



## COGSA OR CARMACK?

**Legal Corner** By David Street, TOYSA Legal Counsel

Good news! All nine Justices of the Supreme Court agree that K-Line is not a railroad. I don't know if Elena Kagan has been asked her opinion on this question during the hearings on her nomination to join the Supreme Court, but she seems like a sensible lady. My guess is that, if confirmed, she will join the other Justices in declining to confuse an ocean carrier with a railroad. The case in which this question arose is *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, a case the Supreme Court decided on June 21, 2010. The case was on appeal from a decision by the United States Court of Appeals for the 9<sup>th</sup> Circuit, which covers the westernmost states and territories of the United States. The 9<sup>th</sup> Circuit had determined that K-Line was a railroad in its opinion, which I discussed in the November 2010 newsletter (*"How K-Line Became a Rail Carrier."*)

Notwithstanding the fun we can have thinking of an ocean carrier as a railroad under U.S. law, this was an important case for all parties who participate in international ocean transportation to and from the United States. The basic issue involved which statute should determine the liability of an inland carrier when goods transported under a through intermodal bill of lading are lost or damaged while in the inland carrier's possession. There are two alternatives. The first is the Carriage of Goods by Sea Act ("COGSA"). Although COGSA applies of its own terms only to port-to-port shipments, it can be extended by contract to cover the inland portions of a through transportation movement. Virtually all carriers' bills of lading do extend COGSA in this manner. And, virtually all carriers' bills of lading terms and conditions contain a "Himalaya Clause," which extends the carrier's defenses and limitations of liability to all of its agents used to provide the transportation covered by the bill of lading. When an ocean carrier performs through transportation to the United States, it usually employs a railroad to act as its agent for the inland portion. When goods are damaged while in the railroad's possession and the railroad is sued by the owners of the cargo, the railroad relies on the Himalaya Clause and the extension of COGSA to the inland movement to claim the defenses and limitations of liability available under COGSA. This is exactly what the railroad (the Union Pacific) did in the *Regal-Beloit* case.

*The contents of this article do not constitute legal advice. You should always consult an experienced attorney about legal issues that arise from particular situations as the individual facts may warrant different legal conclusions in a given case. Mr. Street is a partner at the law firm of GKG Law, P.C and has served as Toysa's legal counsel since 1991.*

The other statutory option is to apply the Carmack Amendment to determine the inland carrier's liabilities for such loss or damage claims. The Carmack Amendment is a statutory provision applicable to rail and motor carriers engaged in domestic transportation within the United States. The cargo owners in the *Regal-Beloit* case asserted that Carmack should apply to the Union Pacific before both the 9<sup>th</sup> Circuit and the Supreme Court. Why did they do this? And why is this such an important issue for the ocean shipping industry? As they said during the Watergate scandal - - "follow the money." If COGSA applies to the inland carrier's liability, the owner of the lost or damaged cargo can collect only \$500 per package. If the Carmack Amendment applies, however, the cargo owner can obtain full compensation for the "actual loss or injury" to its goods. Depending upon the value of the shipment at issue, this can make a huge difference to the inland carrier and the owners of the cargo - - and to their insurance carriers.

If you are an attentive student of these newsletters, you may be saying to yourself that the situation in the *Regal-Beloit* case reminds you of a previous case we have discussed; *Norfolk Southern Arco v. James & Kirby, Pty Ltd.*, (the "Kirby" case). If so, give yourself an A+ for a good memory. The situation in *Kirby* was almost exactly identical to the situation in the *Regal-Beloit* case. A shipment of cargo moving under a through intermodal bill of lading was damaged while in the custody of the railroad performing the inland services. The cargo owners sued the railroad and the railroad, relying on the Himalaya Clause and the extension of COGSA in the ocean carrier's bill of lading, claimed the benefit /of the COGSA \$500 per package limitation. The cargo owners in the *Kirby* case said that another statute should apply to determine the rail carrier's liability. They did not argue that the Carmack Amendment should apply, however, but rather, that state law should apply. They made this argument for the same reason that the cargo owners in the *Regal-Beloit* case argued that the Carmack Amendment should apply; this is, because they would collect more money for their losses under state law than under COGSA. The Supreme Court determined in the *Kirby* case that COGSA, as a federal statute, should take precedence over state law. Therefore, the railroad won. In the *Regal-Beloit* case, however, the situation involved a clash between two federal statutes, COGSA and the Carmack Amendment. Thus, the Supreme Court had to look at a virtually identical fact pattern from a different legal perspective.

In *Kirby*, the Supreme Court had no difficulties finding that COGSA took precedence over state law. That decision was unanimous. The Court had a more difficult time in *Regal-Beloit* and split 6-3. The majority found that, for shipments to the United States under a through bill of lading, COGSA controls and the Carmack Amendment does not apply. The dissenting opinion, written by the newest Justice, Sonia Sotomayor, reached the opposite conclusion, finding that the Carmack Amendment should apply. Both the majority opinion and the dissenting opinion state that they relied upon the "text, history, and purposes of" the Carmack Amendment. How then, did they reach such diametrically opposed conclusions?

The answer, I think, is that one opinion focused on the actual language of the Carmack Amendment and the

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other opinion, while using language from the Carmack Amendment to justify its conclusion, actually focused on making a policy choice. As the dissenting opinion points out by quoting a prominent professor of international maritime law, “[a] simple, straight-forward reading of [the provisions of the Carmack Amendment] practically compels the conclusion that the Carmack Amendment applies in a typical multi-modal carriage case with inland damage.” This is, in fact, an accurate statement. The Carmack Amendment, by its terms, applies to rail carriers “providing transportation or service subject to the jurisdiction of the [Surface Transportation Board].” The jurisdiction of the Surface Transportation Board extends to “transportation in the United States between a place in the United States and a place in a foreign country.” The operations of the Union Pacific Railroad in the *Regal-Beloit* case fall precisely within these parameters. The Union Pacific was providing transportation in the United States that was part of a through transportation movement between the United States and a foreign country. Clearly, then, it appears that the Carmack Amendment should apply to determine the Union Pacific’s liability to the *Regal-Beloit* cargo owners.

The majority opinion obviously didn’t see it that way. Using the language of the Carmack Amendment, the majority determined that the Carmack Amendment only applies to shipments that originate in the United States.<sup>1</sup> Clearly, an international shipment does not originate in the United States and, therefore, the Carmack Amendment - - according to the majority’s reasoning - - does not apply. Although the majority opinion’s reasoning is perfectly rational and logical, it simply does not have the force of the dissenting opinion when it comes to analysis of the entire structure of the Carmack Amendment. Although the majority opinion never states this in so many words, one has the distinct impression from reading it that the driving factor in the decision is a belief that the maritime statute adopted by Congress, i.e., COGSA, should govern throughout the entire course of an international transportation movement that is - - as the *Kirby* decision put it - - a maritime contract because it involves “substantial carriage of goods by sea.” The flavor of the majority’s opinion is best summed up in a quotation from the opinion itself:

Congress has decided to allow parties engaged in international maritime commerce to structure their contracts, to a large extent, as they see fit. It has not imposed Carmack’s regime, textually and historically limited to the carriage of goods received for domestic rail transport, on to what are “essentially maritime” contracts.

Is this a good result? Probably so. It certainly simplifies the analysis of potential liabilities under a through international bill of lading and allows the parties to such transactions to plan their affairs on a solid basis. Again, quoting the *Kirby* decision: “Future parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate.” In that sense, the court’s decision in *Regal-Beloit* has served an extremely useful function. It has made the legal regime applicable to

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<sup>1</sup> The majority opinion specifically stated that it was not deciding which law should apply to export shipments from the United States under through bills of lading. We will have to wait for another case to see how that works out. It would be surprising, however, if the Court determines that Carmack applies to exports, but not to imports.

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international ocean shipments between the United States and foreign countries more predictable. This is what businessmen want and need. Now, shippers, carriers and railroads can purchase insurance policies - - or decide to self-insure - - with certain knowledge about what their potential liabilities are for cargo loss or damage. That is a good thing, for both the parties involved, and society as a whole. For, make no mistake about it, the extra costs that result from legal uncertainty are passed on to the ultimate consumers. Nonetheless, it gives one pause to consider that the court's decision may have been based upon a policy choice rather than strict, reasoned legal analysis. Isn't that why we elect our Congress; to make these policy choices? If we don't like the choices they make, we can always vote against them the next time around. How do we vote against a Supreme Court Justice who adopts policies that we do not like? That, in essence, is why the nomination of Supreme Court Justices is so important and attracts such enormous political attention.

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