No. 08-1553

IN THE

Supreme Court of the United States

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

v.

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

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), this Court held that international shipments under through bills of lading involving substantial ocean carriage are maritime in nature and therefore that federal maritime law rather than state law governs claims arising out of the domestic inland portion of such shipments. This case concerns the related question whether federal railroad law—namely, the Carmack Amendment to the Interstate Commerce Act (the "ICA")—controls claims arising out of the inland portion of international shipments

under through bills of lading, which are maritime contracts. The answer is the same.

As Petitioners Kawasaki Kisen Kaisha, Ltd. ("K" Line) and "K" Line America, Inc. demonstrated in their initial brief, Carmack is inapplicable for two reasons grounded in the ICA itself. *First*, "K" Line is not a rail carrier subject to Carmack because it does not conduct rail operations. Pet. Br. 22-30. *Second*, Carmack does not apply to transportation under through bills of lading for overseas shipments because Carmack applies only to property received for domestic rail transportation. Pet. Br. 30-49. The United States agrees on both points. *See* U.S. Br. 13-26; *accord* UP Br. 20-39. Respondents have no persuasive response. Nor can respondents refute the applicability of the *Kirby* rule that federal maritime law must be applied to transportation under through bills of lading involving substantial ocean carriage by the carrier issuing the bill of lading.

Respondents offer no answer to "K" Line's showing that conducting no rail operations excludes it from the definition of "rail carrier." Respondents cannot dispute that both this Court and the Surface Transportation Board (the "Board") have recognized that the essential, defining characteristic of a rail carrier is the conduct of rail operations, or that there is no evidence of record that "K" Line conducts rail operations. All respondents can offer are extra-record website advertising references to the expertise of "K" Line and its agent regarding operations and movements involving ocean vessels, terminals, and trains. These websites are extra-record, and therefore not before the Court. Moreover, they evidence no conduct of rail operations.

Respondents also argue that "K" Line is a rail carrier by stringing together a series of definitions in the ICA. This Court, however, has recognized that the natural meaning of terms such as "rail carrier" is one who operates a railroad, and the definition of "railroad" invoked by respondents merely states that the term *includes* bridges, ferries, and other things that might not normally be understood as encompassed by the term. Respondents do not—and cannot—offer any reason why such a definition would override the essential characteristic of a rail carrier. Thus, they offer no persuasive defense of the Ninth Circuit's unsupported finding that "K" Line is a rail carrier.

Since "K" Line cannot be a rail carrier, application of Carmack to transportation under "K" Line's through bill of lading is precluded, and the Ninth Circuit should be reversed without more. There are, however, several other reasons why Carmack cannot apply to transportation under through bills of lading involving substantial ocean carriage.

First, Carmack does not cover inland transportation under through bills of lading for overseas shipments and never has. Respondents assert that the current text of Carmack plainly covers inland transportation under overseas through bills of lading and claim that petitioners do not reconcile their contrary position with that text. In fact, "K" Line's initial brief showed that Carmack applies only to property "receive[d] for transportation under this part," 49 U.S.C. § 11706(a), that is, Part A of the ICA, which concerns domestic rail transportation. This requirement limits Carmack to cargo received for domestic rail transportation and excludes cargo received for overseas through transportation.

Respondents ignore this requirement that property be "receive[d] for transportation under this part." They claim that Carmack is co-extensive with the Board's jurisdiction. Carmack, however, is restricted in two ways: it applies only to certain types of carriers ("rail carrier[s] providing transportation or service subject to the jurisdiction of the Board under this part") and to certain types of shipments (those involving "property . . . receive[d] for transportation under this part"). *Id.* Respondents' interpretation reads the restriction on the type of shipment out of the statute. Thus, it is respondents that offer no plausible reading of Carmack's current text.

Second, respondents' interpretation is inconsistent with the nature of through shipments from overseas involving substantial ocean carriage. As *Kirby* recognized, such shipments are essentially maritime in nature and therefore even the inland portion of those shipments should be governed by maritime law. Moreover, Section 7 of the Carriage of Goods by Sea Act ("COGSA") is better suited to the inland portion of overseas shipments than Carmack because it permits COGSA terms, which are more efficient and more flexible than Carmack's, to extend to inland transportation.

ARGUMENT

I. THE RECORD AND THE AUTHORITIES PRECLUDE FINDING "K" LINE A RAIL CARRIER.

The issue of first importance in this case to "K" Line (and the several hundred other ocean container carriers that serve the United States) is whether containership operators are to be transformed into "rail carriers" subject to the ICA when they provide

through transportation in international commerce. "K" Line is not a rail carrier under the ICA because there is no probative evidence nor even an allegation below that it conducts rail operations. "K" Line therefore cannot be subject to Carmack even aside from the maritime character of its through transportation. Pet. Br. 22-30. The United States agrees. U.S. Br. 23-26. And respondents have no persuasive response, factual or legal.

A. Rail Carriers Must Conduct Rail Operations.

Respondents ignore the core requirement for rail carrier status, which, as the Government recognizes, is the conduct of rail operations. U.S. Br. 23.

This Court has long recognized that rail carrier status requires conduct of rail operations. Before the ICA was separated into rail, motor carrier, and pipeline parts, it designated provisions applicable only to railroads with the phrase "carrier by railroad." *United States v. American Ry. Express Co.*, 265 U.S. 425, 433-34 & n.7 (1924). As this Court observed, "[t]he natural meaning of the term 'carrier by railroad' is one who operates a railroad." *Id*. at 432; *see also Edwards v. Pacific Fruit Express Co*., 390 U.S. 538, 540 (1968) (holding that "the words 'common carrier by railroad' mean 'one who operates a railroad as a means of carrying for the public'"). Thus, "one whose shipments are carried by a railroad" is not a carrier by railroad under the ICA. *American Ry. Express*, 265 U.S. at 432-34; *accord Edwards*, 390 U.S. at 543 (applying the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq*.); *United States ex rel. Chicago, N.Y. & Boston Refrigerator Co. v. ICC*, 265 U.S. 292, 293-96 (1924) (applying the

ICA); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187 (1920) (applying FELA).

A "rail carrier" is plainly the equivalent of a "carrier by railroad." Indeed, the provision this Court construed in *American Ry. Express* now uses the term "rail carrier" rather than "carrier by railroad." 49 U.S.C. § 10705(a)(2) (providing that the Board may require a "rail carrier" to short haul traffic only under certain conditions); *see also* 49 U.S.C. § 15(4) (1976) (prohibiting the Interstate Commerce Commission from requiring a "carrier by railroad" to short haul traffic unless certain conditions are met). As this change was made in recodifying the ICA, *see* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 1, 92 Stat. 1337, 1376, it was not meant to change the meaning of the term, *see id*. § 3(a), 92 Stat. 1466. Accordingly, in Carmack, the term "rail carrier" should be interpreted to mean one who operates a railroad. *See, e.g*., *Powerex Corp. v. Reliant Energy Servs*., *Inc.*, 551 U.S. 224, 232 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

The Board also has recognized that a rail carrier must conduct rail operations. In determining whether an entity qualifies as a rail carrier, the Board asks two questions: "(1) does defendant conduct rail operations; and (2) does it 'hold out' that service to the public." *Ass'n of P&C Dock Longshoremen v. The Pittsburgh & Conneaut Dock Co.*, 8 I.C.C.2d 280, 290 (STB 1992).

Lower courts likewise examine whether a party conducts rail operations in determining whether it is a rail carrier. In *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc*., 547 F.3d 351 (2d Cir. 2008), the Second Circuit considered whether an ocean carrier

that, much like "K" Line, received cargo abroad, transported it overseas, and arranged for inland rail transportation under a through bill of lading, was a rail carrier. *Id*. at 354, 360-64. The Second Circuit held that the ocean carrier was not. *Id*. at 364. In so doing, the Second Circuit noted that decisions from other circuits "focus on a carrier's ability to carry or operate rail transportation in determining its status as a 'rail carrier' under the Carmack Amendment." *Id*. at 363.[1]

Thus, conduct of rail operations—that is, the actual moving of rail cars on rails—is an essential characteristic of a rail carrier.

B. No Evidence In Or Outside The Record Supports A Finding That "K" Line Conducts Rail Operations.

"K" Line's initial brief pointed out that there is no evidence or allegation in the record that it operates a railroad or offers to perform any railroad transportation. Pet. Br. 23. Respondents do not—and cannot—dispute this. The record shows that "K" Line subcontracted with Union Pacific ("UP") to provide rail services for its container traffic. Pet. App. 3a; JA 120. Respondents acknowledge (as they must) that "K" Line "does not operate any rail lines between the West Coast ports where its ocean vessels dock and the inland areas of the United States" but instead "subcontracts with railroads to provide the

[1] Although respondents criticize *Rexroth* for focusing on reasons applicable only to OWL, the non-vessel operating common carrier in that case, Resp. Br. 86 & n.35, they inexplicably ignore the decision's recognition that rail carriers must operate rail transportation, which justifies its finding that COSCO, the ocean carrier in the case, was not a rail carrier.

inland portion of its multimodal transportation services." Resp. Br. 11-12.

Nevertheless, respondents later retreat from this admission and try to create the false impression that "K" Line conducts rail operations, selectively quoting from a "K" Line website. They note the website's assertion that "K" Line is a specialist in "double-stack train operations and movement," has an infrastructure of "double-stack trains and containers," and offers "exclusive double stack train service covering the United States, Canada and Mexico." Resp. Br. 85 (quoting "K" Line America, Inc., http://www.k-line.com and http://www.k-line.com/KAMCorpInfo/K-Line_Profile_and_Services.asp). Respondents also note these advertising materials assert that "K" Line operates container terminals with "on-dock rail service" and advertises an on-dock double-stack train yard where containers are "loaded onto dedicated trains of 'K' LINE." Resp. Br. 85-86 (quoting "K" Line, Container Terminals 14, http://www.kline.co.jp/biz/terminal/pdf/terminal.pdf) (quotation marks omitted). Respondents would have the Court leap the chasm separating an ad proclaiming expertise in arranging intermodal movements from proof that the advertiser itself actually performs those movements.

These advertisements are not in the record, and such factual matters should not be introduced for the first time in briefing before this Court. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Pierce v. Shorty Small's of Branson Inc.*, 137 F.3d 1190, 1192 (10th Cir. 1998). Had respondents suggested below that "K" Line conducts rail operations, "K" Line would have presented evidence that it neither owns, controls, nor operates any double-stack trains or

other railroad equipment; does not operate on-dock terminals with rail service; subcontracts for all rail carriage; and supplies no trains or other equipment to rail carriers beyond the containers used to transport cargo in its ocean vessels.

Any suggestion that "K" Line actually operates trains is belied by respondents' admission that "K" Line subcontracts for all its rail services. Resp. Br. 12. "K" Line's website notes its ability to arrange, coordinate, and oversee such rail service, not its actual conduct of rail operations. Hundreds of logistics providers, which perform no transportation of any kind, offer these services. *See JOC Guide to 3PLS*, THE JOURNAL OF COMMERCE, Feb. 8, 2010, at 28-39 (listing 264 logistical providers).

Respondents assert that "K" Line operates container terminals with rail service, but it does no such thing. The website selectively quoted by Respondents talks about terminals operated not by "K" Line, but by a subsidiary, which serves "many major container lines." "K" Line, Container Terminals 14, http://www.kline.co.jp/biz/terminal/pdf/terminal.pdf. Nothing on the website suggests that "K" Line or its affiliate operates the trains that serve the dock (which, in fact, they do not), and the ICC has ruled that a wharf or dock owned and operated independently of any railroad is not a rail carrier even though it has tracks to serve trains receiving or delivering cargo there. *See, e.g.*, *Woodward & Dickerson, Inc. v. Int'l Great Northern R.R. Co.*, 287 I.C.C. 296, 297 (1952); *Wharfage, Handling & Storage Charges*, 59 I.C.C. 488, 489 (1920). Indeed, the Board has held that an ocean carrier operating a rail terminal with a one-quarter mile side-track and owning "double stack" rail cars is not a rail carrier.

See Joint Application of CSX Corp. and Sea-Land Corp., 3 I.C.C.2d 512, 514-21 (STB 1987). In so doing, the Board gave no weight to the carrier's advertisements for domestic rail service it controlled. *Id*. at 516, 521.

Thus, even if respondents' newly discovered "evidence" had been properly raised, it would be insufficient under the Board's construction of the ICA to make "K" Line a rail carrier, and because the Board is entrusted with administering the ICA, that construction deserves deference. *See, e.g.*, *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1171 (D.C. Cir. 2000) (applying *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

C. The Interstate Commerce Act's Definitions Do Not Override the Essential Requirement That A Rail Carrier Conduct Rail Operations.

Respondents argue that "K" Line is a rail carrier by stringing together statutory definitions. They first observe that the ICA defines the term "rail carrier" to mean a person providing "'common carrier railroad transportation for compensation.'" Resp. Br. 81 (quoting 49 U.S.C. § 10102(5)). They further argue that ocean vessels and the containers transported by them both fall within the ICA's definitions of "railroad" and "transportation," and then conclude that "K" Line is a rail carrier because it used an ocean vessel to transport containers that were later carried by rail. *Id*. at 81-83; *see also id*. at 83 (arguing that arranging for rail transportation constitutes transportation). This argument has no merit.

1. The Definitions Invoked By Respondents Do Not Support Their Analysis.

Respondents' string of definitions is defeated by the language of those very definitions. As previously noted, Pet. Br. 26, the ICA does not define what the terms "railroad" and "transportation" *mean*: it defines what they "*include[].*" 49 U.S.C. §§ 10102(6) & (9) (emphasis added). As the Interstate Commerce Commission explained long ago, the ICA defines "railroad" to include instrumentalities such as bridges and ferries "to make certain that where these agencies are employed by railroads the transportation service rendered by them shall still be subject to the provisions of the act." *Enterprise Transp. Co. v. Penn. R.R. Co.*, 12 I.C.C. 326, 335 (1907); *see also Erie R.R. Co. v. Shuart*, 250 U.S. 465, 467 (1919) (noting Congress defined the term "transportation" to include services related to rail carriage "to prevent overcharges and discriminations from being made under the pretext of performing such additional services"). In other words, the definition makes a bridge or ferry leased to a railroad part of the railroad under the ICA "but in such case the bridge company or the ferry company is not a common carrier." *Enterprise Transp. Co.*, 12 I.C.C. at 467-68.

Respondents' contrary approach would lead to absurd results. For example, respondents contend that containers used to hold cargo "during both ocean and inland legs" fall within the definition of both "railroad" (because containers are intermodal equipment) and "transportation" (because containers are

used in moving cargo by rail). Resp. Br. 82-83.[2] By this logic, however, every ocean carrier that transports containers later carried by rail—as most containers are—is a rail carrier. Respondents offer no reason why Congress would have wanted to make virtually all ocean carriers into rail carriers under the ICA.

Nor can they. As the Government points out, U.S. Br. 24-25, Congress distinguishes between water and rail carriers. It has enacted a separate statutory regime for ocean water carriers, *see* 46 U.S.C. §§ 40101-40309, 41301-41309, and for domestic water carriers, *see* 49 U.S.C. §§ 13102-13521. Additionally, when goods are transported by rail and water under an arrangement for continuous carriage, Part A of the ICA limits the Board's jurisdiction to the rail transportation because the part covers only "transportation by a *rail carrier*." *Id*. § 10501(a)(1) (emphasis added). Thus, Congress plainly assumes that, when goods are carried by both rail and water, there will be both rail and water carriers.

Citing *P&C Dock Longshoremen*, respondents assert that the Board "has employed a similar analysis." Resp. Br. 83. Actually, the only similarity between the Board's analysis and respondents' is that the Board recognizes that determining whether an entity qualifies as a rail carrier is a "fact-bound" inquiry and respondents purport to conduct a fact-bound inquiry (albeit, with no facts on their side).

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[2] Respondents also assert that ocean vessels fall within the definition of "railroad" because they are "intermodal equipment" used with railroads. Resp. Br. 82-83 (discussing 49 U.S.C. § 10102(6)(A)). That is plainly wrong: ocean vessels are *uni*modal equipment because they move only by ocean and independently of any rail movement.

P&C Dock Longshoremen, 8 I.C.C.2d at 293. Otherwise, the Board's approach is starkly different. Far from stringing together definitions without regard to a rail carrier's core characteristic, the Board recognized that a rail carrier must "conduct rail operations," *id*. at 290, and applied the definitions of "railroad" and "transportation" in light of that core requirement, *id*. at 291-93.

2. Respondents' Interpretation Would Create A Gap In Carmack's Venue Provision.

"K" Line's brief showed that treating it as a rail carrier would create a gap in Carmack's venue provision. Pet. Br. 27. Under that provision, Carmack actions "may only be brought" in specified venues, 49 U.S.C. § 11706(d)(2)(A), and the venue specified for actions against an "originating" carrier is "the judicial district in which the point of origin is located." *Id*. § 11706(d)(2)(A)(i). The provision, however, defines "judicial district" to mean districts within the United States. *Id*. § 11706(d)(2)(B). So, under respondents' interpretation, an ocean carrier receiving cargo abroad would be a rail carrier, at a litigation dead end, with nowhere to bring a Carmack action against the receiving carrier.

Respondents offer that "point of origin" could mean the "point of origin of the rail carriage . . . in the United States." Resp. Br. 90. But if the point of origin is where rail carriage begins, the "originating" carrier is the carrier providing the initial rail carriage, not the ocean carrier. That reading would require the shipper to sue the rail carrier used by the ocean carrier that received property from the shipper. Carmack, however, was supposed to ensure "unity of responsibility" by holding the receiving car-

rier responsible for all damages during transport. *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U.S. 383, 386-87 (1917).

3. Respondents' Interpretation Would Disrupt The Regulatory Regimes Governing Rail And Ocean Transportation

As the Government recognizes, U.S. Br. 25-26, there is another problem with respondents' interpretation: it would disrupt the long-standing distribution of authority between the Surface Transportation Board and the Federal Maritime Commission (which has regulated through transportation by ocean container carriers for decades). If the hundreds of ocean carriers were rail carriers under the Board's jurisdiction of the Board, the FMC would lose its jurisdiction over them because the jurisdiction of the Board over transportation by rail carriers "is exclusive." 49 U.S.C. § 10501(b)(2).

Respondents wrongly assert that any disruption would be limited and theoretical because the Board has exempted intermodal transportation from regulation. Resp. Br. 89.[3] But the Board's jurisdiction is exclusive even over exempted transportation. Therefore, making ocean carriers that transport containers used in rail transportation into rail carriers would undermine the FMC's hitherto unquestioned authority to regulate ocean common carriers offering through transportation.

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[3] Contrary to respondents' suggestion, Resp. Br. 89, the exemption does not save ocean carriers from filing and reporting burdens, because the Board has exempted only "rail TOFC/COFC service," not rail carriers providing that service. 49 C.F.R. § 1090.2.

II. RESPONDENTS HAVE NOT SHOWN THAT CARMACK COVERS INLAND TRANSPORTATION UNDER THROUGH BILLS OF LADING FOR OVERSEAS SHIPMENTS.

If this Court finds that "K" Line is not a rail carrier, it need go no further. As the Government recognizes, U.S. Br. 26-29, if "K" Line is not a rail carrier, the through bill of lading issued by "K" Line governs the entire shipment, and Carmack is inapplicable. Should this Court nevertheless proceed, it should hold Carmack inapplicable to through bills of lading for overseas shipments.

A. Respondents' Plain Language Argument Ignores Carmack's Requirement That Property Be "Receive[d] For Transportation Under This Part."

Respondents contend that the current text of Carmack plainly covers inland transportation under through bills of lading for overseas shipments and then argue that none of the petitioners tries to parse the current text. Respondents repeatedly assert that "neither petitioner musters *any* argument based on that statutory text." Resp. Br. 21; *see also id.* at 28-29 (asserting that petitioners "studiously avoid discussing the statutory language in effect"). But "K" Line addressed the current text of Carmack in the second section of its argument, Pet. Br. 30-33, and notably absent from respondents' brief is any discussion of the text "K" Line analyzed.

As "K" Line demonstrated, Pet. Br. 30-31, Carmack requires rail carriers to issue bills of lading if they are subject to the Board's jurisdiction *and* receive property for transportation under this "part":

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

49 U.S.C. § 11706(a). As Part A concerns domestic rail transportation, *see id*. § 10501(a)(2), Carmack covers only property received for domestic rail transportation. Property shipped under through bills of lading from overseas origins such as Asia are not covered by Carmack because, by definition, such property is received for ocean transport, *see Kirby*, 543 U.S. at 27, not domestic rail transportation, which the ocean carrier is free to use or not in its discretion, *see* JA 146 (¶ 6).

This conclusion is consistent with Carmack's original purpose. Derailments are rare. Usually cargo is damaged or lost due to water, shifting during transit, or "shrinkage" that could have occurred anywhere in transit. Congress enacted Carmack to spare shippers the often impossible burden of proving which rail carrier caused such injury by treating the receiving rail carrier "as having contracted for through carriage" and holding that rail carrier responsible for any cargo damaged in transit. *Atl. Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 196 (1911). When an ocean common carrier issues a through bill of lading, it automatically assumes such responsibility, *see* 46 U.S.C. § 40102(6), and Carmack is not needed.

Respondents ignore not only petitioners' textual argument, but also the text itself. Ignoring the requirement that property be "receive[d] for transportation under this part," respondents violate the rule they recognize, Resp. Br. 39, that courts are "obliged to give effect, if possible, to every word Congress used." *Carcieria v. Salazar*, 129 S. Ct. 1058, 1066 (2009). Respondents argue that Carmack applies whenever a rail carrier provides transportation that falls within 49 U.S.C. § 10501. Resp. Br. 26-30, 31. But if Carmack were co-extensive with the Board's jurisdiction over rail carriers, the requirement that property be "receive[d] for transportation under this part" would have no effect. So, it is respondents that offer no plausible interpretation of Carmack's current text.[4]

B. The Plain Language And Nearly Unanimous Judicial Construction Of Carmack Before Recodification Confirms The Proper Reading Of Carmack's Current Text.

The proper reading of Carmack's current text, and in particular the requirement that property be "receive[d] for transportation under this part" is evident from Carmack's history. Before recodification, Carmack covered property received for transportation within the United States or "from any point

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[4] Respondents' claim that petitioners' "separate bill of lading" argument has been abandoned, Resp. Br. 30, similarly ignores the requirement that property be "receive[d] for transportation under this part." Carmack applies when separate bills of lading are issued because such bills are for domestic rail transportation and therefore satisfy the requirement that property be received for domestic rail transportation. Respondents' request to dismiss the petition as improvidently granted, Resp. Br. 33 n.11, is baseless.

in the United States to a point in an adjacent foreign country." 49 U.S.C. § 20(11) (1976). Accordingly, courts, the Interstate Commerce Commission, and treatises understood that Carmack did not cover through bills of lading for overseas shipments. Pet. Br. 43-44; UP Br. 28-30; U.S. Br. 14-20. And they continued to do so through Carmack's reenactment in 1995. Pet. Br. 48-49; UP Br. 35. Especially as Congress instructed that Carmack's recodification "may not be construed as making a substantive change in the laws replaced," Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1377, 1466, Carmack's current text cannot be read to cover transportation under through bills of lading for overseas shipments. Pet. Br. 47-48; UP Br. 20-23; U.S. Br. 21-22.

Respondents do not attempt to explain how Carmack's original language could be interpreted to apply to inland transportation under through bills of lading for overseas shipments. Instead, they contend that the current text of Carmack is unambiguous and overrides the precodification language and understanding. Resp. Br. 34-40. "K" Line, however, has offered a natural reading of the current text that is consistent with its pre-codification language and understanding, and respondents have offered no plausible alternative.

Respondents assert the 1978 recodification "clarif[ied]" Carmack's application to imports and exports. Resp. Br. 7-8. That assertion is belied by the fact that Carmack is still restricted to transportation in the United States "or from a place in the United States to a place in an *adjacent* foreign country," 49 U.S.C. § 11706(a)(3) (emphasis added), though that restriction appears as a limitation on liability. U.S. Br. 20-21.

In addition, respondents cite no case before 1995 applying Carmack to through bills of lading for overseas shipments. *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921), did not do so. *Burke* did not even mention Carmack. Moreover, this Court did not treat the cargo in *Burke* as moving under a through bill of lading. Although the ocean carrier in *Burke* issued a through bill, 255 U.S. at 318, the respondent argued that the bill was "inoperative" because the railroad failed to file the bill in its tariff, Brief of Respondents at 2, *Union Pacific R.R. Co. v. Burke*, No. 183 (U.S. Jan. 15, 1921), and the petitioners apparently admitted that point, *see Burke*, 255 U.S. at 320-21. Accordingly, the Court held that, "[f]or purposes of this case, only," it was admitted that the property at issue moved under the railroad's (domestic) uniform bill of lading. *Id*. at 319-20.

Respondents also laud the "detailed *Sompo* opinion," Resp. Br. at 33, but do not contest "K" Line's demonstration that *Sompo* was based on a misunderstanding of the timing of *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury*, 254 U.S. 357 (1920). Pet. Br. 46 n.4. Nor do they contest petitioners' demonstration that *Woodbury* did not apply Carmack. Pet Br. 45; *accord* UP Br. 25; U.S. Br. 18-19. Respondents simply note that *Woodbury* construed the ICA's jurisdictional provision. Resp. Br. 36 n.14. Carmack, however, is not coextensive with that provision, *see supra* pp. 4, 16-17, and was not in 1920, which Congress made clear by amending ICA's jurisdictional provision, *see* Pet. Br. 46.

C. Applying Carmack To Through Bills of Lading For Overseas Shipments Would Render Section 7 Of COGSA Largely Inoperative.

Respondents acknowledge that applying Carmack to through bills of lading of overseas shipments would render Section 7 of COGSA largely inoperative, but note a statement in a committee hearing that Section 7 would be "largely if not wholly inoperative." Resp. Br. 42. Committee hearings, however, are the lowest form of legislative history, *see, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986), and respondents' statement is especially dubious because it is from a pamphlet submitted at the hearing describing a six-year-old bill. *See Carriage of Goods by Sea: Hearing on S. 1152 Before the S. Comm. on Commerce*, 74th Cong. 29, 31-32 (1935) (discussing H.R. 3830, 71st Cong., 1st Sess. (1929)).

III. AS *KIRBY* RECOGNIZED, COGSA IS WELL-SUITED TO INLAND TRANSPORTATION UNDER THROUGH BILLS OF LADING FOR OVERSEAS SHIPMENTS.

"K" Line's initial brief showed that extending COGSA terms to inland transportation under through bills of lading for overseas shipments is a widespread and efficient practice. Pet. Br. 36-41. Respondents do not seriously contest these points, and their arguments for applying Carmack are unpersuasive.

A. Applying Carmack Would Undermine The Uniformity That *Kirby* Sought To Promote And Increase Transaction, Insurance And Litigation Costs.

Respondents argue that applying Carmack to inland portions of overseas shipments under through bills of lading is the best way to achieve the uniformity *Kirby* sought to promote because under Caramck claims caused by catastrophic rail accidents would be governed by a single liability rule. Resp. Br. 43-46. But *Kirby* was not concerned about facilitating mass tort actions. It was concerned about the "uniformity of maritime contracts" because of the "[c]onfusion and inefficiency [that] will inevitably result if more than one body of law governs a given contract's meaning." 543 U.S. at 29. *Kirby* further recognized that through bills of lading involving substantial ocean carriage are maritime contracts and claims based upon the inland leg of such shipments should be governed by maritime law to avoid undermining "the uniformity of general maritime law." *Id* at 28. To protect this uniformity, the Court "reinforce[d] the liability regime Congress established in COGSA." *Id*. at 29. Because Carmack would prevent the extension of COGSA terms, applying Carmack would thwart, not further, the uniformity that *Kirby* sought to achieve.

Applying Carmack also would upset widespread and efficient practices. The practice of extending COGSA terms to inland transportation is entrenched in the shipping industry. Pet. Br. 37; *see also Starrag v. Maersk, Inc*., 486 F.3d 607, 614 (9th Cir. 2007) ("[C]ontractual extension of the COGSA is now routine in the shipping industry."). As *Kirby* recognized, this practice also facilitates "efficient

contracting in contracts for carriage by sea." 543 U.S. at 29. Extending COGSA terms creates uniform rules throughout international shipments, which lowers litigation costs. *Id*. at 37, 40-41. COGSA's per package limits avoid the transaction costs associated with Carmack's declared value limitation. *Id*. at 38. And COGSA's negligence standard avoids the insurance costs imposed by Carmack's strict liability regime. *Id*. at 38-40; *see also* P&I Group Br. 15-19 (explaining that the mutual insurance used in the shipping industry is predicated upon the negligence standard employed by COGSA and similar regimes). Respondents neither contest these points nor attempt to demonstrate the efficiency of Carmack.

B. Applying COGSA Would Not Cause "Legal Chaos" Or Impede Settlement Of Cargo Disputes.

Respondents argue that applying COGSA to inland transportation under through bills of lading for overseas shipments would leave such transportation unregulated and give carriers unfettered freedom to impose terms relieving themselves of liability for negligent cargo handling. Resp. Br. 25. Respondents' concern is unfounded. As just shown, ocean carriers have strong incentives to use uniform terms throughout international shipments and therefore ordinarily extend COGSA terms to inland transportation. Additionally, even where COGSA terms are not extended, carriers do not have free rein. Although Carmack applies only to property received for domestic rail transportation, *see supra* p. 16, absent exemption, the ICA is otherwise applicable to rail transportation under overseas through bills of lading. In addition, where COGSA terms are not extended, the Harter Act, 46 U.S.C. §§ 30701-30707, or federal

common law may apply. *See, e.g.*, *Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys.*, *Inc.*, 235 F.3d 53, 59 (2d Cir. 2000).

Respondents' *amici* assert that overruling the decision below would undermine the current well-functioning system for settling cargo claims. Transportation and Logistics Council ("TLC") Br. 10-18. But most maritime circuits have held Carmack does *not* cover inland transportation under through bills of lading for overseas shipments, Pet. 12-16, and in practice COGSA terms typically are extended to inland transportation. *See supra* p. 21. Thus, *amici*'s data show that claimants are able to resolve their claims quickly and efficiently without Carmack.

C. COGSA Provides Needed Flexibility In Dealing With Forum Selection Clauses.

Respondents' *amici* argue that Carmack should cover the inland transportation under through bills of lading for overseas shipments because American small businesses need protection against being forced to litigate cargo claims in foreign venues. TLC Br. 9, 13-17. Cargo claims, however, are not always brought by small businesses. Like petitioner Regal-Beloit, cargo interests often are large multinational corporations. In addition, where shipments originate overseas, the ocean carriers, shippers, and insurers interested in cargo claims often are foreign: here, the ocean carrier ("K" Line) is Japanese, JA 116; the shippers are Chinese, JA 137, 148, 160, 172; and there is a Chinese insurer, China PICC, and an English insurer, Royal & Sun Alliance, Pet. App. 37a n.1. There is no dispute that Tokyo was a reasonable and fair venue for such parties. *See* Pet. App. 41a-42a.

Moreover, Carmack's rigid requirement that cargo claims be brought in the United States is ill-suited to international shipping. As this Court has recognized, foreign forum selection clauses are "an indispensable element in international trade, commerce, and contracting" because they allow parties to "agree[] in advance on a forum acceptable" to them. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972). Consequently, foreign forum selection clauses cannot be invalidated under the "parochial concept that all disputes must be resolved under our laws and in our courts." *Id.* at 9. Of course, such clauses should not be enforced if they impose a venue "so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court." *Id.* at 18. Ordinarily, however, valid forum selection clauses should be enforced unless their application would be unreasonable or unjust. *Id.* at 15; *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-38 (1995) (enforcing Tokyo forum clause in bill of lading for shipment from Morocco to Massachusetts). Carmack's rigid venue provision does not permit such a case-by-case analysis, which is another reason why Carmack should not be applied to inland transportation under through bills of lading for overseas shipments.

CONCLUSION

For these reasons derived from the Interstate Commerce Act and this Court's decision in *Kirby*, the decision of the court of appeals should be reversed.

Respectfully submitted,

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