No. 08-1553

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA, LTD. AND
"K" LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION *et al.*,
Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Carmack Amendment to the Interstate Commerce Act of 1887, which governs certain rail and motor transportation by common carriers within the United States, 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers), applies to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a "through" bill of lading issued by an ocean carrier that extended the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, to the inland leg, there was no domestic bill of lading for rail transportation, and the ocean carrier privately subcontracted for rail transportation.

PARTIES AND RULE 29.6 STATEMENT

Petitioners Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. were the defendants in the district court and the appellees in the court of appeals. Union Pacific Railroad Company was also a defendant in the district court and an appellee in the court of appeals. Respondents Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co., Ltd. (Shanghai Branch), and Royal Sun Alliance Insurance Co., Ltd. were the plaintiffs in the district court and appellants in the court of appeals.

Petitioner Kawasaki Kisen Kaisha, Ltd. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock. Petitioner "K" Line America, Inc. is not publicly traded, and its parent corporation is Kawasaki Kisen Kaisha, Ltd.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-35a) is reported at 557 F.3d 985. The opinion of the United States District Court for the Central District of California (Pet. App. 36a-47a) is reported at 462 F. Supp. 2d 1098.

JURISDICTION

The Ninth Circuit entered judgment on February 17, 2009. Pursuant to an extension granted by Justice Kennedy on April 20, the petition was timely filed on June 18, 2009. This Court granted certiorari

on October 20, 2009 and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 30701 Note, provides:

> Nothing contained in [COGSA] shall prevent a carrier or a shipper from entering into any agreement . . . as to the responsibility and liability of the carrier or the ship for the loss or damages to . . . goods . . . subsequent to the discharge from the ship on which the goods are carried by sea.

Id. § 7; *see also* Pet. App. 48a-61a (reprinting COGSA in its entirety).

The Carmack Amendment to the Interstate Commerce Act ("Carmack"), 49 U.S.C. §§ 11706, 14706, 15906, provides:

> A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part.

49 U.S.C. § 11706(a). Other relevant portions of Carmack and of the Interstate Commerce Act are reprinted in the petition. Pet. App. 62a-78a. Relevant portions of shipping laws in Title 46 are reprinted in the addendum to this brief. Add. 1a-16a.

STATEMENT

This case is a sequel to *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004). The difference is that Plaintiffs here argue that Carmack applies to

maritime through bills of lading instead of state law, as in *Kirby*. The issue presented here is whether the liability and regulatory regimes for rail transportation in the "Carmack Amendment" to the Interstate Commerce Act, 49 U.S.C. § 11706, by its terms are superimposed on international ocean common carrier maritime contracts with shipper customers when they involve "through" movements from a foreign country to inland U.S. points. To accomplish such through movements, ocean container carriers like Petitioner Kawasaki Kisen Kaisha, Ltd. (" 'K' Line") subcontract with railroads and motor carriers to provide all transportation in the United States.

A. Statutory Background

Since the early part of the last century, economic regulation and liability regimes applicable to ocean carriage in foreign trade, on the one hand, and domestic rail transportation, on the other, have been governed by different statutory schemes and different administrative agencies.

1. Shipping (FMC and COGSA)

Ocean Carriage Economic Regulation—Ocean common carriers are regulated under Title 46 of the U.S. Code, which is based upon the Shipping Act of 1984, as amended, 46 U.S.C. §§ 40101-309, which replaced the Shipping Act, 1916, Pub. L. No. 64-260, 39 Stat. 728. Under the Shipping Act, the Federal Maritime Commission ("FMC" or "Commission") has responsibility for regulating common carriage in ocean foreign trade. *See* Reorganization Plan No. 7 of 1961, Pub. L. No. 88-426, 75 Stat. 840.

Yesteryear's standard method of contracting for commodity rates under carrier tariffs has been

eclipsed in favor of annual or multi-year individual "service contracts" between ocean carriers and cargo shippers. Tariffs are relegated to an ancillary role, supplying applicable rules and some charges. 46 U.S.C. §§ 40501-02. The Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998 changed the regulatory environment, but maintained the Commission as the only regulator of common carriage in ocean foreign commerce under the 1984 Act, as amended.[1] *See* Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, §§ 110, 112, 115, 112 Stat. 1902, 1912 (codified at 46 U.S.C. App. §§ 1710-14). Thus, while ocean common carriers still assume responsibility for cargo from receipt to delivery in accordance with applicable maritime law such as the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (reprinted in the Note following 46 U.S.C. § 30701), the vast majority of packaged cargo carriage is under individually negotiated "service contracts," to the exclusion of tariff rates. World Shipping Council *Amicus* Br. at 8.

All ocean common carrier service contracts in U.S. foreign trade are regulated by the FMC as to form, content, filing, amendment, correction and cancellation. *See* 46 U.S.C. § 40502; 46 C.F.R. part 530 *passim*; *see also* FEDERAL MARITIME COMMISSION, 47TH ANNUAL REPORT FOR FISCAL YEAR 2008, at App. D, *available at* http://www.fmc.gov/UserFiles/pages/File/Annual_Report_FY_2008.pdf (noting 44,438 new service contracts and 294,880 amendments in fiscal

[1] "Common carriage" under the Act and its predecessors is defined by "holding out" to the shipping public to carry cargo and take responsibility for it. 46 U.S.C. § 40102(b). The Act is limited to economic regulation and has never specified any particular liability regime.

year 2008). "Essential terms" of every contract, and applicable tariffs supplementing the contracts, must be published. 46 C.F.R. §§ 520.3, 530.12. To be effective, all terms of service contracts and amendments must be filed with the FMC. *Id*. § 530.8.

The FMC does not dictate the terms of the individual shipment contracts evidenced by ocean carrier bills of lading, but the terms and their implementation are subject to the prohibitions on carrier acts in the Shipping Act. *See* 46 U.S.C. § 41102-06. The Shipping Act requires bill of lading terms to be included in tariffs published by the ocean carriers, as must all non-service contract rates (including "through" rates for delivery beyond the port), charges or anything affecting their levels. *See id*. § 40501(a) & (b).

Ocean Carriage Liability Terms—Liability for cargo loss or damage during ocean carriage in foreign trade is governed by COGSA, 46 U.S.C. § 30701 Note, which was enacted in 1936, ch. 229, 49 Stat. 1207. COGSA "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading." GRANT GILMORE & CHARLES BLACK, JR., THE LAW OF ADMIRALTY § 3-25, at 145 (2d ed. 1975). COGSA requires ocean carriers to issue bills of lading, 46 U.S.C. § 30701 Note § 3(3), and it defines the rights of ocean carriers and their responsibilities for the cargoes they carry. *Id*. §§ 2-4. Liability under COGSA is largely based upon fault, *see id*. § 4(1)-(2); *see generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 88, 104-06 (2d ed. 1994), and it is limited to $500 per package unless a declaration of the value of the cargo by the shipper is inserted into the bill of lading. 46 U.S.C. §30701 Note § 4(5). COGSA also permits

parties to enter into forum selection clauses. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995).

By its terms COGSA applies "tackle to tackle," that is, from the time cargo is loaded onto a ship to the time it is discharged from the ship. 46 U.S.C. § 30701 Note § 1(e). COGSA, however, permits carriers to enter into agreements concerning liability for loss or damage to goods "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." *Id*. § 7. Thus, COGSA gives parties the option to extend its provisions by contract to the domestic leg of an overseas shipment. *See Kirby*, 543 U.S. at 29.

2. Railroads (STB and Carmack)

Rail Carriage Economic Regulation—The Surface Transportation Board (hereinafter "STB" or "Board") is the regulatory successor of the Interstate Commerce Commission, which was created in 1887 to regulate rail transportation. Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887). The STB has exclusive jurisdiction over transportation by rail carriers in the United States. 49 U.S.C. § 10501(b). It also has non-exclusive jurisdiction over motor carrier transportation, *id*. § 13501, and transportation by water carriers inside the United States or from one place to another place in the United States, *id*. § 13521(a); *see also id*. § 13521(b) (defining "United States" to include territories and possessions). The STB has no jurisdiction over the international transportation by ocean carriers regulated by the Federal Maritime Commission.

Rail Carriage Liability Terms—Liability terms during rail carriage are regulated by the Carmack

Amendment to the Interstate Commerce Act. Carmack regulates the liability of rail carriers "providing transportation or service subject to the jurisdiction of the Board under this part," 49 U.S.C. § 11706(a), which is Part A of Subtitle IV of Title 49, Pet. App. 27a n.15. Just as COGSA requires ocean carriers to issue bills of lading, Carmack requires rail carriers providing transportation subject to the STB's jurisdiction to issue receipts or bills of lading for property received "for transportation under this part." 49 U.S.C. § 11706(a). Unlike COGSA, however, Carmack imposes upon receiving carriers (and delivering carriers as well) essentially strict liability to the holder of the bill of lading for loss or injury to property caused by a carrier transporting the property under the bill. *See, e.g.*, *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 9 (1st Cir. 2003). *But see Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137-38 (1964) (noting defenses to liability). Carmack also restricts contractual limitations on liability, 49 U.S.C. § 11706(c), and restricts the venue of actions under the Amendment, *id*. § 11706(d). Carmack has no provision like Section 7 of COGSA addressing international intermodal through transportation.

Rail carriers may opt out of Carmack by contract. In 1980, Congress amended the Interstate Commerce Act to permit rail carriers to contract to provide specified services under specified rates and conditions. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 208(a), 94 Stat. 1895, 1908 (1980) (codified at 49 U.S.C. § 10709(a)). The only duties of a rail carrier entering into such contracts are those specified by the contract. 49 U.S.C. § 10709(b). In addition, such contracts are not subject to Part A and may not be challenged on the ground that they violate provisions in that part. *Id*. § 10709(c).

B. Factual Background

"K" Line operates in United States trade as an ocean common carrier by water in U.S. foreign commerce (Federal Maritime Commission Vessel Operating Common Carrier Organization Number 001466). FEDERAL MARITIME COMMISSION, VESSEL OPERATING COMMON CARRIERS, https://www2.fmc.gov/FMC1Users/scripts/ExtREports.asp?tariffClass=vocc. "K" Line operates no other service, foreign or domestic, so it chooses motor and rail carrier subcontractors, in its discretion, to deliver cargo to inland points. *See, e.g.*, JA 145 (¶5(2)), JA 146 (¶6); *see also Kirby,* 543 U.S. at 21 (describing similar arrangement between an ocean carrier and a rail carrier). "K" Line is the eleventh-largest containership operator in United States foreign trade. THE JOURNAL OF COMMERCE, Dec. 7, 2009, Vol. 10, No. 48 at 32.

1. General Containerized Shipping Practices

"K" Line's containers (like all ocean containers, whether the ocean carrier's or the shipper's) are specially designed and constructed for ocean transportation on vessels—which normally carry only containers because they are fitted with guides to hold them—and are universally interchangeable among ocean container operators. They are also susceptible to inland movement by barge, rail, or truck. These containers do move throughout U.S. foreign trade by all three modes, under ocean common carrier through bills of lading similar to "K" Line's. *See, e.g.*, ALEX ROLAND ET AL., THE WAY OF THE SHIP: AMERICA'S MARITIME HISTORY REENVISIONED 1600-2000, at 347, 350, 351 (2008); *see also* MARC LEVINSON, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER 127-49 (2006) (reviewing the development of standard

containers). Ocean carrier containers are designated for Customs purposes as "instruments of international traffic," and as such are exempt from taxes and duties. *See* 19 U.S.C. § 1332(a); 19 C.F.R. § 10.41a(a). They are extensions of the containership, since they are integral to cargo carriage by the containership. *See* LEVINSON, THE BOX 53-67, 212-23; *Ne. Marine Terminal v. Caputo*, 432 U.S. 249, 269 (1977) ("the container is a modern substitute for the hold of the vessel"); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971) (containers are "functionally a part of the ship").

Virtually all packaged cargo in foreign trade ocean commerce moves in containers specially designed for the purpose. *See generally* LEVINSON, THE BOX 1-15, 24-27. This trade is referred to as "containerized" or "liner" (regular, scheduled) service. *See, e.g.*, 46 C.F.R. § 520.2. Through movements, under single bills of lading and often "door-to-door" in one ocean container, were facilitated by the container revolution of the sixties. The seamless international transportation afforded by the intermodal system of moving containerized cargo is of inestimable value to commerce, by reducing costs, transit time, and pilferage. *See* ROLAND ET AL., THE WAY OF THE SHIP 351-52; LEVINSON, THE BOX 1-15.

2. Service Contracts

Ocean common carriage is performed by vessel-operating common carriers ("VOCCs"),[2] almost exclu-

[2] Middlemen called "non-vessel operating common carriers," or "NVOCCs," also contract with shippers, issue their own "house" bills of lading, and in turn contract with the vessel operators for actual carriage under service contracts. *See Rexroth Hydraudyne, B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 357 (2d Cir. 2008); *see also* 46 U.S.C. § 40102(6) & (16).

sively under rates contained in FMC-regulated service contracts. World Shipping Council *Amicus* Br. at 8. Service contracts routinely cover dozens, even hundreds, of commodities of widely disparate value. *Id*. at 8-9. The total 2008 movement of containerized cargoes in U.S. foreign trades was 305 million "TEUs." *See* FEDERAL MARITIME COMMISSION, 47TH ANNUAL REPORT, *supra*, at 31; *see also* LEVINSON, THE BOX 213 n.* (noting that TEUs are "20-foot equivalent units"). Carriage under "through intermodal" bills of lading to/from points beyond ports makes up a large portion of the containerized movement total. *See, e.g.*, *Kirby*, 543 U.S. at 25-26.

As in the case of the four service contracts between "K" Line and its shipper customers in this case, the service contract rates charged shipper customers by ocean container carriers are usually per container, JA 193 (¶3), JA 194-95 (¶6), but those rates are to some degree commodity-derived, JA 193 (¶3). They are negotiated for the full contract term before any service contract is filed and effective, not as each shipment is tendered to the carrier. *See, e.g.*, JA 199 (¶8).

Shipping rates depend in part upon the scope of the ocean carrier's liability for loss or damage during carriage and the cost of insuring against such liability. *See Kirby*, 543 U.S. at 35 ("[I]f liability limitations negotiated with cargo owners were reliable while limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates."). Ocean carriers are insured by "P&I" (protection and indemnity) "clubs," which are made up of groups of ocean carriers themselves. To obtain insurance beyond COGSA limits under a service contract, ocean carriers must present to the relevant club identification of each commodity and its

volume expected to be carried under that service contract. *See generally* P&I Club *Amicus* Brief.

3. Rail Contracts

"K" Line entered into a long-term "Exempt Rail Transportation Agreement" which incorporated UP's Master Intermodal Transportation Agreement (collectively, "the Rail Agreement") as Shipper[3] with Petitioner Union Pacific Railroad ("UP") as Carrier, effective from August 1, 2003 to July 31, 2008. JA 120-136; Pet. App. 16a-20a. It is critical to differentiate this railroad transportation contract from the maritime contracts "K" Line makes for through transportation with its shipper customers, which the court below did not appear to do.

UP agreed to "provide rail transportation" on its "double-stack" trains for ocean containers delivered to it by "K" Line, moving to or from overseas and points in the United States, using exclusively UP "railcar equipment." JA 121-22 (§ 14G). "K" Line furnishes no equipment to be used for the double-stack transport of its ocean containers by UP. Its truck chassis may be used by motor carriers to deliver the containers to UP and to customers from the UP terminal after rail carriage. *Id*. The ocean containers are not necessarily "K" Line's: shippers are free to

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[3] "K" Line's General Agent, Petitioner "K" Line America, Inc. ("KAM") was recognized in the Agreement as an arranger of the rail transportation for "K" Line, the person "furnishing inland transportation service under its through bills of lading." JA 120. KAM is not an ocean carrier under the Shipping Act and Commission regulations, so it cannot contract as such. *See* 46 C.F.R. §§ 530.2, 530.3(n),(q). KAM acted only as an agent for a disclosed principal in this case, JA 143 (¶1(b)), JA 145 (¶5(2)), and hence it has no role in this controversy.

use their own containers, as contemplated in "K" Line's bill of lading. JA 146 (¶11).

The Rail Agreement's rates were on a flat per-container basis, regardless of what shipper or overseas origin might be involved. JA 121 (§ 5); Pet. App. 118a. It set a $250,000 per-unit or $10,000 per package cap on the UP's cargo liability. JA 132 (§ 3.1.C.3). "K" Line as the contracting shipper abandoned any rights under Carmack, and committed to ship via UP a percentage of the ocean containers it moved in rail corridors served by UP. *See generally* JA 120 (¶2), JA 132-133. Thus, the Agreement was a "requirements" contract, which did not become effective as to any particular container until "K" Line delivered it to UP.

4. The Shipments In This Case

Four service contracts ("the Service Contracts") were made in 2004, between "K" Line and four cargo shippers in Asia ("the Shippers"), who are either respondents here or subrogors of the two insurer respondents. Pet. App. 2a n.1. Each was for one year but some were extended to later dates. JA 183-201. The Service Contracts covered transportation of many listed commodities from Asian origins to U.S. ports or inland destinations, contained all the terms required by the Shipping Act and FMC regulations, JA 183-201, and were filed with the FMC as required, JA 190 (¶X). The Service Contracts did not offer rail carriage or motor carriage; they specified no mode of inland transportation for through movements. JA 188 (¶IV(B)). They incorporated the terms of "K" Line's standard bill of lading form. JA 190 (¶VIII).

Under the terms of the umbrella Service Contracts, the Shippers loaded the cargoes in this case into "K" Line ocean vessel containers ("the Containers"), and delivered them with cargo descriptions to "K" Line. JA 117-118 (¶¶6-12). At this point in the movements, "K" Line had the contractual right under its bill of lading terms, *see* JA 156 (¶5(1)), to subcontract to move the containers inland from the port of discharge by the ocean vessel via any mode (or modes) of surface carriage it chose. JA 157 (¶¶6(a)-(c)). The published bill of lading terms apply automatically, even if a physical bill of lading is never actually issued. *See Caterpillar Overseas, S.A. v. Marine Transp., Inc*., 900 F.2d 714, 718 (4th Cir. 1990). When containers arrive at the discharge port, "K" Line always has the right under through bills to use any combination of truck, rail, or water transport to deliver them to their ultimate destination. "K" Line is free to discharge the containers at some other discharge port and subcontract for trucking all the way to destination. JA 157 (¶¶ 6(a)-(c)).

A "K" Line Combined Transport Bill of Lading (a "Through Bill") was issued for each shipment, JA 137-82, covering the through transport from Asia to inland U.S. points. The Through Bills, together with applicable tariffs published under the Act and Commission Regulations, and the Service Contracts described herein, constituted the complete transportation contracts between "K" Line and each Shipper customer. *See* JA 187 (¶ II), JA-190 (¶ VIII).

The Through Bills contained five particularly pertinent provisions. Clauses 4(1) and 4(3) extended COGSA to the inland leg of the through transportation, with its $500 per package cargo liability limitation, JA 144-45 (¶¶4(1) & 4(3)); Clause 5(1) autho-

rized "K" Line to subcontract all or part of the transportation to other carriers on any terms, JA 145 (¶5(1)); Clause 5(2) extended all defenses under the Through Bills to any subcontractor, JA 145 (¶5(2)); and Clause 6 gives "K" Line the right to choose any method (land, water or air) or route to transport the cargo. JA 146 (¶6). Finally, there was a forum selection clause, requiring actions relating to the carriage to be brought in Tokyo District Court, JA 144 (¶ 2), which gave rise to this case.

The Containers were discharged and delivered to UP for rail carriage to Chicago. Pet. App. 3a. Their trip was truncated in Tyrone, Oklahoma where the train crashed, damaging cargo (including Plaintiffs') in "K" Line containers aboard 36 Union Pacific rail cars. *Id*.

C. Proceedings Below

Plaintiffs, two of the Shippers and insurers for the remaining two Shippers, sued UP, "K" Line and KAM for cargo damage, negligence and breach of contract in California state court. Pet. App. 2a, 3a. After UP removed the case to federal court, "K" Line and KAM moved to dismiss under the Tokyo forum selection clause in their Through Bills. UP joined in the motion. The district court granted the motion and dismissed plaintiffs' claims. Pet. App. 47a.

Specifically, the district court found that the plaintiffs would not suffer any undue inconvenience if the Tokyo forum selection clause were enforced and that the clause was therefore enforceable under COGSA, which the parties had agreed would cover the inland leg of the shipments. Pet. App. 41a-42a. In addition, the court rejected plaintiffs' argument that Carmack applied and barred enforcement of the forum selection clause because, the court found, the

parties had entered into a contract under 49 U.S.C. § 10709 and therefore were excused from Carmack's requirements. Pet. App. 45a-47a.

The Ninth Circuit reversed based upon three rulings that in "K" Line's view are erroneous. *First*, the Ninth Circuit held that "K" Line, an ocean carrier, is a "rail carrier" for purposes of Carmack. Pet. App. 12a-17a; *see also* 49 U.S.C. § 11706(a) (regulating the liability of a "rail carrier providing transportation or service subject to the jurisdiction of the [STB]"). The court of appeals based this holding upon the Interstate Commerce Act's definition of rail carrier, which is "a person providing common carrier railroad transportation for compensation," 49 U.S.C. § 10102(5), and its definition of railroad, as "includ[ing]. . . "intermodal equipment used by or in connection with a railroad," *id*. § 10102(6)(A). Finding that "K" Line had arranged for transportation by railroad and water "via 'intermodal equipment,'" the court concluded that "K" Line had provided railroad transportation and therefore qualified as a rail carrier under Carmack. Pet. App. 12a-13a. The Ninth Circuit did not identify the intermodal equipment supposedly employed by "K" Line, but presumably thought the ocean containers qualified as such, those containers being the only "K" Line equipment involved. The Ninth Circuit did not explain the leap it made in holding "K" Line's agent, KAM, to be a rail carrier.

Second, the Ninth Circuit held that Carmack applies to shipments from foreign countries into the United States under through bills of lading. Pet. App. 17a-19a. Although the court of appeals recognized that four circuits had held otherwise, it declined to follow those decisions. Pet. App. 17a-18a. Accord-

ing to the Ninth Circuit, these decisions in other circuits had rested on the false notion that the STB lacks jurisdiction over through bills of lading for transportation from foreign countries. Pet. App. 18a. The Ninth Circuit rejected these decisions on the ground that the STB has jurisdiction over all rail transportation in the United States and because "Carmack's reach is coextensive with the [STB's] jurisdiction." Pet. App. 18a. The Ninth Circuit did not explain why it held Carmack to be coextensive with the STB's jurisdiction.

Third, the Ninth Circuit held that the district court erred in applying Section 10709 because that Section does not apply to exempt transportation, and it remanded to determine whether "K" Line had offered Carmack-compliant terms to the Shippers. Pet. App. 26a-35a. The court of appeals offered little explanation of this offer requirement or why the offer should be made to the Shippers by "K" Line, which did not promise to provide rail transportation, and not to "K" Line by UP, which contracted to provide such transportation.

The Ninth Circuit, in its lengthy discussion, failed to distinguish between the two entirely separate contracts in the fact pattern, which may have been the root of its error. The railroad made the long-term Rail Agreement (composed of the "ERTA/MITA") with its shipper customer "K" Line, while "K" Line made the Service Contract/Bill of Lading package of maritime contracts with its shipper customers. *See* Pet. App. 30a.

SUMMARY OF ARGUMENT

In *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), this Court considered a shipment

that, like the ones here, involved substantial carriage of goods by sea from a foreign country under through bills of lading extending the terms of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 30701 Note, to the inland portion of the shipment. Finding the contract was maritime in nature due to the substantial ocean carriage, and noting the benefits of applying uniform liability rules to through shipments and the efficiency of COGSA's default rules, 543 U.S. at 28-29, this Court affirmed the coverage of federal law, including COGSA, against state law-based challenges to COGSA liability limits, *see id*. at 22-24, 30-35. This case is another side of the *Kirby* coin, with a choice between two federal statutes.

In this case, plaintiffs challenged the application of a forum selection clause that is indisputably proper under COGSA on the ground that the inland leg of the through shipments in this case is governed by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706, which does not permit forum selection clauses. The Ninth Circuit upheld this challenge, holding that "K" Line is a "rail carrier" for purposes of Carmack; that Carmack applies to the domestic portion of through shipments from foreign countries; and that neither the ocean carrier's contracts with its shippers nor the ocean carrier's contract with the rail carrier excused them from Carmack.

The Ninth Circuit erred in these rulings. For no less than three main reasons, Carmack does not apply to ocean carriers such as "K" Line or to through shipments from foreign countries involving substantial ocean transportation.

1. Carmack does not apply to "K" Line because "K" Line is not a "rail carrier." Carmack applies only to

rail carriers providing transportation subject to the jurisdiction of the STB under the rail part of the Interstate Commerce Act. Because "K" Line neither owns nor operates a railroad (or any part of one), it is not a "rail carrier" and does not provide transportation subject to the STB's jurisdiction.

The Ninth Circuit reached the odd conclusion that "K" Line, an ocean carrier, is a rail carrier because the definitions applicable to Carmack state that the word "railroad" "includes" intermodal equipment used by or in connection with a railroad. Thus, under the decision below, any entity controlling intermodal equipment—which under the decision appears to include the ubiquitous containers used in modern intermodal transportation—qualifies as a railroad and is subject to Carmack. That is not the law. To qualify as a rail carrier, an entity must actually conduct rail operations, which "K" Line does not.

Compounding its error, the Ninth Circuit's expansive view of Carmack would throw the regulatory structure covering through transportation into confusion. For nearly a century, the FMC and its predecessors have regulated ocean carriage while the STB and its predecessors have regulated ground transportation and domestic water carriage. Under the decision below, however, ocean common carriers providing through transportation would be converted to "rail carriers" subject to the STB's jurisdiction, which conflicts with the FMC's authority because the STB's jurisdiction over rail carriers is exclusive. This impact on transportation regulation is gratuitous and unnecessary.

2. Carmack does not cover through shipments from foreign countries. Carmack applies only to property received for transportation under the rail

part of the Interstate Commerce Act, which covers only domestic rail transportation. The cargo in this case was received for through shipment from China, and this Court recognized in *Kirby* that through bills of lading with substantial ocean carriage are maritime contracts governed by maritime law. Indeed, "K" Line had no obligation to use rail for the domestic leg of these shipments: its contracts with the shippers left the mode of domestic transportation to "K" Line's discretion. Thus, an ocean carrier providing through transportation from abroad is not subject to Carmack.

This conclusion comports with the purpose of Carmack. That purpose was to relieve shippers whose cargo was lost or damaged during shipment of the burden of determining which of the multiple carriers involved in the shipment was responsible. As this Court recognized in *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U.S. 186 (1911), Carmack accomplishes this by effectively requiring the carrier receiving the cargo to provide through carriage. When an ocean common carrier provides through carriage, the shipper is relieved of this burden by the ocean carrier's common carrier liability throughout the entire through movement. There is no need to apply Carmack to ocean carrier through carriage.

3. The inland portion of through shipments is governed by COGSA, rather than Carmack. Section 7 of COGSA explicitly addresses liability for through shipments from foreign countries by authorizing parties to agree upon an ocean carrier's liability for inland transportation. Imposing Carmack's stringent liability terms on the rail segment of ocean carrier through shipments would nullify Section 7 as to those

segments. Stretching the boundaries of one statutory scheme to undercut another that applies explicitly cannot be justified.

Yet another negative impact of the decision below is that applying Carmack to the inland portion of ocean carrier through shipments would upset established shipping practices and increase the cost of the seamless through transportation that has been tremendously beneficial to world trade. As this Court recognized in *Kirby*, COGSA contains efficient default rules for international shipping. Application of Carmack in place of those rules would increase ocean carrier costs, notably insurance costs, and foment litigation. Requiring an offer of Carmack terms effectively requires ocean carriers to offer insurance for the manifold cargoes they carry under their long-term service contracts. Ocean carrier cargo risks are insured by mutual "clubs" of ocean carriers, which insure on the basis of the existing liability structure. These clubs are not in any way equipped to insure the full value of the world of commodities moving in ocean carrier through movements, and the ocean carriers are not equipped to micro-manage such risk.

4. Finally, the language of the Amendment prior to the 1978 recodification of Carmack bars its application to ocean carrier through movements. Prior to recodification, Carmack stated it applied only to domestic transportation or transportation "from a point in one state to a point in another State," 49 U.S.C. § 20(11) (1976), and therefore Carmack did not apply to through shipments from foreign countries. In recodifying the Interstate Commerce Act in 1978, Congress stated the revisions "may not be construed as making a substantive change." Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466.

This caveat forbids a change from the pre-recodification interpretation that Carmack does not apply to such shipments.

The brief filed by the Union Pacific Railroad demonstrates the error by the Ninth Circuit regarding application of the so-called "opt-out" provisions which come into play under Carmack.

ARGUMENT

I. CARMACK IS INAPPLICABLE TO ANY THROUGH TRANSPORTATION UNDER MARITIME CONTRACTS

In 1906, Congress added the Carmack Amendment to the Interstate Commerce Act ("Carmack") to require rail carriers receiving property for transportation to provide shippers the benefits of through carriage. *See* Pub. L. No. 59-377, § 7, 34 Stat. 584, 593-95 (1906) (currently codified at 49 U.S.C. § 11706); *see also Atl. Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 198 (1911) (discussing Carmack's practical effect). In the decision below, the Ninth Circuit extended Carmack to apply to an ocean carrier offering through transportation from a foreign country under a maritime contract. This disregards the limited purpose of Carmack, and contradicts the language of the Amendment restricting its operation to rail carriers and domestic rail transportation. If allowed to stand, this decision would undermine the structure of regulatory and liability regimes governing surface transportation, subjecting ocean carriers to regulation under two different and contradictory statutory schemes, and disrupting efficient shipping practices.

A. "K" Line, An Ocean Common Carrier, Is Not A Carmack Rail Carrier Subject To STB Jurisdiction.

The Ninth Circuit shoehorned "K" Line into Carmack inland coverage by deeming "K" Line to be a "rail carrier" under the Interstate Commerce Act because, in offering through transportation from China, "K" Line subcontracted with a railroad for part of the ground transportation leg. This ruling conflicts with the plain language of Carmack, which applies only to a "rail carrier" that provides transportation subject to the jurisdiction of the STB. Treating ocean carriers such as "K" Line as "rail carriers" would undermine the established distribution of authority between the STB and the FMC, potentially subjecting "K" Line and all ocean common carriers to a whole new set of regulatory obligations.

Carmack Terms—Carmack's language contains no hint that it applies to international ocean common carriers. Statutory interpretation "begins with the plain language of the statute." *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009). "And where the statutory language provides a clear answer, it ends there as well." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000) (quotation marks and citations omitted).

Carmack imposes liability upon rail carriers that provide domestic rail transportation. Carmack requires a "rail carrier providing transportation or service subject to the jurisdiction of the Board under this part" to issue a bill of lading for property it receives, 49 U.S.C. § 11706(a), and it makes "[t]hat rail carrier" and any delivering carrier "providing transportation or service subject to the jurisdiction of the Board under this part" liable for any loss caused

by a rail carrier transporting the property, *id*. Thus, Carmack imposes liability upon "rail carriers" that provide transportation subject to the jurisdiction of the "Board under this part"—that is, the jurisdiction of the STB, *see id*. § 10102(1) (defining "Board" to mean the "Surface Transportation Board"), under Part A of Subtitle IV of the Transportation Code, the "Rail" part, *see id*. §§ 10101-11908, which states that the Board's jurisdiction over rail transportation "applies only to transportation in the United States," *id*. §10501(a)(2).

"K" Line falls outside this clearly defined scope. First, "K" Line is not a rail transportation provider and has no railroad equipment. For purposes of Carmack, a rail carrier is a person "providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). There is, however, no allegation or evidence that "K" Line operates any railroad or offers to perform any railroad transportation. To the contrary, as plaintiffs acknowledged in their Service Contracts, "K" Line is an ocean common carrier, JA 183, and the only transportation that it provided was ocean transportation: it shipped plaintiffs' cargo by sea from China to Long Beach. JA 117-118 (¶¶ 6-11).

The STB Has No Jurisdiction Over Foreign Trade Ocean Carriage—Second, "K" Line is not subject to the jurisdiction of the STB because the Board has no jurisdiction over ocean carriage in foreign trade. The Board has jurisdiction over transportation that is "by railroad and water" where, as here, that transportation is under an arrangement for "continuous carriage or shipment." 49 U.S.C. § 10501(a)(1)(B). That jurisdiction, however, is only "over transportation by rail carrier," *id*. § 10501(a)(1), and it applies

"only to transportation in the United States," *id*. § 10501(a)(2). Thus, the Board does not have jurisdiction over ocean carriage in foreign trade, and therefore it has no jurisdiction over an ocean carrier such as "K" Line that provides no domestic water carriage. *See, e.g.*, *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc*., 547 F.3d 351, 357 n.6 (2d Cir. 2008). *Rexroth* offers a clear and authoritative analysis supporting the inapplicability of Carmack to international through carriage by ocean carriers.

The STB has jurisdiction over domestic water carriage. *See* 49 U.S.C. § 13521(a)(3) (granting jurisdiction over transportation by water carrier "between a place in the United States and a place outside the United States"). But this jurisdiction does not extend to water carriage in foreign trade. Where a water carrier provides transportation from outside the United States, the STB's jurisdiction covers only transportation "from a place in the United States to another place in the United States after transshipment to a place in the United States from a place outside the United States." *Id*. § 13521(a)(3)(C). Water carriage in foreign trade—that is, ocean carriage—is the province of the FMC. *See Rexroth*, 547 F.3d at 357 ("The Federal Maritime Commission (FMC), and not the STB, regulates ocean shipping between the United States and foreign countries . . . .").

Subcontracting Does Not A Rail Carrier Make—"K" Line did not become a rail carrier subject to the STB's jurisdiction by subcontracting for rail transportation as part of an intermodal shipment. The Ninth Circuit held that, in arranging for a railroad to carry these cargoes for part of their inland journey, "K" Line acted as a rail carrier subject to the Board's jurisdiction and therefore subject to Carmack. Pet.

App. 12a-17a. This misconstrues the scope of the term "rail carrier" and the Board's jurisdiction.

The Ninth Circuit noted that "Carmack applies to '[a] rail carrier providing transportation or service subject to the jurisdiction of the Board.'" Pet. App. 12a (quoting 49 U.S.C. § 11706(a)). Then it held "K" Line to be a "rail carrier" because "K" Line provides "common carrier railroad transportation for compensation." *Id*. (quoting 49 U.S.C. § 10102(5)). At this point, its analysis derailed. It avoided the fundamental question whether "K" Line provided "common carrier railroad transportation" and diverted to the Carmack definition of "railroad." It never explained how an ocean vessel operator provides common carrier railroad transportation when that operator never offered or promised to provide rail transportation to its customers and is incapable of providing such transportation.

Transferring Ocean Containers To A Railroad Is Not Railroad Transportation—The court below seeks to substitute the transfer of ocean containers to an actual railroad for transportation under subcontract for the providing of "common carrier railroad transportation." The court's apparent assumption was that "K" Line's ocean container was "intermodal equipment used by or in connection with a railroad." But it cannot be divined how this railroad use of "K" Line's container qualifies "K" Line as providing railroad transportation in this case.

The "common carrier railroad transportation" that qualifies one as a "rail carrier" is in no way related to the list of ancillary "railroad" accessories in 49 U.S.C. § 10102(6)(A). There is no connection. Even if an ocean container were deemed to be "intermodal equipment" used by UP, this has no

bearing on whether "K" Line is a "rail carrier," any more than it bears on whether a cargo shipper who furnishes the container is a "rail carrier." Handing the container off to the railroad cannot be the key point identifying a "rail carrier."

The Ninth Circuit incorrectly assumed that an entity furnishing "intermodal equipment," at least in connection with intermodal transportation involving a railroad, is a railroad. Part A, however, states only that the term "railroad" "*includes* . . . a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad." 49 U.S.C. § 10102(6) (emphasis added). In other words, the definition expands the word "railroad" to encompass bridges, ferries, and other equipment that facilitate railroad operations, as well as the locomotives and cars that are normally understood to come within the definition of a "railroad." Part A does not make a bridge a "railroad," only a functional component of a railroad when it is a railroad-carrying bridge.

An ocean carrier that operates no locomotives or rail cars does not become a railroad because a railroad carries its containers. If this were so, every trucker who loads his trailers on railcars for part of his haul would be a railroad, as would freight forwarders or even actual cargo owners who deliver their own containers to the railroad for carriage. Defining a "rail carrier," the Board took the sensible tack, contrary to the court below, that one must "conduct rail operations" to be a "railroad." *Ass'n of P&C Dock Longshoremen*, 8 I.C.C.2d 280, 290 (Surface Transp. Bd. 1992).

The Ninth Circuit did not consider whether "K" Line provides railroad transportation as a common carrier. Part A defines the term rail carrier to mean

a person "providing *common carrier* railroad transportation." 49 U.S.C. § 10102(5) (emphasis added). A common carrier is a carrier "offering service to all comers." WEBSTER'S THIRD NEW INT'L DICTIONARY 458 (2002). "K" Line's Service Contracts and Bills of Lading offered no railroad transportation. The Service Contracts do not mention rail transportation, and the Bills of Lading obligate "K" Line only to somehow get the cargo to the inland destinations by any means "K" Line chooses. *See, e.g.*, JA 146 (¶6); JA 188 (¶IV.B). Again, *Rexroth* is perfectly on point. *See* 547 F.3d at 351.

The Carmack Venue Provisions Are Incompatible With Through Transportation—Congress has implicitly recognized that Carmack does not apply to through shipments from foreign countries. In 1980, Congress added a venue provision to Carmack. *See* Staggers Rail Act, Pub. L. No. 96-448, §211(c), 94 Stat. 1895, 1911 (1980) (codified at 49 U.S.C. § 11706(d)). That provision states that a civil action under Carmack may be brought against the originating or receiving rail carrier "in the judicial district in which the point of origin is located." 49 U.S.C. § 11706(d)(2)(A)(i). The term judicial district is defined to mean either "judicial district of the United States" or the "geographic area over which [a state] court exercises jurisdiction." *Id*. § 11706(d)(2)(B). But when an ocean carrier such as "K" Line ships cargo from a foreign country, the point of origin for the transportation is not in a judicial district of the United States or within the geographic boundary of a state court. Thus, when Congress enacted Carmack's venue provision in 1980, it plainly assumed that Carmack applies only to goods received for shipment within the United States.

Carmack Coverage Would Pit FMC Jurisdiction Against STB Jurisdiction—Treating "K" Line as a rail carrier would upset long established administrative jurisdiction. Ocean common carriers have been regulated solely by the FMC and its predecessors since 1916, and rail carriers by the STB and its predecessors since 1896. *See supra* pp. 3-5. Title 49 gives the STB "exclusive" jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501(b). The remedies provided under the rail part of Subtitle IV "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* Thus, if "K" Line and other ocean carriers providing through transportation were deemed "rail carrier[s] providing transportation or service subject to the jurisdiction of the Board" under the rail part, purportedly the Board, not the FMC, would have exclusive jurisdiction over through transportation by ocean carriers—an irreconcilable conflict with the Shipping Act. This sudden shift would hit the international shipping community like a rogue wave.

The FMC has always exercised exclusive regulatory jurisdiction over through intermodal carriage by ocean common carriers. For example, the tariff regulations promulgated by the FMC cover all transportation by ocean common carriers, "including through transportation with inland carriers." 46 C.F.R. § 520.1. The Board has acknowledged this. *See Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (Surface Transp. Bd. 1987). Without benefit of legislation, the Ninth Circuit's decision threatens to interfere with the FMC's jurisdiction over through international transportation by ocean carriers in favor of the STB, which has laid no claim to it and has no experience with it.

Carrier Status Carries Insupportable Burdens—Judicially forcing "rail carrier" status on ocean common carriers would impose substantial new burdens on ocean carriers. As rail carriers under the Interstate Commerce Act, ocean carriers would be subject to financial regulations requiring them to use certain depreciation rights and accounting systems, 49 U.S.C. §§ 11143, 11162, and to file annual reports detailing their expenses, investments, and operating data, *id*. § 11145. They also might be subject to STB regulations on how to calculate their charges, *id*. § 10746, and be required to seek STB approval before terminating any rail carrier operations, *id*. § 10903(a). And, as rail carriers, they also might be subject to other specialized rail statutes such as the Railway Labor Act, 45 U.S.C. § 151 *et seq*.; the Railroad Retirement Act, *id*. § 231 *et seq*.; the Federal Employers Liability Act, *id*. § 51 *et seq*.; and the Federal Rail Safety Act, 49 U.S.C. § 20101 *et seq*.

Treating ocean carriers as rail carriers would raise overlapping and possibly contradictory filing requirements. If the STB had exclusive jurisdiction over ocean carriers when they provide the inland leg of through shipments, through rates in service contracts for such inland transportation apparently would no longer be filed with the FMC, but port-to-port service contract rates still would be filed. The treatment of the ancillary tariff charges and rules applicable to through movements and currently published per FMC Regulations would be a knotty question. Service contracts, which cover both port-to-port and through movements, would be filed with the Commis

sion, but would also come under Board jurisdiction. It would be an impossible situation.

The Interstate Commerce Act cannot be read to wreak such havoc. Statutes must be read to harmonize rather than create conflicts between them. *See, e.g.*, *Sky Reefer*, 515 U.S. at 533 ("[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (quotation marks and citation omitted)). This principle applies with special force where, as here, an interpretation would create a conflict between the jurisdiction of two administrative agencies that have been operating harmoniously (and whose views were not considered or even sought). *See, e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that statutes should be interpreted to create a "symmetrical and coherent regulatory scheme" (quotation marks and citation omitted)).

Carmack does not apply to "K" Line's through transportation because "K" Line is not a "rail carrier" by Carmack's definition.

B. Carmack Applies Only To Property Received For Domestic Rail Transportation.

The Ninth Circuit wrongly assumed that Carmack's coverage is coextensive with the STB's jurisdiction. Pet. App. 12a. Carmack applies where property is received for domestic rail transportation and not where the property is received for through transportation into the United States.

Carmack requires rail carriers providing transportation subject to the Board's jurisdiction to issue a

receipt or bill of lading for property received "for transportation under this part." 49 U.S.C. § 11706. Carmack appears in Part A of the Interstate Commerce Act, which grants the Board jurisdiction over "transportation by rail carrier," *id*. § 10501(a)(1), but applies "only to transportation in the United States," *id*. § 10501(a)(2). Thus, it is triggered only when property is received for domestic rail transportation.

When cargo is shipped substantially by ocean under a through bill of lading, the contract is maritime in nature. As this Court recognized in *Kirby*: "Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce . . . ." 543 U.S. at 27.

"K" Line was under no obligation to use rail or any other mode of domestic transportation to move the Shippers' cargoes. "K" Line received the cargo at issue in this question in China for shipment to points in the Midwest, JA 117-18 (¶¶ 6-11), but not by rail. The Service Contracts obligated "K" Line only to carry cargo "from the Origins to the Destinations." JA 188 (¶IV). Ocean carriage to Long Beach was contemplated in the Bills of Lading, JA 138, 149, 161, 173 (see face of bills of lading), but no rail carriage was specified to the Midwest. Quite the contrary, the bills explicitly acknowledged that carriage "may be done by more than one method or route of transport" and that "no method or route of transport nor Vessel nor any other means of transport is agreed to be used." JA 146 (¶6). Thus, "K" Line was free to use motor carriers or barges for any segment of the domestic transportation.

Since "K" Line was not required to use rail transportation by the service contracts or the bills of

lading for the Shippers' cargo and was free to use motor carriers or barges to deliver those cargoes, it did not receive the cargo "for transportation under this [railroad] part," as required by Carmack. 49 U.S.C. § 11706(a).

This conclusion is consistent with the basic mechanism adopted by Carmack. Carmack regulates rail transportation liability through the "efficacious device" of dealing with the terms of bills of lading for rail transportation. GILMORE & BLACK, THE LAW OF ADMIRALTY § 3-25, at 145. The primary purpose of Carmack was "to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling . . . goods." *Reider v. Thompson*, 339 U.S. 113, 119 (1950). Carmack accomplished this goal by requiring receiving carriers to issue a bill of lading for transportation to the final destination, and making them liable for loss or damage caused by a carrier in transit, excepting certain exemptions from this liability. Act of June 29, 1906, Pub. L. No. 59-377, § 7, 34 Stat. 584, 595 (codified at 49 U.S.C. § 11706(a)). Thus, as this Court recognized, the "effect of the Carmack amendment is to hold the initial carrier . . . as having contracted for through carriage to the point of destination." *Atl. Coast Line R.R.*, 219 U.S. at 196.

When ocean common carriers issue through bills of lading, there is no need for Carmack because, as in this case, the ocean carrier is liable from receipt to delivery. By definition, an ocean common carrier "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(6); *see also id.* § 40102(17) (defining ocean common carrier). Thus,

adding Carmack to the mix for inland rail legs would be a gratuitous, confusing complication.

C. Section 7 Of COGSA Governs The Inland Legs Of Through Transportation Under Maritime Contracts Involving Foreign Trade.

While through transportation by ocean carriers under maritime contracts in foreign trade is beyond the scope of Carmack, COGSA explicitly deals with such transportation, and Section 7 of COGSA provides for extension of its terms to the inland leg of a through shipment. Carmack should not be stretched to cover such shipments and thereby create a conflict with COGSA—especially because, as this Court noted in *Kirby*, Section 7 promotes uniformity and facilitates efficient contracting.

1. Section 7 Of COGSA Applies By Its Terms To The Domestic Leg Of Transportation From Foreign Countries When It Is Incorporated In Maritime Contracts.

Section 7 of COGSA permits ocean carriers to enter into agreements with shipper customers concerning their responsibility and liability for domestic transportation following the discharge of goods from a ship:

> Nothing contained in [COGSA] shall prevent a carrier . . . from entering into any agreement . . . as to the responsibility and liability of the carrier . . . for the loss or damage to or in connection with the custody and care and handling of goods . . . subsequent to the discharge from the ship on which the goods are carried by sea.

46 U.S.C. § 30701 Note § 7.

Thus, this language permits ocean carriers to enter into agreements governing their dealings with their shipper customers, including the carriers' liability for domestic transportation provided under a through bill of lading. *See, e.g.*, *Kirby*, 543 U.S. at 29 (applying COGSA to rail transportation provided under through bill of lading). The Shippers and "K" Line did so in this case by agreement in the Through Bills, JA 144 (¶4), and gave all subcontractors involved in the through transportation the benefit of all COGSA terms, JA 145 (¶5(2)). The parties contracted to apply COGSA to all phases of the through transportation, thereby achieving liability uniformity under their Through Bills and certainty in their dealings during the entire carriage.

2. Nothing In Law Or Practice Recommends Substituting Carmack For COGSA.

Extending Carmack by forced interpretation to international transportation under through bills of lading would bring Carmack into needless conflict with Section 7 of COGSA. The Through Bills limit the liability of "K" Line and its subcontractors as well as affording them an array of traditional defenses to cargo liability. If Carmack were applied, these provisions would be nullified in violation of well-settled principles of statutory interpretation.

The liability regime imposed by Carmack is incompatible with COGSA. Under COGSA, a carrier's liability for loss or damage to cargo during transit is based upon negligence. 46 U.S.C. § 30701 Note § 4; *see generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 88, 104-06 (2d ed. 1994). COGSA is flexible, allowing parties to contractually limit liability, 46 U.S.C. § 30701 Note § 4(5), as well as

select forums for disputes, *see Sky Reefer*, 515 U.S. at 537-39.

Carmack is far more rigid. Carmack makes receiving and delivering carriers liable for loss or damage caused by a rail carrier, 49 U.S.C. § 11706(a), and thus imposes "something close to strict liability." *Rankin*, 336 F.3d at 9. Carmack restricts the ability of parties to agree to limitations on liability, 49 U.S.C. § 11706(c), or to contractual limitations periods, *id*. § 11706(e). In addition, Carmack's venue provision, *id*. § 11706(d), has been interpreted to prohibit forum selection clauses. *See, e.g*., *Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co*., 537 F.2d 648, 657 (2d Cir. 1976). The decision below recognized that its view of Carmack creates conflict with Section 7 of COGSA. Pet. App. 24a.

Carmack should not be cast so as to create such a conflict. Where two statutes potentially touch upon a subject, courts should interpret those statutes to create "a symmetrical and coherent regulatory scheme." *Brown & Williamson*, 529 U.S. at 133 (quotation marks and citation omitted). Accordingly, courts should construe statutes to harmonize, not conflict. *See, e.g*., *Sky Reefer*, 515 U.S. at 533. That is easily done: properly read, Carmack does not impinge upon the domestic portion of international shipments under through bills of lading. *See supra* pp. 32-34.

Other supporting canons of construction can be brought to bear: First, it is a "cardinal principle of statutory construction" that statutes should not be construed to render any part of a statute "superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Extension of Carmack to international through bills of lading transgresses this

rule by preventing the extension of COGSA terms to rail legs of international through transportation in the face of Section 7's authorization of shippers and carriers to agree "as to the responsibility and liability of the carrier or the ship for the loss or damage to . . . goods . . . subsequent to the discharge from the ship on which the goods are carried by sea." 46 U.S.C. § 30701 Note § 7.

Second, a statute pinpointing an issue should govern over one that does not, because Congress presumably paid conscious heed to the issue in passing the statute recognizing it. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Section 7 of COGSA's attention to the inland leg of intermodal shipments from foreign countries by ocean carriers trumps any tangential concern with the subject that might be read into Carmack.

3. Applying COGSA Section 7 To Domestic Portions Of Transportation Under Through Bills Of Lading Comports With Widespread Practice, Promotes Uniformity, And Avoids Unnecessary Litigation.

As this Court recognized in *Kirby*, COGSA contains efficient default rules and permits uniform rules to govern all phases of international through shipments. *See Kirby*, 543 U.S. at 25. Introducing Carmack into maritime through transportation and thereby replacing COGSA's rules with Carmack's would undermine accepted, stable shipping practices, create confusion and inefficiency, and unnecessarily increase the cost of litigating transportation claims. Carmack would defeat its own objective, by making shippers search out where and when losses occur.

COGSA is Entrenched in International Ocean Shipping—The decision below would undermine the existing liability structure for ocean transportation implemented in shipping practices in all United States ocean trades. Ocean carriers routinely use Section 7 to extend COGSA provisions to inland transportation. *See, e.g.*, *Starrag v. Maersk*, *Inc.*, 486 F.3d 607, 614 (9th Cir. 2007) ("contractual extension of the COGSA is now routine in the shipping industry"). Through bills of lading applicable "both to sea and land . . . are regularly executed around the world." *Kirby*, 543 U.S. at 28; *see also Robert C. Herd & Co. v. Kravill Mach. Corp.*, 359 U.S. 297, 301 (1959) (noting COGSA codifies an international convention). Extending Carmack would be a blow to orderly, established shipping practices.

Casting COGSA Aside Would be a Blow to Uniformity in International Ocean Shipping—Application of Carmack would eliminate the uniformity permitted by extension of COGSA's terms. In *Kirby*, this Court observed that extension of Section 7 is an "efficient choice" because "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." 543 U.S. at 26, 29; *see also Indem. Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 636 (7th Cir. 2003) (noting that applying one body of law to a shipment makes "eminent good sense, as compared with the inefficient alternative of applying a different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck"). Thus, as the decision below acknowledged, Pet. App. 25a, its novel application of Carmack would defeat "the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea." *Kirby*, 543 U.S. at 29.

Carmack Would Burden a Staggering Industry with New Layers of Costs—Carmack would increase ocean carriers' and, inevitably, their customers' costs by introducing new elements into through transportation costs and pricing. Carmack permits restrictions on liability for transporting cargo only if they are based upon a declaration concerning the value of a particular shipment. *See* 49 U.S.C. § 11706(c)(3)(A). But the container rates in long-term service contracts employed by ocean carriers such as "K" Line are fixed when the contracts are signed, and can be changed only by filed amendments. They are only loosely based on the value of each commodity, because liability is fixed by the COGSA limits, regardless of the commodity shipped. JA 194-95 (basing rate on size of container shipped).

"K" Line, and every other VOCC subcontracting for rail carriage of ocean containers, would be required by the lower court to offer Carmack terms to every shipper for the inland rail "leg" at the outset, when negotiating any service contract contemplating inland movement under through bills of lading. Ocean carriers would be liable under through bills of lading to shipper customers for any loss or damage caused by railroads exceeding railroad contract limitations, without the protection of the through bill of lading liability limits and defenses. Ocean carriers would thus effectively have to become cargo insurers for inland legs on an industry-wide basis. The result would be confusion and increases in costs for all concerned. The decision below would impact the contracting process like a runaway train.

If Carmack were applied to ocean common carriers providing through transportation, in order for the carriers to assess and insure their liability, they

would have to engage in a new endeavor: investigating the value of each commodity and guessing at volumes to be shipped during one, two or three years. This Court has recognized that such an investigation alone could increase substantially the cost of contracting, *see Kirby*, 543 U.S. at 35. The unavoidable effect of all this would be radically increased costs for the ocean carriers, both for insurance itself and for the administration of this new and complex liability structure.

All these problems, unexplored territory for the lower court, would be created for a seamless transportation system that has been benefiting commerce for decades without the intrusion of warring regulatory regimes. ROLAND ET AL., THE WAY OF THE SHIP 351-52.

Superimposing Carmack's liability rules upon ocean carriers would have dire consequences for the intermodal transportation industry, which is already in desperate straits, only now seeing some hope for recovery after two years of disastrous results (losses of some $20 billion this year alone). THE JOURNAL OF COMMERCE, Dec. 2, 2009, Vol. 10, No. 48, at 10, 11. Carmack makes carriers liable for loss or damage to property on an essentially strict liability basis subject only to a handful of defenses. *See Rankin,* 336 F.3d at 9.

Application of Carmack to ocean carriers effectively would transfer responsibility for insuring cargo to ocean carriers. Ocean carriers are insured by "P&I clubs," which are actually a mechanism for ocean carriers to pool their risks. *See generally* P&I Club *Amicus* Brief. The club structure, based as it is on mutual risk sharing by ocean carriers, is not adaptable to a Carmack liability regime. The clubs in U.S. trades

would be offered as the cargo insurers for the full value of each of a huge universe of commodities, replacing the cargo shipper's insurers. The ocean carriers would be in the business of insuring against the loss or damage to cargoes in the hundreds of millions of containers shipped in through transport each year in U.S. foreign trade. *Id*. The ramifications of imposing potential liability of this magnitude are too serious and complex to assay.

It is clear Carmack would increase insurance costs. Cargo owners are in the position to determine the exact value and volume of their cargoes on an individual basis. Ocean carriers can only guess at the value and volumes of the cargo that will be offered by a shipper over the term of a service contract. The task of underwriting this whole new world of risk could only result in massive waste and inefficiency. *See generally* P&I Group *Amicus* Brief. Thus, as the decision below acknowledged, Pet. App. 25a, application of Carmack would defeat "the apparent purpose of COGSA[] to facilitate efficient contracting in contracts for carriage by sea." *Kirby*, 543 U.S. at 29.

Application of Carmack Would Increase Litigation Costs—Application of Carmack to the domestic portion of international through shipments and the creation of differing legal regimes for different portions of those shipments would needlessly and wastefully complicate claims for loss or damage as well. It would be necessary to determine when, where and how a particular loss occurred in order to determine ocean carrier liability. When ocean common carrier liability is governed by a single, uniform rule, such determinations are unnecessary, and there may be no need to litigate those issues.

Carmack Application Would Undercut Carmack's Own Primary Objective—Indeed, applying Carmack to international through transportation would be counterproductive, for it would undermine Carmack's primary objective of protecting shippers from having to determine which carrier involved in an interstate shipment was responsible for loss or damage to cargo. *See Reider*, 339 U.S. at 502. Under the Ninth Circuit's decision, the shipper would have to determine which carrier in a string of carriers was responsible, for through transportation involves a daisy chain of truckers overseas, the ocean carrier, domestic truckers, the railroad, then more domestic truckers.

Carmack imposes liability for loss or injury "caused by—(1) the receiving *rail* carrier; (2) the delivering *rail* carrier; or (3) another *rail* carrier" transporting the property. 49 U.S.C. § 11706(a) (emphasis added). Of course, an ocean carrier is not a "rail carrier," so the Ninth Circuit decision cannot be read to displace COGSA and require Carmack terms for the ocean leg or the motor carrier legs; thus the only leg where the full value would be triggered would be the domestic rail leg. *See supra* pp. 23-32. How this nightmarish scenario would impact shippers' damage claims processes is anyone's guess, but the one certainty is that it would not simplify it.

II. CARMACK'S HISTORY CONFIRMS IT DOES NOT APPLY TO TRANSPORTATION FROM NON-ADJACENT COUNTRIES.

Any ambiguity concerning the application of the Carmack Amendment to international through shipments from foreign countries is dispelled by the history of the Amendment. Prior to its recodification in

1978, Carmack plainly did not cover shipments involving nonadjacent foreign countries. Although the recodification facially obscured that restriction, Congress unequivocally instructed that the recodification was not to alter Carmack's meaning.

A. Before Recodification In 1978, Carmack Unquestionably Was Inapplicable To Through Transportation From Foreign Countries.

Before the 1978 recodification, it was perfectly clear from both the plain language of the Carmack Amendment and the decisions construing the Amendment that it did not extend to import shipments or export shipments to non-adjacent countries.

1. Before Recodification, Carmack's Terms Limited It To Property Received For Domestic Transportation Or For Transportation "From Any Point In The United States To A Point In An Adjacent Foreign Country."

When Carmack was originally enacted, it applied only to transportation "from a point in one State to a point in another State." Act of June 29, 1906, Pub. L. No. 59-377, § 7, 34 Stat. 584, 595. In 1915, in the Cummins Amendment, Congress expanded the scope of Carmack to include transportation to United States territories and export shipments to adjacent countries. *See* Act of Mar. 4, 1915, Pub. L. No. 63-325, § 1, 38 Stat. 1196, 1197. As a consequence, prior to its recodification, Carmack applied only to property received for transportation "[1] from a point in one State or Territory or the District of Columbia to a point in another State, Territory, [or] District of

Columbia, or [2] *from any point in the United States to a point in an adjacent foreign country*." 49 U.S.C. § 20(11) (1976) (emphasis added). Thus, Carmack plainly did not apply where a carrier received property for transportation *from* rather than to a foreign country or to any transportation involving a *non-adjacent* foreign country such as China.

2. Before Recodification, Courts Unanimously Recognized Carmack's Inapplicability To Through Transportation From Foreign Countries.

Before recodification, courts recognized that Carmack does not apply to shipments under through bills of lading from foreign countries into the United States. *See, e.g.*, *Sklaroff v. Pa. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950); *Strachmen v. Palmer*, 177 F.2d 427, 429-30 (1st Cir. 1949); *Fabiano Shoe Co v. Alitalia Airlines*, 380 F. Supp. 1400, 1402 (D. Mass. 1974); *Condakes v. Smith*, 281 F. Supp. 1014, 1015 (D. Mass. 1968); *Harry Becker & Co. v. Wabash Ry. Co*., 55 N.W.2d 776, 779 (Mich. 1952); *Leary v. Aero Mayflower Transit Co.,* 207 S.E.2d 781, 789 (N.C. Ct. App. 1974) 335 Mich. 159, 164 (1952); *Alwine v. Pa. R.R. Co.*, 15 A.2d 507, 509 (Pa. 1940).

The Interstate Commerce Commission also recognized that Carmack does not apply to transportation from foreign countries. Indeed, shortly after the Cummins Amendment was enacted expanding Carmack to cover limited international transportation, the Interstate Commerce Commission observed that Carmack does not apply to "export and import shipments to or from foreign countries not adjacent to the United States" because Carmack "makes no reference to shipments . . . from a nonadjacent foreign country." *In re Cummins Amendment*, 33 I.C.C. 682, 693

(1915); *see also Heated Car Serv. Regulations*, 50 I.C.C. 620, 623 (1918) ("[T]he so-called Cummins amendment to the act to regulate commerce does not relate to traffic moving from points in an adjacent foreign country to points in the United States . . . ."). A leading treatise on common carriers similarly recognized that Carmack does not cover carriers "engaged in transporting property in foreign commerce other than to adjacent foreign countries." 1 M.G. ROBERTS, FEDERAL LIABILITIES OF CARRIERS § 360, at 710 (2d ed. 1929).

Thus, before recodification there was no doubt Carmack had no application to shipments under through bills of lading from foreign countries.

3. This Court's Decision In *Woodbury* Did Not Require Application Of Carmack To Through Transportation From Foreign Countries.

In *Galveston, H. & S.A. Ry. Co. v. Woodbury*, 254 U.S. 357 (1920), this Court applied Section 1 of the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (currently codified at 49 U.S.C. § 10501), to the domestic leg of a roundtrip railroad trip from Canada to Texas. Because at that time Section 1 contained language similar to Carmack, the Second Circuit reasoned that Carmack's pre-codification language must have covered shipments from foreign countries. *See Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 65-69 (2d Cir. 2006). But *Woodbury*'s construction of Section 1 was not based upon the language shared with Carmack, and the test it adopted for applying Section 1 is incompatible with Carmack.

In construing Section 1 of the Interstate Commerce Act in *Woodbury*, this Court focused upon the nature of a carrier's operations. At the time applicable to the case, Section 1 covered common carriers "engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country." *Woodbury*, 254 U.S. at 359 (quoting 49 U.S.C. § 20(11) (1917)). Focusing on the nature of the operations in which carriers engage, this Court held that "[t]he test of the application of the Act is not the *direction* of the movement, but the *nature* of the transportation as determined by the field of the carrier's operation." *Id*. at 359-60 (emphasis added). Because carriers engaged in transportation from a foreign country normally engage in transportation to that country as well, this Court held that Section 1 applied to a rail carrier that transported a passenger on the inbound leg of a round trip journey from Canada to Texas and therefore enforced a provision limiting liability in the tariff. *Id*. In so doing, the Court did not parse the text of Section 1 or in any way suggest that the test adopted by the Court was based upon the language shared with Carmack.

Whatever the merits of the test *Woodbury* adopted for applying Section 1, that test should not be applied to Carmack. Carmack does not regulate the general operations of carriers; it imposes liability for shipment of property. *See* 49 U.S.C. § 11706(a). In addition, the direction of shipment was significant under Carmack because Carmack required rail carriers to issue bills of lading for transportation "from a point" in one State or Territory "to a point" in another State or Territory, or "from any point" in the United States "to a point" in an adjacent foreign country. *Id*. Accordingly, when this Court applied Carmack in *Reider v. Thompson*, 339 U.S. 113 (1950),

it did not employ the *Woodbury* test. Instead, this Court held that under Carmack "[t]he test is . . . where the obligation of the carrier as receiving carrier originated." *Id*. at 117.

The coverages of Carmack and the ICA are not coextensive. Congress has made clear that Section 1 of the Interstate Commerce Act is broader than Carmack. The lower court decision in *Woodbury* held that neither Carmack nor Section 1 of the Interstate Commerce Act applied to the transportation in that case from Canada to Texas. *See Woodbury v. Galveston, H. & S.A. Ry. Co*., 209 S.W. 432, 435 (Tex. Civ. App. 1919). The following year, in the Transportation Act of 1920, Congress amended Section 1 to say that the Act applies to transportation "from or to any place in the United States to or from a foreign country," 41 Stat. 456, 474 (1920). Congress, however, did not amend the portion of Carmack limiting its application to property received for transportation "from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. § 20(11) (1976). Thus, Congress clearly intended for Section 1 to be broader than Carmack.[4]

Woodbury offers no basis for ignoring the language of Carmack prior to codification, which plainly excluded shipments from non-adjacent foreign countries such as China.

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[4] In *Sompo* the Second Circuit misunderstood the significance of the Transportation Act of 1920 because it mistakenly believed that the statute was "enacted two months after the Supreme Court issued its decision in *Woodbury*." *See* 456 F.3d at 66. In fact, the Transportation Act was enacted on February 28, 1920, 41 Stat. 456, eleven months before the Supreme Court's decision in *Woodbury* was issued on December 13, 1920, *see Woodbury*, 254 U.S. 357.

B. The 1978 Recodification Did Not Expand Carmack Because Congress Expressly Eschewed Substantive Changes By The Recodification.

In 1978, Congress recodified the Interstate Commerce Act and related laws. Act of Oct 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. When a statute is codified or recodified, this Court does not presume that the changes in the statute "worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)) (quotation marks and citation omitted). Congress expressly stated that this recodification "restate[s], without substantive change, laws" revised in the recodification. Act of Oct 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. Lest there be any mistake, Congress added, the revised provisions "may not be construed as making a substantive change." *Id.* Thus, Congress could not have been clearer that the 1978 recodification made no substantive change in the law.

While Congress revised the language from the Cummins Amendment limiting Carmack to domestic shipments and export shipments to adjacent countries, there is no reason to believe that Congress intended to expand the scope of Carmack in doing so. Prior to recodification, Carmack required carriers covered by it to issue bills of lading when they received property "for transportation from a point in one State or Territory to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. § 20(11) (1976). In the recodi-

fication, Congress sought to streamline this language by requiring covered carriers to issue bills of lading for property received "for transportation under this subtitle," Act of Oct. 17, 1978, Pub. L. No. 94-473, 92 Stat. 1453, and this language in turn was revised into the current reference to property received "for transportation under this part," 49 U.S.C. § 11706(a). Moreover, while the Cummins language does not directly limit Carmack to domestic shipments and export shipments to adjacent foreign countries, it does so indirectly.

C. When Congress Reenacted Carmack In 1995, It Implicitly Adopted Prior Judicial Decisions Holding Carmack Inapplicable To Through Transportation From Foreign Countries.

In 1995, as part of the ICC Termination Act, Congress revised the rail part of the Transportation Code and in the process reenacted Carmack. *See* Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 847-49. When Congress reenacts a statute, it is assumed to be aware of, and to adopt, prior case law construing the statute. *See, e.g.*, *Keene Corp. v. U.S.*, 508 U.S. 200, 212 (1993); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

The courts interpreting Carmack between the 1978 recodification and the 1995 reenactment adhered to the prior understanding that Carmack does not apply to through shipments from foreign countries. *See Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703-04 (4th Cir. 1993); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); *see also Kenny's Auto Parts, Inc.*

v. Baker, 478 F. Supp. 461, 464 (E.D. Pa. 1979) ("The cases interpreting the Carmack Amendment have uniformly held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States."). The reenactment of Carmack provides one final confirmation that the Amendment cannot be applied to the through transportation that "K" Line provided from China.

CONCLUSION

For these reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

46 U.S.C.A. § 40501 (2009)

§ 40501. General rate and tariff requirements

(a) **Automated tariff system**.

(1) In general. Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

(2) **Exceptions.** Paragraph (1) does not apply with respect to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste.

(b) **Contents of tariffs.** A tariff under subsection (a) shall—

(1) state the places between which cargo will be carried;

(2) list each classification of cargo in use;

(3) state the level of compensation, if any, of any ocean freight forwarder by a carrier or conference;

(4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;

(5) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and

(6) include copies of any loyalty contract, omitting the shipper's name.

(c) **Electronic access.** A tariff under subsection (a) shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations. A reasonable fee may be charged for such access, except that no fee may be charged for access by a Federal agency.

(d) **Time-volume rates.** A rate contained in a tariff under subsection (a) may vary with the volume of cargo offered over a specified period of time.

(e) **Effective dates.**

(1) **Increases.** A new or initial rate or change in an existing rate that results in an increased cost to a shipper may not become effective earlier than 30 days after publication. However, for good cause, the Federal Maritime Commission may allow the rate to become effective sooner.

(2) **Decreases.** A change in an existing rate that results in a decreased cost to a shipper may become effective on publication.

(f) **Marine terminal operator schedules.** A marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable

by an appropriate court as an implied contract without proof of actual knowledge of its provisions.

(g) **Regulations.**

(1) **In general.** The Commission shall by regulation prescribe the requirements for the accessibility and accuracy of automated tariff systems established under this section. The Commission, after periodic review, may prohibit the use of any automated tariff system that fails to meet the requirements established under this section.

(2) **Remote terminals.** The Commission may not require a common carrier to provide a remote terminal for electronic access under subsection (c).

(3) Marine terminal operator schedules. The Commission shall by regulation prescribe the form and manner in which marine terminal operator schedules authorized by this section shall be published.

46 U.S.C.A. § 40502 (2009)

§ 40502. Service contracts

(a) **In general.** An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this part.

(b) **Filing requirements.**

(1) **In general.** Each service contract entered into under this section by an individual ocean common carrier or an agreement shall be filed confidentially with the Federal Maritime Commission.

(2) **Exceptions.** Paragraph (1) does not apply to contracts regarding bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste.

(c) **Essential terms.** Each service contract shall include—

(1) the origin and destination port ranges;

(2) the origin and destination geographic areas in the case of through intermodal movements;

(3) the commodities involved;

(4) the minimum volume or portion;

(5) the line-haul rate;

(6) the duration;

(7) service commitments; and

(8) the liquidated damages for nonperformance, if any.

(d) **Publication of certain terms.** When a service contract is filed confidentially with the Com-

mission, a concise statement of the essential terms specified in paragraphs (1), (3), (4), and (6) of subsection (c) shall be published and made available to the general public in tariff format.

(e) **Disclosure of certain terms.**

(1) **Definitions.** In this subsection, the terms "dock area" and "within the port area" have the same meaning and scope as in the applicable collective bargaining agreement between the requesting labor organization and the carrier.

(2) **Disclosure.** An ocean common carrier that is a party to or is otherwise subject to a collective bargaining agreement with a labor organization shall, in response to a written request by the labor organization, state whether it is responsible for the following work at a dock area or within a port area in the United States with respect to cargo transportation under a service contract:

(A) The movement of the shipper's cargo on a dock area or within the port area or to or from railroad cars on a dock area or within the port area.

(B) The assignment of intraport carriage of the shipper's cargo between areas on a dock or within the port area.

(C) The assignment of the carriage of the shipper's cargo between a container yard on a dock area or within the port area and a rail yard adjacent to the container yard.

(D) The assignment of container freight station work and container maintenance and repair work performed at a dock area or within the port area.

(3) **Within reasonable time.** The common carrier shall provide the information described in paragraph (2) to the requesting labor organization within a reasonable period of time.

(4) **Existence of collective bargaining agreement.** This subsection does not require the disclosure of information by an ocean common carrier unless there exists an applicable and otherwise lawful collective bargaining agreement pertaining to that carrier. A disclosure by an ocean common carrier may not be deemed an admission or an agreement that any work is covered by a collective bargaining agreement. A dispute about whether any work is covered by a collective bargaining agreement and the responsibility of an ocean common carrier under a collective bargaining agreement shall be resolved solely in accordance with the dispute resolution procedures contained in the collective bargaining agreement and the National Labor Relations Act (29 U.S.C. 151 *et seq.*), and without reference to this subsection.

(5) **Effect under other laws.** This subsection does not affect the lawfulness or unlawfulness under this part or any other Federal or State law of any collective bargaining agreement or element thereof, including any element that constitutes an essential term of a service contract.

(f) **Remedy for breach.** Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

46 U.S.C.A. § 40102 (2009)

§ 40102. Definitions

In this part:

(6) **Common carrier.** The term "common carrier"—

(A) means a person that—

(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country; but

(17) **Ocean common carrier.** The term "ocean common carrier" means a vessel-operating common carrier.

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46 U.S.C.A. § 41102 (2009)

§ 41102. General prohibitions

(a) **Obtaining transportation at less than applicable rates.** A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

(b) **Operating contrary to agreement.** A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if—

(1) the agreement has not become effective under section 40304 of this title or has been rejected, disapproved, or canceled; or

(2) the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission.

(c) **Practices in handling property.** A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

46 U.S.C.A. § 41103 (2009)

§ 41103. Disclosure of information

(a) **Prohibition.** A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information—

(1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or

(2) may improperly disclose its business transaction to a competitor.

(b) **Exceptions.** Subsection (a) does not prevent providing the information—

(1) in response to legal process;

(2) to the Federal Maritime Commission or an agency of the United States Government; or

(3) to an independent neutral body operating within the scope of its authority to fulfill the policing obligations of the parties to an agreement effective under this part.

(c) **Disclosure for determining breach or compiling statistics.** An ocean common carrier that is a party to a conference agreement approved under this part, a receiver, trustee, lessee, agent, or employee of the carrier, or any other person authorized by the carrier to receive information—

(1) may give information to the conference or any person or agency designated by the conference, for the purpose of—

(A) determining whether a shipper or consignee has breached an agreement with the conference or its member lines;

(B) determining whether a member of the conference has breached the conference agreement; or

(C) compiling statistics of cargo movement; and

(2) may not prevent the conference or its designee from soliciting or receiving information for any of those purposes.

46 U.S.C.A. § 41104 (2009)

§ 41104. Common carriers

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not—

(1) allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means;

(2) provide service in the liner trade that is—

(A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title; or

(B) under a tariff or service contract that has been suspended or prohibited by the Federal Maritime Commission under chapter 407 or 423 of this title;

(3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for an other reason;

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of—

(A) rates or charges;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, with due regard being given to the proper loading of the vessel and the available tonnage;

(D) loading and landing of freight; or

(E) adjustment and settlement of claims;

(5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port;

(6) use a vessel in a particular trade for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade;

(7) offer or pay any deferred rebates;

(8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage;

(9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port;

(10) unreasonably refuse to deal or negotiate;

(11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title;

(12) knowingly and willfully enter into a service contract with an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other

surety as required by section 40902 of this title, or with an affiliate of such an ocean transportation intermediary.

46 U.S.C.A. § 41105 (2009)

§ 41105. Concerted action

A conference or group of two or more common carriers may not—

(1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;

(2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations;

(3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;

(4) negotiate with a non-ocean carrier or group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those non-ocean carriers, unless the negotiations and any resulting agreements are not in violation of the antitrust laws and are consistent with the purposes of this part, except that this paragraph does not prohibit the setting and publishing of a joint through rate by a conference, joint venture, or association of ocean common carriers;

(5) deny in the export foreign commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount;

(6) allocate shippers among specific carriers that are parties to the agreement or prohibit a carrier that is a party to the agreement from soliciting cargo from a particular shipper, except as—

(A) authorized by section 40303(d) of this title;

(B) required by the law of the United States or the importing or exporting country; or

(C) agreed to by a shipper in a service contract;

(7) for service pursuant to a service contract, engage in any unjustly discriminatory practice in the matter of rates or charges with respect to any locality, port, or person due to the person's status as a shippers' association or ocean transportation intermediary; or

(8) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any locality, port, or person due to the person's status as a shippers' association or ocean transportation intermediary.

46 U.S.C.A. § 41106 (2009)

§ 41106. Marine terminal operators

A marine terminal operator may not—

(1) agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp;

(2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or

(3) unreasonably refuse to deal or negotiate.