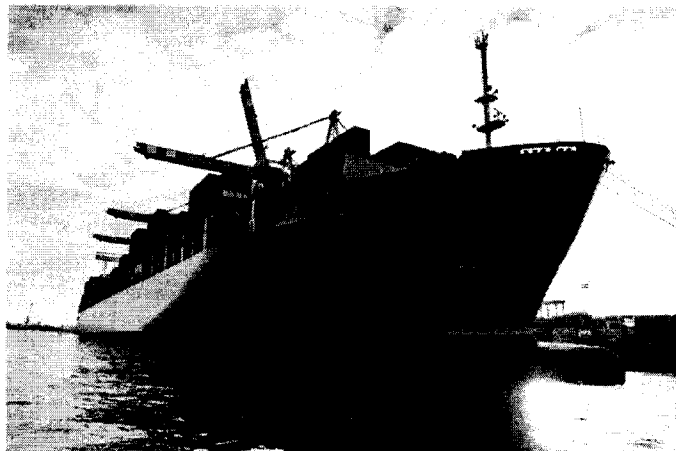


International Shipments and the Eroding Application of the Carmack Amendment

John E. Anderson, Sr. and Jonathan R. Patton



Introduction

In today's global marketplace, it is not uncommon for products to be shipped across borders to reach consumers in every corner of the world. Inevitably, as products travel great distances via multiple forms of transportation, accidents sometimes occur in which the cargo is damaged or destroyed.

The Carmack Amendment provides a well-established legal regime to deal with such incidents that occur on interstate trucking shipments within the United States. When the accident occurs on the domestic portion of an international route, however, the applicability of the Carmack Amendment is still evolving. The purpose of this article is to examine the application of the Carmack Amendment to international shipments. First, it provides an introduction to the Carmack Amendment. Then, it discusses how the Carmack Amendment applies to international shipments and examines the Supreme Court's recent decision in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* Finally, the article profiles three recent cases that all suggest a more limited application of the Carmack Amendment to transnational shipments after *Kawasaki*. This article does not address the applicability of the Carmack Amendment to transportation by a motor carrier in the United States solely between a place in a state and a place in another state.

The Carmack Amendment

The Carmack Amendment was enacted in 1906 to govern bills of lading in the rail transportation industry.¹ It has been altered and codified over the last century.² In its current form, it provides a uniform national system of liability and damages for interstate rail and motor carriers designed to provide certainty to both shippers and carriers.³

Carmack represents a codification of the common law rule imposing strict liability upon the common carrier—without proof of negligence.⁴ Where applicable, Carmack

imposes upon 'receiving carriers' and 'delivering carriers' liability for actual loss or injury to property caused during the motor or rail route under the bill of lading, regardless of which carrier caused the damage.⁵ One purpose of Carmack is to relieve cargo owners of the burden of searching out a particular negligent carrier among the often numerous carriers handling an interstate shipment of goods.⁶

When does the Carmack Amendment apply to International Shipments?

One evolving issue is the applicability of the Carmack Amendment to portions of international shipments. By its terms, the Carmack Amendment applies to shipments between places in the United States, and between a place in the United States and a place in a foreign country to the extent the transportation is in the United States.⁷ Although this seems clear, what is not entirely clear is whether the Carmack Amendment applies to domestic segments of an international shipment that involves multiple different methods of transportation and one contract—often a through bill of lading—that covers all segments of the journey.

The U.S. Supreme Court dealt with this issue in the case of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corporation*. In *Kawasaki*, the plaintiffs were cargo owners who contracted with the defendant to transport their cargo from China to inland destinations in the midwestern United States.⁸ The defendant issued four through bills of lading that covered the entire course of the shipment, including the transport segments through the United States.⁹

The through bills of lading included several provisions at issue in the case. First, they included a "Himalaya Clause," which purported to extend the through bills' limitations on liability to subcontracting carriers.¹⁰ Second, they allowed the Defendant to sub-contract on any terms whatsoever.¹¹ Third, the bills provided that the Carriage of Goods by Sea Act (COGSA) applied to the entire journey, not just the sea portion.¹² And finally, the bills included a forum-selection clause requiring that lawsuits relating to the carriage be brought in Japan.¹³

The goods were shipped to a port in Long Beach, Calif. where the containers were loaded onto a Union Pacific train.¹⁴ The cargo was destroyed when the train carrying the cargo derailed in Tyrone, Okla.¹⁵ The plaintiffs filed suit in California, and they argued that the Carmack Amendment applied to the portion of the cargo's journey in the inland United States and that it therefore trumped the forum-selection clause (and the other clauses) in the through bills of lading.¹⁶ The District Court for the Central District of California disagreed and dismissed the case.¹⁷ On appeal,

INTERNATIONAL continued on page 6

INTERNATIONAL continued from page 5

however, the Ninth Circuit agreed with the plaintiffs and held that the Carmack Amendment applied to the inland portion of the journey.¹⁸

The issue was whether the terms of a through bill of lading issued abroad by an ocean carrier can apply to the domestic part of the import's journey by a rail carrier and supersede the Carmack Amendment. The Supreme Court held that Carmack does not apply to the domestic segments of a shipment originating overseas under a single through bill of lading.¹⁹

Justice Kennedy, writing for the majority, reasoned that since Carmack only applies to carriers required by the statute to issue a Carmack-complaint bill of lading, and since only "receiving carriers" are required to issue such a bill of lading, in order for Carmack to apply to a carrier, that carrier must be a "receiving carrier" under the statute.²⁰ He explained that a receiving carrier for purposes of the Carmack Amendment was only the initial carrier that "received" the property "at the journey's point of origin."²¹ He then concluded that since the defendant received the cargo at an overseas location under a through bill of lading that covered transport into an inland location in the United States, the journey did not include a receiving rail carrier that had to issue bills of lading under Carmack, and, consequently, Carmack did not apply.²²

Thus, the Supreme Court's decision in *Kawasaki* limited Carmack's application in international shipments. However, it left open several issues such as whether Carmack applies to situations where goods are received in the United States for export, and whether it applies in situations involving a freight forwarder or other intermediaries.

These questions and the application of the Carmack Amendment after *Kawasaki* are making their way through the lower courts. Three recent opinions demonstrate that courts seem to be using *Kawasaki* to carve out even more instances where carriers can avoid Carmack liability.

Recent Cases

In *Norfolk Southern Railway v. Sun Chemical Corp.*, the plaintiff, Sun Chemical Corporation (Sun), hired an ocean carrier to transport two containers of ink manufactured by Sun from Kentucky to Brazil.²³ After the ocean carrier hired a freight forwarding company to arrange the shipment, the freight forwarder hired the defendant, Norfolk Southern Railway Company (Norfolk) to carry the ink by rail from Kentucky to Savannah, Georgia, where it would begin its ocean voyage to Brazil.²⁴ The rail cars carrying the containers derailed and the ink was destroyed.²⁵ Sun and its insurer sued Norfolk for negligence and breach of contract.²⁶ Sun moved for summary judgment on several theories, including the theory that Norfolk was strictly liable for the loss under the Carmack Amendment.²⁷ The trial court granted the motion for summary judgment and held that Norfolk Southern was subject to the Carmack Amendment.²⁸

Sun had entered into a contract with the ocean carrier under a "through bill of lading," a bill in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction.²⁹ The ocean carrier thus took responsibility for the entire transportation of the shipment from the place of receipt to the place of the final destination, and it retained the right to use the services of other carriers and modes of transportation.³⁰ Sun also authorized the ocean carrier to subcontract on any terms for the handling and carriage of the goods.³¹

Under this authority, the ocean carrier contracted with a freight forwarding company for inland transportation, which in turn hired Norfolk to transport Sun's ink from Kentucky to Savannah.³² The transportation agreement between the freight forwarding company and Norfolk incorporated Norfolk's rules circular governing such transport, which offered customers a choice between "standard" and "Carmack" liability provisions.³³ The rules circular stated in bold face capitals that unless language expressly selecting "Carmack" was included in the original shipping instructions, any tender of freight for transportation would be accepted under standard liability coverage provided and not under Carmack coverage.³⁴

The primary question before the Georgia Court of Appeals was whether Sun could be bound by the agreement of the freight forwarder and Norfolk, reached without notice to Sun, such that Norfolk could not be held strictly liable under the Carmack agreement.³⁵ The Court held that Norfolk was not subject to Carmack liability for several reasons: first, the bill of lading issued by the ocean carrier was a "maritime contract" to which Carmack liability does not apply; second, Norfolk was not the "receiving carrier" of the ink containers for purposes of Carmack liability; and third, Sun authorized downstream carriers to reach their own terms as to liability, which the freight forwarder did but then declined Norfolk Southern's offer of Carmack liability.³⁶ The court of appeals, therefore, held that Norfolk was not subject to the Carmack Amendment.

In *Royal & Sun Alliance Insurance, PLC v. Service Transfer, Inc.* the parties disputed whether the domestic leg of an international transportation contract was governed by COGSA or the Carmack Amendment.³⁷ The defendant was an interstate motor carrier that provided service to ocean carrier American President Lines, Ltd. (APL).³⁸ In April 2011, Biolife Plasma Services, LLC delivered a shipment of frozen human plasma to the defendant at a warehouse in Kentucky.³⁹ It was intended that the defendant would transport and deliver the plasma from Kentucky to APL in Norfolk, Virginia for further shipment by sea to Bremerhaven, Germany en route to its ultimate destination in Vienna, Austria.⁴⁰ Biolife is part of Baxter and the plasma was to be delivered to a European affiliate of Baxter.⁴¹ While driving between Kentucky and Virginia, the defendant's truck driver fell asleep and drove the truck off the road.⁴² The truck burned and the shipment

was lost. Royal and Sun Alliance (Royal) commenced the action as subrogee of Baxter.⁴³

The shipment of plasma was subject to a sea waybill between Baxter and APL.⁴⁴ The waybill provided for the through intermodal transport of the goods from Kentucky to Vienna, Austria.⁴⁵ The waybill included a Clause Paramount and a Himalaya Clause.⁴⁶ The clauses, in relevant part, extended APL's liability under COGSA to the period prior to loading goods onto APL's ocean vessel and permitted APL's subcontractors to invoke COGSA liability limitations, respectfully.⁴⁷

When the defendant's truck driver picked up the shipment from Kentucky on April 11, 2011, the defendant driver signed a straight bill of lading dated April 9, 2011.⁴⁸ The bill of lading stated that the subject shipment was from MDI in Kentucky to Baxter AG in Vienna, Austria.⁴⁹

In its discussion, the court noted that COGSA governed the terms of bills of lading issued by ocean carriers engaged in foreign trade.⁵⁰ Further, COGSA allowed parties the option of extending certain COGSA terms by contract to cover the entire period to which the goods would be under a carrier's responsibility, including a period of inland transport.⁵¹ The Carmack Amendment, by contrast, governed the terms of bills of lading issued by domestic motor carriers providing transportation or service subject to the jurisdiction of the surface transportation board.⁵²

The court held that the clear terms of the waybill stated that COGSA governed this action.⁵³ The ocean freight services agreement between Baxter and APL provided that liability for any freight claims shall be determined pursuant to the terms and conditions of the waybill.⁵⁴ The waybill specified that APL was responsible for the performance of the carriage from the place of receipt to the place of delivery of the combined carriage indicated on the waybill, namely the shipment of goods from Erlanger, Kentucky to Vienna, Austria via the ports of Norfolk, Va. and Bremerhaven, Germany.⁵⁵ Also, it contained a Clause Paramount that specifically extended COGSA's application to the inland portion of the shipment.⁵⁶ The Himalaya Clause extended COGSA's application to STI as APL's subcontractor on the waybill.⁵⁷ STI did not issue its own bill of lading and thus it had no privity with Baxter.⁵⁸ In fact, no bill of lading was issued by any party to cover solely the domestic segment of the international shipment.⁵⁹ Thus, the court reasoned that claims arising during STI's transport of the goods from the waybill's place of receipt, Erlanger, Ky. to the port of loading, Norfolk, Va., were covered by COGSA.⁶⁰

The court noted that the Carmack Amendment by its terms did not apply to non-receiving carriers transporting goods as part of a shipment between the United States and a non-adjacent foreign country under a through bill of lading.⁶¹ It therefore concluded that COGSA governed the claims at issue in the action and not the Carmack Amendment.⁶²

Finally, *Hartford Fire Insurance Co. v. Expeditors International of Washington, Inc.* involved the loss of solar panels while in transit from the United States to France.⁶³ Hartford brought

the suit as subrogee of Evergreen Solar, Inc. (Evergreen).⁶⁴ Expeditors International of Washington (Expeditors) hired Intransit to transport an empty ocean container to Evergreen in Devens, Mass., and, after having the container loaded by Evergreen, to deliver it to a terminal in Elizabeth, N.J.⁶⁵ Evergreen loaded the container and sealed it with a seal.⁶⁶ On June 29, 2009, Intransit issued a "pick-up/delivery receipt" listing Intransit's "client" as Expeditors and the entity that delivered the container as Evergreen.⁶⁷

On July 2, 2009, Intransit's driver delivered the container with the seal intact.⁶⁸ Intransit claimed that Evergreen sealed the container, at no time during Intransit's transport was the container open and visible for inspection, and that Intransit had no knowledge of how the container was loaded and secured.⁶⁹

Expeditors issued a bill of lading on July 6, 2009, listing Evergreen as the shipper and Soleil Energie SAS (Soleil) as the consignee.⁷⁰ The bill of lading listed the place of Evergreen's receipt as Devens, the port of loading as New York, New York and the place of delivery as Soleil as Fos-Sur-Mer, France.⁷¹ The bill of lading contained a choice of law provision stating that COGSA applied.⁷²

The bill of lading contained three other provisions relevant to the case. First, it contained a limitation of liability provision.⁷³ Second, the bill of lading also limited liability "where the state of carriage during the loss of or damage to the goods cannot be provided"—in that instance, "it will be presumed that the loss or damage occurred during that portion which is considered sea carriage under this bill."⁷⁴ Third, the bill of lading contained a sub-contracting provision, which provided that the carrier could subcontract on any terms, but that Evergreen was to indemnify the carrier against any claims made against it by any of its sub-contractors.⁷⁵

The parties disputed whether COGSA or the Carmack Amendment applied to the action. Intransit argued that COGSA, not the Carmack Amendment, applied to the shipment at issue because Carmack "does not apply to cargo moving under a through bill of lading to or from a non-adjacent country."⁷⁶ The court agreed and noted that the bottom line in determining Carmack's applicability is whether the carrier functioned as a receiving rail carrier.⁷⁷

The court noted that the facts regarding Intransit's role were undisputed. Expeditors contracted with Evergreen for the through movement from the U.S. to France.⁷⁸ It was undisputed that Expeditors was the freight forwarder for the transport at issue.⁷⁹ It was further undisputed that Intransit transported the container to Evergreen in Massachusetts and then delivered the container after it was loaded by Evergreen to the terminal in Elizabeth, N.J.⁸⁰ In other words, Expeditors only contracted a small portion of the move to Intransit, and instructed and permitted Intransit to pick up the cargo from the consignee in Massachusetts pursuant to Expeditors' bill of lading and shipping receipt.⁸¹ So Intransit was an intermediate carrier for the freight forwarder.⁸²

On those facts, the court decided that Expeditors, not

INTERNATIONAL continued on page 8

INTERNATIONAL continued from page 7

Intransit, was the receiving carrier.⁸³ Because Carmack did not apply to the mere delivery carriers, the Court reasoned that it did not apply to Intransit.⁸⁴

The Court also noted that there were two additional reasons why Carmack did not apply in this instance. First, the plaintiff sued based upon the bill of lading issued by Expeditors and thus was bound by its terms.⁸⁵ The bill of lading clearly stated that COGSA applied to Expeditors and its subcontractors. Second, where a bill of lading required a substantial carriage of goods by sea, its purpose was to effectuate maritime commerce, and thus it was a maritime contract.⁸⁶ For all of those reasons, the court found that COGSA, not the Carmack Amendment, applied.

These three cases all demonstrate the eroding applicability of the Carmack Amendment to the domestic portions of international shipments. They suggest that after *Kawasaki* courts are more likely to conclude that other bodies of law or contractual arrangements apply to those situations. ❖

Conclusion

International shipments have become more commonplace as products are increasingly transported across the world. The application of the Carmack Amendment to these shipments has become somewhat complicated due to the number of entities involved and the complexity of the agreements between them.

The Supreme Court's decision in *Kawasaki* and several recent cases in its wake indicate a more limited application of Carmack to the domestic segments of international shipments. This trend is significant because it provides motor carriers and railway companies with strategies for attempting to avoid Carmack liability both at the contracting stage and in litigation.

John E. Anderson, Sr. is a member of Dickinson Wright, PLLC in its Nashville, Tenn. office. He specializes in transportation litigation and is the head of the firm's transportation and logistics practice group. Also, he is a member of the board of directors of the Federal Bar Association's Transportation & Transportation Security Law Section, Defense Research Institute, the Transportation Lawyer's Association, and the Federation of Defense & Corporate Counsel.

Jonathan Patton is an associate in Dickinson Wright's Nashville office.

Endnotes

¹*Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2440 (2010).

²*Id.*

³See 49 U.S.C. §§ 11706, 14706.

⁴Patricia O. Alvarez & Marc J. Yellin, *Where to Start with a Motor Carrier Cargo Claim*, FOR THE DEFENSE, Feb. 2006, at 29.

⁵*Kawasaki*, 130 S.Ct. at 2441.

⁶Alvarez, *supra* note 4.

⁷*Id.*

⁸*Kawasaki*, 130 S.Ct. at 2439.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* at 2439–40.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 2442.

²⁰*Id.* at 244–46.

²¹*Id.* at 2443.

²²*Id.* at 2444, 2449.

²³*Norfolk S. Rwy v. Sun Chem. Corp.*, 735 S.E.2d 19, 21 (Ga. Ct. App. 2012).

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.* at 22.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵See *id.*

³⁶*Id.* at 27.

³⁷*Royal & Sun Alliance Ins., PLC v. Serv. Transfer, Inc.*, No. 12 Civ. 97 (DLC), 2012 U.S. Dist. Lexis 172307, at *1 (S.D.N.Y. Dec. 4, 2012).

³⁸*Id.*

³⁹*Id.* at *1–2.

⁴⁰*Id.* at *2.

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.* at *3.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.* at *4.

⁴⁹*Id.*

⁵⁰*Id.* at *5.

⁵¹*Id.*

⁵²*Id.* at *6.

⁵³*Id.* at *7.

⁵⁴*Id.*

⁵⁵*Id.* at *7–8.

⁵⁶*Id.* at *8.

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.* at *8–9.

⁶²*Id.* at *15.

⁶³*Hartford Fire Ins. Co. v. Expeditors Int'l of Wash.*, No. 10 Civ. 5643 (KBF), 2012 U.S. Dist. LEXIS 96974, at *1 (S.D.N.Y. July 9, 2012).

⁶⁴*Id.*

⁶⁵*Id.* at *2.

⁶⁶*Id.*

⁶⁷*Id.* at *2–4.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.* at *5.

⁷³*Id.*

⁷⁴*Id.* at *6.

⁷⁵*Id.*

⁷⁶*Id.* at *11.

⁷⁷*Id.* at *15–16.

⁷⁸*Id.* at *16.

⁷⁹*Id.* at *17.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at *18.

PROFILE continued from page 1

So, my priority is to enable the office to continue to do what we're doing right by exploring options for knowledge transfer and providing training.

What has changed the most in your time at DOT?

One major change has been the technology. I came here before the age of email. I came before the age of computers on people's desks. Now, the working environment and the pace are different because people expect a more immediate response.

For lawyers, having legal research tools at your fingertips helps you provide quicker advice or have a better understanding of the issues.

Record retention practices have changed because now we are dealing with electronic filing. We are determining how to embrace technology more, and make it easier to share information.

What advice would you have for attorneys who are new to the world of transportation?

Try to understand the underlying transportation *system*. We serve our clients best by trying to understand what they work on. So, if there are opportunities to do on-site field work, to see how something actually operates, whether it is a pipeline, an airplane, or a tank car, please take them. It is important to get a programmatic perspective in order to understand the challenges the clients are facing. And understand the interrelatedness of the transportation system. It is intermodal and connected.

Also, develop listening skills, and listen to the client. Be a problem-solver. Use ADR skills. We are often called upon to solve problems, and part of doing that effectively is developing a relationship with the client so that you understand what their concerns are. So, the ADR piece is

about asking those types of questions. Engage questions, listen to their concerns, engage with them so they know you understand them, brainstorm options, and then start to narrow it down. ADR teaches you to suspend judgment. That has helped me a lot. You need to be able to hear both sides equally in order to help be a problem-solver.

What are your favorite books or movies?

Choosing a favorite is difficult because that may change over time. There are a couple of movies that I'm willing to watch over and over. I own the "Day the Earth Stood Still," original 1951 black and white version. I remember seeing it as a kid. It's a movie that takes place in Washington, D.C. The message of the movie, delivered by a space alien, is that people of the Earth need to live peacefully or be destroyed as a danger to other planets. In some ways, I feel that influenced me to move to D.C. and to work for the government.

Also, "Yankee Doodle Dandy." I like the music and flag-waving patriotism of it. I'm proud to be an American and a federal employee.

As for books, I like fiction and non-fiction. As a leader, I often pick up the book 21 Laws of Leadership by John Maxwell. I pick it up when I'm dealing with a lot of tough issues, as a reminder of the importance of thinking about the leadership in the workplace.

Is there anything else you would like to share with *TransLaw*?

We are fortunate in the department to have skilled and dedicated lawyers who are part of the department's decision-making process, starting with the General Counsel's team. We're open to working with the private sector, and I'd like to continue the relationship with the Transportation and Transportation Security Law Section of the Federal Bar Association. ❖