

During the course of his employment, Romero, from time to time, logged in to an online portal to complete paperwork and trainings. To log in, the system required a unique employee identification number and password. According to the system's data log, on April 19, 2019, Romero's unique user account completed a set of "Associate Acknowledgements," through which he clicked "I Agree," signifying that he read and agreed to the Schneider Mediation & Arbitration Policy (the "Arbitration Policy"). The Arbitration Policy is a stand-alone agreement, which requires that "all employment-related disputes" be resolved through individual arbitration. By assenting to it, an employee waives any right to bring or participate in a class action.

The Arbitration Policy also contains a "Governing Law" section. It states that the agreement is "expressly subject to and governed by the Federal Arbitration Act," and purports to "waive the application or enforcement of any provision of the FAA which would otherwise exclude [the agreement] from its coverage." However, "in the event a court of competent jurisdiction holds or decides that this [agreement] and/or its Waiver Provisions are not subject to and governed

by the FAA, then the laws of the State of Nevada . . . will be the applicable state law . . . without regard to or application of any conflict of laws principles."

The Arbitration Policy was not a condition of employment. Employees could opt out of the mandatory arbitration clause, the choice of law provision, or both, by providing written notice to the company within 30 days. Romero did not opt out.

In August 2019, Watkins announced it would cease operations and informed Romero that he, among other employees, would be laid off. Romero was terminated on August 23, 2019.

II. Procedural History

In September 2019, Romero filed a putative class action against Watkins in the San Bernardino Superior Court, asserting claims under the California WARN Act, Cal. Labor Code § 1401, and the federal WARN Act, 29 U.S.C. § 2101 *et seq.*, which require advance notice to be given to employees before being laid off. He sought to represent both a California and a nationwide class of similarly situated ex-Watkins employees who were terminated in August 2019.

Watkins removed the case to federal court and then moved to compel arbitration of Romero's claims. The district court granted the motion. Among other things, it determined that the FAA did not apply to the Arbitration Policy, because the statute exempts workers who are engaged in interstate commerce, a provision which cannot be waived by the terms of a private agreement. Romero appeals. Watkins argues that we should affirm, but challenges the district court's reasoning that the FAA does not apply. Watkins argues that we should affirm on the

alternative ground that arbitration was correctly ordered under the FAA.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over the federal claims pursuant to 28 U.S.C. § 1291 and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a) and 28 U.S.C. § 1441(c). We also have jurisdiction under the Class Action Fairness Act. 28 U.S.C. § 1332(d)(2). We review *de novo* the district court's order to compel arbitration and the legal conclusions it made in support of that ruling. *Casa del Caffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016).

ANALYSIS

In 1925, Congress enacted the Federal Arbitration Act "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "The FAA reflects both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (citations omitted).

Embracing these principles, the Arbitration Policy selects the FAA as its governing law. However, § 1 of the FAA exempts from the Act's coverage all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118–19 (2001). The district court concluded that Romero, a truck driver who did not himself cross state lines but delivered goods that had once crossed state lines, fell

within "any other class of workers engaged in interstate commerce," thereby sweeping his contract within the scope of the exemption.

The district court is correct. In *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 1374 (2021), this court held 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." *Rittman* is binding on this panel. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Therefore, Romero falls within the class of workers which § 1 excludes from the FAA's coverage.

Watkins attempts to distinguish the Arbitration Policy from the arbitration agreement in *Rittman*. Unlike the agreement in *Rittman*, the Arbitration Policy contains a clause "waiv[ing] the application or enforcement of any provision of the FAA which would otherwise exclude [the Arbitration Policy] from its coverage." Because the parties have chosen to forgo the § 1 exemption, Watkins argues, the FAA should govern. The district court disagreed. It held that the Arbitration Policy's attempted waiver of § 1 is unenforceable. According to the district court, the FAA affords courts the power to enforce arbitration agreements, but not when they involve transportation workers engaged in interstate commerce pursuant to § 1. Section 1 acts as a limit on the court's power and, thus, cannot be waived.

Again, the district court is correct. In *New Prime Inc. v. Oliveira*, the Supreme Court held that a district court, not an arbitrator, must determine whether § 1's exemption applies in a given case. 139 S. Ct. 532, 537–38 (2019). That question is not at issue here. However, *New Prime* supports our conclusion that a waiver is not possible. The Supreme Court

noted that § 1 "says that 'nothing herein'"—meaning nothing in the FAA—"may be used to compel arbitration in disputes involving the 'contracts of employment' of certain transportation workers," *i.e.* those engaged in interstate commerce. *Id.* at 536 (quoting 9 U.S.C. § 1). The "nothing herein" language indicates that § 1 restrains the very authority of courts to send the parties to arbitration, rather than serving as a waivable right.

Indeed, *New Prime* consistently describes § 1 as providing the contours of judicial "authority" or "power." *New Prime* defines "a court's authority under the [FAA] to compel arbitration" as "considerable" but not "unconditional." *Id.* at 537. It "doesn't extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration," because "antecedent statutory provisions limit the scope of the court's powers" to order arbitration. *Id.* Section 1 is one of those provisions. When it is applicable, it prohibits a court from staying a litigation and ordering the parties to arbitration. *Id.* In line with that reasoning, *New Prime* directs courts to decide for themselves whether the exemption applies. *Id.* "After all, to invoke its statutory powers . . . a court must first know whether the contract itself falls within or beyond the boundaries of" § 1. *Id.* A private agreement cannot change this. In fact, a "private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum." *Id.* at 537–38.[1]

[1] We anticipated *New Prime* when we ruled, eight years earlier, that the question of whether § 1 applies cannot be delegated to an arbitrator because "a district court has no authority to compel arbitration . . . where

Beyond this, we have previously rejected a similar theory to the one Watkins advances. In *Rittman*, an employer argued that a court may choose to "enforce [an] arbitration provision" that selects the FAA as its governing law even if § 1's exemption applies, because "the parties did not negotiate for the FAA to apply only to make the FAA inapplicable." 971 F.3d at 919. The employer posited that "the FAA's enforcement provisions"—which are different from, but related to, the § 1 exemption—"are a body of substantive law that the parties are free to agree to apply, just as they could agree to apply the substantive contract law of a particular state that would not apply by its own force." *Id.* (internal quotation marks omitted). We disagreed, saying that the *Rittman* parties could not "contract around the FAA's transportation worker exemption." *Id.* Neither can the parties here.

Watkins responds by noting that the FAA does not expressly state that § 1 is nonwaivable. However, the statute need not repeat what its language already makes clear: "nothing herein," including the grant of power to courts to compel arbitration, "shall apply to contracts of employment of . . . workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Broad, policy-based contentions that the FAA was designed to apply Congress' commerce power expansively and that § 1 is a narrow exemption do not change what the plain text commands. Nor does the fact that certain unrelated statutory employee and consumer rights have been held waivable. Under § 1's plain text, the FAA's transportation worker exemption cannot be waived by the terms of a private contract. Thus, because the exemption

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Section 1 exempts the underlying contract from the FAA's provisions." *In re Van Dusen*, 654 F.3d 838, 843 (9th Cir. 2011).

applies here, the FAA does not govern the Arbitration Policy.

CONCLUSION

For the foregoing reasons, the district court correctly concluded that the FAA is not the controlling law. Nevertheless, for the reasons stated in the memorandum disposition filed concurrently with this opinion, the district court correctly granted Watkins' motion to compel arbitration.

AFFIRMED.