

1 General, Department of Justice, Washington, D.C.; for
2 United States, as amicus curiae, supporting
3 Petitioners.

4 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf
5 of Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-1553, Kawasaki Kisen Kaisha, Ltd. V. Regal-Beloit Corporation, and the consolidated case.

Mr. Ballenger.

ORAL ARGUMENT OF J. SCOTT BALLENGER

ON BEHALF OF THE PETITIONERS

MR. BALLENGER: Mr. Chief Justice, and may it please the Court:

From its enactment in 1906 until very recently, it has been settled law for a century that the Carmack Amendment does not apply to the inland leg of an import through shipment. This Court had a factually identical --

JUSTICE SOTOMAYOR: Are you taking -- are you taking a position different than the U.S., that it applies to exports but not imports? I think the -- the Solicitor General's position is that it doesn't apply to any import or export.

Is it yours that it doesn't apply to imports?

MR. BALLENGER: I don't believe so, Your Honor. I think both of our position is that the current

1 scope of Carmack is consistent with its historic scope,
2 which had a very limited special application to exports
3 to Canada and Mexico. Other than that, it doesn't apply
4 to foreign trade at all.

5 JUSTICE SOTOMAYOR: Could you tell me
6 something? Is there -- do you know if there is a
7 railroad line from the U.S. through to -- through
8 Mexico? I know there is one from New York to Canada, a
9 freight line.

10 MR. BALLENGER: There certainly are rail
11 connections between the United States and Mexico, yes,
12 Your Honor.

13 JUSTICE SOTOMAYOR: There are?

14 MR. BALLENGER: Yes, absolutely.

15 This Court had a factually identical import
16 case just a few years ago in Kirby and, although it did
17 not discuss the Carmack Amendment, this Court agreed
18 unanimously on both reasoning and a result that are
19 flatly inconsistent with Respondent's arguments here.

20 JUSTICE GINSBURG: I thought the government
21 told us in this -- in that case that Carmack wasn't in
22 the case because it was either waived or something. But
23 the case was considered on the basis of on the one hand,
24 COGSA, and on the other, the law of 50 States.

25 MR. BALLENGER: That's correct, Justice.

1 The United States represented to this Court that -- that
2 Carmack was not in the case, either because it was
3 waived or because the traffic was moving under 49 U.S.C.
4 section 10709, which of course is true here as well.

5 Our view has always been that this Court
6 wouldn't have granted certiorari purely on the basis of
7 a waiver. But in any event, this Court's reasoning in
8 Kirby was that it's very important to foreign trade and
9 to the uniformity of rules on a through shipment --

10 JUSTICE GINSBURG: Yes, but uniformity is
11 one thing when you are talking about 50 States and
12 another when it's just two Federal statutes.

13 MR. BALLENGER: That's absolutely true, Your
14 Honor. But the -- for more than a century, the relevant
15 Federal statutes have been construed harmoniously not to
16 overlap in this particular situation. Foreign ocean
17 commerce is governed by the Carriage of Goods At Sea
18 Act, and the Carmack Amendment has always governed
19 purely domestic traffic and exports to Canada and
20 Mexico.

21 Now, Respondents say that the settled
22 meaning of that statute changed dramatically in 1978,
23 but Congress said that it didn't. And it's not really
24 that hard to read the present language --

25 CHIEF JUSTICE ROBERTS: Well, what if --

1 what if Congress was wrong? I mean, the language that
2 they adopted sure looks quite different to me than what
3 was applicable prior to 1978, and the boilerplate
4 provision that, oh, when we codify this we don't mean to
5 change anything -- I mean, which prevails, the actual
6 language they used or that boilerplate?

7 MR. BALLENGER: Your Honor, I think that
8 this Court's task, as always, is to read the statute as
9 a whole, which includes that language that Your Honor
10 characterizes as boilerplate, and also includes the
11 language that we are here to construe. And you would
12 want to read it all together if possible.

13 So let's look at the -- at the present
14 language. It appears at the back of Union Pacific's
15 reply brief at page 6a. Just like it always has,
16 Carmack distinguishes between receiving carriers,
17 delivering carriers, and connecting carriers. The
18 simplest way to resolve this case is that I believe even
19 Respondents would concede that for Carmack to apply, you
20 need a receiving carrier that is a rail carrier.

21 "K" Line is the receiving carrier here and they are not
22 a rail carrier. Numerous decisions of this Court and
23 the Interstate Commerce Commission confirm what the
24 statute plainly says, which is that a rail carrier is a
25 party providing common carrier railroad transportation,

1 not --

2 CHIEF JUSTICE ROBERTS: Those are -- those
3 are two different arguments, right; your rail carrier
4 argument and your pre-1978 argument?

5 MR. BALLENGER: They are, Your Honor. The
6 simplest way to resolve this case is that the present
7 language, even taken on its face, requires a receiving
8 carrier that is a rail carrier.

9 "K" Line is the receiving carrier here.
10 They are not a rail carrier. This Court and the ICC
11 have long held that merely subcontracting for common
12 carrier service does not make you a common carrier.
13 This Court held that in the American Railway Express
14 case. The ICC made this crystal clear in the
15 CSX/SeaLand matter in 1987, where they held that the
16 ocean carrier SeaLand was not a rail carrier simply
17 because it subcontracted for inland rail transportation
18 and provided carrier containers to the inland rail
19 carrier.

20 JUSTICE SOTOMAYOR: So your -- I'm sorry.
21 I'm a little confused. Your position is that "K" Line
22 -- you are representing whom here?

23 MR. BALLENGER: I -- my client is Union
24 Pacific, but I am here today speaking for both of the
25 Petitioners, "K" Line and Union Pacific.

1 JUSTICE SOTOMAYOR: You have a bit of a
2 conflict, don't you? Because isn't "K" Line taking the
3 position it's not a rail line, and who are you speaking
4 for when you say it's --

5 MR. BALLENGER: For both of us, Your Honor,
6 because that resolves -- actually resolves the case for
7 both "K" Line and Union Pacific.

8 JUSTICE SOTOMAYOR: If it's considered what?
9 If it's considered --

10 MR. BALLENGER: "K" Line -- the statute
11 requires -- to be triggered, it requires a receiving
12 carrier that is a rail carrier. "K" Line is the
13 receiving carrier here and they are not a rail carrier.
14 So then the question becomes -- Union Pacific certainly
15 is a rail carrier. The question becomes: Can you treat
16 Union Pacific as the receiving carrier? You can't. The
17 receiving carrier language has been in the statute since
18 1906. It has never changed. And for a century it has
19 always meant the carrier that receives the property from
20 the shipper at the point of origin. The current
21 language --

22 JUSTICE SOTOMAYOR: Where is that defined in
23 Carmack? Where in the pre-1978 provisions or in the
24 current statute is that to be read?

25 MR. BALLENGER: Well, there are -- there is

1 not an explicit definition of the term "receiving
2 carrier," Your Honor. It appears in the first sentence
3 of 11706, where it has always appeared in the first
4 sentence of Carmack, and then there are implications
5 in -- throughout the rest of Carmack, which I'm happy to
6 talk about.

7 JUSTICE SOTOMAYOR: That's -- I am trying to
8 find it, statutorily. And what case says that? What
9 case of ours defines a -- a receiving carrier in that
10 particular way?

11 MR. BALLENGER: Well, let's start with the
12 statutory language, if we may. The first sentence of
13 Carmack says that "A rail carrier providing
14 transportation or service subject to the jurisdiction of
15 the board under this part shall issue a receipt or bill
16 of lading for property it receives for
17 transportation under the --

18 JUSTICE SOTOMAYOR: The only one --

19 MR. BALLENGER: That's how --

20 JUSTICE SOTOMAYOR: The only one who has --
21 the board has jurisdiction over is the railroad. It
22 doesn't have jurisdiction over the ocean carrier
23 receiving.

24 MR. BALLENGER: That -- that's correct, Your
25 Honor. And then the question is --

1 JUSTICE SOTOMAYOR: And so you are the --
2 you have to be the person -- the railroad has to be the
3 person receiving the goods, correct?

4 MR. BALLENGER: No, Your Honor. The
5 receiving carrier has always been the party at the point
6 of origin of the shipment. And you see if you look at
7 the venue provision in the current language --

8 JUSTICE SOTOMAYOR: But you are not reading
9 the language. Doesn't the language say the person who
10 receives under the jurisdiction of the board?

11 MR. BALLENGER: No, Your Honor. It's --
12 it's two separate requirements. It's always been
13 understood as two separate requirements. Carmack
14 requires that the receiving -- a receiving carrier is
15 subject to the jurisdiction of the board and then it
16 also has to be the receiving carrier. The receiving
17 carrier is the originating carrier. If you look at the
18 venue provision --

19 JUSTICE SOTOMAYOR: I -- I keep going back
20 to: What language tells me that particular point in the
21 statute?

22 MR. BALLENGER: Because otherwise the whole
23 structure of the statute doesn't work. Carmack draws a
24 distinction between receiving carriers, delivering
25 carriers, and connecting carriers.

1 If receiving property directly from another
2 common carrier and merely moving it for a portion of the
3 journey in connecting were enough to make you a
4 receiving carrier -- and, of course, it is in common
5 parlance; you are receiving goods in that circumstance.
6 -- but receiving --

7 JUSTICE SOTOMAYOR: That's my problem.

8 MR. BALLENGER: "Receiving carrier" has
9 always been a term of art in this statute. If that were
10 enough to make you a receiving carrier, then the
11 statutory structure would fall apart, because every
12 interim carrier in the line would be a receiving
13 carrier. Every single one of them receives.

14 JUSTICE SCALIA: Yes, but not -- not
15 every -- where you are dealing with -- with intermodal
16 transportation, not every receiving -- not every rail
17 carrier would be the receiving rail carrier. I mean,
18 this --

19 MR. BALLENGER: That --

20 JUSTICE SCALIA: Your client is the first
21 rail carrier to receive, right?

22 MR. BALLENGER: It's not how -- that's not
23 how the statute is worded, Justice Scalia. The -- the
24 statute --

25 JUSTICE BREYER: Is this the language? The

1 -- if it helps with Justice Scalia's question, the
2 language says "a rail carrier providing transportation
3 or service subject to the jurisdiction of the STB shall
4 issue a receipt or bill of lading for property it
5 receives."

6 MR. BALLENGER: Correct.

7 JUSTICE BREYER: And so that's what it has
8 to do. It's a bill of lading for property it receives.
9 And you are saying "receives" means receives from the
10 shipper.

11 MR. BALLENGER: It has always --

12 JUSTICE BREYER: It does not mean receives
13 from another carrier.

14 MR. BALLENGER: It has always meant that.

15 JUSTICE BREYER: Is that right?

16 MR. BALLENGER: That's correct, Your Honor.
17 It has always meant that. It has to mean that, because
18 otherwise, if you read it to mean receives from another
19 carrier then every connecting carrier or delivering
20 carrier in the chain would be a receiving carrier as
21 well as a connecting or delivering carrier and required
22 to issue its own bill of lading, which would turn the
23 historic purposes of Carmack on its head.

24 The purpose of Carmack was to require the
25 first carrier in the chain to issue a single through

1 bill of lading to the destination that would govern the
2 whole voyage under uniform consistent liability terms.
3 No one else in the chain is supposed to issue a bill of
4 lading, so there is only one receiving carrier. It's
5 the first carrier who deals directly with the shipper.
6 If you look at the venue provision you can see that the
7 statute uses the term "originating carrier"
8 interchangeably with "receiving carrier," and it
9 provides venue over that carrier only at the point of
10 origin of the shipment. That would make absolutely no
11 sense if someone downstream could be the receiving
12 carrier. In this circumstance you would say, I suppose,
13 that Union Pacific was the receiving carrier.

14 JUSTICE SOTOMAYOR: I always thought that
15 the purpose of Carmack was to ensure rail
16 responsibility, rail carrier responsibility, so that it
17 was one bill of lading with respect to all railroad
18 connections. If that was the purpose of Carmack --

19 MR. BALLENGER: That's not quite correct,
20 Your Honor. Historically, as this Court explained in
21 Atlantic Coast Line v. Riverside Mills and in the Ward
22 case, the purpose of Carmack was to require through
23 transportation, a through bill of lading, from the
24 originating point to the destination point, a single
25 bill of lading under consistent terms, so that the

1 shipper does not have to prove where damage occurred.
2 The point of Carmack --

3 JUSTICE SOTOMAYOR: But on the rail line.

4 MR. BALLENGER: On --

5 JUSTICE SOTOMAYOR: On rail -- on rail
6 transportation.

7 MR. BALLENGER: On any transportation,
8 actually, Your Honor. The way that the statute works,
9 it can --

10 JUSTICE SOTOMAYOR: Historically you say
11 that?

12 MR. BALLENGER: Yes, Your Honor.

13 JUSTICE SOTOMAYOR: In the pre-1978 Carmack,
14 there is a -- if you want to take a look at it, it is in
15 page 99a of your petition. It reads: "If the loss,
16 damage, or injury occurs while the property is in the
17 custody of a carrier by water, that liability" -- "the
18 liability of such carrier shall be determined by the
19 bill of lading of the carrier by water and by and under
20 the laws applicable to transportation by water."

21 MR. BALLENGER: Yes, Your Honor.

22 JUSTICE SOTOMAYOR: So --

23 MR. BALLENGER: That provision was
24 introduced in the Transportation Act of 1920. It's
25 talking about domestic water carriers. And it's still

1 there in the statute. It's just in the Carmack
2 provision when Congress split Carmack into three in 1995
3 it moved that provision to 14706(c)(2).

4 JUSTICE SOTOMAYOR: So explain to me what
5 happens in domestic water cases. It says that you can
6 have a different bill of lading for the water transport.
7 That bill of lading controls your damage on the water,
8 and it separates that out from damage on the rail side?

9 MR. BALLENGER: In domestic -- Congress drew
10 a distinction between foreign and domestic commerce for
11 a very long time, Your Honor. In domestic commerce the
12 rule has been that a rail carrier could interconnect
13 with a domestic water carrier and the a domestic water
14 carrier could carry it for a leg of the trip. And the
15 whole trip would still be governed by the Carmack
16 through bill of lading. But if there was damage during
17 the water portion, it would be governed by the water
18 law, which was the Harter Act.

19 JUSTICE SOTOMAYOR: And the railroad is
20 covered by any damage that occurs on land?

21 MR. BALLENGER: The railroad is liable on a
22 through transportation basis for the entire trip, but if
23 the damage occurred during the water leg its liability
24 is limited and confined by the law that governs the
25 water leg.

1 JUSTICE SOTOMAYOR: So there already is
2 domestically two different forms of liability
3 protection?

4 MR. BALLENGER: Congress made that
5 compromise, because Congress was forced to choose
6 between not having through bills of lading at all
7 domestically or making -- or essentially repealing the
8 Harter Act in circumstances where rail carriers interact
9 with them. Congress made the choice to compromise and
10 have kind of a hybrid arrangement.

11 But in foreign trade -- the geographics of
12 Carmack was always confined, that Carmack did not apply
13 to imports at all and it did not apply to exports except
14 for exports to adjacent foreign countries.

15 CHIEF JUSTICE ROBERTS: Prior to 1978. If I
16 think you lose under that question under the law as
17 happens to be currently codified, but would prevail
18 under the pre-1978 law, what is your strongest case for
19 the proposition that what I referred to earlier as the
20 boilerplate language trumps the plain language of the
21 currently codified version?

22 MR. BALLENGER: Your Honor, we don't think
23 that this Court has ever interpreted language of that
24 nature. But in a different context with a much weaker
25 statutory language, the Fourco Glass line of cases, this

1 Court applies a strong thumb on the scale that Congress
2 didn't intend to change the law.

3 CHIEF JUSTICE ROBERTS: It's kind of a
4 difficult -- I mean, if you are a shipper and you are
5 trying to figure out, okay, let's ship some goods, and
6 you pick up the law and it says, well, this is what the
7 law says, who's going to tell you that, well, you may
8 think that's what the law says, but you are really
9 governed by the pre-1978 law.

10 MR. BALLENGER: Well, Your Honor, we don't
11 think that it is necessary for this Court to read the
12 statute in a countertextual way. You just have to do
13 what this Court has always done and read the statute as
14 a whole, including giving some weight to that provision
15 which is in the text of the statute and reading the rest
16 of the statute in light of it.

17 And I think if you do that, particularly in
18 this case, it's really not that hard to reconcile the
19 pre-1978 law with the current law. Union Pacific cannot
20 be a receiving carrier because it didn't receive the
21 goods at the point of origin. "K" Line isn't a rail
22 carrier. That's enough to resolve this case and this
23 Court doesn't need to go any farther. Actually that
24 would as a practical matter mostly resolve the
25 commercial problem that this Court granted certiorari to

1 resolve.

2 JUSTICE KENNEDY: I have one question, and I
3 know that your white light is on. Can I assume that
4 whether we rule for Petitioners or Respondents in this
5 case, the shipping world, the cargo world, will
6 immediately adjust to our decision? It's not going to
7 be a problem. There are insurers, there are freight
8 forwarders, there are form contracts. People will know
9 exactly what to -- they will adjust in 1 week to what we
10 do. Am I right about that? Or can you say that if we
11 adopt the Respondent's position it will be disruptive to
12 the shipping trade and so forth?

13 MR. BALLENGER: Not exactly, Your Honor,
14 because of course Respondent's position is that Carmack
15 is a mandatory regime; there is no way to contract
16 around it if it applied. So Respondent's position is
17 that Carmack mandatorily must govern the inland leg of
18 any of these through shipments. The practical
19 consequence of that is that true through bills of
20 lading, unity of responsibility in one shipper under
21 consistent terms for the entire voyage will become
22 impossible in foreign trade. So there won't be a way to
23 correct that.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.
25 Ballenger.

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Mr. Yang.

ORAL ARGUMENT OF ANTHONY YANG ON BEHALF
OF THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING PETITIONERS

MR. YANG: Mr. Chief Justice and may it
please the Court:

I would like to address a few of the
questions that have come up already. Justice Sotomayor
you asked what Supreme Court decision addresses the
receiving carrier. There is a series of decisions which
address receiving carriers and the nature of the
receiving carrier as the initial care that receives
goods from the shipper. I would -- Mexican Light and
Power Company, 1947, is probably the best, but that
traces its way back all the way to the 1910s, Galveston
Wharf Company, Ward, Starburg, Lish Milling, Riverside
Mills. These cases are largely cited at our brief at
page 27 to 28, footnote 10.

Regarding the geographic scope of Carmack on
the current text, we believe that the current text,
which is reproduced in the petition appendix at 69a --
if you look at the combination of both the first and the
third sentences of Carmack, we believe that that
reproduces the historic scope as encompassing only
domestic transportation, purely domestic transportation,

1 and transportation to an adjacent foreign country when
2 it's an export.

3 The first sentence requires that the rail
4 carrier be providing transportation or service subject
5 to the jurisdiction of the board and issue a receipt or
6 bill of lading. The very purpose of Carmack from the
7 very beginning, its core purpose, was to allow a shipper
8 to sue the initial carrier. The initial carrier was
9 responsible for the entire shipment. All the connecting
10 carriers were deemed to be agents of the initial carrier
11 and therefore there was an easy defendant for the
12 shipper who dealt directly with that shipper -- or that
13 carrier, and received a bill of lading from that carrier
14 to sue.

15 CHIEF JUSTICE ROBERTS: I read -- I read
16 your brief, like your friend's, as relying almost
17 exclusively on the pre-1978 language.

18 MR. YANG: Our brief addressed the first
19 sentence briefly in, I believe, the prior page. Page 20
20 to 21 deals with the first sentence, and then 22 with
21 the third. But our point is that the first sentence
22 sets an anchor in the United States as the -- as the
23 origin of the shipment.

24 Part A jurisdiction -- this is reproduced at
25 page 62a in the petition appendix. It does cover

1 shipments that themselves transit United States and
2 foreign countries.

3 JUSTICE SCALIA: Excuse me, what -- what are
4 you referring to now?

5 MR. YANG: 62a of the petition appendix.
6 This is Section 10501, which defines Part A jurisdiction
7 of the STB. And then I'm looking --

8 CHIEF JUSTICE ROBERTS: The Union Pacific
9 petition appendix?

10 MR. YANG: They are both -- both of them are
11 actually the same. Both the petition appendixes are the
12 same.

13 So I'm looking down at -- A.2 provides that
14 the jurisdiction of the STB applies only to
15 transportation into the United States when that's
16 between -- you know, part of a larger transit between
17 the U.S. and a foreign country or even purely
18 domestically.

19 So, a shipper -- or a carrier that is
20 subject to STB jurisdiction has to be providing this
21 U.S. transportation when it issues the bill of lading.
22 So the -- again, the central purpose was to provide a
23 carrier by which -- against whom the shipper can bring
24 suit in a convenient form, the person that the shipper
25 dealt with. And that's now reflected in section -- the

1 forum provision of Carmack which is subsection (d)(2),
2 it provides that a suit under Carmack may only be
3 brought against the originating rail carrier in the
4 judicial district in which the point of origin is
5 located.

6 And the prior provision said that that's a
7 U.S. district court or a State court. Carmack itself
8 anchors the transportation as starting in the United
9 States.

10 And then the third sentence explains the
11 remainder of the historic scope. The third sentence --

12 JUSTICE GINSBURG: We are looking where,
13 now?

14 MR. YANG: This is back to 69(a) of Carmack.
15 The third sentence in subsection (b), it defines the
16 liability under Carmack. It says "The liability under
17 this section is for damage caused by the receiving
18 carrier, the delivering carrier or another rail carrier
19 over whose line or route the property is transited in
20 the United States or from a place in the United States
21 to a place in an adjacent foreign country.

22 So, what that does is that provides the
23 center for the two bookends. The first bookend is the
24 originating carrier, the receiving carrier that received
25 the goods in the United States, provides the bill of

1 lading to the shipper.

2 The second bookend is the delivering
3 carrier, and in between -- remember Carmack was intended
4 to cover the entire carriage as a unified whole. The
5 in-between is transportation in the United States or
6 export transportation from the United States to a point
7 in a foreign country.

8 We believe that that text, read as a whole,
9 reflects the historic scope of Carmack that's existed
10 since 1915 when it was extended beyond purely domestic
11 transportation.

12 JUSTICE SCALIA: But why -- why doesn't the
13 (2), (a)(2), the delivering rail carrier -- if what you
14 say is true, that should be the delivering rail carrier
15 delivering in a -- in an adjacent foreign country.

16 MR. YANG: Correct.

17 JUSTICE SCALIA: That -- that limitation is
18 strangely missing from (2).

19 MR. YANG: Well, we believe the portion of
20 (a)(3), which now looks like it's in (a)(3), the "over
21 whose line or route the property is transited" --
22 "transported" actually applies to the receiving and
23 delivering rail carrier.

24 If you would turn to page 5a and 6a of the
25 reply brief of Union Pacific, there is a side-by-side

1 comparison.

2 JUSTICE SCALIA: Okay. Wait a minute now.

3 MR. YANG: I'm sorry --

4 JUSTICE SCALIA: The paragraphing you say is
5 wrong?

6 MR. YANG: From 5a to 6a, you will see 5a is
7 the 1978 version of Carmack that was enacted in the 1978
8 codification.

9 JUSTICE SCALIA: Right.

10 MR. YANG: The current version is reflected
11 on the facing page. There was no paragraph indentation
12 in 1978. And in 1995 when Congress changed the text, it
13 did include a paragraph indentation, but the committee
14 report -- the conference report is very clear that
15 Carmack was not changed. Also --

16 JUSTICE SCALIA: So all -- you are saying
17 that -- I think what you are saying is that all we have
18 to use the statutory statement that "nothing was meant
19 to be changed or" is to say, well, that paragraphing in
20 3 is just wrong, right?

21 MR. YANG: Well, I don't know -- you mean
22 the indentation?

23 JUSTICE SCALIA: The indentation.

24 MR. YANG: The indentation was inadvertent.
25 And I would actually direct the Court to 73a, which is

1 the other part of Carmack that now exists for motor
2 transportation and freight forwarders. There is no
3 indentation. The current version of the other half of
4 Carmack does not provide the indentation. The
5 indentation is inadvertent. And in '95 -- the '95,
6 which --

7 JUSTICE SCALIA: I'm losing you. 73a?

8 MR. YANG: 73a. (A)(1) reproduces what we
9 were just looking for -- looking at in the rail carrier.

10 JUSTICE SCALIA: Rail carrier.

11 MR. YANG: It's a single paragraph. That's
12 the way it's existed since, you know, 1915, basically,
13 or 1927 when they added receiving carrier."

14 So what the Court can do -- it's true,
15 Carmack is less clear than it used to be. It was made
16 somewhat less clear in '78 and in '95. But we believe
17 that when you take the text as a whole, particularly
18 when read in light of the context of this Court's
19 decision, the longstanding practice in the United States
20 reflected in the STB -- the STB's decision, that is the
21 ICC's decision, the predecessor, that at least the
22 provision is ambiguous.

23 And if the provision is ambiguous, section
24 3(a) that mandated the statute should not be construed
25 to make a substantive change in the law should control.

1 CHIEF JUSTICE ROBERTS: This may not have
2 anything to do with anything. Is there a reason the STB
3 doesn't appear on your brief?

4 MR. YANG: The STB does not appear in our
5 brief --

6 CHIEF JUSTICE ROBERTS: It did in the Kirby
7 case just a few years ago.

8 MR. YANG: It did. It did. The STB has not
9 taken a position about the current scope of Carmack and
10 therefore decided not to join our brief.

11 JUSTICE BREYER: Is -- is there a way to --
12 are you finished?

13 MR. YANG: No. I would say, though, that
14 the ICC's decisions remain binding. That is 1995, the
15 statute, ICDA section 204(a), which is a note now to
16 section 701 of Title 49, specifically provided that the
17 ICC's orders and determinations would remain binding
18 unless changed by the STB. The STB just did not, at
19 this point, come on record and take a position about the
20 scope of Carmack.

21 JUSTICE BREYER: We don't even get into this
22 problem if -- unless the ship line is a rail carrier?

23 MR. YANG: In part. There's -- if you --

24 JUSTICE BREYER: Well, it says "A rail
25 carrier providing transportation or service subject to

1 the STB shall issue a receipt or a bill of lading."
2 That's what leads us into the problem.

3 MR. YANG: That would take care of the
4 initial carrier, what we believe is the initial
5 receiving carrier in the case, "K" Line. However, I
6 believe the argument is being made that Carmack could
7 suddenly apply mid-carriage at the border.

8 JUSTICE BREYER: But mid-carriage -- it only
9 talks about -- they use that word "received." That's
10 why I thought possibly it didn't because it says --

11 MR. YANG: I believe the argument is that
12 the first carrier who receives property in the United
13 States would be deemed the receiving carrier.

14 JUSTICE BREYER: That's a separate argument?

15 MR. YANG: That's a separate argument.

16 JUSTICE BREYER: Did the Ninth Circuit pass
17 on that argument?

18 MR. YANG: You would have -- excuse me?

19 JUSTICE BREYER: Did the Ninth Circuit pass
20 on that argument?

21 MR. YANG: It did not.

22 JUSTICE BREYER: It did not.

23 MR. YANG: It did not.

24 JUSTICE BREYER: So that's not right in
25 front of us?

1 MR. YANG: That is correct.

2 JUSTICE BREYER: It's quite different.

3 MR. YANG: It is a different -- but we think
4 it's clearly wrong in light of Carmack's historic
5 purpose. This would be to divide the -- the -- if that
6 were correct, it would divide the transportation in two.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. YANG: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Frederick.

10 Mr. Frederick.

11 ORAL ARGUMENT OF DAVID C. FREDERICK

12 ON BEHALF OF THE RESPONDENTS

13 MR. FREDERICK: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 It does not take great mental gymnastics to
16 read the plain language of this statute and resolve it
17 the way the Ninth Circuit did in favor of Respondents.

18 The case is controlled by the plain language
19 of several Federal statutes, and they have been averted
20 to, to some extent. But I would like to point out to
21 the Court that in 2-1/2 pages of our merits brief,
22 starting at page 26 and going over to page 28, we not
23 only cite the full language in full of the Carmack
24 Amendment and the jurisdictional provision of the STB,
25 but explain how Union Pacific is a delivering carrier

1 within the meaning of the Carmack Amendment; under the
2 plain terms of the statute, they are liable for the
3 loss; the Carmack Amendment applies to their receipt of
4 the property; and the train derailment which was caused
5 by their negligence comes within the plain terms of the
6 Carmack Amendment.

7 JUSTICE BREYER: Then under that view, I
8 guess that -- that any intermodal transport, China, all
9 the goods coming from China, which tend to move under a
10 single bill of lading, as soon as they get to the United
11 States and go on a train for 50 miles a new bill of
12 lading must issue?

13 MR. FREDERICK: No. In fact, Carmack --

14 JUSTICE BREYER: Why?

15 MR. FREDERICK: -- explicitly says, quote:
16 "Failure to issue a receipt or bill of lading does not
17 affect the liability of a rail carrier." Carmack --

18 JUSTICE BREYER: All right, so you're saying
19 they don't have to issue --

20 MR. FREDERICK: They do not have to issue --

21 JUSTICE BREYER: Fine. If they don't have
22 to issue a separate receipt, what we are talking about
23 is a bill of lading that was issued by the ship.

24 MR. FREDERICK: That's correct.

25 JUSTICE BREYER: All right. Now, if that's

1 correct and if the ship -- the only one that has to do
2 that, it says, is a rail carrier, and a rail carrier is
3 a person providing common carrier rail transport. And
4 then that's defined to include intermodal equipment used
5 by or in connection with a railroad. And my
6 understanding, which I'm asking you for correction -- is
7 that the argument here is the ship is providing
8 intermodal equipment used by or in connection with a
9 railroad.

10 MR. FREDERICK: That's correct.

11 JUSTICE BREYER: And it's the words "used by
12 or in connection with" that I am focusing on, because to
13 apply those words here seems to me to bring every
14 international shipment in the world, no matter how small
15 the American portion by rail and no matter how big the
16 foreign part of this transport, it brings it all within
17 Carmack. And it means that the bill of lading issued
18 by people throughout the world are all going to have to
19 apply to meet the terms of the Carmack Amendment, which
20 had the purpose of railroads in the United States, and
21 that's going to be a nightmare.

22 MR. FREDERICK: No, it won't,
23 Justice Breyer.

24 JUSTICE BREYER: Now, first, is it true what
25 I said? And second, if it is true why isn't it way

1 contrary to purpose and a nightmare?

2 MR. FREDERICK: It is not -- it is true and
3 not true, but for different reasons. And if I could
4 take a moment to explain, because I think it is
5 important.

6 In 1978 the plain language of the statute
7 defined what the STB's jurisdiction is. They do not
8 dispute that the last part of the jurisdictional
9 provision is the STB jurisdiction when a -- a shipment
10 is in, quote, "between the United States and a place in
11 a foreign country," but the STB only has jurisdiction to
12 the extent the transportation occurs in the United
13 States.

14 So it is true that imports into the United
15 States are covered by the Carmack Amendment, but only to
16 the extent of the transportation being within the United
17 States.

18 JUSTICE BREYER: So why don't they have to
19 issue a bill of lading? That's what they say. So every
20 company, the Finnish company, Chinese, every company,
21 every shipowner, even if you've never have been to the
22 United States -- sad for him, but nonetheless -- if
23 every one of those is going to have to issue a bill of
24 lading, whatever, meeting whatever requirements are
25 there, and we know at least one requirement you think

1 applies.

2 MR. FREDERICK: Let me go back -- let me go
3 back to the international point, Justice Breyer, because
4 the railroads argued against an international uniform
5 rule that would apply both to ocean carriage and inland
6 carriage in the Rotterdam rules. And they made the
7 representation to the international community, you don't
8 need to have a uniform rule that applies to both ocean
9 carriage and inland carriage, because we have this thing
10 called the Carmack Amendment. And they made the
11 representation that the Carmack Amendment would apply to
12 imports, as this Court in the Woodbury case written by
13 Justice Brandeis, decided in 1920, and a month
14 earlier --

15 JUSTICE SCALIA: What are you arguing,
16 estoppel?

17 MR. FREDERICK: No, I'm arguing that their
18 position is inconsistent with their representations, and
19 therefore the plain language of the statute --

20 JUSTICE SCALIA: Which one is right? That's
21 what we are concerned about.

22 MR. FREDERICK: What I'm --

23 JUSTICE SCALIA: Which one is right? Their
24 earlier position or their current position?

25 MR. FREDERICK: Their earlier -- their

1 earlier position was correct under the plain
2 language of --

3 JUSTICE SCALIA: Why don't you speak to that
4 rather than the fact that they had an earlier position?

5 MR. FREDERICK: The plain language,
6 Justice Scalia, as it is currently enforced I think
7 disposes of the case without any real argument.

8 JUSTICE SOTOMAYOR: Excuse me, can I go back
9 to Justice Breyer's question?

10 MR. FREDERICK: Yes.

11 JUSTICE SOTOMAYOR: And perhaps, as I
12 understand this, I think we are all forgetting that none
13 of these liability provisions come into play until there
14 is proof that an incident has occurred somewhere, either
15 on a railroad or on the ocean, correct?

16 MR. FREDERICK: Correct.

17 JUSTICE SOTOMAYOR: And so the issue becomes
18 which set of rules governs that particular incident --

19 MR. FREDERICK: Correct.

20 JUSTICE SOTOMAYOR: -- where it happens.

21 MR. FREDERICK: Correct.

22 JUSTICE SOTOMAYOR: I think Justice Breyer
23 asked you why it made sense that there would be two
24 rules in effect for what happens on the ocean and what
25 happens on land; and if we had it, wouldn't it create

1 great difficulty. I think -- you may correct me.

2 JUSTICE BREYER: Your point was --

3 MR. FREDERICK: That's how the world --

4 JUSTICE BREYER: -- if it creates such
5 difficulty, why were the railroads in favor of it
6 before?

7 MR. FREDERICK: Correct. And that's how --
8 that's how Europe operates. Europe has separate
9 conventions for rail and road that apply to damage that
10 occur on land and the European nations have acceded to
11 the various versions of Hague rules --

12 JUSTICE BREYER: Anything here that says on
13 land? Anything in Carmack that says on land?

14 MR. FREDERICK: Well, it's transport --

15 JUSTICE BREYER: In other words, if it's in
16 a ferry boat? Remember, we have a very broad definition
17 of "rail" where "rail" includes all things that have
18 nothing to do with rail.

19 So now we have got that broad definition,
20 and I would have thought we through what has to be in
21 the receipt and then we get to the -- that section and
22 where it's exempt, because they got -- want to get rid
23 of it; then you have to put in -- you have to put in a
24 certain kind of waiver, which is very hard to achieve.
25 And that -- that's my understanding of it.

1 MR. FREDERICK: It's the Surface
2 Transportation Board, Justice Breyer, that has the
3 jurisdiction here.

4 JUSTICE BREYER: Yes, but they can't get rid
5 of the thing you like.

6 MR. FREDERICK: No, they can.

7 JUSTICE BREYER: And --

8 MR. FREDERICK: They can.

9 JUSTICE BREYER: How do they do it?

10 MR. FREDERICK: And I want to answer
11 Justice Kennedy's question. They can. These are
12 background rules that we are talking about and they will
13 be contracted around. After the Somo decision was
14 decided in the Second Circuit, Union Pacific went right
15 out and changed the contract that they had with ocean
16 carriers to ensure that the ocean carriers would
17 indemnify them if they were liable and did not get the
18 full benefits of contractual extensions. What we're
19 talking about here --

20 CHIEF JUSTICE ROBERTS: Counsel --

21 MR. FREDERICK: -- is whether there's an
22 American forum for American cargo interests for an
23 American train that is derailed in the United States.
24 That's what we are talking about.

25 CHIEF JUSTICE ROBERTS: But part of your

1 argument -- you don't rely heavily on your plain
2 language argument when it comes to deciding that these
3 huge ocean vessels are rail carriers.

4 MR. FREDERICK: Let me go to that point now,
5 Mr. Chief Justice. The Port of Long Beach is situated
6 more than 20 miles from Los Angeles and the port has
7 60 miles of train track with intermodal, multimodal
8 facilities that get the cargo containers, which "K" Line
9 owns on chassis that "K" Line owns, and they have to get
10 from the Port of Long Beach 20 miles away to the Los
11 Angeles train depo where Union Pacific picks them up.

12 Now, under "K" Line's theory of the case
13 they get to have a donut hole in the Carmack Amendment
14 liability provision for that 20-mile transport. We
15 would submit as a factual matter, which of course would
16 need to be done on remand, that there are facts that can
17 be adduced to establish the functionality test which the
18 ICC has long administered to look at the functions being
19 performed as well as --

20 CHIEF JUSTICE ROBERTS: So that's a little
21 bit different from your argument that they are a rail
22 carrier because their bill of lading would cover the
23 train ride to Chicago.

24 MR. FREDERICK: We didn't make that
25 argument. Our argument was that, based on the functions

1 and them holding themselves out to be a rail carrier,
2 which they have done, they qualify under the normal ICC
3 method of determining rail carrier.

4 CHIEF JUSTICE ROBERTS: If it weren't -- if
5 it weren't for the -- for the track from Long Beach to
6 Los Angeles, you would say then they are not a rail
7 carrier?

8 MR. FREDERICK: The argument as the ICC is
9 defined it also looks at things like the multimodal
10 facilities, like the containers, and -- and the holding
11 themselves out as a rail carrier in their advertising.
12 Those are important parts of the functionality test.

13 JUSTICE KENNEDY: Well, how -- how does
14 the Chief Justice's hypothetical work with the language
15 of the statute? They -- it just goes to Los Angeles and
16 it -- there is a railroad track right by -- by the
17 wharf, and it's the Union Pacific Railroad.

18 MR. FREDERICK: Well, there are -- there are
19 two ways to read the text and resolve the case. One is
20 to say "K" Line is the receiving rail carrier when it
21 transfers from the international ocean carriage
22 corporation to the American multimodal transportation
23 operation and gets the goods from the Port of Long Beach
24 up to Los Angeles, and then treat UP, Union Pacific, as
25 the delivering rail carrier. Under the statute UP is

1 not required -- although the first part says you are
2 supposed to issue a bill of lading, their liability for
3 the train derailment does not turn on whether they
4 issued a bill of lading or not.

5 JUSTICE SOTOMAYOR: Is your case -- does
6 your case end if we hold that "K" Line is not a railroad
7 carrier?

8 MR. FREDERICK: No.

9 JUSTICE SOTOMAYOR: All right.

10 MR. FREDERICK: "K" Line gets out of the
11 case. We would have to go to Tokyo to pursue "K" Line
12 under the bill of lading. But we could continue our
13 suit against Union Pacific as a delivering rail carrier
14 delivering carrier under the Carmack Amendment.

15 JUSTICE SOTOMAYOR: As a delivering carrier.

16 MR. FREDERICK: Correct.

17 CHIEF JUSTICE ROBERTS: Well, unless we
18 hold, as your friends argue on the other side, that they
19 can opt out under 10709.

20 MR. FREDERICK: Well, you would need to
21 reach the question of whether or not exempt carriage
22 under 10502 takes away the option of a 10709 contract.

23 CHIEF JUSTICE ROBERTS: And that's a
24 different question with respect to liability and claims
25 than with respect to venue.

1 MR. FREDERICK: Correct. And let me address
2 that if I might.

3 JUSTICE SOTOMAYOR: Could I just -- just
4 briefly before you answer the Justice -- the Chief.

5 MR. FREDERICK: Sure.

6 JUSTICE SOTOMAYOR: In what capacity -- "K"
7 Line is the contracting party with Union Pacific. Under
8 what contract could the shipper sue Union Pacific?

9 MR. FREDERICK: Under the --

10 JUSTICE SOTOMAYOR: If "K" Line is -- is the
11 shipper.

12 MR. FREDERICK: Directly under the Carmack
13 Amendment. And in fact, when Union Pacific removed this
14 case from State court to Federal court, the Federal
15 question was they said: There is a Carmack Amendment
16 claim being asserted against us. That's how we get from
17 State court to Federal court. And when they -- when
18 they sought to transfer the case from California to New
19 York, they did so on the basis of the convenience of 28
20 of the 32 witnesses to their train derailment being
21 American citizens.

22 So it's not like there needs to be some
23 special -- there is a special cause of action within the
24 Carmack Amendment, Justice Sotomayor, that provides a
25 means of redress for damaged cargo interests to go

1 directly against the railroad.

2 JUSTICE SOTOMAYOR: Regardless of whether
3 the shipment was by them directly or not?

4 MR. FREDERICK: Correct, if they caused the
5 damage. That's the whole point of the Carmack
6 Amendment.

7 CHIEF JUSTICE ROBERTS: Maybe now you could
8 respond to my question about the distinction under 10502
9 between claims and liability and venue.

10 MR. FREDERICK: Yes. The STB, in an
11 authoritative determination that is entitled to our
12 deference, has said that when it issues an exemption for
13 certain categories of rail carriage, which it has done
14 with the multimodal shipments, those exemptions remove
15 the possibility of a 10709 contract carriage.

16 And the reason for that is that in both
17 situations the rail carrier has to provide an
18 opportunity for Carmack-compliant terms to be given to
19 the shipper. If it's exempt cargo carriage under 10502,
20 10502(e) says that the carrier must provide
21 Carmack-compliant terms in order to take advantage of
22 the exemption and contract under the exemption. 10709
23 provides contract carriage, but only if the rail carrier
24 provides common carrier tariffs that a cargo interest
25 could ship under.

1 Here, because the transportation is exempt
2 under 105 -- 10205, there is no common carrier tariff
3 that is applicable. And that's why the STB has said if
4 there is no common carrier tariff applicable under
5 11101, then there cannot be an opportunity for contract
6 carriage. To do otherwise would be to make the statute
7 a complete deregulation statute.

8 CHIEF JUSTICE ROBERTS: Well, but it's a
9 little -- I mean, am looking at page 64a of the petition
10 appendix, where they are saying you can't exempt through
11 contractual terms for liability and claims. Venue is
12 treated elsewhere, separately from liability and claims.
13 So again, under -- you are the plain language team, and
14 that seems fairly plain that venue is not covered.

15 MR. FREDERICK: No -- well, liability, Your
16 Honor, is where you can bring your suit and what your
17 suit --

18 CHIEF JUSTICE ROBERTS: No, the liability is
19 not where you can bring your suit. Liability is
20 liability. Venue is where you can bring your suit.

21 MR. FREDERICK: The -- the way the board has
22 construed this in the letter brief that they filed in
23 the -- in the Second Circuit, which is entitled to our
24 deference, says the Ninth Circuit in Regal-Beloit got it
25 right with respect to the interplay between 10502,

1 10709, and -- and contract carriage.

2 JUSTICE SCALIA: Wait. You say we have to
3 defer to a letter brief in another case?

4 MR. FREDERICK: No --

5 JUSTICE SCALIA: I think most of my
6 colleagues would not defer to a letter brief in this
7 case. And you are saying that we owe deference to a
8 letter brief in another case?

9 MR. FREDERICK: That is what this Court
10 held --

11 JUSTICE SCALIA: Which I didn't agree with,
12 it seems to me.

13 MR. FREDERICK: "Mead did not overrule Auer,
14 and in Auer the Court, this Court, gave deference to a
15 brief by the Federal Government that was setting forth
16 the authoritative --

17 JUSTICE SCALIA: In another case?

18 MR. FREDERICK: In that case.

19 JUSTICE SCALIA: In that case. Do we have a
20 brief here?

21 MR. FREDERICK: But I don't know why -- it's
22 a distinction without a difference, because here the
23 Second Circuit invited the views of the STB to tell us:
24 What do you think is the interplay between these various
25 provisions? And the STB gave an authoritative view to

1 the Second Circuit so that it could resolve a case in
2 which the STB was not a party.

3 JUSTICE BREYER: There are two things here I
4 don't understand. I'm just trying to get clear. In the
5 first part, 706(a), it talks about -- in the definition
6 of "rail carrier." 102-6, I guess -- it says railroad
7 includes -- railroad transport will include intermodal
8 connect -- intermodal equipment transport used in
9 connection with a railroad.

10 What is intermodal equipment?

11 MR. FREDERICK: Those are the chassis. They
12 are the containers that are used to --

13 JUSTICE BREYER: Okay. So now, if we read
14 it literally, to go back to my -- I'm trying to produce
15 the worst example that frightens me the most. There is
16 three miles of railroad transport in the United States,
17 but it carries the chassis, or it carries that big box,
18 which has come all over the world, from all over the
19 world. And if we read this with no limitation, this
20 definition makes ships that carried it from other
21 places, railroads, and once that's railroad
22 transportation, we are into Carmack.

23 And now, if STB exempts it, what happens is
24 the provision comes into play that says you can't exempt
25 an exempt carrier, in effect, from the liability

1 provision. And it means the ships that had to issue the
2 bill of lading now have to allow the kinds of suits --
3 now, here is the point I'm not certain about -- I would
4 think against them, not just against a railroad carrier,
5 and perhaps against them for anything that happens, even
6 on the ocean, and not just the railroad carrier for
7 something that happens within the United States.

8 MR. FREDERICK: No.

9 JUSTICE BREYER: Now, explain to me: What
10 is it that gets us out of that?

11 MR. FREDERICK: There -- the -- COGSA
12 applies tackle to tackling. The damage is occurring on
13 a ship.

14 JUSTICE BREYER: Yes.

15 MR. FREDERICK: The STB has no jurisdiction
16 over that. Carmack does not apply. It is only once the
17 ship --

18 JUSTICE BREYER: Well, where does it say
19 that? Because I better read that one.

20 MR. FREDERICK: Well, COGSA itself, which is
21 set out in the --

22 JUSTICE BREYER: Yes. Yes. Where? Do you
23 know -- do you know offhand where it says that, just so
24 I can --

25 MR. FREDERICK: Yes. I can give -- the

1 provision of COGSA that you are looking for is the
2 definition of "carriage," which is set forth in --

3 JUSTICE BREYER: Good.

4 MR. FREDERICK: -- page 48A of the petition
5 appendix, and it is 1(e). The term "carriage of goods"
6 covers the period from the time when the goods are
7 loaded on to the time when they are discharged from the
8 ship. And as the Court in Kirby said --

9 JUSTICE BREYER: That's COGSA. That's not
10 Carmack.

11 MR. FREDERICK: Right.

12 JUSTICE BREYER: So what gets us out of
13 Carmack?

14 MR. FREDERICK: Carmack only applies if it
15 is carriage and transportation within the STB's
16 jurisdiction. The STB has no jurisdiction over COGSA
17 carriers. That's the Federal Maritime Commission.

18 JUSTICE BREYER: Then why are we suing --
19 why are we suing -- why does the ship being sued here?

20 MR. FREDERICK: The ship is performing two
21 different functions, Justice Breyer. It is performing
22 an ocean function, and then once its on land -- and
23 there were thousands of "K" Line containers all over the
24 United States right now where "K" Line is performing
25 services, motor service and rail carriage services, here

1 in the United States.

2 CHIEF JUSTICE ROBERTS: Is that because they
3 have contracted for them?

4 MR. FREDERICK: They own them.

5 CHIEF JUSTICE ROBERTS: Well, they don't own
6 Union Pacific's rail line.

7 MR. FREDERICK: No, they own the containers
8 that Union Pacific is pulling.

9 CHIEF JUSTICE ROBERTS: So if I -- if I own
10 a container being pulled by somebody else's train, I'm
11 in the train business?

12 MR. FREDERICK: Under the definition of
13 functionality, where that is part of how the STB
14 regulates. And to say otherwise, Mr. Chief Justice,
15 would be to deny the Federal government the regulatory
16 authority over containers that come into this country
17 representing approximately 80% of the trade.

18 CHIEF JUSTICE ROBERTS: No, it wouldn't. It
19 would just -- it may not just mean that they don't have
20 the regulatory authority because that container is a
21 rail carrier. What is carrying it is the rail carrier.
22 It's a container.

23 MR. FREDERICK: But they -- well, at one
24 level, Mr. Chief Justice, it's sort of academic, because
25 the STB exempted from Part A, which includes the Carmack

1 Amendment, those containers, and it did so in an
2 exemption order which we cited in our -- in our brief.
3 So at some level, there is an academic quality to this
4 colloquy.

5 JUSTICE SOTOMAYOR: I think -- I am a little
6 bit confused now. Now, back to being confused.

7 You are suggesting that from the landing,
8 it's an ocean carrier. And the minute that the
9 containers are unloaded from the vessel and put on land,
10 it becomes a railroad carrier, even though its delivery
11 contract may have ended at that point?

12 MR. FREDERICK: No. If its delivery
13 contract ended at that point it did not hold itself out
14 as a rail carrier --

15 JUSTICE SOTOMAYOR: So what about -- what is
16 it that you're arguing makes them a railroad carrier
17 once they put it there. Let's assume the reverse is the
18 hypothetical that you -- that you posited. They deliver
19 to the dock, and Union Pacific is the one that owns
20 those three to six miles of connection to its main
21 railroad. It's the one who is going to provide the
22 motor carriage. It's the one who is going to take it
23 from the -- the dock and bring it in.

24 MR. FREDERICK: And can I just add to the
25 hypothetical the fact, which is an important fact: Did

1 the rail carrier hold itself out to the public as a rail
2 carrier in making the contract with the original
3 shipper? Because that is an important fact that does
4 not help us resolve your particular hypothetical,
5 Justice Sotomayor.

6 If UP is picking up the goods with its
7 equipment, the ocean carrier is not a rail carrier under
8 our theory of the case. There has to be functions being
9 performed that are multimodal functions and the ocean
10 carrier has to --

11 JUSTICE SOTOMAYOR: So it's not merely that
12 it has possession of the container that it has dropped
13 somewhere. It has to transport it in some way in
14 relationship to the railroad?

15 MR. FREDERICK: I think that's the best way
16 to understand the statute.

17 JUSTICE BREYER: Can we go back one more
18 second? Can you just give me the citation in Carmack --
19 not COGSA, but Carmack -- that would get our intermodal
20 shipment out of the board's jurisdiction?

21 Because what I'm thinking about is the
22 intermodal shipment and the boat sinks near Hawaii.
23 Okay? Now, on your reading of Carmack, not COGSA, what
24 gets that shipment sunk in Hawaii -- or Midway or Guam
25 or someplace -- what gets them out of Carmack? Which

1 words?

2 MR. FREDERICK: Well, the -- on 62A, the
3 petition appendix defines the general jurisdiction.

4 JUSTICE BREYER: And it includes transport
5 just as you defined it between the United States and
6 another place -- United States and a place in a foreign
7 country.

8 MR. FREDERICK: Yes.

9 JUSTICE BREYER: So that's what this is.
10 This is a shipment between Shanghai and San Francisco.

11 MR. FREDERICK: And at (a)(2) -- will you
12 look at (a)(2), please? (A)(2) says jurisdiction under
13 paragraph 1 applies only to transportation in the United
14 States.

15 JUSTICE BREYER: Oh, sorry, between a place
16 in -- oh, transportation in the United States.

17 MR. FREDERICK: In the United States.

18 JUSTICE BREYER: Between a place in.

19 MR. FREDERICK: Exactly.

20 JUSTICE BREYER: Thank you.

21 MR. FREDERICK: Yes, thank you.

22 (Laughter.)

23 MR. FREDERICK: Now, it is not true that the
24 law was settled prior to 1978. The Woodbury case
25 applied the Carmack Amendment to imports. Union

1 Pacific v. Burke applied it to imports. And in those
2 cases, this court made the determination that the words
3 "from" and "to" were also meaning "between." And
4 Congress, when it cleaned up the statute in 1978 and
5 provided words that are very easy to understand now, was
6 not changing what had been a well-settled practice of
7 goods that were getting -- arriving at a port in the
8 United States and then being transported by land means.

9 And it's important to understand the context
10 in which this arose. Because I think our fundamental
11 disagreement with the Solicitor General's presentation
12 is that it ignores the container revolution that was
13 occurring between the late 1950's and the '70s, when
14 this act was codified and cleaned up. And in that
15 container revolution, prior to the time when containers
16 were used for multimodal transportation, it was common
17 for goods to be repackaged at ports in the United
18 States. They were taken off ships. They were
19 repackaged, put onto trains or trucks, and that required
20 a separate contractual arrangement. Now, this Court, in
21 Woodbury and Burke, had said it is not so important
22 whether or not there is a separate contract, so long as
23 the function and the intent is clear that it is being
24 moved by rail or road in the United States.

25 The Carmack Amendment will apply, Justice

1 Sotomayor. You are completely correct that the purpose
2 of the Carmack Amendment was to hold railroads and motor
3 carriers responsible for the liabilities caused by their
4 loss. But when Congress cleaned that up and put it in
5 section 3, it was not intending to obviate the clear and
6 unambiguous language of the statute. It was simply
7 providing, you know, some boilerplate that I think is
8 very difficult to -- to cause the Court to override the
9 plain language of the statute today.

10 And in 1995, when Congress eliminated --
11 terminated the ICC and enacted the ICC Termination Act,
12 it reenacted that language. It did not encompass
13 section 3 at that time, so the statute as it presently
14 exists does not have a statutory pointer as to how you
15 are to interpret the language. And under the normal
16 canons that this Court has instructed for courts in the
17 bar, the easiest way to practice law in this area is to
18 look at the statute, see what it says, and not have to
19 go back, not just through the last iteration of the
20 statute, but the one before that, and not just to be
21 able to look at what was in the U.S. Code, but to have
22 to go back to the statutes at large to see what other
23 statutory provisions Congress had put into the statute.
24 That would make the practice of law extremely difficult.

25 JUSTICE SCALIA: Can I ask you a question

1 about -- about whether -- whether the shipper becomes a
2 rail carrier? Suppose it's not three to five miles.
3 Suppose the -- suppose the American rail carrier is
4 waiting right at the foot of the wharf.

5 All these wharfs have rails that go out to
6 the ship, okay? And let's assume that that's owned by
7 the shipping company. And a crane takes the -- the
8 goods off of the ship, puts it on a -- on a car that
9 rides along those rails for a couple of hundred yards.
10 Is that enough to make the shipper a railroad?

11 MR. FREDERICK: I would -- I would concede
12 the point of interchange at the port, Justice Scalia. I
13 don't think it's necessary for the Court to reach that.
14 I will concede that point, so long as, you know, we are
15 talking about an immediate nexus between the vessel and
16 the ship. And -- and that is not -- not a point that we
17 have to prevail on to win in this case.

18 JUSTICE SCALIA: And you say here they own
19 rail lines that --

20 MR. FREDERICK: There are 60 --

21 JUSTICE SCALIA: -- that go for --

22 MR. FREDERICK: Well, there was no discovery
23 because this was decided on the pleadings as a matter of
24 law. We believe that once discovery is permitted, if
25 you allow the case to go back for factual development,

1 that the facts would reveal that "K" Line was engaging
2 in significant rail operations that at least get us
3 beyond -- into the realm of legitimate advocacy.

4 JUSTICE SOTOMAYOR: When you say "engaging
5 in," are you talking about vis-à-vis this shipment?

6 MR. FREDERICK: Yes.

7 JUSTICE SOTOMAYOR: Or is it just in
8 general? Vis-à-vis you?

9 MR. FREDERICK: That's correct. When my
10 colleague here says that we take the position that
11 Carmack cannot be contracted around, that is not true.
12 Our point here is that when there is exempt carriage,
13 the STB has already defined this as something that can
14 be provided by contract, but we believe that 10502(e)
15 says that they have to provide Carmack-compliant terms.

16 The industry will adapt to a decision by
17 this Court in setting the background rules. We would
18 submit that the simpler regime and the one that the
19 railroad had advocated in the international community
20 was their -- was for there to be a U.S. statute that
21 applies and not to allow complete deregulation through
22 contracts --

23 CHIEF JUSTICE ROBERTS: Well, they -- they
24 can't contract around liability for an event such as the
25 one that happened here. Because they have to offer

1 Carmack-compliant terms, and if the owner of the goods
2 has the option of accepting those, they can't contract
3 around that.

4 MR. FREDERICK: That's correct. And -- and
5 the point here about the forum is an important one,
6 because Union Pacific has never thought that in these
7 ocean bills of lading that that entitles American cargo
8 interest to have to go to a foreign country under the
9 ocean carrier's bill of lading in order to vindicate the
10 interests in damage to their cargo. That was an
11 invention by "K" Line in this case after UP sought to
12 remove it under the Carmack Amendment and transfer it to
13 New York, and UP joined that motion and has argued
14 throughout that the Carmack Amendment applies.

15 It would be unusual, to say the least, to
16 allow UP now to take advantage of a contractual
17 extension of COGSA where section 12 of COGSA, by its
18 plain terms, in language that is completely ignored by
19 the other side, says COGSA stops basically at the
20 tackle-to-tackle period and does -- otherwise does not
21 affect otherwise applicable law. And there is a
22 specific reference in section 12 to the Harter Act and
23 any other applicable law. And in 1936, when Congress
24 enacted COGSA to implement the United States -- of the
25 Hague rules, it was aware of the Carmack Amendment.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
2 Mr. Ballenger, you have four minutes
3 remaining.

4 REBUTTAL ARGUMENT OF J. SCOTT BALLENGER
5 ON BEHALF OF PETITIONERS

6 MR. BALLENGER: Thank you, Your Honor.
7 Even Respondents can't really bring
8 themselves to say that Union Pacific is the receiving
9 carrier here. It's obviously not. They say that
10 somehow, UP could be liable as the delivering carrier
11 under Carmack. But of course, if "K" Line is not a rail
12 carrier, there is no receiving carrier who is obligated
13 to issue a bill of lading under Carmack.

14 No one is allowed to under Carmack. That is
15 how the statute always worked, from 1906 to 1978. If
16 the receiving carrier was not governed by Carmack, as it
17 was not in any import case and in any export case except
18 for Canada and Mexico, then Carmack did not apply to
19 anyone. You can't parachute in midstream into the
20 middle of a big movement and impose Carmack's
21 obligations at the midpoint, because that would turn the
22 historic purpose of Carmack completely upside down. It
23 would read Carmack as mandating the commercial problem
24 that Carmack was designed to solve.

25 The point of Carmack and the through bills

1 under Carmack and COGSA is uniformity of responsibility
2 under consistent terms for the whole voyage in one
3 person.

4 And the reason is that in order to recover
5 from anyone, the shipper has to prove receipt of the
6 goods in good condition by that carrier, and if you
7 break the chain of the through bill, then you would have
8 to prove -- the shippers would have to prove that Union
9 Pacific, for instance, received the property in good
10 order, when as Respondents concede, all that Union
11 Pacific gets is a sealed container. It has no idea at
12 that point.

13 And -- and so the shipper would be left in a
14 position at the end of the day; it opens the container,
15 there's damage; no one knows where it occurs; and there
16 is -- there is no source of law, no source of facts to
17 figure out where the damage occurred.

18 Respondents raise a lot of questions about
19 some track that they say "K" Line owns from Long Beach
20 to Los Angeles. None of this is in the record, and it's
21 waived at this point, Your Honors. It's not actually
22 true, that's not "K" Line; it's an affiliate; and they
23 don't provide rail transportation, it's a Union Pacific
24 subsidiary that provides the rail transportation.

25 But the real point is that all of this is

1 far too late. This case was decided on a rule 12(b)(3)
2 motion to dismiss for improper venue, and the lower
3 courts have made clear, sensibly, that if you are
4 confronted with a forum selection motion to dismiss, you
5 are required to at least come forward with any factual
6 disputes that you think need to be resolved before the
7 district court can grant or deny that motion. It's far
8 too late to wait until the Supreme Court of the United
9 States, and say we have discovered some X number of
10 miles --

11 JUSTICE BREYER: How -- how do you get out
12 of the language that says that a rail carrier providing
13 transportation shall issue a receipt for property it
14 receives?

15 Now the boat, oddly enough, is a rail
16 carrier under the definition.

17 MR. BALLENGER: The --

18 JUSTICE BREYER: And therefore, it should
19 have issued -- since you agree it's the receiving
20 character, it should have -- it should have issued a --
21 a bill of lading, that then, if it's within Carmack as
22 I've just tried to put it, requires it to have certain
23 things in it that they say aren't there.

24 MR. BALLENGER: Under the definition a rail
25 carrier is a party providing railroad transportation.

1 And this --

2 JUSTICE BREYER: Yes, right; and now we see
3 a rail carrier; we've got the definition there; and it
4 includes somebody who provides intermodal equipment and
5 you look at transportation and transportation includes
6 services related to that equipment.

7 MR. BALLENGER: The definitions of railroad
8 and transportation have always been defined to include
9 all of the equipment used by a real railroad. But that
10 doesn't mean that anyone who happens to own that
11 equipment is also a railroad. For instance --

12 JUSTICE BREYER: Ah, now all right. Fine.

13 MR. BALLENGER: -- the purpose of -- the
14 purpose of those definitions from 1906 on is to make
15 sure that railroads couldn't evade rate regulation by
16 overcharging for the use of a bridge.

17 JUSTICE BREYER: But, now just give me how
18 -- what I would write in the opinion that would in
19 fact -- because what they did here, the ship, is it took
20 the container and put it on the train. Okay? So that's
21 interservice equipment. What's the language that does
22 it your way?

23 MR. BALLENGER: A party providing rail
24 common carrier transportation, the scope of the -- of
25 that transportation is defined to include a container.

1 But that doesn't mean that everyone who owns a container
2 is -- meets the first part of the definition of
3 providing railroad transportation. Otherwise, for
4 instance, everyone who owned a bridge or a track or
5 provided rail cars would be providing railroad
6 transportation.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 The case is submitted.

9 (Whereupon at 11:06 a.m., the case in the
10 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>able 52:21</p> <p>above-entitled 1:19 60:10</p> <p>absolutely 5:14 6:13 14:10</p> <p>academic 47:24 48:3</p> <p>acceded 35:10</p> <p>accepting 55:2</p> <p>achieve 35:24</p> <p>act 6:18 15:24 16:18 17:8 51:14 52:11 55:22</p> <p>action 40:23</p> <p>actual 7:5</p> <p>adapt 54:16</p> <p>add 48:24</p> <p>added 26:13</p> <p>address 20:7,11 40:1</p> <p>addressed 21:18</p> <p>addresses 20:9</p> <p>adduced 37:17</p> <p>adjacent 17:14 21:1 23:21 24:15</p> <p>adjust 19:6,9</p> <p>administered 37:18</p> <p>adopt 19:11</p> <p>adopted 7:2</p> <p>advantage 41:21 55:16</p> <p>advertising 38:11</p> <p>advocacy 54:3</p> <p>advocated 54:19</p> <p>affect 30:17 55:21</p> <p>affiliate 57:22</p> <p>agents 21:10</p> <p>ago 5:16 27:7</p> <p>agree 43:11 58:19</p>	<p>agreed 5:17</p> <p>Ah 59:12</p> <p>AL 1:4,7,14</p> <p>allow 21:7 45:2 53:25 54:21 55:16</p> <p>allowed 56:14</p> <p>ambiguous 26:22,23</p> <p>Amendment 4:14 5:17 6:18 29:24 30:1,3,6 31:19 32:15 33:10,11 37:13 39:14 40:13,15 40:24 41:6 48:1 50:25 51:25 52:2 55:12,14,25</p> <p>American 8:13 31:15 36:22,22 36:23 38:22 40:21 53:3 55:7</p> <p>amicus 2:2 3:7 20:3</p> <p>anchor 21:22</p> <p>anchors 23:8</p> <p>Angeles 37:6,11 38:6,15,24 57:20</p> <p>answer 36:10 40:4</p> <p>ANTHONY 1:25 3:6 20:2</p> <p>apart 12:11</p> <p>appear 27:3,4</p> <p>APPEARAN... 1:22</p> <p>appeared 10:3</p> <p>appears 7:14 10:2</p> <p>appendix 20:21 21:25 22:5,9 42:10 46:5 50:3</p>	<p>appendixes 22:11</p> <p>applicable 7:3 15:20 42:3,4 55:21,23</p> <p>application 5:2</p> <p>applied 19:16 50:25 51:1</p> <p>applies 4:19 18:1 22:14 24:22 30:3 33:1,8 45:12 46:14 50:13 54:21 55:14</p> <p>apply 4:14,20,22 5:3 7:19 17:12 17:13 28:7 31:13,19 33:5 33:11 35:9 45:16 51:25 56:18</p> <p>approximately 47:17</p> <p>area 52:17</p> <p>argue 39:18</p> <p>argued 33:4 55:13</p> <p>arguing 33:15 33:17 48:16</p> <p>argument 1:20 3:2,5,9,12 4:4 4:8 8:4,4 20:2 28:6,11,14,15 28:17,20 29:11 31:7 34:7 37:1 37:2,21,25,25 38:8 56:4</p> <p>arguments 5:19 8:3</p> <p>arose 51:10</p> <p>arrangement 17:10 51:20</p> <p>arriving 51:7</p> <p>art 12:9</p> <p>asked 20:9 34:23</p> <p>asking 31:6</p>	<p>asserted 40:16</p> <p>Assistant 1:25</p> <p>assume 19:3 48:17 53:6</p> <p>Atlantic 14:21</p> <p>Auer 43:13,14</p> <p>authoritative 41:11 43:16,25</p> <p>authority 47:16 47:20</p> <p>averted 29:19</p> <p>aware 55:25</p> <p>a.m 1:21 4:2 60:9</p> <p>A.2 22:13</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>b 23:15</p> <p>back 7:14 11:19 20:15 23:14 33:2,3 34:8 44:14 48:6 49:17 52:19,22 53:25</p> <p>background 36:12 54:17</p> <p>Ballenger 1:23 3:3,13 4:7,8,10 4:24 5:10,14 5:25 6:13 7:7 8:5,23 9:5,10 9:25 10:11,19 10:24 11:4,11 11:22 12:8,19 12:22 13:6,11 13:14,16 14:19 15:4,7,12,21 15:23 16:9,21 17:4,22 18:10 19:13,25 56:2 56:4,6 58:17 58:24 59:7,13 59:23</p> <p>bar 52:17</p> <p>based 37:25</p> <p>basically 26:12 55:19</p>	<p>basis 5:23 6:6 16:22 40:19</p> <p>Beach 37:5,10 38:5,23 57:19</p> <p>beginning 21:7</p> <p>behalf 1:23 2:4 3:4,7,11,14 4:9 20:2 29:12 56:5</p> <p>believe 4:24 7:18 20:20,23 21:19 24:8,19 26:16 28:4,6,11 53:24 54:14</p> <p>benefits 36:18</p> <p>best 20:14 49:15</p> <p>better 45:19</p> <p>beyond 24:10 54:3</p> <p>big 31:15 44:17 56:20</p> <p>bill 10:15 13:4,8 13:22 14:1,3 14:17,23,25 15:19 16:6,7 16:16 21:6,13 22:21 23:25 28:1 30:10,11 30:16,23 31:17 32:19,23 37:22 39:2,4,12 45:2 55:9 56:13 57:7 58:21</p> <p>bills 17:6 19:19 55:7 56:25</p> <p>binding 27:14 27:17</p> <p>bit 9:1 37:21 48:6</p> <p>board 10:15,21 11:10,15 21:5 36:2 42:21</p> <p>board's 49:20</p> <p>boat 35:16 49:22 58:15</p> <p>boilerplate 7:3,6</p>
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