Nos. 08-1553 & 08-1554 (Consolidated)

In the Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER UNION PACIFIC RAILROAD CO.

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INTRODUCTION

Respondents agreed to assume the risk of loss while these shipments were in transit from China to the United States, under standard commercial terms that included an agreement that any disputes would be litigated in Tokyo, where the ocean carrier that issued the bill of lading is located. Respondents argue that enforcing the contracts to which they agreed would be unfair, but those policy arguments are unpersuasive, inconsistent with settled law, and more than a bit rich considering that three of the four respondents are foreign corporations with substantial operations in China.

On the actual legal merits, respondents effectively concede that prior to the non-substantive 1978 recodification the plain language (and settled interpretation) of the Carmack Amendment did not extend to inland legs of import shipments moving under through bills of lading. Even after 1978, that remained the consensus view until the Second Circuit diverged less than four years ago. *See Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, 456 F.3d 54 (2d Cir. 2006). Respondents nevertheless argue that the language Congress used in 1978 must be construed as changing that long-settled law, despite the statute's extraordinary express command that it "may not be construed as making a substantive change in the laws replaced." *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, §3, 92 Stat. 1337, 1466. Even respondents' favorite case, *Sompo*, conceded that the pre-1978 language and precedents must control and that the 1995 amendments did not change the substance of Carmack in any way.

Because that issue disposes of this case, there is no need for this Court to wade into the interplay between

49 U.S.C. §§10709 and 10502. If this Court does address those issues, however, it should hold that Union Pacific properly opted out of any obligations Carmack might impose. Respondents and the United States argue that the STB has "exempted" multimodal shipments from the free contracting privilege created by §10709. But §10709 is not the sort of regulatory "requirement" for which §10502 exemptions were designed. Their argument would give the STB the power to repeal the Staggers Rail Act deregulation entirely by "exempting" all carriage from §10709 while leaving all of the ICA's common carriage and rate regulation requirements in place. Obviously that is not what Congress intended.

Regardless, Union Pacific satisfied any obligation it had by making Carmack liability terms available to UP's direct customer: "K"-Line. Respondents' belated suggestion that Carmack terms were not offered to "K"-Line is both waived and incorrect.

ARGUMENT

I. RESPONDENTS' POLICY ARGUMENTS ARE UNFOUNDED

Respondents argue at length that the position advocated by petitioners and the United States would leave cargo owners with no legal protections and no effective recourse in the event of cargo loss and would unfairly force them to litigate in distant forums. These concerns ignore commercial reality and settled law.

First, respondents effectively concede that the inland legs of import shipments moving under through bills of lading were not covered by the Carmack Amendment from its inception in 1906 until 1978 (when respondents believe the law changed). Indeed, that rule remained essentially unchallenged until the *Sompo*

decision in 2006. For a century Congress, the ICC, and the courts all agreed it was appropriate, and perfectly fair to shippers and consignees, to enforce the terms of the maritime contracts to which the parties agreed. U.S. international commerce was reasonably successful and prosperous during that period.

Second, these contracts sensibly specified venue in Japan because they were signed in Asia by Chinese shippers and a Japanese shipping company—all of whom obviously would find it far easier to litigate in Japan than in the United States. The plaintiffs here happen to be the U.S. purchasers (consignees) and their subrogated insurers rather than the Chinese shippers, but that is purely a product of how the shippers and consignees chose to allocate the risk of loss during shipment. If the shippers had retained the risk of loss during delivery (in U.S. domestic commercial parlance, an "FOB destination" rather than "FOB origin" shipment), then the plaintiffs here would be the Chinese shippers—and *respondents'* arguments would force the Chinese plaintiffs to travel across the Pacific to sue in Oklahoma. In other words, in the next case all of respondents' concerns about cargo interests being forced to litigate in inconvenient forums may cut the other way.

Third, those arguments actually cut the other way to a substantial extent *in this case*. The fact that two of these respondents are foreign insurers vividly illustrates the solution to the non-problem respondents identify. When a U.S. consignee assumes the risk of loss during transit under a bill of lading specifying a foreign forum, it can always purchase insurance from an insurer well situated to litigate in that forum. (That is just one of the many reasons why, as this Court

recognized in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), it is always more efficient to buy insurance from an insurance company than from a railroad.) One of the four respondents is PICC Property & Casualty Company Limited Shanghai Branch, "a foreign insurance company with its principal place of business at 2 Floor, 700 Zhongshan Road (S), Shanghai 2000010, China." JA-47. A brief glance at the web sites of respondents Royal & Sun Alliance and Regal-Beloit Corporation reveals that they also are foreign corporations with substantial operations in China.[1]

Fourth, this Court has already grappled with this precise issue under COGSA and has held that forum selection clauses specifying an overseas forum are presumptively enforceable and *not* unfair to consignees. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). Respondents agreed to assume the risk of loss for a long multimodal voyage that was predominantly maritime in nature. If the cargo were damaged on the ocean leg, this Court's settled precedents would require respondents to sue in Japan—and would squarely reject their suggestion here that having to sue in Japan somehow changes the liability regime or leaves them without effective recourse. *Sky Reefer*, 515 U.S. at 539-41. In international commerce "[m]anifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were

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[1] *See* http://www.regalbeloit.com/rbclocations.htm; http://www.rsagroup.com/rsa/pages/aboutus/aroundtheworld.

left to any place where the [cargo] or [defendant] might happen to be found," and "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Bremen*, 407 U.S. at 13-14. Respondents waived any argument that this forum selection clause is oppressive under *Bremen* and *Sky Reefer*. Pet.App.9a, 41a-42a. The basic equities and policies are not altered in any way when the damage happens to occur on land. And respondents' belief that all shipping disputes involving a U.S. entity simply must be litigated in the United States is inconsistent with basic principles of international comity. *Sky Reefer*, 515 U.S. at 537.

Finally, respondents repeatedly suggest that if Carmack does not apply these shipments will be completely "unregulated." But ocean through bills and shipping contracts are regulated by COGSA and the Federal Maritime Commission, and the ICC decided decades ago that further regulation of the inland leg is unnecessary. 49 C.F.R. §1090.2.

More importantly, the vast majority of all business transactions are "unregulated" in the sense that respondents mean. Parties sign contracts, and those contracts are generally enforced. All of respondents' arguments are directed at escaping the plain terms of the efficient shipping contracts to which they agreed. And even without "statutory" regulation there are always background rules—such as the federal admiralty principles this Court applied in *Kirby*. Respondents' suggestion that "[c]arriers would have unfettered freedom to impose whatever terms they wished, including the freedom to relieve themselves of all liability for negligent cargo handling" would be

flatly inconsistent with §3(8) of COGSA on the ocean leg. If the parties agreed to terms for the land leg that were somehow inconsistent with public policy, the courts could craft appropriate principles. *This* case involves parties who agreed to be governed by COGSA terms throughout the journey, and who now seek only to enforce the sort of forum selection clause that this Court has routinely approved.

II. THE CARMACK AMENDMENT DOES NOT APPLY TO IMPORTS UNDER A THROUGH BILL

Petitioners and the United States explained at length that prior to the 1978 recodification the plain language of Carmack reached only purely domestic shipments and exports to Canada and Mexico. The courts and the ICC consistently held that Carmack applied to imports only if the parties chose not to employ a through bill of lading and instead issued separate bills of lading for the ocean and land legs (as in *Reider v. Thompson*, 339 U.S. 113 (1950)). The entire structure of ICC regulation of imports and exports was built on that premise.

Respondents muster only a weak footnote suggesting "ambiguit[y]" in that settled law. Resp.Br.36 n.14. Petitioners and the United States have explained why *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920), does not support respondents' position. UP Br.25-33; U.S.Br.18-20. The fact that the jurisdictional provision interpreted in *Woodbury* was a predecessor to the provision that respondents now (incorrectly) say governs the scope of Carmack is a non sequitur. The jurisdictional provision plainly did not govern Carmack's scope in 1920, and contemporaneous courts

overwhelmingly recognized that *Woodbury*'s reasoning did not apply to Carmack. Moreover, respondents have no answer to the point that even if the *Woodbury* reasoning *were* applied to Carmack the statute still would not reach shipments, like this one, originating in a non-adjacent country. And *Union Pacific Railroad Co. v. Burke*, 255 U.S. 317 (1921), adds nothing. The *Burke* Court accepted, "[f]or the purposes of [that] case, only," the parties' stipulation that the property was moving under a separate domestic bill of lading rather than an ocean through bill, and then applied (without ever mentioning Carmack) common law principles that would have been the same whether Carmack applied or not. *Id.* at 319-20.

This case therefore turns entirely on respondents' argument that the 1978 recodification and/or 1995 amendments must be understood as radically changing the long-settled meaning of Carmack. But the present language is at least ambiguous, and in any event Congress commanded that any changes made in the 1978 recodification "may not be construed" as changing the prior law. Congress then reenacted Carmack without substantive change in the ICC Termination Act of 1995, thus ratifying a century of settled law.

A. Congress Has Not Changed The Historic Scope Of Carmack

1. Congress commanded, in statutory text passed by both Houses and signed by the President, that the 1978 recodification "may not be construed as making a substantive change in the laws replaced." Pet.App.88a. Respondents assert (with no support) that such language "simply instructs courts to do what they already do under the *Fourco Glass* presumption," and "has no role to play in the construction of *unambiguous*

language." Resp.Br.39.[2] But the "may not be construed" language is by far the clearest and most unambiguous part of the 1978 statute, and the legislative history confirms that it was the only provision Congress actually cared about. If that interpretive command could be overridden at all, it would only be by statutory language of at least comparable clarity and forcefulness. Respondents claim that the 1978 statute extended the scope of Carmack—for the first time—to the outer limits of the ICC's jurisdiction. But the text on which respondents rely does not say that—and certainly does not say it with sufficient clarity to trump Congress's direct instruction that the statute "may not be construed" as changing the prior law.

"K"-Line explained in its opening brief (30-31) that, under the present text, Carmack is triggered when a "rail carrier providing transportation or service subject to the jurisdiction of the [STB] ... receives [property] for transportation under this part," meaning Part A of the ICA. 49 U.S.C. §11706(a). Part A extends "only to transportation in the United States." §10501(a)(2). Because the receiving carrier here ("K"-Line) is not a "rail carrier" and did not receive property for rail transportation in the United States, Carmack does not apply. Both this Court and the ICC have made clear

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[2] Respondents wrongly claim that petitioners "place great weight on the presumption that, when Congress recodifies a statute, it does not intend to change the statute's meaning." Resp.Br.21, 34-40. Petitioners and the United States placed almost no weight on that presumption—merely observing that this Court likely would not have interpreted the 1978 codification as changing the law even if Congress had not expressly forbidden such interpretations. UP Br.22-23.

that an ocean carrier is not a rail carrier just because it offers subcontracted inland transportation or owns equipment used by a railroad. *United States v. Am. Ry. Express Co.*, 265 U.S. 425 (1924); *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968); *Joint Application of CSX Corp. & Sea-Land Corp.*, 3 I.C.C.2d 512 (1987). The Act's expansive definitions of what a "railroad" and "transportation" "include" just ensure that everything an actual "rail carrier" does is regulated, "to prevent overcharges and discriminations from being made under the pretext of performing … additional services." *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Dettlebach*, 239 U.S. 588, 594 (1916). Respondents' approach would play havoc with the ICA's distinctions between rail, motor, and water carriers, and between carriers, forwarders, and brokers.

UP adopted "K"-Line's arguments and also refuted respondents' suggestion that *UP* received property for domestic transportation within the meaning of Carmack when it accepted this cargo from "K"-Line in Long Beach. UP Br.23, 26 n.2. Carmack draws important distinctions between the "receiving" carrier and connecting or delivering carriers. Only the first carrier receiving property directly from the shipper is the "receiving" carrier. Since 1906 the whole point of Carmack has been to centralize responsibility under a single through bill, issued by the carrier with whom the shipper dealt directly, and to eliminate the once-common practice of connecting carriers issuing separate bills. The crucial issue is "where the obligation of the carrier as receiving carrier originated." *Reider*, 339 U.S. at 117. Treating UP as a "receiving" carrier obliged to issue a separate bill of

lading would read Carmack as mandating the very commercial problem Carmack was designed to solve.

Additionally, as the United States explains (U.S.Br.21-23), the "liability imposed under" Carmack is still expressly limited to transportation "in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading." §11706(a). Respondents read that limitation as modifying only the immediately preceding subclause concerning connecting carriers. Resp.Br.30 n.8. But viewing Carmack "'as a whole,'" *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009), and in light of its history and purpose, that language is best read as modifying the entire sentence. The indentation that makes that language appear to be a part of subclause (a)(3) was introduced in 1995 and was surely a drafting accident. *See* Addendum 5a-6a (comparing 1978 and current versions). It does not appear in the parallel provision governing motor carriers. *See* 49 U.S.C. §14706; Pet.App.73a.

And why would Congress want to impose new, universal extraterritorial liability on the receiving or delivering carrier for any damage caused by either, but then confine their liability for damage caused by *connecting* carriers to the historic scope of Carmack? Imagine a through shipment by ocean carrier from Argentina to Mexico and then overland by rail from Mexico to Chicago. Under the historic and correct interpretation, Carmack does not apply. In respondents' view, however, the U.S. delivering carrier and the ocean carrier are both strictly liable under Carmack for any damage either causes, but *not* for damage caused by a Mexican rail carrier on its line in

Mexico. Or imagine an export through shipment from Chicago to Germany. In respondents' view, the initial U.S. rail carrier would be strictly liable under Carmack for damage during the U.S. inland leg and the delivering leg in Germany—but not for damage during the ocean leg or on a connecting line in France. Respondents' interpretation would thus make Carmack applicable to international ocean shipments but leave large, arbitrary holes in the liability it imposes—requiring the shipper to determine and prove where the damage actually occurred. That would frustrate Carmack's core purpose. *See Mo., Kan. & Tex. Ry. v. Ward*, 244 U.S. 383, 386-87 (1917); U.S.Br.21.

The current language is *at least* ambiguous—particularly when the history, full statutory context, and consequences are considered. Respondents' reading would ignore Congress's interpretive instructions elsewhere in the statute, treat ocean carriers as "rail carriers," transform the regulation of ocean carriers and call into doubt the settled jurisdiction of the FMC, produce results inconsistent with Carmack's original purpose, and "defeat[]" the "apparent purpose of COGSA," *Kirby*, 543 U.S. at 29, by rendering COGSA §7 a virtual nullity. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); *Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009) (same).

2. The 1995 ICCTA made no relevant substantive changes to Carmack. It just replaced references to the ICC with the new STB, split Carmack for the first time into separate provisions governing rail and motor carriers, added the indentation discussed above, and

moved what remained of former §10730 (dealing with declared value liability limitations) into §11706. *See* Addendum 5a-6a; Pet.App.69a, 86a.

The courts have uniformly recognized that the ICCTA "worked no substantive change on the Carmack Amendment." *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 73 n.4 (2d Cir. 2001); *see also, e.g.*, *White v. Mayflower Transit, LLC*, 481 F. Supp. 2d 1105, 1109 (C.D. Cal. 2007) (same), *aff'd*, 543 F.3d 581 (9th Cir. 2008); *Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F. Supp. 2d 494, 496 n.5 (D.S.C. 2005) (same); *Molloy v. Allied Van Lines, Inc.*, 267 F. Supp. 2d 1246, 1251 n.3 (M.D. Fla. 2003) (same). The legislative history confirms that view. *See, e.g.*, H.R. Rep. No. 104-422, at 195 (1995) (Conf. Rep.) ("The new section [of Carmack] makes no substantive change in the rules of liability for loss or damage to rail shipment.").

Respondents do not dispute that courts between 1978 and 1995 uniformly held Carmack inapplicable to import shipments. Thus, far from effecting a "repeal[]" (Resp.Br.38), Congress *ratified* the longstanding judicial and agency interpretation of Carmack when it re-enacted Carmack in the ICCTA. *See* UP Br. 33-34; U.S.Br.21-23.

3. Respondents have entirely too little faith in the legal profession when they assert (Resp.Br.35-36) that no one could have figured out that the present statute is consistent with Carmack's historic scope. The statute *at least* permits such a reading, and it is supported by plenty of recent commentary[3] and most

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[3] *See, e.g.*, 1-3 Saul Sorkin, *Goods in Transit* §3.05[1][a] (2009) (Carmack "cover[s] the property while it is transported in the

of the case law. Even the Second Circuit in *Sompo* recognized that the pre-1978 language remained controlling after 1995. *See* 456 F.3d at 64. And the courts that have addressed Congress's "may not be construed" language (including this Court) have uniformly respected it. *See, e.g.*, *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).[4] It has never been possible to understand the Carmack Amendment without looking at the case law—and that hardly makes Carmack an unusual statute.

United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading."); Vibe Ulfbeck, *Multimodal Transports in the United States and Europe – Global or Regional Liability Rules?*, 34 Tul.Mar.L.J. 37, 60 n.92 (2009) (Carmack "does not apply to imports and does not apply to exports to nonadjacent foreign countries."); Jack Knebel & Denise Blocker, *United States Statutory Regulation of Multimodalism*, 64 Tul.L.Rev. 543, 555 (1989) (same); Richard Palmer & Frank DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 Tul.L.Rev. 281, 329 (1989) (same); Saul Sorkin, *Limited Liability in Multimodal Transport and the Effect of Deregulation*, 13 Tul.Mar.L.J. 285, 294 (1989) (same).

[4] *See also Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 184 (3d Cir. 2006); *Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*, 358 F.3d 82, 90 n.7 (1st Cir. 2004); *Zatz v. United States*, 149 F.3d 144, 146 (2d Cir. 1998); *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 287 n.1 (7th Cir. 1997); *Cent. Freight Lines v. ICC*, 899 F.2d 413, 423 (5th Cir. 1990); *Kan. City Indus., Inc. v. ICC*, 902 F.2d 423, 437-38 (5th Cir. 1990); *Trailer Marine Transp. Corp. v. Fed. Mar. Comm'n*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979); *Riduco, S.A. v. A.P. Moller-Maersk A/S*, 2009 WL 4680197, *3 (N.D. Ill. 2009).

B. Respondents' "Separate Bill Of Lading" Arguments Are Misplaced

Respondents attack the reasoning of *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), and suggest that the writ should be dismissed because petitioners have not defended it. Resp.Br.30-34 & n.11.

Petitioners have not "abandoned" their certiorari argument (or the circuit split) by not defending the precise reasoning of *Swift*. UP's petition, like its merits brief, forthrightly explained that "[t]he *Swift* court's articulation of the test for Carmack's applicability is in some tension with other aspects of its reasoning," but nonetheless "correctly implements the statutory language of Carmack prior to the 1978 codification." Pet.17-18. UP's petition certainly did not rely on *Swift* as the sole "origin" of the traditional rule. *Contra* Resp.Br.32. It explained that that rule is the best reading of this Court's decision in *Reider* (Pet.25) and also cited most of the important older cases (Pet.21-22 & n.4).

Respondents' point seems to be that *Swift* articulated the rule in terms of whether a separate bill of lading was issued for the domestic leg, whereas *Reider*, the *Alwine* line of cases, and petitioners' merits briefs have more precisely explained that the question is whether a through bill was issued or instead separate bills governing the sea and land legs, respectively (as in *Reider*). The difference between those two articulations is quite subtle—and comes down to the hypothetical point that when a through bill is issued, any later issuance of a duplicative separate bill would not trigger Carmack. *See* UP Br.33-34 & n.6; U.S.Br.28-29 & n.11. But the question presented is

whether "the Carmack Amendment applies to the inland leg of an international, multimodal shipment under a 'through' bill of lading," Pet.i, and UP's petition repeatedly explained that the key issue is whether the shipment is moving under a through bill. *See* Pet.13-14, 16, 21, 24, 26, 27, 28. At the only point in the petition where this distinction could possibly have mattered—its description of what "K"-Line would have needed to do to invoke Carmack—the petition phrased it exactly right. *See* Pet.32-33. And the circuits do not disagree about what to do with hypothetical overlapping bills of lading; they disagree about whether an ocean through bill matters *at all* to the application of Carmack. *Compare* Pet.13-14 *with* Pet.20-21.

Respondents misunderstand Carmack's language providing that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier." 49 U.S.C. §11706(a). If (as in *Reider*) the ocean bill terminated at the port and Carmack therefore required a domestic bill, the carrier could not escape liability simply by not issuing the bill of lading that Carmack requires. That proviso has no application where (as here) Carmack does not require that a bill of lading be issued.

C. Respondents' Uniformity Arguments Are Inconsistent With *Kirby* And Unpersuasive

1. Respondents wrongly claim that extending Carmack to the inland leg of multimodal import shipments would best serve the "uniformity goals this Court recognized in *Kirby*." Resp.Br.43. This Court explained in *Kirby* that if the terms of the bill of lading "did not apply equally to all legs of the journey," parties "would not enjoy the efficiencies" of through

shipping arrangements … [a]nd the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated." 543 U.S. at 29. As UP explained (Br.37-38), respondents' proposed regime would make the law governing particular cargo depend on a threshold factual inquiry about where damage occurred that will often be very unclear and for which Congress supplied no standards or procedures.

Respondents offer the counter-observation that in cases involving a clear locus of damage to large numbers of containers (such as a derailment) a single liability regime governing every piece of cargo on a particular train would have *different* advantages for judicial efficiency. Resp.Br.43-46. Fair enough. But large-scale catastrophes are not the only, or even the primary, cause of damage to cargo transported from abroad. It is far more common for individual containers (or packages within containers) to be damaged by, *e.g.*, rough handling, water seepage, or theft. *See* Hugh Kindred & Mary Brooks, *Multimodal Transport Rules* 143 (1997). In *those* situations, the concerns this Court identified in *Kirby* predominate.

2. Respondents assert that the full-journey-uniformity this Court spoke of in *Kirby* might not be achieved if the parties contract for different rules inland than on the ocean leg. Resp.Br.46-48. The international shipping industry is highly competitive, consisting of "more than 140 different shipping lines (not to mention countless NVOCCs)" that serve one port alone. Resp.Br.45. The STB agrees that the market for inland shipping of containerized goods is also robust. Competitive markets gravitate to efficient terms, and the dominant industry practice is to extend

the key terms of COGSA inland. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 597-99 (4th ed. 2004); Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J.Mar.L. & Com. 1, 9 (2009). Regardless, the fact that parties might not elect the "efficient choice" this Court spoke of in *Kirby* is no reason to deny them the option altogether—as respondents would. 543 U.S. at 26.

3. Respondents note that "K"-Line's bill of lading defers to "mandatory national law" in other countries. Resp.Br.52-53. But *United States* rail carriers have operated for decades on the understanding—reinforced by *Kirby*—that the ocean bill, rather than Carmack, governs the inland leg of an import shipment. And the mandatory liability regimes in many other countries are more consistent with COGSA than Carmack is.[5]

Respondents and *amici* make much of AAR's comments during the negotiation of the Rotterdam Rules. AAR opposed the "Draft Instrument" because it would have replaced the "well understood system of handling rail freight loss and damage claims" based on liability and pricing terms set forth in the rail carriers' circulars. U.N. doc. No. A/CN.9/WG.III/ WP.28, at 33 (Jan. 31, 2003) (*Comments on Behalf of the Association of American Railroads*). AAR's filing is ambiguous about the precise role that Carmack played in the development of U.S. law, but clearly explained that the U.S. status quo allows ocean carriers and railroads to extend COGSA inland and enforce Himalaya clauses.

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[5] *See* United Nations Conference on Trade and Dev., Implementation of Multimodal Transport Rules – Comparative Table (Oct. 9, 2001), *available at* http://www.unctad.ch/en/docs/posdtetlbd2a1.en.pdf.

Id. AAR also explained that a "critical feature" of the U.S. legal regime "is that a claim for loss or damage can be brought against the railroads only by ocean carriers because the railroads do not have privity of contract with any other party in the transportation chain, including the shipper," and that venue for such suits may be specified by contract between the ocean carrier and the railroad. *Id.*

III. EVEN IF CARMACK EXTENDS TO IMPORT SHIPMENTS, PETITIONERS OPTED OUT

This Court need not reach the opt-out issues, but if it does it should hold that UP and "K"-Line contracted out of the ICA (including Carmack) under §10709, or that the terms UP offered satisfy any obligations imposed by §10502(e).

A. The STB Cannot "Exempt" Transportation From §10709

1. Respondents and the United States argue that because §10709 is part of the ICA, the STB's TOFC/COFC exemption order "exempts" this carriage from §10709. That theory fails because the STB's exemption authority does not extend to §10709, and because the exemption itself covers only the regulatory "requirements" of the ICA.

Congress enacted the Staggers Act "to rid railroads of unnecessary and inefficient regulation[]." *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir. 1993). Section 10709 was viewed as one of the bill's most significant achievements. *See, e.g.*, H.R. Rep. No. 96-1430, at 100 (1980) (Conf. Rep.) ("The conferees stress that the establishment of contract rates is a significant aspect of the new

freedom … to market rail transportation more effectively."); H.R. Rep. No. 96-1035, at 58 (1980) ("Rail carriers and shippers should be free to negotiate and enter into contracts …."); S. Rep. No. 96-470, at 24 (1979) ("A contract rate provision is one of the most important provisions in the bill" and is "an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements"). Section 10502 is an additional, parallel deregulatory provision—in some ways more powerful than §10709 and in some ways less—that permits the STB to exempt categories of carriage from the ICA altogether when it determines that regulation is not needed to further the ICA's transportation policy goals or to prevent "abuses of market power." §10502(a); H.R. Rep. No. 96-1430, at 105.

The STB's authority to exempt traffic from ICA provisions selectively (*see* U.S.Br.31) illustrates why respondents and the government cannot be right. Their interpretation would give the STB authority to "exempt" a class of carriage (or all carriage) from §10709 *only*, while leaving the entire structure of regulation in place. In other words, they suppose that Congress gave the STB the power—in an ostensibly deregulatory provision—to repeal the Staggers deregulation entirely and return the industry to "the Kafkaesque regulatory regime of the pre-Staggers era." H.R. Rep. No. 104-311 at 91 (1995); *see also* STB Ex Parte No. 669, 72 Fed. Reg. 16,316 (Apr. 4, 2007). There is no reason to impute to Congress such a self-defeating intention, particularly with no support from the text or legislative history.

The better reading is that §10502 authorizes the STB to "exempt" categories of carriage from the

regulatory *requirements* of the ICA but not from provisions—like §10709 and §10502 itself—that *release* shippers and carriers from those requirements. The STB actually phrased its TOFC/COFC exemption order in terms of the ICA's "requirements." *See* 49 C.F.R. §1090.2; *see also* Improvement of TOFC/COFC Regulation, 45 Fed. Reg. 79,123 (Nov. 28, 1980). Reading "requirements" to mean "privileges" exceeds the bounds of any *Auer* deference owed to an agency brief filed in the Second Circuit. Resp.Br.61.[6] Regardless, the phrasing indicates that even the STB once held a more common-sense understanding of §10502. And the United States acknowledges that its arguments here are inconsistent with its representations to this Court in *Kirby*. U.S.Br.31 n.12.[7]

2. Section 10502(e) does not impose any obligation on carriers to offer Carmack terms. It is phrased as a limitation on the STB's *exemption authority*, not an independent source of duties for carriers. *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166-67 (2004) (savings clause will not be read to expand or create any affirmative right). And nothing in it suggests an intent to repeal or limit the contracting authority granted elsewhere. Respondents focus on the word "alternative" (Br.64) in the second sentence of §10502(e), but ignore the rest of that sentence—which is also phrased as a savings clause clarifying that "[n]othing in this subsection or [Carmack] shall prevent

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6 That brief clearly is not entitled to *Chevron* deference.

7 With respect, the potential applicability of Carmack was not "ancillary" in *Kirby*; it was a "threshold issue" that directly affected "the appropriateness of" granting certiorari. U.S. *Kirby* Invitation Br. 11.

rail carriers from offering alternative terms." Two consecutive negative statements about what a §10502 exemption *does not do* cannot add up to imposing an affirmative obligation.[8]

Respondents and the government observe that when a shipper of *non-exempt* freight is presented with an unappealing offer to contract under §10709, it can always fall back on the railroad's common carriage obligations and demand Carmack-compliant tariff service instead. They hypothesize that shippers of *exempt* freight should always have an equivalent option, even if the STB has exempted the railroad from common carrier obligations.

Either as a freestanding policy concern or as an explanation of Congress's intentions, those arguments will bear very little weight. A §10502 exemption represents the STB's judgment that the market is competitive enough that regulation is not needed. If the STB believes that shippers will not be offered reasonable terms, it can limit its exemption to preserve whatever regulation it thinks necessary.

Respondents and the government also would distort the statute to preserve an "alternative" that would have no practical value to shippers. The STB's exemption means that railroads are free to refuse TOFC/COFC service altogether, and §10502(e) itself makes clear that railroads cannot be compelled to offer Carmack terms at any particular price. The only practical effect of respondents' interpretation would be

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[8] The snippets of §10709(f)'s legislative history cited at Resp.Br.59-60 plainly are not referring to §10502(e)—since §10502 authorizes the STB to exempt railroads from their "common carrier obligations."

to put railroads to an artificial choice between refusing service and making an completely uneconomic alternative "Carmack-compliant" offer. That would serve no coherent policy purpose.

3. Respondents suggest that §10709 is inherently inapplicable to exempt carriage, regardless of how the STB structures its exemption orders. The government does not go that far (U.S.Br.31 n.12), for good reason.

Respondents' reading offers no way to distinguish among exemption orders, and would make §10709 unavailable whenever the STB has exempted carriage from *any* ICA requirement, however small—such that any attempt at modest *deregulation* would have the actual effect of very significant *re-regulation*. Congress surely did not intend such arbitrary consequences.

4. Respondents and the government also suggest that §10502(e) "specifies contractual terms that a carrier must offer before a contract for carriage is made, whereas Section 10709 specifies the effect of such a contract after it has been executed." U.S.Br.30. But §10709 leaves no room for preconditions elsewhere in the ICA. It provides that carriers "may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions," and that a contract "authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of [the ICA]." §10709(a), (c)(1).[9] The gist of

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[9] When Congress enacted the ICCTA, it *removed* certain "statutory preconditions" from §10709 (filing and agency-approval

the government's argument is that the *terms* of a §10709 contract are not subject to the ICA and cannot be challenged, but that the *enforceability* of such contracts is subject to, and challengeable under, preconditions drawn from §10502(e). The plain language of §10709 does not draw such a distinction. Section 10709 contracts are "authorized by" §10709 itself, and are not "subject to" any provision of the ICA, including §10502(e).

B. UP Fulfilled Any Obligation Under §10502(e) To Offer Carmack-Compliant Terms

1. Respondents argue that U.S. railroads must be bound by Carmack terms unless they ensure that such terms were offered to the unknown foreign shippers by the ocean carrier. *See* Resp.Br.66-76. As the government explains, that would be an "unworkable regime" and would "undermine a significant benefit of through transportation." U.S.Br.32.

Kirby and *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508 (1914), establish the sensible rule that a rail carrier providing service on a through bill may rely on its contracts with its direct counterparty. In *Great Northern*, this Court held that "the Railroad … was obliged to treat the [freight] Forwarder *as shipper*," and that "the carrier had the right to assume that the [intermediary] could agree upon the terms of the shipment," regardless of whether there had been a "*bona fide* effort" between the shipper and the intermediary "to agree on a valuation" of the goods. *Id.* at 514-15. Because *Great Northern*

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conditions) as "unneeded and unduly burdensome regulation." H.R. Rep. No. 104-422, at 175 (1995) (Conf. Rep.).

involved a shipment "from Minneapolis to Portland," *id.* at 513, Carmack clearly applied.

Relying on *Great Northern*, this Court held in *Kirby* that a shipping "intermediary can negotiate reliable and enforceable agreements with the carriers it engages." 543 U.S. at 33. The Court explained why this policy makes sense, given the realities of modern international shipping. *See* UP Br.47; Part I, *supra*.

Burke is not to the contrary. *See* Resp.Br.72-73. In that case, the carrier and the shipper stipulated that the inland carriage was governed by a separate domestic bill of lading and tariff filed with the ICC. 255 U.S. at 319-20. The only issue before the Court was whether that domestic tariff authorized both full and reduced-liability rates. *Id.* at 322-23. Because this Court found that the carrier had "but one applicable published rate east of San Francisco," it determined that the carrier "could not lawfully have given" *anyone* a choice of rates—and the issue of whether a choice presented only to the ocean carrier would have been good enough simply was not presented. *Id.* at 323. Unsurprisingly, the litigants in *Burke* did not even cite this Court's then-recent decision in *Great Northern*.

Respondents rely heavily on *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128 (1953), and its holding that under Carmack (and the common law it codified) a shipper must be given a "fair opportunity" to select full liability rates before released value rates are enforceable. Section 10709 imposes no such limitations. But more importantly, *Nothnagle* does not speak to *who* must be given a "fair opportunity" to select rates. *Great Northern* and *Kirby* squarely hold that a railroad may treat its direct

counterparty as the "shipper" for purposes of that doctrine.

2. As explained in UP's petition and opening brief, "K"-Line could have elected Carmack terms under UP's MITA by drafting its ocean bill of lading to terminate at the U.S. port of entry, just like the ocean carrier in *Reider* did. *See* UP Br.44.

Because respondents did not contest this fact in their opposition brief, they have waived the point. Respondents argue that Rule 15.2 applies only when a belated dispute "'bears on what issues properly would be before the Court if certiorari were granted.'" Resp.Br.77 n.28. But the question presented, in part, is "[w]hether the Ninth Circuit must be reversed because it … erred by holding that carriers providing exempt transportation cannot contract out of Carmack … by offering Carmack-compliant terms to the rail carrier's own direct customer?" UP Pet.i. Respondents contend, precisely, that that aspect of the question presented is not before the Court because it assumes a factual premise they now (belatedly) challenge. Regardless, Rule 15.2 has been held applicable to *all* factual statements in the petition that go unopposed at the certiorari stage. *See, e.g.*, *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004); *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 413 n.2 (1997).

Even if this Court were inclined to forgive the waiver, it should conclude—as the United States has—that "K"-Line had a fair opportunity to obtain Carmack terms. *See* UP Br.44-46. As the MITA's terms make clear, UP's concern is with shippers attempting to pass off purely domestic shipments as international, in order to secure the much lower international rates. JA-134-

136. If an international shipper wanted to opt into the more expensive domestic shipping rates, including the Carmack option (which is 250% more expensive than even the domestic baseline) UP obviously would have no objection. Indeed, the MITA *forces* an international shipper into the domestic rates if it does anything at all with the containers ("warehoused, processed, repackaged, etc.") prior to putting them on the train. JA-134-135.[10]

Respondents actually had a fair opportunity *themselves* to opt into the Carmack regime—either by insisting that "K"-Line's bill of lading cover only the ocean leg (as in *Reider*) or by contracting with "K"-Line only for ocean transport to Long Beach and then arranging separately for domestic rail transportation. UP's MITA was at all relevant times publicly available on its website.[11] As UP pointed out (Br.46), the old common law "fair opportunity" principles *did not* require that the parties actually discuss the various alternatives before contracting. And this Court held in *Kirby*, citing *Nothnagle*, that the shipper "had the opportunity to declare the full value of the machinery and to have [the carrier] assume liability for that value" when "negotiating the [ocean] bill." 543 U.S. at 19. The same was true here.

Respondents contend that UP's offer is not "fair" because electing Carmack terms would have cost more and deprived the shippers "of the benefits of through transportation." Resp.Br.79. This is dangerous

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[10] Respondents vastly overstate (Resp.Br.68-70) the complexity of the MITA and the ERTA. *See* UP Br.11-12, 44-46, 46 n.10.

[11] *See* UP SER (9th Cir. filed Aug. 27, 2007) 92 ¶2.

nonsense. The only benefits of conventional through transportation that respondents would have lost if they or "K"-Line had elected Carmack terms—cheaper shipping prices reflecting limited liability for all carriers, and consistent terms for the whole voyage—are inherent to Carmack's application (and precisely why, in the real world, shippers almost *never* select Carmack terms). UP is not obligated to price a shipping option involving uncapped strict liability for undiscovered damage to sealed cargo at the same level it has been pricing liability capped at $500 per container. Section 10502(e) makes that crystal clear.

Respondents suggest (Resp.Br.74) that UP is somehow trying to have it both ways, but the truth is opposite. Respondents want all the benefits of the efficient default rules they are now laboring to destroy, without accepting the costs. Put differently, respondents want UP to provide the full-value cargo insurance that two of these respondents procured elsewhere, without charging for it. This Court should not be fooled.

Finally, respondents argue that UP does not offer a "fair opportunity" to select *venue* terms consistent with Carmack. Resp.Br.77-80. Again, these arguments are waived. The MITA specifies preconditions "for a shipment to be subject to the terms of 49 U.S.C. §11706." JA-132-133. Regardless, neither §10502(e) nor the "fair opportunity" doctrine respondents extract from *Nothnagle* properly applies to forum selection clauses.

In cases like *Bremen* and *Sky Reefer* this Court has enforced forum clauses in ocean bills of lading without any inquiry into whether the shipper had a "fair opportunity" to specify something else. There is no

reason to force a Japanese ocean carrier to offer a Chinese shipper, in Shanghai, the option of an Oklahoma forum before the two of them can agree to litigate disputes in Japan. And it often will not even be possible for the carrier to determine up front what venue the background law would later specify for a lawsuit. Carmack, for example, authorizes suit against connecting carriers only "in the judicial district in which such loss or damage is alleged to have occurred." §11706(d)(2)(A)(iii). And venue for suit against the delivering carrier varies based on who happens to sue. §11706(d)(2)(A)(ii); Part I, *supra*.

Nor does a forum selection clause affect the "contractual terms for liability and claims" discussed in §10502(e). As this Court explained in *Sky Reefer*, there is an important "difference … between applicable liability principles and *the forum* in which they are to be vindicated." 515 U.S. at 534 (emphasis added). This Court held that a Tokyo forum selection clause did not violate COGSA's express prohibition against contracts varying COGSA's liability terms. And "claims" in this context refers to the process by which shippers present a claim for cargo damage *to the carrier*, not to lawsuits in court. Carmack has specified terms for the filing of "claims" and lawsuits since 1915, *see* Pet.App.97a, and has always distinguished between them. The Staggers Act added the current venue provisions in order to protect *railroads* from suit in inconvenient jurisdictions. *See* H.R. Rep. No. 96-1430, at 103; Pet.App.44a. It is therefore unsurprising that Congress did not include venue among the Carmack terms from which an STB exemption may not "relieve" a carrier. §10502(e). (Instead, it gave parties the

option to select a forum by contracting under §10709(c)(2).)

CONCLUSION

This Court should vacate the judgment of the Ninth Circuit and reinstate the district court's judgment or, at a minimum, remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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ADDENDUM

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34 Stat. 584 (1906)

* * * SEC. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid. * * *

41 Stat. 474 (1920)

* * * Sec. 400 The first four paragraphs of section 1 of the Interstate Commerce Act, as such paragraphs appear in section 7 of the Commerce Court Act, are hereby amended to read as follows:

"(1) That the provisions of this Act shall apply to common carriers engaged in–

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

* * *

92 Stat. 1359 (1978)

* * * **§ 10501. General jurisdiction**

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country. * * *

49 U.S.C.A. §10501 (2009)

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country. * * *

92 Stat. 1453 (1978)

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

* * *

49 U.S.C. §11706 (2000)

§ 11706. Liability of rail carriers under receipts and bills of lading

(a) 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. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

* * *