

ENVIRONMENTAL, ENERGY AND MARITIME LAW

December 2010

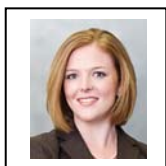
IN THIS ISSUE

The authors report on the case that answered the question: If goods are damaged during inland rail carriage after also being transported by sea pursuant to a single contract, does federal rail-carrier law apply, or does the contractually-extended maritime law apply?

Kawasaki v. Regal-Beloit:

The Supreme Court Resolves the Long-Standing Circuit Split Regarding the Law Applicable to Multimodal Shipping Contracts

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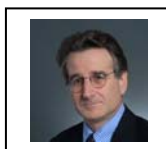


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As any first-year law student can tell you, federal law governs interstate commerce, such as the carriage of goods by rail. Similarly, federal maritime law governs international and interstate carriage of goods by sea. Which law governs, however, when goods are carried from a foreign port by sea and then inland by rail has long been a point of contention among the Courts of Appeals. The debate has been particularly contentious in situations where goods are carried pursuant to a single contract, which governs both the sea and rail carriage and also extends the application of maritime law to the entire journey. The main question is this: if the goods are damaged during the inland rail carriage, does federal rail-carrier law apply, or does the contractually-extended maritime law apply? That is the question that was presented to the United States Supreme Court in *Kawasaki v. Regal-Beloit*.

INTRODUCTION

In the United States Supreme Court's recent decision in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*,¹ the Court considered the provisions of through² bills of lading, which purportedly extended the provisions of the Carriage of Goods by Sea Act ("COGSA") to the inland portion of an international, multimodal journey.³ In this maritime case about a train wreck, the petitioners asked the Court to resolve a split among the circuits and consider whether the terms of the through

bills of lading, including the contractually extended provisions of COGSA, governed the inland rail carrier's liability, or whether the rail carrier was subject to the provisions of the Carmack Amendment.⁴

The Court held "that the amendment does not apply to a shipment originating overseas under a single through bill of lading. . . . [Instead], the terms of the bill govern the parties' rights."⁵ The Court's decision provided long-awaited guidance for shippers and carriers who deal with international and multimodal shipments regularly.

While the decision addresses an important question of maritime law, its biggest impact will be on rail carriers within the United States that are now subject to the provisions of COGSA when the rail carriage is part of a larger, multimodal shipment pursuant to a through bill of lading.

HISTORICAL BACKGROUND

I. International Multimodal Shipments: COGSA and the Carmack Amendment

The Carmack Amendment to the Interstate Commerce Act of 1887 governs interstate rail carriers within the United States.⁶ The Carmack Amendment outlines the basic requirements for liability for "rail carrier[s] providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part."⁷ With respect to the "jurisdiction of the Board," the Carmack Amendment provides that "the Board has jurisdiction over transportation by rail carrier that is . . . only by railroad; or . . .

¹ 561 U.S. ----, 130 S. Ct. 2433 (June 21, 2010) (rendering an opinion in both *Kawasaki* and *Union Pacific Railroad Co. v. Regal-Beloit Corp.*, a case that presented identical issues).

² "A bill of lading issued in a foreign country to govern a shipment throughout its transportation from abroad to its final destination in the United States is termed a 'through' bill of lading." *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394 (7th Cir. 1992).

³ *Kawasaki*, 130 S. Ct. at 2438-39.

⁴ *Id.* at 2439.

⁵ *Id.* at 2442.

⁶ 49 U.S.C. § 13501(1)(C).

⁷ *Id.* at § 11706(a).

by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.”⁸

COGSA governs the international carriage of goods by sea.⁹ By its terms, COGSA only applies to shipments to or from, but not between, U.S. ports.¹⁰ If it does not apply of its own force, COGSA allows parties “the option of extending [certain COGSA terms] by contract” to cover “the entire period in which [the goods] would be under [a carrier’s] responsibility, including [a] period of . . . inland transport.”¹¹

Pursuant to the U.S. Supreme Court’s decision in *Norfolk Southern Railway v. Kirby*, the provisions of COGSA may be applied by extension when incorporated into a through bill of lading if the sea carriage constitutes a substantial portion of the total shipment.¹² Because the bill of lading at issue in *Kirby* extended COGSA coverage to the entire period of carriage, the Court held that COGSA governed the inland segment of the journey.¹³ The *Kirby* Court, however, did not consider the issue of the Carmack Amendment’s applicability to the inland leg.

II. The Circuit Split: Carmack Amendment vs. Contractually Extended COGSA

The interplay between COGSA and the Carmack Amendment has been a source of judicial discrepancy in cases where a single, multimodal bill of lading incorporates the terms of COGSA to govern both an

international carriage by vessel and an inland carriage by rail.¹⁴ Most circuits addressing the issue have held that the Carmack Amendment does not apply to the inland portion of shipments under a through bill of lading unless the inland carrier issues a separate, domestic bill of lading.¹⁵

The principle that a separate, domestic bill of lading must be issued for the Carmack Amendment to apply to the inland portion of an international, multimodal carriage of goods has its roots in *Reider v. Thompson*.¹⁶ In *Reider*, an inland carrier issued a separate, domestic bill of lading to govern the inland portion of a shipment from Buenos Aires to Boston.¹⁷ The Supreme Court considered in that case whether the Carmack Amendment applied to the domestic bill of lading, despite the fact that the shipment originated outside the United States.¹⁸ Ultimately, the Supreme Court determined that the shipment’s origination in a foreign country was irrelevant, because the inland carriage was covered by a separate bill of lading clearly within the purview of the Carmack Amendment.¹⁹ The Court, however, specifically noted that its holding did not address and should not be construed as affecting jurisprudence as to the application of the Carmack Amendment to inland carriers subject to a single, through bill of lading for international, multimodal shipments.²⁰

⁸ *Id.* at § 10501(a).

⁹ 46 U.S.C. § 30702.

¹⁰ *Id.*

¹¹ *Norfolk Southern Railway v. Kirby*, 543 U.S. 14, 29 (2004); 46 U.S.C. § 30702.

¹² 543 U.S. at 26-27.

¹³ *Id.*

¹⁴ *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288, 1291 (11th Cir. 2006).

¹⁵ See, e.g., *Am. Road Serv. Co. v. Consol. Rail Corp.*, 348 F.3d 565, 568 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703 (4th Cir. 1993); *Capitol Converting*, 965 F.2d at 394; *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986). See also *Reider v. Thompson*, 339 U.S. 113, 117-18 (1950); 49 U.S.C. § 10501.

¹⁶ 339 U.S. 113 (1950)

¹⁷ *Id.* at 115.

¹⁸ *Id.* at 117.

¹⁹ *Id.*

²⁰ *Id.* at 118.

A. Circuits Requiring a Separate Bill of Lading to Apply the Carmack Amendment

In the wake of *Reider*, the Eleventh Circuit specifically addressed the Carmack Amendment's application to the domestic carriage portion of a foreign shipment subject to a single, through bill of lading.²¹ In *Swift Textiles*, the Eleventh Circuit noted that the *Reider* Court, in deciding that the Carmack Amendment did apply, relied on its finding that the domestic carriage in that case was covered by a "new, separate, and distinct" bill of lading.²² Following another Carmack case, *United States v. Erie Railroad*,²³ the Eleventh Circuit found that when deciding whether the Carmack Amendment should apply to the domestic leg of a shipment, the critical inquiry is whether the domestic leg was intended to be part of a larger shipment originating in a foreign country.²⁴ Applying this "intent test," the Eleventh Circuit held

[W]hen a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey . . . will be subject to the Carmack Amendment as long as the domestic leg is covered by a separate bill . . . of lading.²⁵

The *Swift* court upheld the application of the Carmack Amendment, finding that the shipment was covered by a separate bill of lading, and that the domestic transport, though it was only intrastate, was intended to be part of a larger shipment from a foreign country.²⁶

Following on the heels of *Swift*, the Seventh Circuit addressed the same Carmack Amendment issues in *Capitol Converting Equipment v. LEP Transport, Inc.*²⁷ In that case, an Italian company issued a single bill of lading for the carriage of goods from Genoa, Italy, to Chicago, Illinois.²⁸ The Seventh Circuit held that the Carmack Amendment does not apply to a through bill of lading issued in a foreign country where that bill of lading includes no separate domestic segment.²⁹

Shortly after the Seventh Circuit announced its decision in *Capitol Converting*, the Fourth Circuit held that the Carmack Amendment does not apply to shipments from a foreign country unless the domestic leg of the shipment is covered by a separate domestic bill of lading.³⁰ The Fourth Circuit, relying on the Eleventh Circuit's decision in *Swift*, held that, if the shipment originated in a foreign country under a single through bill of lading, it would not be subject to the Carmack Amendment's provisions.³¹

²¹ *Swift*, 799 F.2d at 701.

²² *Id.* at 700.

²³ 280 U.S. 98 (1929).

²⁴ *Swift*, 799 F.2d at 701.

²⁵ *Id.* Interestingly enough, the court found the fact that the inland portion of the shipment was covered by a separate domestic bill of lading was irrelevant, because the parties intended the shipment to be one continuous endeavor. *Id.* Because it was a continuous foreign

shipment, and not a separate, intrastate carriage, the court applied the federal Carmack Amendment. *Id.*

²⁶ *Id.*

²⁷ 965 F.2d 391 (7th Cir. 1992).

²⁸ *Id.* at 392.

²⁹ *Id.* at 394.

³⁰ *Shao*, 986 F.2d at 703.

³¹ *Id.* The Fourth Circuit, while articulating its ruling, ultimately vacated and remanded the case on this issue for further development of the factual record. *Id.* at 703-04.

Eleven years later, the Sixth Circuit considered the language in a bill of lading that limited the period for filing a civil action to nine months after the delivery of the shipment.³² The plaintiff in that case argued that the Carmack Amendment, with its two-year statute of limitations, should apply to the inland portion of a shipment covered by a through bill of lading.³³ The Sixth Circuit relied upon the rule articulated in *Swift* that, absent a separate domestic bill of lading, the statute of limitations listed in a through bill of lading, not the statute of limitations in the Carmack Amendment, applied to the domestic segment of the shipment.³⁴

In 2006, the Eleventh Circuit brought the *Swift* jurisprudence full circle. In *Altadis USA, Inc. v. Sea Star Line LLC*, the court relied upon *Swift* and its progeny and held that “in the absence of a separate domestic bill of lading covering the inland leg – the Carmack Amendment . . . does not apply to [a] maritime contract covering a shipment pursuant to a single through bill of lading which governs the ocean voyage . . . and also the inland transportation.”³⁵

B. Circuits Applying the Carmack Amendment Despite Contractual Extension of COGSA

The Ninth Circuit has broken with the jurisprudence of the other circuits.³⁶ In *Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Railway Co.*, the Ninth Circuit acknowledged the Eleventh Circuit’s ruling in *Swift* and the subsequent consensus among the circuits that the

Carmack Amendment only applies when a separate bill of lading is issued for the domestic leg of a foreign shipment.³⁷ The Ninth Circuit, unpersuaded, instead focused on a plain reading of both the Carmack Amendment and COGSA. The court determined that the Carmack Amendment governs the domestic portion of a foreign shipment, even when the entire shipment is pursuant to a through bill of lading, to the extent that the domestic portion is beyond the statutory scope of COGSA.³⁸ This determination is in line with the general understanding that when the provisions of COGSA are extended beyond their statutorily articulated scope, such as an extension beyond the tackles in a through bill of lading, the contractually extended provisions do not supersede other applicable laws.³⁹

³⁷ *Id.* at 1119.

³⁸ *Id.*; see also 46 U.S.C. § 30702 (stating that COGSA applies from the time the goods are loaded onto the vessel until the time they are discharged).

³⁹ 46 U.S.C. § 30701 note (“Nothing in this chapter shall be construed as superseding any part of . . . any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.”). See *Colgate Palmolive Co. v. S/S Dart Can.*, 724 F.2d 313, 315 (2d Cir. 1983) (refusing to apply COGSA, as incorporated in a bill of lading, where it conflicted with applicable state law); *Aisin Seiki Co. v. Union Pac. R. Co.*, 236 F. Supp. 2d 343 (S.D.N.Y. 2002) (finding that COGSA’s limitation of liability provisions, extended to agents of the ocean carrier by a Himalaya clause in the bill of lading, applied to a rail carrier only as a matter of contract and not by force of law). The Fifth Circuit, though it has not addressed the interplay between COGSA and the Carmack Amendment, has held that “[i]f the parties extend the provisions of COGSA to the preloading phase, any inconsistency with the Harter Act must yield to the Harter Act.” *Uncle Ben’s Int’l Div. of Uncle Ben’s, Inc. v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 217 (5th Cir. 1988).

³² *Am. Road Serv. Co.*, 348 F.3d at 568.

³³ *Id.*

³⁴ *Id.* at 568-69.

³⁵ 458 F.3d 1288, 1294 (11th Cir. 2006).

³⁶ *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry.*, 213 F.3d 1118 (9th Cir. 2000).

The Second Circuit also has diverged from *Swift* and its progeny.⁴⁰ In *Sompo Japan Insurance Co. of America v. Union Pacific Railway Co.*, the Second Circuit considered a bill of lading that authorized an ocean carrier to subcontract part of the shipment to an inland carrier and extended COGSA's terms to such inland carriers.⁴¹ The court found that COGSA applied to the inland domestic transportation as a contractual matter, but that the Carmack Amendment applied by force of law.⁴² The Second Circuit, relying on the *Swift* court's analysis but not its inconsistent articulated holding, resolved the conflict by determining that the Carmack Amendment, as federal law, should outweigh the force of a bargained-for term in the bill of lading.⁴³

THE SUPREME COURT'S DECISION IN KAWASAKI

In *Kawasaki*, the Supreme Court resolved the circuit split, though it did not rely strongly on the rationales developed by either side of the split. Instead, the Court relied on its own interpretation of the statutes and the legislative history of the Carmack Amendment to reach its conclusion. The Court first noted that the Carmack Amendment requires "[a] rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part [to] issue a receipt or bill of lading for property it receives for transportation."⁴⁴ The Court interpreted this provision as requiring only a "receiving" rail carrier, which it defined as "the initial carrier, which 'receives' the property for domestic rail

transportation at the journey's point of origin," to issue a bill of lading.⁴⁵

The Court next noted the provision of the Carmack Amendment that establishes when liability attaches for rail carriers: "[The receiving rail carrier referred to in the first sentence] and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the [STB] under this part are liable to the person entitled to recover under the receipt or bill of lading."⁴⁶ From the liability provision the Court determined that the Carmack Amendment "applies only transport of property for which Carmack requires a receiving carrier to issue a bill of lading, regardless of whether that carrier erroneously fails to issue such a bill."⁴⁷

The Court found no "receiving" rail carrier, as the Court defined it, when a domestic rail carrier receives property for inland transportation pursuant to a through bill of lading.⁴⁸ The Court, therefore, ultimately concluded that the Carmack Amendment "does not apply if the property is received at an overseas location under a through bill that covers the transport into an inland location in the United States."⁴⁹

THE DISSENT

Justice Sotomayor, joined by Justices Stevens and Ginsburg, filed a dissent that is lengthier than the Court's opinion.⁵⁰ The dissent pointed out that the Carmack Amendment "plainly applies to the inland leg of a multimodal shipment" unless the parties

⁴⁰ *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.*, 456 F.3d 54 (2d Cir. 2006).

⁴¹ *Id.* at 56-57.

⁴² *Id.* at 69.

⁴³ *Id.* at 63, 69.

⁴⁴ *Kawasaki*, 130 S. Ct. at 2443 (quoting 49 U.S.C. § 11706(a)).

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.* at 2444 (quoting 49 U.S.C. § 11706(a)) (alterations made by Court).

⁴⁷ *Id.*

⁴⁸ *Id.* at 2444-45.

⁴⁹ *Id.* at 2444.

⁵⁰ *Id.* at 2449-64.

“have permissibly contracted around Carmack’s requirements.”⁵¹ To avoid this conclusion, the dissent observed, the majority “contort[ed] the statute and our cases, misread[] the statutory history, and ascribe[d] to Congress a series of policy choices that Congress manifestly did not make.”⁵²

The dissent first noted the same Carmack Amendment liability provision cited by the majority. Unlike the majority, however, the dissent determined that “a rail carrier’s provision of ‘transportation or service subject to the jurisdiction of the [STB]’ is the criterion that establishes liability” under the Carmack Amendment, not whether the Carmack Amendment would require the issuance of a bill of lading for the service.⁵³ Considering the liability provision in tandem with the provision delineating the STB’s jurisdictional scope, the dissent noted that the STB “has authority ‘over transportation by rail carrier,’ either when that transportation is ‘only by railroad’ or when it is ‘by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.’”⁵⁴

The dissent concluded that “[a] simple, straight-forward reading of [these provisions] practically compels the conclusion that the Carmack Amendment applies in a typical multimodal carriage case with inland damage.”⁵⁵ The dissent specifically rejected the majority’s definition of the term “receiving rail carrier,” noting that the cases cited by the majority in support of the narrow

definition adopted were “inapposite” to the case at bar and in fact “compatible with [the dissent’s] view that the ‘receiving carrier’ is an rail carrier that first receives cargo for transportation in the United States.”⁵⁶

In sum, the dissent would have held that, “[a]s long as there is a receiving rail carrier in the United States . . . Carmack attaches. Because the property at issue in these cases was received in the United States for domestic transportation by Union Pacific, Carmack governs the rail carrier’s liability.”⁵⁷

ANALYSIS

The Court’s decision resolves a circuit split that has persisted for more than twenty years. The notion that the Carmack Amendment applies when a separate domestic bill of lading is issued for the inland transport has its roots in Supreme Court caselaw dating back to 1950.⁵⁸ A majority of the circuits considering the issue extended this notion in developing the generally accepted rule that the Carmack Amendment *only* applies when a separate domestic bill of lading is issued for the inland portion of a multimodal shipment.⁵⁹ The Second and Ninth Circuits, however, maintained that a separate bill of lading is irrelevant, because the contractual extension of COGSA in a bill of lading did not undermine the force of law of the Carmack Amendment.⁶⁰

⁵¹ *Id.* at 2449.

⁵² *Id.*

⁵³ *Id.* at 2450-51 (quoting 49 U.S.C. § 11706(a)).

⁵⁴ *Id.* at 2451 (quoting 49 U.S.C. § 10501(a)(1)).

⁵⁵ *Id.* at 2450 (quoting Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COMM. 1, 13 (2009)).

⁵⁶ *Id.* at 2453; *see also Reider*, 339 U.S. at 117 (The test for whether the Carmack Amendment applies “is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated.”).

⁵⁷ *Id.* at 2455.

⁵⁸ *See Reider*, 339 U.S. at 113-18.

⁵⁹ *See, e.g., Am. Road Serv. Co.*, 348 F.3d at 568; *Shao*, 986 F.2d at 703; *Capitol Converting*, 965 F.2d at 394; *Swift*, 799 F.2d at 701.

⁶⁰ *See Neptune Orient Lines*, 213 F.3d at 1119; *Sompo Japan*, 456 F.3d at 68.

The majority opinion does not adopt wholesale the approach of either side of the circuit split. The Court, unlike the majority of the circuits, found that a separate domestic bill of lading is not required for the inland portion of an international multimodal shipment, because there is no “receiving carrier” that would be required to issue such a bill of lading under the Carmack Amendment.⁶¹ Reaching essentially the same outcome as the majority rule, however, the Court held that the provisions of the Carmack Amendment are, per se, inapplicable to the inland portion of a multimodal shipment pursuant to a through bill of lading.⁶²

The Court’s decision effectuates the purpose of COGSA, which expressly gives parties to a carriage contract the option of extending its provisions to situations to which COGSA does not apply of its own force.⁶³ In so doing, however, the Court’s decision ignores the statutory force and purpose of the Carmack Amendment. In cases where a bill of lading extends COGSA coverage, Congress has stated that the contractual extension should not affect or supersede other statutes that govern by force of law.⁶⁴ Courts, too, have routinely held that some contractual extensions of COGSA may attain statutory force, but extensions beyond the tackles must yield to conflicting applicable laws.⁶⁵

Despite the proclamations of Congress and other courts, the Supreme Court ultimately

concluded that the parties to international shipping contracts should be allowed the benefit of their bargain, even if that bargain would trump federal law:

Congress has decided to allow parties engaged in international maritime commerce to structure their contracts, to a large extent, as they see fit. It has not imposed Carmack’s regime . . . onto what are “essentially maritime” contracts.⁶⁶

Enforcing a contractual term, despite the existence of a conflicting federal statute specifically drafted by Congress to govern the liability of domestic rail carriers, did not strike the majority as curious. Therein lies the dissent’s main point of contention.

CONCLUSION

The *Kawasaki* decision serves the need for uniform application of federal shipping laws. Shippers and carriers who regularly negotiate international, multimodal shipments can now rest assured that the contractually bargained for extension of COGSA will apply to the entire shipment, regardless of the other potentially applicable state or federal laws. Inland rail carriers, and their attorneys, should note that rail transport, when it is part of an international, multimodal carriage pursuant to a through bill of lading, will be governed by COGSA and not the Carmack Amendment. While the application of one liability regime fosters uniformity, it may also result in an increased number of “maritime cases about train wrecks.”

⁶¹ *Kawasaki*, 130 S. Ct. at 2444-45.

⁶² *Id.*

⁶³ See 46 U.S.C. § 30702.

⁶⁴ See 46 U.S.C.A. § 30701 note.

⁶⁵ See, e.g., *Sompo*, 456 F.3d at 71; *Colgate*, 724 F.2d at 315-16. The Fifth Circuit, though it has not addressed the interplay between COGSA and the Carmack Amendment, held that “[if] the parties extend the provisions of COGSA to the preloading phase, any inconsistency with the Harter Act must yield to the Harter Act.” *Uncle Ben’s*, 855 F.2d at 217.

⁶⁶ *Kawasaki*, 130 S. Ct. at 2449.

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