Nos. 08-1553 & 08-1554 (Consolidated)

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al*.,
Petitioners,
v.
REGAL-BELOIT CORPORATION, *et al*.,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
v.
REGAL-BELOIT CORPORATION, *et al*.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association

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[1] In accordance with Rule 37.2(a), AAR has provided notice of its intent to file this brief to counsel for petitioners and respondents. The parties consented to AAR's filing of an *amicus* brief. Letters expressing consent have been filed with the Clerk of the Court. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. This case, which raises the question of whether the Carmack Amendment applies to international shipments moving under a through bill of lading, presents such a matter.

AAR's member railroads handle large volumes of freight arriving from overseas, accounting for a significant share of their business. This business is conducted in accordance with established commercial practices designed to assure that goods move reliably, services are paid for, and the terms of the carriage are well understood. The arrangements railroads enter into, and the manner in which their services are offered and priced, are based to a large extent on the settled understandings of the legal regime that applies to international multimodal shipments. Under the Ninth Circuit's decision, these settled practices can no longer be relied upon by railroads participating in international commerce.

The decision below strikes a blow against uniformity and certainty in an area where predictability is critical. As a result, it will lead to inefficiencies as railroads and other participants in intermodal international transportation are forced to accommodate an unworkable legal rule. AAR filed two amicus briefs in *Norfolk Southern Ry. Co. v. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), another case in which this Court addressed important issues arising in the context of international commerce. Because resolution of the issues raised by this case are at least as critical, AAR is filing this brief on behalf of its member railroads to emphasize to this Court the significance of the impact of this case on the railroad industry.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

As Petitioner, Union Pacific, correctly argues, the Carmack Amendment does not apply to the inland leg of an international shipment moving under a through bill of lading. Carmack's prescriptions were never intended to apply to overseas shippers who import goods to the United States. The decision of the Ninth Circuit, which holds that Carmack does apply in such circumstances, will have a significant adverse impact on how railroads that participate in foreign trade conduct their business.

Most import shipments are moved from origin to destination in containers—which, because they are easily carried on, loaded onto, unloaded off, and interchanged between, ships and trains—have made the transportation phase of foreign trade remarkably efficient. Import shipments typically move under a through bill of lading, a shipping contract that is intended to cover the entire move and extend its terms to all parties participating in the move. Generally, through bills of lading will extend the terms of the Carriage of Goods By Sea Act (COGSA)—which by statute covers ocean transport to and from U.S. ports—to the inland leg of the transportation. COGSA limits carrier liability for damage to the cargo unless the shipper declare a value of the goods (something rarely done), and grants the parties flexibility to agree to other contract terms, such a forum selection clause. On the other hand, Carmack prescribes a number of requirements on parties to a bill of lading.

The practice of covering an entire international shipment with the same legal regime under a through bill of lading has enabled railroads to offer transportation services in an efficient manner. As a practical matter, railroads rarely do business directly with the overseas shippers of the cargo. Rather, they enter into arrangements at the point a shipment hits the U.S. port with an ocean carrier (or its agent) or an intermediary, such as a freight forwarder, often agreeing to ship large volumes of freight delivered by these parties. As beneficiaries of the terms negotiated by the ocean carrier with respect to all of the containerized traffic coming off a ship, including liability limitations, railroads need not be concerned with the nature of the goods in each container, or its value to the shipper. Instead, they rely on the common practice under which the originating shipper, who, unlike the railroad is fully aware of the goods' nature and value, elects to insure its cargo. Typically, this permits the shipper to opt for the lower freight rates that are available when the carriers are not faced with the potential of unpredictable liability.

Application of Carmack, which would override the contractual terms to which the parties agreed, and on which railroads rely, will undermine the ability to continue the efficient business practices which have developed in confluence with containerization. Applying different legal regimes to different legs of an international move will create uncertainty for all involved parties. It certainly will pose difficulties when it is unclear where damage to cargo occurred. The Ninth Circuit's decision, which ignores these practical concerns, not only is contrary to the long-standing rule followed by the majority of the courts, it is inconsistent with this Court's decision in *Kirby*, which is premised on the need for certainty and predictability of contracting in foreign trade.

The Ninth Circuit also held that carriers may opt out of Carmack only pursuant to 49 U.S.C. §10502(e), which it further held required the ocean carrier to offer Carmack terms to the overseas shipper. Union Pacific offered Carmack terms to the ocean carrier with whom Union Pacific did direct business, which, from the standpoint of the railroad, is the shipper of the goods. To the extent offering Carmack terms is necessary, offering such terms to the railroads' direct shipper constitutes compliance with that obligation. Any rule that would require a U.S. railroad to offer Carmack terms to an overseas shipper, with whom they do not deal and whose identity often is unknown, would impose a near impossible burden on railroads.

ARGUMENT

I. APPLYING THE CARMACK AMENDMENT TO MULTIMODAL IMPORT SHIPMENTS MOVING ON A THROUGH BILL OF LADING IS INCONSISTENT WITH THE COMMERCIAL PRACTICES AND SETTLED EXPECTATIONS OF RAILROADS PARTICIPATING IN FOREIGN TRADE

The outcome of this case will have a profound impact on foreign trade and the expectations of the parties that regularly participate in this multi-billion dollar form of commerce. Invoking the Carmack Amendment, 49 U.S.C. §11706, Respondents, who contracted to ship goods from China to inland destinations in the United States, seek to avoid the contractual obligations to which they agreed. The Ninth Circuit erroneously accepted their position, issuing an opinion that leaves a landscape in which conflicting legal regimes can apply to a single commercial transaction involving the shipment of goods from a foreign country to the United States over both sea and land. Given the significant role of the United States in global trade, the decision below will inject substantial uncertainty into the commercial transactions that underlie international commerce, particularly for U.S. railroads. This result might be acceptable (though hardly desirable) if it reflected what Congress intended; but it does not.

Petitioner, Union Pacific, correctly argues that the Carmack Amendment does not apply under the circumstances of this case. See Pet. Br. at Part I. The Carmack Amendment, which dates to 1906,[2] was enacted to provide certain protections to domestic shippers who were thought to be disadvantaged in their dealings with railroads, at the time the dominant means of transporting freight over land. See *Royal & Sun Alliance Ins. Co. v. Ocean World Lines, Inc.*, 572 F.Supp.2d 379, 389 (S.D.N.Y. 2008). Among other things, Carmack (1) imposes liability on rail carriers receiving or delivering property for the actual loss to the property caused by any transporting rail carrier; (2) prescribes the venue where Carmack claims may be brought; and (3) establishes a minimum statute of limitations for such claims. 49 U.S.C. §11706(a), (d) & (e). To construe Carmack as conferring rights on foreign shippers (or their insurers), who contract with

[2] Act of June 29, 1906, ch.3591, §7, 34 Stat. 584, 595.

ocean carriers or non-carrier intermediaries, who in turn arrange for a variety of downstream transportation and transportation-related services, goes well beyond the intent of the statute. Certainly, such parties would not have a "reasonable expectation" of being the beneficiaries of Carmack's protection. As the court in *Royal & Sun Alliance Ins.* puzzled, given the purpose of Carmack, "[h]ow can it be said that the foreign shipper—indeed, the foreign insurer of the foreign shipper—is in need of the . . . protection" of that statute? *Id*. at 398.

Not only is Petitioner's position a proper reading of the law,[3] it serves as the basis of the commercial practices, and buttresses the settled expectations, of railroads, and other parties, involved in international trade. These expectations were evidenced by the very arrangements made by the parties to the transaction underlying this case. Indeed, like the parties in this case, when parties to the myriad transactions involving imports to the United States transact business they typically rely on a regime that does not contemplate the application of Carmack: rather, they have come to do business in a way that more closely reflects the realities of international trade.

A. Containerization Has Produced Great Efficiencies in International Transportation in Which Railroads Play a Key Role

The prevailing view among participants in foreign trade today is that shipping cargo from origin to destination involves a unitary transportation service,

[3] AAR concurs with the position of Union Pacific that the pre-1978 recodification precedent controls with regard to Carmack's application, but will not repeat those arguments in this brief.

notwithstanding the participation of multiple parties and transportation modes. This has come about in response to the technology that has transformed the business: containerization. Noting the evolution of international transportation, this Court explained that "[t]he cause is technological change: Because goods can now be packaged in standardized containers, cargo can move easily from one mode of transport to another. [citation omitted] 'Containerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner.' [citation omitted]" *Kirby*, 543 U.S. at 25.

Over the past half century, this technological revolution led to the development and growth of multimodal international transportation—the shipment of freight between continents by means of more than one mode of transportation—that today plays a vital role in the global economy. *See generally,* GERHARDT MULLER, *Intermodal Freight Transportation* (3d ed. 1995); DAVID J. DEBOER, *Piggyback and Containers* 159 (1992); DAVID R. MCKENZIE ET AL., *Intermodal Transportation—The Whole Story* 55-57 (1989). Containers are conducive to intermodal transport. They can be stacked on the decks or in the holds of massive ships. They also can be mounted on chassis to be hauled by truck or loaded onto flat cars coupled together to make up long, fast, dedicated intermodal trains. Shipping goods in standard-sized containers speeds the loading and unloading process and facilitates interchange between modes, with containers often unloaded off of ships at port directly onto flatcars designed for container transport. Import shipments, which typically consist of high-value items such as consumer goods, electronics, household products and clothes, are particularly suited for transportation in containers. Today, containers predominate in international moves, and millions of containers, accounting for billions of dollars in transportation revenue, are transported from overseas to points in the United States each year.

In short, the advent of containers has transformed international transportation into an integrated service. MULLER at 17. "The international transportation industry 'clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water and land.'" *Kirby,* 543 U.S. at 25 (quoting 1 T. Schoenbaum, Admiralty and Maritime Law 589 (4th ed. 2004). "Container technology has transformed the transportation process, converting what was once segmented transportation into through transportation and making mulimodal transportation possible." Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 403-04 (1998).

That a railroad, like Petitioner, played an important role in this case is hardly unusual.[4] Railroads are active participants in international trade and a vital link in the global economy. They serve all the major ports ringing the U.S. coast line from Boston to Seattle-Tacoma. Connecting these ports to numerous inland locations, railroads play a key role in the movement of international freight, originating much export traffic, and serving as intermediate or destina-

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[4] Railroads were in the forefront of containerization and continue to use containers in a significant portion of their business, hauling over 9 million last year. Association of American Railroads, *Railroad Facts* 26 (2009 ed.). Significant use of containers by railroads began in the 1920s, while containerization of ocean cargo became widespread in the late 1950s. MULLER at 12-13.

tion carriers for large volumes of import traffic. Railroads derive approximately $3 billion in annual revenue moving import traffic in several million containers.

B. Parties to Foreign Trade Have Adopted Efficient Business Practices Utilizing Through Bills of Lading Which Typically Apply the Same Legal Regime to an Entire Shipment

The technological efficiencies generated by containerization have given rise to commercial efficiencies: multimodal international shipments typically move under a "through" bill of lading.[5] "Today, increasing volumes of cargo are moving under multimodal 'through' bills of lading issued by ocean carriers and intermediaries, such as freight forwarders and non-vessel owner common carriers (NVOCCs), providing the shipper an efficient, stream-lined method of moving goods from 'door-to-door.'" Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods By Sea: The Multimodal Problem*, 79 TUL. L. REV., 1461, 1462 (2005). "Contracts for carriage of goods now frequently involve a through bill of lading, whereby the same contract governs the entire shipment, even though multiple carriers and multiple modes of transportation are

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[5] A bill of lading is a document evidencing receipt of goods for shipment issued by persons engaged in the business of transporting or forwarding goods, which contains, among other things, the contract for carriage of the goods. BLACK'S LAW DICTIONARY 168 (6th ed. 1990). 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 Equipment, Inc. v. LEP Transport Inc.*, 965 F.2d 391, 394 (7th Cir. 1992).

used." Raymond T. Waid, Comment, *Piloting in Post-Kirby Waters: Navigating the Circuit Split Over Whether the Carmack Amendment Applies to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading*, 34 TRANSP. L. J. 113, 114 (Summer 2007). Indeed, the through bill of lading is the commercial manifestation of the potential efficiencies brought about by containerization and is essential to achieving those efficiencies.

International cargo shipments usually involve complex transactions, involving multiple modes of transportation, as well as providers of associated services, who perform different roles, over distances often spanning thousands of miles. It goes without saying that a single entity does not (and cannot) transport goods both by sea and land, and also provide all the loading and unloading services as needed. *See Carman Tool & Abrasives, Inc. v. Evergreen Lines,* 871 F.2d 897, 900 (9th Cir. 1989)(AInternational shipping transactions are relatively complex. The parties usually include the seller, one or more freight forwarders, a carrier, a consignee, as well as several banks and insurers.@)*; See also* Wood at 404. ("The transportation process creates 'a series of interconnected commercial arrangements' that bring together some or all of the following parties: shipper; banker; insurer; freight forwarder; terminal operator; carrier; and consignee.") Despite their inherent complexities, these transactions all have the straightforward goal of moving freight between two points, quickly, economically and efficiently. Shippers of cargo have an interest in making arrangements for a complete transaction, *i.e.*, shipment from origin to final destination, with all necessary transportation and associated services provided. "[S]hippers and carriers rely on their contractual arrangements, made directly and through intermediaries, to provide for safe transportation of goods, moving from one carrier to another at low, competitive prices." *Royal & Sun Alliance Ins.*, 572 F.Supp.2d at 387. With this aim in mind, the details of who is performing each aspect of the service is of lesser importance.

Given the various components that make up a Athrough@ international move, arranging for the transportation typically involves a series of commercial transactions in which no single party is directly involved in every transaction. Cargo owners do not enter into individual business relationships with numerous parties providing various aspects of the service, some of whom may be located on different continents. Instead, they usually entrust their goods to a vessel carrier who provides or arranges for the transportation and other services needed to move the goods to their final destination, or to a freight forwarder that will contract in its own name with a vessel carrier to provide those services.[6] Further down the transportation chain, railroads enter into arrangements with ocean carriers (or their agents) calling on U.S. ports, and agree to transport cargo that is off-loaded from the carriers' ships, without regard to the identity of the individual shipper or the content of individual containers. Thus, the series of transactions entered into in this case were unre-

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[6] Intermodal transportation has given rise to numerous service providers devoted not actually to moving cargo, but to the support and facilitation of transportation in a variety of ways. Among other services these companies provide is the consolidation of many small shipments into large consignments for more economical shipping. MULLER at 129. In addition, loading, unloading and storage services typically are components of intermodal moves.

markable, indeed, were typical, of international commerce.

The arrangements contemplated by the through bill of lading allow business to be conducted efficiently, obviating the need for foreign shippers to locate and contract with a land-based U.S. carrier for each shipment it wishes to move. Regardless of the details of a particular transaction, it is the general practice that a party other than the foreign shipper will make the arrangements that will result in the shipper=s goods being placed on a train for inland transport in the United States. Originating international shippers understand this process must occur when they enter into a contract to move their goods, since they are contracting for services which inevitably will be performed by several parties—including inland carriers—some located in different countries and continents. But the fact remains that these are all pieces of the unitary service contracted for by the shippers wishing to move cargo from a specific origin point to a specific destination point.

The through bill of lading typically will establish the rights and obligations of the originating shipper for the entire move. The common practice where import traffic is destined for the United States is for the parties to incorporate the regime set forth in the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936), 46 U.S.C. § 30701 (Notes). By its terms, COGSA governs bills of lading covering transportation by ship to or from U.S. ports, but COGSA's reach may be extended contractually to parties participating in a shipment both before loading and after unloading of the ship, 46 U.S.C. § 30701 (Notes Sec.

7).[7] "As a practical matter, contractual extension of the COGSA is now routine in the shipping industry," *Starrag v. Maersk, Inc*., 486 F.3d 607, 614 (9th Cir. 2007), and is what the parties did in this case.[8]

COGSA and Carmack differ in key respects. In contrast to Carmack's imposition of liability on carriers for the "actual loss" of property transported, COGSA establishes a default liability limitation of $500 per package, unless the nature and value of the cargo is declared by the shipper and inserted into the bill of lading. 46 U.S.C. 30701 (Notes Sec. 4(5)). And, unlike the Carmack Amendment, COGSA does not limit venue; it also has a shorter statute of limitations. Contractual extension of COGSA has become the solution of choice for addressing the problem of conflicting legal regimes that may govern a single shipment. See Marva Jo Wyatt, *Contract Terms in Intermodal Transport: COGSA Comes Ashore*, 16 TUL. MAR. L.J. 177, 178-79 (1991).

The ability to utilize a through bill of lading that effectively establishes uniform terms that apply to the entire shipment—from the overseas origin to the inland U.S. destination—greatly simplifies down-stream negotiations, and is key to efficient transpor-

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[7] Contractual extensions of COGSA to cover parties participating in the shipment prior or subsequent to the ocean carriage are known as Himalaya clauses. *Generali v. D'amico,* 766 F.2d 485, 487-88 (11th Cir. 1985).

[8] *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.,* 557 F.3d 985, 991 (9th Cir. 2009)("It is undisputed that the responsibility clauses in the bills of lading purport to extend the application of COGSA to the entire period of transport, and that the Himalaya Clause extends the full benefits of the bills of lading to all of the carrier's subcontractors 'as if such provisions were expressly for their benefit.'")

tation practices. A common element in through bills of lading is a provision limiting the liability of the carrier issuing the bill and all downstream parties providing the through transportation in accordance with the COGSA default limits. This enables railroads contracting with ocean carriers for the transportation of containers that arrive at a port to do so on a "bulk" basis. Rather than individually contracting to transport each discrete shipment belonging to a particular originating shipper, railroads contract with ocean carriers to ship large volumes of containers during the term of the contract at agreed to rates. Under this type of arrangement there is no need to be concerned about the specific contents of each container or the value of those contents, obviating the need to take the time and expense to negotiate over each shipment based on the level of risk that the carrier might be exposed to should a loss occur. As a result, railroads can load a large volume of containers onto a single train, without the need to differentiate among them based on which of the vast array of goods that are imported to the United States is in each container or goods' value.

This manner of doing business can be effective only if the parties can be confident that a single liability regime, as set forth in the through bill of lading, will apply. However, if Carmack applies to the inland move, and, consequently, a railroad can potentially be liable for the "actual loss" should some mishap occur, prudent business practices will require railroads to determine the level at which to insure and/or price this transportation on an individual basis, and contract accordingly. If railroads lose the ability to view each container they transport as essentially the same commodity, governed by the same legal regime, it will in turn complicate the contracting by originating shippers, who generally choose to enter into through bills of lading intended to extend their terms to an entire shipment.

When arranging to import goods into the United States, shippers typically do not declare a value of their goods as COGSA permits, as that likely would result in a higher freight rate to account for the increased risk taken on by the carriers. *See Carman Tool*, 871 F.2d at 899 ("The shipper may, however, increase the carrier's liability by declaring on the bill of lading the nature and value of the goods shipped, and paying an ad valorem freight rate."); *Wemhoener Pressen v. Ceres Marine Term., Inc.* , 5 F.3d 734, 735 (4th Cir. 1993)("Shippers are entitled to avoid liability limitations if they so choose by entering the value of the goods in the space provided on the Express Bill and by paying a higher price to ship the goods . . .") Rather, shippers generally leave the $500 per package limit in place, choosing the certainty of purchasing insurance for the full value of the goods over the inherent risks involved in relying on enforcement of the putative right to collect damages from liable parties.

This choice to insure makes commercial sense, and generally constitutes the most rational and efficient means of doing business. *See Traveler Indemnity Co. v. Vessel Sam Houston*, 26 F.3d 895, 899-900 (9th Cir. 1994)(sophisticated shipper made a considered choice to insure its cargo rather than opt for higher liability limits). This is so because the originating shipper knows exactly what is being shipped and the shipment's value. On the other hand, carriers, particularly a railroad situated a continent away that has arranged to accept numerous containers—which remain unopened until final destination is reached—

without extensive and costly individualized inquiry as to the identity of the originating shipper and the specific nature of the goods contained therein, generally are not in a position to even approximate the goods' value. Thus, the originating shipper is in the best position to determine whether to declare a high value or to insure, and at what level. Similarly, insurers who underwrite this insurance know they are insuring a risk for which other parties' liability is limited. As one court explained, "shippers and intermediaries balance costs of insurance and freight, and enter into package limitation clauses according to their evaluations of the relative economies and efficiencies between higher freight rates and lower insurance rates, or lower freight rates and higher insurance rates, in determining the relative responsibilities, between carriers and insurers, should their goods be damaged in transit." *Royal & Sun Alliance Ins.*, 572 F.Supp. at 388. Insurers understand that they may have to pay their insured for the full value of any damaged cargo yet be limited by the liability limitations agreed to by their insured. *Id.* at 392. Presumably, the premium charged will reflect that risk. *Id.*

Application of Carmack to the land-based segment of import shipments to the United States surely will introduce a significant element of uncertainty to the routine assessments made by shippers, carriers and insurers when they arrange for multimodal transportation, to the ultimate detriment of international trade. The potential to be governed by Carmack's prescriptions introduces a new factor for downstream carriers, like railroads, to consider, which inevitable will affect the terms that can be offered to the originating shipper. Thus, if downstream, land-based carriers face Carmack's prescriptions, which are likely to differ from the agreement embodied in the through bill of lading, originating shippers also stand to lose the certainty and predictability that characterizes through shipping today.

Certainly, the liability regime that applies to a shipment is important, but so too are other contract terms, like provisions setting forth where the parties will litigate any dispute that arise. This case involves the validity of the venue provision in the through bill of lading, and turns on whether Carmack, which restricts venue, applies to the inland move during which the cargo was allegedly damaged.[9] Like liability allocations, venue provisions reflect efficient choices that are freely entered into by the parties for any number of reasons. Courts should respect those contractual arrangements which, just as allocation of liability, constitute part of the bargain entered into by the parties.

C. The Ninth Circuit's Decision Undermines the Efficient Practices Which Benefit All Parties in International Trade and on Which Railroads Have Come to Rely

The majority of the courts of appeals have properly limited Carmack's application, holding that Carmack does not apply to shipments that originate overseas under a through bill of lading unless a separate domestic bill of lading is issued by the inland carrier. These decisions are based on the long-accepted con-

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[9] "A reasonable forum selection clause typically is enforceable under COGSA, but such a clause is valid under Carmack *only* if the parties fulfill one of Carmack's two statutory methods for contracting out of the statute's venue restrictions." *Regal-Beloit*, 557 F.3d at 988.

struction of Carmack, which was never meant to reach shipments that originate in foreign countries in the absence of a separate domestic bill of lading. *E.g., Sklaroff v. Penn. R.R.*, 90 F. Supp. 961, 962 (E.D. Pa.), *aff'd*, 184 F.2d 575 (3rd Cir. 1950)(adopting the reasoning of *Alwine v. Penn. R.R.*, 15 A.2d 507 (Pa. Super. Ct. 1940); *Strachman v. Palmer*, 82 F.Supp. 161 (D. Mass), *aff'd*, 177 F.2d 427, 429 (1st Cir. 1949)(same); See Pet. Br. at 29-30.[10] The upshot of this rule is that parties engaged in international trade can rely on the terms of the through bill of lading that typically is intended to cover the transportation from origin to destination. On the other hand, where a separate domestic bill of lading is issued by the inland carrier it reflects the parties' intent to treat the inland move as distinct from the ocean move, potentially subject to different terms. *Reider v. Thompson*, 339 U.S. 113, 117 (1950).

The long-standing majority rule on Carmack's application is consistent with this Court's decision in *Kirby* which "affirmed the broad principle that courts should evaluate multimodal contracts in their entirety rather than treat each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would present an obstacle to efficient

[10] More recent decisions have been in accord. *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993); *Capital Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987). This construction of Carmack was only called into question three years ago by the Second Circuit in *Sompo Japan Ins. Co. of America v. Union Pac. R.R.*, 456 F.3d 54 (2d Cir. 2006), and more recently, by the court below.

liability rules." *Royal Ins. Co. of Amer. v. Orient Overseas Container Line LTD*, 525 F.3d 409, 414 (6th Cir. 2008). Reliance on this rule has enabled both railroads and import shippers to contract for services in an efficient manner through one party. *See supra* pp. 14-17. In contracting with ocean carriers, railroads rely on the ocean carriers' commitment to pass on limited liability under COGSA when they establish the rates under which they will transport the imported goods. Thus, railroads can transact business with their immediate customer, the ocean carrier, without the need to identify cargo owners residing across oceans. The efficacy of these business practices will be greatly diminished if the Ninth Circuit's decision is upheld.

In contrast to the majority rule, and notwithstanding the clear contractual intent of the parties that the entire shipment from the foreign origin point to inland destinations in the United States be governed by the same terms, the Ninth Circuit viewed this case as constituting a series of atomized transactions, with Carmack applying once the cargo was loaded onto a train at the port. If Carmack applies to the inland rail leg of import shipments moving under through bills of lading, as the Ninth Circuit concluded, one set of rules would apply while the cargo is transported by sea, and another set when transported over land. Carmack's prescriptions would be in effect when damage occurs during land-based transport of the goods, but not the sea-based transport. However, as this Court admonished, "the shore is now an artificial place to draw a line." *Kirby*, 543 U.S. at 25.

A distinction between the land and sea-based leg of the same shipment defies logic where, as in this case, the ocean carrier has contracted to perform the entire move to destination and will subcontract, at its discretion, for the necessary services (like land-based transportation) that it is not in a position to perform. Moreover, in some cases damage to the cargo will be discovered only after the containers are opened at their destination, and it will not be immediately (if ever) clear as to when the damage occurred. *E.g., Kyodo U.S.A. v. Cosco N. America*, *Inc.*, 2001 WL 1835158 at *3, n.6 (C.D. Cal. 2001)(pointing out that the evidence did not indicate whether the damage to the cargo occurred during the domestic leg or international leg, that the court would assume for the purpose of defendant's motion to dismiss that it occurred on the domestic leg, but that if the evidence eventually showed otherwise, the issue could be revisited). And, even if the point of damage or loss is known, there may be a dispute over which party was responsible for the cargo at that point.

The Ninth Circuit's holding is premised on the fiction that cargo owners intend to contract for one set of terms on one leg of the shipment and another set of terms for the other leg of the shipment. This is belied by the common practice of utilizing a through bill of lading to contract for uniform terms to govern all parties to, and all legs of, a multimodal international shipment. If the arrangements that have served historically to limit railroad liability are overridden by application of Carmack, railroads will no longer be able to enter into international transportation arrangements with assurance that they have foreclosed exposure to unforeseen and unpredictable liability to unknown parties.

II. ANY RAILROAD OBLIGATION TO OFFER CARMACK-COMPLIANT TERMS IS SATISFIED BY MAKING SUCH AN OFFER TO THE PARTY FROM WHOM THE RAILROAD ACCEPTS THE GOODS

The prescriptions of the Carmack Amendment are not unalterable. Under the ICC Termination Act,[11] parties are free to enter into transportation arrangements that limit the application of Carmack by contract: that is not in dispute. Having held that Carmack applies, the Ninth Circuit further held that because the shipment involved "exempt" traffic[12] carriers may opt out of Carmack's requirements only as permitted under 49 U.S.C. §10502(e), which it construed to require the ocean carrier to offer Carmack terms to the overseas shipper. Unsure of whether this had been properly accomplished in a case like this involving multiple parties and multiple contracts, the Court remanded the case to the district court. Should this Court reach this question, it should fashion a rule that accounts for the practicalities of international multimodal transportation.

Petitioner entered into a contract with the ocean carrier, from whom it accepted the cargo, which offered the option of Carmack-compliant terms for inland domestic traffic. Pet. Br. at 44-45. This was a

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[11] Pub. L. No. 104-88, 109 Stat. 803 (1995), *codified at* 49 U.S.C. §§ 10101 *et seq.* ICCTA replaced the Interstate Commerce Act (ICA), eliminated the ICC and assigned its surviving functions to the Surface Transportation Board (STB). See 49 U.S.C. §§ 701-702

[12] The STB has authority to exempt from the requirements of the ICA "transportation that is provided . . . as part of a continuous intermodal movement, 49 U.S.C. §10502(f), authority which it has exercised. 49 C.F.R. §1090.2.

logical, and the only practical, option for Petitioner, since, from its standpoint (and that of any similarly situated rail carrier), and pursuant to the terms of the applicable contract, the ocean carrier with whom it does business is the shipper of the goods. Moreover, the railroad usually is unaware of where the goods originated, how many other parties might have been involved in the transaction (or their identities) and the nature and value of the goods. Any rule that would hold the railroad responsible for seeking out and offering Carmack-compliant terms to an overseas cargo owner would create a near impossible obligation on railroads participating in international commerce and prevent the efficient allocation of risk currently produced by market transactions.

Under such a rule, railroads might be compelled to require its shipper (typically an ocean carrier or its agent) to certify that Carmack compliant terms are offered to the foreign cargo owner, and to seek a defensive indemnity against liability that might arise if that offer is not made or deemed ineffective. (Of course, the ocean carrier itself may not even be dealing directly with the cargo owner, who may have engaged the services of an intermediary.) In turn, the other parties involved in the shipment of the goods may feel compelled to take similar action. Indeed, given the insurer's effort to cherry-pick its legal regime despite the originating shipper's acceptance of liability limits from the originating carrier, each entity in the transportation chain may feel compelled to seek multiple layers of assurance regarding liability agreements. The creation of these linked indemnities will result in a cascade of parties being drawn into litigation if the shipper/insurer is able to bypass the freight forwarder's/ocean carrier's limitations of liability and proceed against the railroads, or some other party involved in the transportation, for excess recoveries pursuant to Carmack. Moreover, from the standpoint of the railroads, indemnity rights only provide a meaningful remedy to the extent the indemnifying party is solvent and amenable to suit, a circumstance that is not always assured. This hardly is an effective way to do business. See Pet. Br. at 48-49.

The alternative would be for railroads directly to offer Carmack-compliant terms to foreign shippers. But, given the nature of international shipments, it would be highly impractical to expect railroads to find a way to contract directly with parties with whom they would not ordinarily deal (and whose identity is almost always unknown to them), a proposition of questionable feasibility and likely considerable expense. *See Carman Tool*, 871 F.2d at 901 (declining to impose on carriers a heavy "burden of tracking down remote parties and advising them" of the right to declare a higher value of the good on a bill of lading.) While a railroad can offer Carmack-compliant terms to the party from whom it receives the freight—and indeed, Petitioner did so here—it is not in a position to assure such an offer is made overseas, as part of a contract negotiation that occurs an ocean away. *See Kirby*, 543 U.S. at 35 (acknowledging the impracticality of seeking out information about the terms of upstream contracts). From the standpoint of an inland carrier, any obligation it has with respect to Carmack must be satisfied in its dealing with the party from whom it receives the freight, regardless of whether the traffic is exempt. This is precisely the reason that this Court has recognized that it is counterproductive to adhere to the fiction that the shipper is not bound by the terms of a through bill of lading issued to the freight forwarder that has been engaged to arrange transportation for that shipper=s goods.

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Five years ago, in *Kirby*, this Court clarified the rules that apply to multimodal international shipments. Importantly, this Court held that a shipper is bound by the liability terms in a contract entered into between its intermediary and a carrier. Rather than apply traditional agency principles, the Court established an "efficient default rule" of maritime law that enables a carrier to assume that an intermediary entrusted with cargo is contracting on behalf of the cargo owner, and to rely on the liability terms agreed to with the intermediary. *Id*. at 33-34. As a result, when such a contract extends its coverage to downsteam carriers, they too may avail themselves of its benefits and enforce it against the cargo owner. This Court explained that this rule "ensure[s] the reliability of downstream contracts for liability limitations" and "tracks industry practices." *Id*. at 34. The Ninth Circuit's decision upends this sensible approach to multimodal international shipments and should be reversed.[13]

[13] See *Altadis* where the Court opined that the argument that Carmack applies to the inland leg of a shipment moving under a through bill of lading is "in tension" with *Kirby*. 458 F.3d at 1293.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

Respectfully submitted

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