Loss and Damage Freight Claims - Rail

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I. INTRODUCTION

"This is a maritime case about a train wreck."[1] So stated the unanimous United States Supreme Court in *Norfolk S. Ry. Co. v. Kirby*, expressing in an economy of words the confluence of ocean and rail intermodal transportation that has led to a number of conflicting decisions related to the Carmack Amendment,[2] the Carriage of Goods by Sea Act[3] and the international nature of today's intermodal transportation by sea, rail and road.[4] In order to grasp fully the evolution of the treatment of loss and damage claims in rail transportation, this article will address the historical development of the Carmack Amendment and its application to railroad loss and damage claims, the effect of deregulation, the current treatment of railroad loss and damage claims in common carriage, contract carriage and exempt transportation and the sea-change intermodalism has had upon both the practical and legal aspects of rail transportation. Lastly, this article will address what will become the new Rotterdam Rules and the effect they are likely to have upon intermodal transportation in the United States.

II. HISTORICAL DEVELOPMENT OF THE CARMACK AMENDMENT

Historically, railroads were considered common carriers.[5] Common carriers were insurers of the cargo entrusted to them. "That railroad companies are common carriers cannot be disputed, and, being so, they are bound and controlled, as a general principal, by all the common law

1. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 18 (2004).

2. Enforcement: Investigations, Rights, and Remedies, 49 U.S.C. §§ 11706, 14706, 15906 (2006) (rail, motor, pipeline, respectively) [hereinafter *Carmack Amendment* or *Carmack*]; *See* Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000157 (last visited Feb. 3, 2009) (The Carmack Amendment was named for Senator Edward W. Carmack of Tennessee who died in a gun fight in Nashville, Tennessee, November 9, 1908).

3. Liability of Water Carriers, 46 U.S.C. § 30701 (2006) [hereinafter *COGSA*]; both Carmack and COGSA have been codified at several different sections of Title 49 since their enactments. Originally codified at 49 U.S.C. §20 (11), Carmack was recodified in 1978 at 49 U.S.C. §11707 and then recodified again in 1996 at 49 U.S.C. § 14706. The current version of Carmack is codified at 49 U.S.C. § 11706; *see* Sompo Japan Ins. Co. v. Norfolk S. Ry. Co., 540 F. Supp. 2d 486, 492 (S.D.N.Y. 2008) [hereinafter *Sompo II*]. COGSA was originally codified at 46 U.S.C. § 1301-1315, which is how the statute is cited in most of the relevant case law. Congress recodified portions of Title 46 of the United States Code as positive law in October 2006, and in so doing, moved COGSA to the notes section of 46 U.S.C. § 30701; *see* Regal-Beloit v. Kawasaki Kisen Kaisha, F.3d 985 (9th Cir. 2009), *cert. granted*, 2009 WL 1725959, 77 U.S.L.W. 3710 (U.S. Oct. 20, 2009) (No. 08-1553).

4. *See infra* Section V.

5. McCoy v. Pac. Spruce Corp., 1 F.2d 853, 855 (9th Cir. 1924) ("A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges.").

rules applicable to such a position – they becoming, in fact, insurers."[6] The only defenses available to the carrier were acts of God or acts of the public enemy.[7]

The Interstate Commerce Act ("ICA"), passed in 1887 as "An Act to Regulate Commerce," created the Interstate Commerce Commission ("ICC") and made railroads the first federally regulated industry in the United States.[8] The thrust of the ICA in 1887 was not cargo loss and damage; but instead, was to require just and reasonable rates and effective freight and passenger rail service. The thrust towards a uniform system for handling loss and damage claims in rail carrier transportation arose as a consequence of non-uniform state law governing limitations on liability. This became clear in *Penn. R.R. Co. v. Hughes*, where the Supreme Court upheld a Pennsylvania state court's determination that Pennsylvania state law prohibited the application of a limitation of liability that would be valid under New York law, the place of shipment.[9] In doing so, the Supreme Court acknowledged (i) the power of Congress to preempt the subject; and (ii) that Congress has not done so in the ICA:

> It may be assumed that under the broad power co[n]ferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provisions as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation.[10]
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> While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has

6. JAMES W. ELY, JR., RAILROADS & AMERICAN LAW 181 (University Press of Kansas 2001) (quoting Ill. Cent. R.R. Co. v. Morrison & Crabtree, 19 Ill. 135, 138 (1857) ("A carrier, although not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by an act of God, the public enemy, the act of the shipper himself, public authority, or inherent vice or the nature of the goods."); *see also* Mo. Pac. R. Co. v. Elmore & Stahl, 377 U.S. 134 (1964).

7. OLIVER WENDELL HOLMES, JR., THE COMMON LAW & OTHER WRITINGS 180, 199-200 (The Legal Classics Library 1982). ("A common carrier is liable for goods which are stolen from him, or otherwise lost from his charge except by act of God or the public enemy."
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"The language of *Coggs v. Bernard* is, that 'the law charges the person thus intrusted to carry goods as against all events but acts of God and the enemies of the king.' This was adopted by solemn decision in Lord Mansfield's time, and it is now settled that the common carrier 'is liable for all losses which do not fall within the excepted cases.' That is to say, he has become an insurer to that extent, not only against the disappearance or destruction, but against all forms of damage to the goods except as excepted above."); *see also* SAUL SORKIN, GOODS IN TRANSIT §5.02 (Matthew Bender & Co. 1988).

8. Rail Transportation Policy: General Provisions, 49 U.S.C. § 10101 (2009); *see also* Interstate Commerce Act, Ch. 104, 24 Stat. 379 (1887).

9. Penn. R.R. Co. v. Hughes, 191 U.S. 477, 487 (1903).

10. *Id.*

> prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy [limitation of liability].[11]

Accordingly, the Supreme Court concluded:

> The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding.[12]

Subsequent to *Hughes*, Congress enacted the Carmack Amendment as part of the Hepburn Act of June 29, 1906.[13] The purpose and effect of the Carmack Amendment on the issue raised in *Hughes* became apparent in *Adams Express Co. v. E. H. Croninger*,[14] a case involving the loss of a ring and the lower court's holding that the limitation of liability alleged by the defendant common carrier railway was invalid under Kentucky state law. In reviewing the law, the Supreme Court noted:

> Prior to [the Carmack Amendment], the rule of carriers' liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law, as declared by this court and enforced in the Federal courts throughout the United States or that determined by the supported public policy of a particular state, or that prescribed by statute law of a particular state.[15]

The Supreme Court then considered the Carmack Amendment and held that Congress intended by that amendment to "take possession of the subject,"[16] and that any continued enforcement of the patchwork of state law on the subject would effectively defeat the very uniformity the amendment was intended to achieve.[17] Accordingly, the court held that

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11. *Id.* at 488.

12. *Id.* at 491.

13. The Carmack Amendment has been said to be the codification of common law. *See Elmore & Stahl,* 377 U.S. at 137; for a compilation of various iterations of the Carmack Amendment including the Hepburn Act of June 29, 1906, as amended by the Cummins Amendment of March 4, 1915, the second Cummins Amendment of August 9, 1916, the Transportation Act of 1920, the Act of July 3, 1926 and the Newton Amendment of March 4, 1927; *see* Ward v. Allied Van Lines, Inc., 231 F.3d 135, 139 (4th Cir. 2000); WILLIAM J. AUGELLO, TRANSPORTATION LOGISTICS AND THE LAW, app. 6 at XXXX (George Carl Pezold ed., Transportation Consumer Protection 2001).

14. Adams Express Co. v. E.H. Croninger, 226 U.S. 491, 504 (1913).

15. *Id.* (internal citations omitted).

16. *Id.* at 506.

17. *Id.* at 513 (The text of the Carmack Amendment relied upon by the Court in *Adams Express* provided:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or

the Carmack Amendment preempted state law on the subject and allowed a carrier to limit its liability to a lower value related to a lower rate of transportation.[18] The Court then considered the validity of the limitation of liability in the bill of lading. While recognizing the common law liability of a carrier for ". . .any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. . ."[19] the Court also stated:

> It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.[20]

The Court also turned to a decision of the ICC and stated:

> That a carrier rate may be graduated by value, and that a stipulation limiting recovery to an agreed value, made to adjust the rate, is recognized by the Interstate Commerce Commission, see Re Released Rates, 13 Inters. Com. Rep. 550.[21]

Ultimately, the Court held:

> We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract

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transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."
"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.").

18. *Id.* at 504 (According to the U.S. Supreme Court, the effect of the early iterations of the Carmack amendment was:

> "First. It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a point in one state to a point in another.'
> Second. Such initial carrier is made 'liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it.'
> Third. It is also made liable for any loss, damage, or injury to such property caused by 'any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass.'
> Fourth. It affirmatively declares that 'no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.'").

19. *Id.* at 509.

20. *Id.* at 510.

21. *Id.* at 512.

here in question.[22]

In 1915 the Cummins Amendment provided that the carrier was liable for the "full actual loss or damage or injury" to the goods covered by the receipt or bill of lading.[23] The Second Cummins Amendment, in 1916, codified that rates related to the value of the property had to be filed as part of a carrier's tariff.[24]

Continuing in this vein, in *Mo., Kan. & Tex. Ry. Co. of Tex. v. J. H. Ward*,[25] Justice Brandeis stated that the purpose of the Carmack Amendment was to "create in the initial carrier unity of responsibility for the transportation to destination."[26] In referring to that portion of the Carmack Amendment that made the receiving carrier liable to the holder of the bill of lading for loss or damage occurring anywhere on the route, and even in the hands of another carrier performing part of the transportation, Justice Brandeis explained that the purpose of the Carmack Amendment "was to relieve shippers of the difficult, and often impossible, task of determining on which of the several connecting lines the damage occurred."[27] The Carmack Amendment, as amended, also provides for the carrier paying a claim to recover from the carrier on whose line the loss occurred the amount paid in respect of the loss plus reasonable expenses incurred in defending the claim.[28]

Subsequent amendments and deregulating legislation led ultimately to the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995) ("ICCTA") which reorganized the ICA and recodified the Carmack Amendment at 49 U.S.C. § 11706.[29]

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22. *Id.; see also id.* at 508. The text of the limitation of liability under consideration by the Court provided:

> In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding $50 unless a greater value is declared, the shipper agrees that the value of said property is not more than $50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than $50 if no value is stated herein.

23. Act of Mar. 4, 1915, Ch. 176, 38 Stat. 1196 (1915); *see also* Sorkin, *supra* note 7, at 2 § 13.02.

24. Act of Aug 9, 1916, Ch. 301, 39 Stat. 441 (1916); *see also* Sorkin, *supra* note 7.

25. Mo., Kan. & Tex. Ry. Co. of Tex. v. J.H. Ward, 244 U.S. 383, 386 (1917).

26. *Id.*

27. *Id.* at 387; *See also* Reider v. Thompson, 339 U.S. 113, 119 (1950) (the purpose of the Carmack Amendment was to "relieve shippers of the burden of searching a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.").

28. *See* Interstate Transportation, *supra* note 3 at § 11706 (b). (Additionally, ICCTA sunset the ICC and transferred what remaining regulation still existed to the newly-created STB).

29. The iterations leading up to the present Carmack Amendment essentially required (1) the carrier to issue a bill of lading or receipt for property received for interstate commerce; (2) made more than one carrier liable for the loss or damage to alleviate the shipper's difficulty determining which carrier is responsible for the loss; (3) enabled the carriers to seek indemnity

III. CARMACK LIABILITY IN COMMON CARRIAGE

(A) JURISDICTION

The jurisdiction of the Secretary and the Board[30] is set forth in Title 49 U.S.C. § 10501:

> § 10501. General jurisdiction
> (a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail 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.
> (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.[31]

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from one another; (4) imposed outside ranges of time limits on notice of claims; and (5) commencement of actions and (5) made the railroad liable for the actual loss or injury to the property subject to certain specific methods by which a rail carrier could limit its liability.

30. 49 U.S.C. § 10102 (2006) contains a number of useful and relevant definitions:
(1) "Board" means the Surface Transportation Board
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(5) "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interrurban electric railways not operated as part of the general system of rail transportation;
(6) "railroad" includes –
(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
(B) the road used by a rail carrier and owned by it or operated under an agreement; and
(C) a switch, spur, track, terminal, terminal facility, and freight depot, yard, and ground, used or necessary for transportation;
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(9) "transportation" includes –
(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;

31. With respect to the absence of the word "adjacent" before "foreign country," *see infra* note 96 and accompanying text.

The application of the Carmack has been held to be co-extensive with the jurisdiction of the Board.[32]

(B) Carmack Liability and Alternative Terms

Title 49 U.S.C. §11706, the embodiment of the Carmack Amendment, provides in pertinent part:

> (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;[33]
> (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.[34]
> 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.
> (b) The rail carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lad-

32. Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., 547 F.3d 351, 356 (2d Cir. 2008) ("[T]he boundaries of Carmack's applicability have always been co-extensive with . . . the [ICC's] jurisdiction.") (quoting Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54, 68 (2d Cir. 2006)); *Regal-Beloit*, 557 F.3d at 995.

33. Kyodo U.S.A. Inc. v. COSCO N. Am., Inc., No. 01-CV-499, 2001 WL 1835158 at *4 n.7 (C.D. Cal. 2001) ("The 'initial' or 'receiving' carrier within the meaning of the Carmack Amendment is ordinarily the 'one who first contracts to transport the shipment,' because it is that carrier 'with which the shipper does business and to which it looks.'") (quoting Miss. Valley Barge Line Co. v. Miss. Valley Barge Line Co., 285 F.2d 381, 393 (8th Cir. 1960)); *see* Sompo Japan Ins. Co. of Am. v. Yang Ming Marine Transp. Corp., 578 F. Supp. 2d 584, 593 (S.D.N.Y. 2008) (hereinafter *Sompo III*) (discussing an ocean carrier's role as a receiving carrier under § 11706) ("Although there is no specific definition of 'receiving rail carrier' in the statute, as there is for 'delivering rail carrier,' the common sense meaning of 'receiving rail carrier' is an entity providing rail transportation for compensation that receives the cargo from the shippers or, alternatively, arranges for it to be received by the railroad operator. Therefore, under [Fed. R. Civ. P.] 12(b)(6)'s plausibility standard, Yang Ming may alternatively be held liable under Carmack because it is a receiving rail carrier."); *but cf. Rexroth*, 547 F.3d at 364; *Regal-Beloit*, 557 F.3d at 993-994; discussed *infra* Section V.

34. Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 552 n.2 (2nd Cir. 2000) ("A 'through bill of lading'" is defined as, "one by which a carrier agrees to transport goods from origin to destination, even though different carriers (such as a railroad, trucker, or air carrier) may perform a portion of the contracted shipment." (citation omitted)); *see also Kirby*, 543 U.S. at 19 (defining "through" transportation as "end-to-end").

> ing was issued is entitled to recover from the rail carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

With respect to the means by which a rail carrier may limit its liability, § 11706 provides, in pertinent part:

> (c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.
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> (2) A rail carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on trains carrying passengers.
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> (3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which –
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> (A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or
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> (B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

As a result of § 11706(c), most railroads offer "alternative terms," that is, terms that are an alternative to Carmack liability under § 11706. The usual way in which the alternative is offered is for the rail carrier to offer one rate, say $X if Carmack is to apply and another rate that is often equivalent to 1/2$X for a "release" value far less than the "actual value" of the loss. Courts have tended to strictly construe the ability of a railroad to limit its liability by offering alternative rates.[35]

In *Tamini Transformatori S.R.L. v. Union Pac. R.R.*,[36] the court held that the failure of the railroad to include the limitation of liability language in the bills of lading or the waybills[37] issued contemporaneously with the shipment was fatal. *Tamini* may be contrasted with *Ferrostaal,*

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35. *See also infra* Section V.

36. Tamini Transformatori S.R.L. v. Union Pac. R.R., No. 02 Civ. 129, 2003 WL 135722 (S.D.N.Y. Jan. 17, 2003).

37. *Id* at *5 ("A bill of lading, also known as a waybill [. . .] 'is the document [that] contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and the shipowner.'" (citing Jessica Howard Ltd. v. Norfolk So. Ry. Co., 316 F.3d 165, n.1 (2d Cir. 2003) (citations omitted))); *Regal-Beloit*, 557 F.3d at 988 n.3 ("A bill of lading is a contract that 'records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage. 'Through' bills of lading specifically cover both oceanic and inland legs of a journey in a single document." (internal citations omitted)).

Inc. v. Union Pac. R.R. Co.[38] In *Ferrostaal* the court upheld the non-Carmack terms (one-year filing period versus two-year filing period under Carmack).[39] The court found that in exchange for a lower freight rate, plaintiff "affirmatively opted for the one year limitations period" that was contained in "UP Exempt Circular 4-D"[40] and applicable to the shipment. Plaintiff did not dispute that it was offered Carmack.[41]

In common carriage, it is customary for alternative terms to be offered. Where the offer of alternative terms complies with Title 49 U.S.C. § 11706(c), the alternative terms are customarily enforced.

(C) Time Limitations

Title 49 U.S.C. § 11706(e) provides, in pertinent part:

> (e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection –
> (1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and
> (2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

It is important to note that Title 49 U.S.C. § 11706(e) does not establish a statute of limitations but instead establishes minimum time periods of nine (9) months from a notice of a claim to be given to the carrier and two (2) years from written denial of the claim or any part of it to file suit.

The process governing the prosecution and handling of claims arising in regulated or common carrier rail carrier transportation for loss or damage has been prescribed by regulations issued by the ICC.[42] Essentially,

38. Forrostaal, Inc. v. Union Pac. R.R. Co., 109 F. Supp. 2d 146 (S.D.N.Y. 2000).

39. *See supra* Section III(b).

40. *See infra* Section IV for a discussion on "Exempt Circulars."

41. *Ferrostaal*, 109 F. Supp. 2d at 150.

42. *See* Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, 49 C.F.R. § 1005 (2008). Note, although these regulations were published pre-ICCTA, the Savings Clause of ICCTA, Section 204, provides:

> (a) Legal Documents. —All orders, determinations, rules, regulations, permits, grants, loans, contracts, agreements, certificates, licenses, and privileges—
> (1) that have been issued, made, granted, or allowed to become effective by the Interstate Commerce Commission, any officer or employee of the Interstate Commerce Commission, or any other Government official, or by a court of competent jurisdiction,

these regulations address the applicability of the regulations, the filing, acknowledgment, investigation, and disposition of claims, processing of salvage and using weight as a measure of loss.

(D) VENUE

Title 49 U.S.C. § 11706(d) provides, in pertinent part:

> (d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.
> (2)(A) A civil action under this section may only be brought –
> (i) against the originating rail carrier, in the judicial district in which the point of origin is located;
> (ii) against the delivering rail carrier in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and
> (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.
> (B) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

In *Royal & Sun Alliance*,[43] the ocean bill of lading between the vessel operating common carrier (VOCC) and a non-vessel operating common carrier (NVOCC) provided for the exclusive jurisdiction of English courts and the application of English law. The NVOCC bill of lading issued to the cargo interests provided for U.S. law to apply and selected the Southern District of New York as the forum.[44] The VOCC argued that because the NVOCC could only sue the VOCC in England, the NVOCC's customer was similarly restricted.[45] The court rejected this argument, holding that *Kirby* required "intermediaries entrusted with goods are 'agents' *only* in their ability to contract for liability limitations

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in the performance of any function that is transferred by this Act or the amendments made by this Act; and
(2) that are in effect on the effective date of such transfer (or become effective after such date pursuant to their terms as in effect on such effective date), shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the Board, any other authorized official, a court of competent jurisdiction, or operation of law. The Board shall promptly rescind all regulations established by the Interstate Commerce Commission that are based on provisions of law repealed and not substantively reenacted by this Act. PL 104-88, 109 Stat. 803. Comparable regulations have been published with respect to motor carrier claims at 49 C.F.R. § 370.

43. Royal & Sun Alliance Ins., PLC. v. Ocean World Lines, Inc., 572 F. Supp. 2d 379 (S.D.N.Y. 2008); *appeal pending* 2d Cir. No. 08-4324-cv(L).

44. *Id.* at 396.

45. *Id.*

with carriers downstream. Nothing in *Kirby* can be read to extend that ruling to a forum selection clause and a covenant not to sue."[46]

The *Sompo III*, case also contains a very interesting discussion of the venue provisions of Title 49, particularly in light of that court's holding that the ocean carrier may be considered a rail carrier even though it does not operate trains:

> "There appears to be a gap in the venue provision. As discussed above, Carmack permits claims against rail carriers who are not the delivering rail carrier, receiving rail carrier, or the rail carrier who caused the loss. As a result, Carmack permits liability against shipping companies like Yang Ming, yet fails to guarantee plaintiffs a proper venue for pursuing claims against them unless they are also construed to be the receiving or originating rail carrier, as they are in this case."[47]

(E) Prima Facie Case

A prima facie case against a rail carrier for loss or damage under § 11706 is made when the plaintiff establishes:

1. The good condition of the goods when tendered to the carrier;
2. The damaged condition of the goods at delivery; and
3. The amount of damages.[48]

Under the Carmack Amendment, damages are to be measured by "actual loss or injury to the property."[49] "[T]he general rule for measuring damages is the market value at destination. . . ."[50]

With respect to common carriage, once a plaintiff establishes a prima facie case, the burden shifts to the carrier to show that it was not negligent and that the loss arose as a result of an exception to liability identified in the bill of lading. The terms of the bill of lading governing common carriage, including the defenses that may be contained therein, are prescribed by 49 C.F.R. 1035.1, which provides in pertinent part:

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46. *Id.* at 397 (quoting *Kirby*, 543 U.S. at 34 (emphasis in original)).

47. *Sompo III*, 578 F.Supp.2d at 596 n.7 (Note, however, that *Sompo III* was decided before the Second Circuit's decision in *Rexroth*); *see also* the Ninth Circuit's decision in *Regal-Beloit*, 557 F.3d at 1003; *See supra* Section III(c).

48. *See* Mo. Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964) ("[U]nder federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages.").

49. 49 U.S.C. § 11706(a) (2006).

50. CPCI v. Tech. Transp., Inc., 393 F. Supp. 2d 1087, 1088 (W.D. Wash. 2005); *see also* Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co., 213 F.3d 1118, 1120 (9th Cir. 2000) (holding that the measure of damages under Carmack is "the difference between the market value of the property in the condition in which it should have arrived at its destination and its market value in the damaged condition in which it did arrive.").

> Sect. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by ***the act of God***, ***the public enemy***, ***the authority of law***, or the ***act or default of the shipper*** or owner, ***or for natural shrinkage.*** The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring ***while the property is stopped and held in transit upon the request of the shipper***, owner or party entitled to make such request, or ***resulting from a defect or vice in the property***, or ***for country damage to cotton***,[51] or ***from riots*** or ***strikes***.[52]

IV. Exempt Transportation and Contract Carriage

As noted, the foregoing discussion only applies as a matter of law to common carriage or regulated transportation. However, not all cargo is regulated and not all carriage is common. During the period of deregulation, Congress enabled the ICC, now the STB, to exempt certain transportation from regulation.[53] Although deregulation was primarily directed towards freedom to contract and the abolition of tariffs other than in specific cases,[54] deregulation also affected loss and damage claims.

Contract carriage or exempt transportation is usually provided pur-

51. "Country Damage" has been defined as "damage to cotton caused by moisture, dust or sand affecting bales that have either been exposed to the weather or stored on wet or contaminated ground." Cotton on the Net, "Country Damage," http://www.cotton-net.com/information/glossary_of_terms.php (February 9, 2009).

52. Emphasis added.

53. *See generally* Railroad Revitalization & Regulation Reform Act of 1976, 45 U.S.C. § 801 (2008); *see also* Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

54. Tariffs need only be filed with respect to the transportation in the non-contiguous domestic trade of the United States or household goods. *See* 49 U.S.C. § 13702(a)(1)-(2). Other than with respect to exempt transportation or contract carriage (discussed *infra* in Section IV), a rail carrier must still make its terms of service available upon request of a shipper. *See* 49 U.S.C. § 11101(a); Disclosure Requirements for Existing Rates, 49 C.F.R. § 1300.2.

suant to a private contract between the railroad and the shipper or pursuant to a railroad's "Exempt Circular."[55] An "Exempt Circular" is a name usually given to the terms and conditions of carriage published by a railroad together with the statement that it governs the transportation by the railroad of exempt commodities under Title 49 U.S.C. § 10502 discussed in subsection (a), below, or contract carriage under 49 U.S.C. § 10709 discussed in subsection (b), below.

(A) Exempt Transportation

Title 49 U.S.C. § 10502(a) provides:

> Sec. 10502. Authority to exempt rail carrier transportation
>
> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
>
> (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
>
> (2) either—
>
> (A) the transaction or service is of limited scope;
>
> (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.[56]

Of course, § 10502(a) cannot be read in a vacuum. Title 49 U.S.C. § 10502(e) provides:

> (e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

The result of these provisions is to exempt the transportation of certain goods by a rail carrier from the provisions of Part A, provided that the rail carrier offers Carmack liability or alternative terms that comply with § 11706. As noted earlier, such alternative terms usually include a reduced rate in exchange for reduced liability.

(B) Contract carriage

Another section of Title 49 that arose from Congress's efforts to deregulate the rail industry by removing impediments to negotiated con-

55. *See infra* note 114 and accompanying text.
56. 49 C.F.R. § 1300.2 (a) (2009).

tracts is § 10709. Title 49 U.S.C. § 10709, which was intended to allow market forces to govern negotiated agreements between shippers and rail carriers, provides, in pertinent part:

> (a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.
> (b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.
> (c)(1) A contract that is 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 this part.
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28, United States Code.[57]

Although 49 U.S.C. § 10709(c)(2) provides that subject matter jurisdiction in the federal courts is not conferred by § 10709, subject matter jurisdiction for claims arising under § 11706 has been granted to the U.S. District courts in 28 U.S.C. § 1337 in cases in which the amount in controversy with respect to each bill of lading exceeds $10,000.00.[58] Ancillary or supplemental jurisdiction has been exercised over lesser amounts in controversy where plaintiffs allege a mixed assortment of claims, some of which meet the jurisdictional threshold and some of which do not.[59]

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57. Certain additional provisions apply to contracts for the transportation by rail of agricultural products. *See* 49 U.S.C. §10709 (1996).

58. 28 U.S.C. § 1337 (2009) states:

> (a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11706 or 14706 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.
> (c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

59. Schoenmann Produce Co. v. Burlington N. Santa Fe Ry. Co., 420 F. Supp. 2d 757, 764 n.2 (S.D. Tex. 2006) (citing 28 U.S.C. § 1367; Dress Barn, Inc. v. LTA Group, Inc., 822 F. Supp. 88, 90 (D. Conn. 1993)).

The interplay of 49 U.S.C. § 10502 and 49 U.S.C. § 10709 has given rise to a number of conflicting points of view. In *Tamini*, the court held that § 10709 did not immunize a common carrier railroad from the obligation under § 10502 to offer Carmack prior to establishing a non-Carmack contractual relationship with the shipper:

> ". . . while it is true that Carmack protections do not apply to 49 U.S.C. § 10709 contracts, the existence of such a contract presupposes that the shipper turned down Carmack terms."[60]

On the other hand, in *Mitsui Sumitomo Ins. Co. v. Evergreen Marine Co.*, the District Court held that § 10709 did not require the rail carrier to offer alternative terms.[61] As discussed in the next section of this article, recent cases as well as the STB itself, have begun to focus additional attention on this issue.

V. International Intermodalism

(A) COGSA v. Carmack debate

The decisions in *Norfolk S. Ry. Co. v. Kirby*[62], and *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, ("*Sompo I*")[63] and the competing arguments concerning the application of COGSA, versus the Carmack Amendment, to cargo loss and damage occurring during the inland portion of multi-modal transportation under a through ocean bill of lading have given rise to a great debate.[64] Essentially, *Kirby* held that an intermediary between the cargo interest and a carrier, and each succeeding intermediary with respect to any downstream carrier, has a limited agency to bind the cargo interest to a limitation of liability agreed to between the intermediary and the carrier.[65] *Kirby* also enforced the extension by contract pursuant to Himalaya clause[66] of a limitation of liability

60. *Tamini*, 2003 WL 135722, at *7.

61. Mitsui Sumitomo Ins. Co. v. Evergreen Marine Co., 578 F. Supp. 2d 575, 581 (S.D.N.Y. 2008).

62. *Kirby*, 543 U.S. 14.

63. Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54 (2d Cir. 2006) [hereinafter *Sompo I*].

64. *Kirby*, 543 U.S. at 25 (explaining that "Multimodal" and "Intermodal" are used interchangeably to describe the transportation of cargo by more than one mode of transportation); Multimodal is the more common by used phrase outside of the US, whereas in the US, intermodal is more popular. "Intermodal" refers to the use of more than one method of transport during a single shipment.

65. *Kirby*, 543 U.S. at 16, 33; *see also* Werner Ent., Inc. v. Westwind Mar. Int'l, Inc., 554 F.3d 1319, 1323 (11th Cir. 2009) (applying the "limited agency" rationale of *Kirby* to motor carrier transportation under Part B of subsection IV of Title 49, explaining that "when an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed").

66. A Himalaya clause is a clause in an ocean bill of lading that purports to extend by

under COGSA to a subcontracting inland rail carrier providing inland rail transportation under a through ocean bill of lading.

On the contrary, *Sompo I*, stating that *Kirby* did not address the application of the Carmack Amendment, held that the Carmack Amendment applied as a matter of law to the inland transportation and that COGSA's permissive extension of its terms by contract had to yield to the compulsory application of Carmack unless Carmack was waived according to its terms.[67] Subsequent cases have held that various entities, including VOCCs and NVOCCs could be considered "rail carriers" subject to the Carmack Amendment under *Sompo I*.[68] This extension of the Carmack Amendment to non-motor carrier / non-rail carrier defendants was addressed by the Second Circuit in another case involving transportation similar to that in *Sompo I* that allowed the Second Circuit to revisit *Sompo I*.

In *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, the Second Circuit revisited its decision in *Sompo I*.[69] In *Rexroth*, the court stated that the *Sompo I* case held that "Carmack trumps a conflict between itself and a contractual extension of COGSA inland for transports covered under Carmack."[70] The question resolved by *Rexroth* was whether Carmack also defines the liability for losses to shipments that occur on the inland leg of a continuous international shipment. The Second Circuit

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contract the benefits of the bill of lading to contractors of the ocean carrier. Its name is derived from a case involving a ship named Himalaya. *See* Adler v. Dickson ("The Himalaya") (1955) 1 Q.B. 158 (C.A).

67. *Sompo I*, 456 F.3d at 71; *but see* Royal & Sun Alliance Ins., PLC. v. Ocean World Lines, Inc., 572 F. Supp. 2d 379, 392-398 (S.D.N.Y. 2008) (appeal pending 2d Cir. No. 08-4324-cv(L)) (where the District Court declined to apply *Sompo I*, under substantially identical transportation arrangements holding that it was bound by *Kirby*. The District Court stated that the critical question is whether the Carmack Amendment regulates the liability of companies like OWL – NVOCCs that engage ocean carriers, and then inland rail and motor carriers, to perform multimodal carriage of goods. The court said that OWL, unlike the rail carrier in *Sompo I*, was an NVOCC and was not subject to Carmack liability or benefits, because it does not "provid[e] transportation or service" under subchapter I or III of chapter 135 of title 49 United States Code. The Court said that "COGSA, not Carmack, governs the liability of NVOCCs, not only with respect to damages occurring to merchandise in transit during the ocean portion of a multimodal carriage of goods, but as well to the inland portions of carriage contemplated by the bill of lading issued by the NVOCC." In reaching this decision, Judge Hellerstein stated that the only point of distinction between *Kirby* and *Sompo I* is the absence of a discussion regarding Carmack in *Kirby*. The court stated that:

> [o]n that omission, the Second Circuit felt free to depart from the rule of *Kirby*. But how can it be said that the nine Justices simply forgot about Carmack? If, as the Supreme Court ruled, COGSA extended with the intermodal shipment to govern the scope of liability of rail and truck carriers, Carmack perforce does not govern that same scope of liability.).

68. *Rexroth*, 547 F.3d at 355-356; *see also Regal*-Beloit, 557 F.3d 985.

69. *Rexroth*, 547 F.3d at 355.

70. *Id.* at 359.

found that it did not.[71]

The Second Circuit focused its decision on the jurisdictional reach of the STB including the qualifications necessary for a party to constitute a "rail carrier." In doing so, the court also noted that both defendants before it were subject to the regulations of the Federal Maritime Commission ("FMC"), not the STB.

The court reiterated its holding in *Sompo I* with respect to rail carriers, stating:

> ". . . when a rail carrier is charged with damage. . . its liability is defined by [Carmack] and that alternative contractual provisions of the accompanying intermodal bill of lading – even when authorized by [COGSA] – are ineffective as to the rail carrier unless they satisfy the requirements set forth by Carmack and [Staggers]."[72]

Having said this the Second Circuit then held:

> ". . . defendants here [NVOCC; VOCC and its agent] do not fall within the statutory grasp of Carmack and are therefore entitled to employ the contractual limitations of liability set out in the through bills of lading."[73]

The court in *Rexroth* thus held that the defendants were not "rail carriers" subject to STB jurisdiction and distinguished earlier case law as relying only on the "nature of shipment" rather than the "character of the carrier."[74] The court also acknowledged "modern intermodal international shipments" and distinguished earlier Supreme Court case law.[75]

The court pointed out that the plaintiff's argument that the defendants were rail carriers was based in large part on an unpublished district court case, rather than on the actual language of Carmack.[76] The *Kyodo* court reasoned that the application of Carmack must turn on the "nature of the shipment," rather than on the "character of the carrier."[77]

The Second Circuit found, however, that ***both*** of these criteria were necessary and established a "binary" test.[78] First, "is the shipment covered by the [Carmack] Amendment?" And second, "is the carrier covered by the [Carmack] Amendment?" The Second Circuit rejected *Kyodo* holding that it "would extend the reach of the statute without Congress lifting a finger. . .."[79]

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71. *Id.*
72. *Id.* at 353.
73. *Id.* at 354.
74. *Id.* at 259
75. *Id.* at 357; *see also Royal & Sun Alliance*, 572 F. Supp. 2d at 388.
76. *Rexroth*, 547 F.3d at 358; *and Kyodo*, 2001 WL 1835158, at *4.
77. *See Kyodo*, 2001 WL 1835158, at *4-5.
78. *Rexroth*, 547 F.3d at 360.
79. *Id.*

Although the court recognized the importance of uniformity, the court held that Carmack imposes uniformity only on carriers covered by the statute, such as rail and motor carriers.[80]

The court then cited numerous examples of the characteristics of a traditional rail carrier. Central to each example was a focus on "a carrier's ability to carry or operate rail transportation in determining its status as a 'rail carrier' under the Carmack Amendment."[81] On the basis of this analysis, the court concluded (i) that arranging transportation by rail was not the same as providing rail carrier transportation;[82] and (ii) that the NVOCC was not a rail carrier.[83]

The Ninth Circuit has recently reached a different conclusion in *Regal-Beloit*. There, the court referred to the definition of "transportation" in Title 49 as "including 'a bridge, car float, lighter, ferry *and intermodal equipment used by or in connection with a railroad*'.[84] The court reaffirmed that the "Board's jurisdiction is co-extensive with Carmack,"[85] and described that jurisdiction as including 'transportation that is by railroad and water, *when the transportation is under common control, management or arrangement for a continuous carriage or shipment.*' 49 U.S.C. § 10501(a)(1)(B)"[86] The Court then held that the ocean carrier that shipped the cargo from China to the United States, under a through bill of lading from origin to destination, and "contracted with [the railroad] to ship the cargo [inland] through its agent, provided 'continuous carriage on shipment' that was 'by railroad and water' via 'intermodal equipment

80. *Id.*

81. *See id.* at 363-364 (citing Nevada v. Dep't of Energy, 457 F.3d 78 (D.C. Cir. 2006) (emphasizing that the "principal test is whether there is a bona fide holding out [as a common carrier] coupled with the ability to carry for hire") (citations omitted); Hanson Natural Res. Co.-Non-Common Carrier Status-Petition for a Declaratory Order, Fin. Dkt. No. 32248, 1994 WL 673712, at *14 (S.T.B. Nov. 15, 1994) (holding that "'ability to carry' is evidenced by an 'an ostensible and actual movement of traffic'"); Am. Orient Express Ry. Co. v. Surface Transp. Bd., 484 F.3d 554, 556 (D.C. Cir. 2007) (focusing on the plaintiff's "actual operation of trains" to conclude that it was a "rail carrier" under the Amendment even though it did not own the tracks over which it carried passengers); Simmons v. ICC, 871 F.2d 702 (7th Cir. 1989) (holding that a new company that was acquiring a rail line, but had not commenced operations was not yet a "rail carrier" providing railroad transportation)).

82. *Rexroth*, 547 F.3d at 364; *cf.* 49 U.S.C. § 13102(2) (2006) ("broker" in the motor carrier context means "means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation"). There is no similar defined term in Part A of subtitle IV defining a rail broker.

83. *Rexroth*, 547 F.3d at 364; *but see Mitsui*, 578 F. Supp. 2d 575 and *Sompo III* (both reaching contrary decisions, but also decided prior to *Rexroth* or *Regal-Beloit*).

84. *Regal-Beloit*, 557 F.3d at 992 (emphasis in original).

85. *Id.*

86. *Id.*

used by or in connection with a railroad,'"[87] and was therefore subject to the Carmack Amendment.

The Court further opined that applying Carmack to the ocean carrier was consistent with one of the original purposes earlier discussed in this article quoting *Reider v. Thompson*, "to relieve shippers of the burden on searching out a particular negligent carrier from among the often numerous carriers handling . . . goods."[88]

The Ninth Circuit characterized the Second Circuit's holding in *Rexroth* as addressing transportation arranged by an NVOCC, a "middleman" that provided "no services on any vessel it owned nor did it otherwise physically handle the shipment itself."[89] With respect to the distinction made by the Second Circuit between one that "arranges" transportation and one that "provides" transportation the Ninth Circuit stated:

> Even if we were to accept this reasoning, it would not apply to [the ocean carrier's] arrangements because there was no middleman between the ocean carrier and Plaintiffs. Rather, Plaintiffs dealt directly with [the ocean carrier], who actually transported the cargo on its ocean liner and had sustained contact with the shipped goods.[90]

In addition, the Ninth Circuit questioned the Second Circuit's reference to the jurisdiction of the FMC over the ocean carrier stating, "[t]he Second Circuit also seemed to suggest that because ocean carriers fall under the jurisdiction of the [FMC], they cannot also be regulated by the Board. . . . Nothing in the FMC's jurisdictional statute makes its jurisdiction exclusive.[91]

The Ninth Circuit touched upon the arguments that Carmack does not apply to the international shipment to the United States under a through bill of lading unless there is a separate bill of lading issued for the inland move,[92] concluding that the Second Circuit's decision in *Sompo I*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 993-994.

91. *See id.* at 994 n.7; *see also* 46 U.S.C. § 40301 (2006).

92. *Regal-Beloit*, 557 F.3d at 994 ("Defendants jointly argue that Carmack cannot apply to a shipment from a foreign country into the United States under a through bill of lading, and therefore the parties' contractual extension of COGSA, with its more liberal rules regarding venue, should control here. In support of their argument, Defendants highlight that four circuits have held that "the Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and overland leg to the final destination in the United States) *unless the domestic overland leg is covered by a separate bill of lading.*" Altadis USA, Inc. ex. rel. Fireman's Fund Ins. Co. v. Star Line, LLC, 458 F.3d 1288, 1291 (11th Cir. 2006) (emphasis added); *see* Am. Road Serv. Co. v. Consol. Rail Corp., 348 F.3d 565, 569 (6th Cir. 2003); Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 703 (4th Cir. 1993); Capital Converting Equip., Inc. v. LEP Transport, Inc., 965 F.2d 391, 394 (7th Cir. 1992); *but see Sompo I*,

and its own decision in *Neptune Orient Lines Ltd. v. Burlington N. & Santa Fe Ry. Co.*,[93] foreclose that argument and clearly hold that "the language of [Carmack] also encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading."[94]

However, and critically, when the Carmack Amendment was recodified in 1978, the term "adjacent" was omitted from the text of the jurisdictional grant.[95] Prior to the 1978 recodification, the jurisdictional grant of the Carmack Amendment provided:

> Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or *from* any point in the United States *to* a point in an *adjacent* foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no, contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed . . .[96]

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456 F.3d at 57, 60-69 (holding that Carmack applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country even where the transport was under a single through bill of lading that incorporated COGSA beyond the tackle-to-tackle phase). Despite this weight of authority, our own precedent expressly forecloses Defendants' argument in this circuit. In *Neptune*, 213 F.3d at 1119, we held that "the language of [Carmack] also encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading. . . ."; *see* Nippon Yusen Kaisha v. Burlington & N. Santa Fe Ry. Co., 367 F. Supp. 2d 1292, 1298 n.4 (C.D. Cal. 2005); Chubb Group of Ins. Companies v. H.A. Transp. Systems, Inc., 243 F. Supp. 2d 1064, 1068 n.3 (C.D. Cal. 2002). Contrary holdings in the Fourth, Sixth, Seventh and Eleventh Circuits rest on the notion that the Board lacks jurisdiction over intermodal shipments into the United States from a point in a foreign country under a through bill of lading; *see e.g. Am. Road Servs. Co.*, 348 F.3d at 568 ("The [Board]'s jurisdiction does not extend to a shipment under a through bill of lading unless a domestic segment of the shipment is covered by a separate bill of lading."). The Second Circuit has disagreed, holding that a plain reading of the Board's jurisdictional statute applies Carmack to any rail transportation in the United States, even if it originated in a foreign country under a through bill of lading; *see Sompo I*, 456 F.3d at 64. As we noted above, Carmack's reach is coextensive with the Board's jurisdiction, *see* 49 U.S.C. § 11706(a); therefore our conclusions regarding the extent of the Board's jurisdiction, expressed in Neptune, determine Carmack's reach as well. Crucially, *Neptune* interpreted our precedent and Carmack's language to apply to "shipments to or from overseas ports" without any requirement for a separate domestic bill of lading for the inland carriage. *Neptune*, 213 F.3d at 1119 (citing F.J. McCarty Co. v. S. Pac. Co., 428 F.2d 690, 692 (9th Cir. 1970))").

93. *Sompo I*, 456 F.3d at 60; *Neptune*, 213 F.3d 1118.

94. *Regal-Beloit*, 557 F.3d at 995 (citations omitted).

95. Pub. L. No. 95-473, 92 Stat. 1337 (1978); *see also* H.R. Rep. No. 1395, 95th Cong. 2d Sess. 9 (1978, reprinted in U.S. Code Cong. & Ad. News 3009, 3018)

96. 49 U.S.C. § 20(11) (1976).

The 1978 recodification was intended to clarify that the Carmack Amendment was not limited to transportation "to" an adjacent foreign country but "to and from" an adjacent foreign country.[97]

The decisions addressing the compulsory jurisdiction of the Carmack Amendment have not emphasized the recodificiation of the Carmack Amendment in 1978, the purpose of which was stated in the introduction to the recodification to be:

> "To revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV of Title 49, United States Code, "Transportation."[98]

In 1981, the Second Circuit addressed the intent of Congress not to change the substance of the Carmack Amendment:

> Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.[99]

Despite the foregoing, the Second Circuit in *Sompo I* held that it was foreclosed from considering the adjacency argument (which the court raised sua sponte) by its own decision in *Project Hope v. M/V IBN SINA*.[100]

> This objection, however, is foreclosed by our decision in *Project Hope* (citation omitted). Focusing solely on the post-codification language, we held in *Project Hope* that Carmack applied to the domestic motor carriage portion of an international shipment originating in Virginia and destined for a non-adjacent country, Egypt. Although *Project Hope* involved motor, rather than rail, carriage, the post-codification language governing the Board's jurisdiction, and therefore Carmack's applicability, is identical regardless of

97. *See* Galveston H. & S. A. Ry. Co. v. Woodbury, 254 U.S. 357, 359-60 (1920) (explaining that "a carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. The test of the application of the act is not the direction of the movement but the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission"); *see also* Reider v. Thompson, 339 U.S. 113, 115-117 (1950) (discussing "through" bills of lading from a non-adjacent country compared to a bill of lading from a non-adjacent country that ends upon arrival in the United States); *and* Octavio Berlanga v. Terrier Transp., Inc., 269 F. Supp. 2d 821, 826-827 (N.D. Tex. 2003).

98. H.R. Res. 10965, 95th Cong. (1978).

99. In re Roll Form Prods., Inc., 662 F.2d 150, 153 n.5 (2d Cir. 1981).

100. Project Hope v. M/V IBN SINA, 250 F.3d 67 (2d Cir. 2001); *Sompo I*, 456 F.3d at 68.

> the mode of transport. Thus, we find ourselves bound by *Project Hope's* holding, which effectively extended Carmack's applicability to international shipments involving non-adjacent foreign countries.[101]

It would appear from the jurisdictional grant language that Carmack was intended by Congress to apply to water transportation only in that limited category of circumstances defend as the non-contiguous domestic trade of the United States.[102] COGSA on the other hand appears to have been written to govern ocean bills of lading with the express permission to extend that application by contract to transportation beyond its compulsory application.[103]

The Ninth Circuit addressed § 30701(7) by referring to § 30701(12) and § 30701(13) and holding that the Carmack Amendment was outside of COGSA and constituted an "other law which would be applicable in the absence of this [Act]."[104] However, when "adjacent" is returned to the jurisdictional grant in the Carmack Amendment, and because it does appear in 49 U.S.C. § 11706(a)(3), the Carmack Amendment is not, by its terms, applicable to transportation from a non-adjacent country to the United States under a through bill of lading. It would appear inconsistent for Congress, in 1936, to include in COGSA a means of extending its application by contract if the contractual extension was statutorily foreclosed by the existing Carmack Amendment unless a carrier subject to COGSA also satisfied the waiver provisions of § 11706(c). In light of the continuing COGSA v. Carmack debate there is some reason to believe that the Supreme Court will grant certiorari in an appropriate case, as it did in *Altadis* two years ago.[105]

The Court in *Regal-Benoit* also addressed the policy considerations

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101. *Sompo I*, 456 F.3d at 68 n.13 (internal citations omitted); The author gratefully acknowledges the contribution of fellow Transportation Law Association member and Holland & Knight LLP partner, Chester D. Hooper, and partner Francesca Morris and associate Warren Gluck to the discussion of the adjacency argument further developed in the Amicus Brief identified in footnote 129, infra, Section IV. For argument that Project Hope is not precedential because it did not address the recodification and therefore did not rule on the issue, see p. 7 of that brief.

102. *See* 49 U.S.C. § 13102(17) (2006) ("The term 'noncontiguous domestic trade' means transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States").

103. 46 U.S.C. § 30701(7) (2006) ("Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.").

104. 49 U.S.C. § 30701(12) (2006); *Regal-Beloit*, 557 F.3d at 996.

105. Altadis USA, Inc. v. Sea Star Line LLC, 549 U.S. 1106 (2007), *cert. dismissed*, 549 U.S. 1189 (2007) (an interesting aspect in *Altadis* is that the transportation was from Puerto Rico to Florida and the loss occurred on land between Tampa and Jacksonville. On its face, this would appear to be part of the non-contiguous domestic trade of the United States, governed by Title 49, not Title 46.); *see* 49 U.S.C. § 13102(17) (2006); 49 U.S.C. § 13501 (2006); *see also* 46 U.S.C.

discussed in *Kirby*, particularly the need for uniform law in international maritime trade.[106] On this point, the Ninth circuit stated:

> Nonetheless, and mindful of these policy considerations, *Kirby* does not control here. There, the Court held that *state* law did not apply to a bill of lading that extended COGSA inland, where COGSA and the state law conflicted.[107] Focusing as it did on the need for state law to yield to federal law in the maritime context, the Court did not have occasion to consider which of two conflicting federal laws should govern a maritime shipment with an inland leg.[108] The policy of uniformity in maritime shipping, however compelling, must give way to controlling statutes and precedent. Given *Neptune*'s holding that Carmack applies and the conspicuous absence in COGSA of language allowing parties to give superseding statutory force to their contractual extensions of COGSA inland under Section 7, we hold that a mere contractual extension of COGSA is not alone sufficient to overcome Carmack.

The Court then addressed the means under Carmack by which the parties may avoid the statutory application of the Carmack Amendment, § 10502 and § 10709.

As noted earlier, Title 49 U.S.C. § 10502 permits the STB to exempt certain transportation from regulation by the STB or the Secretary of Transportation. Intermodal transportation is one category of exempt transportation.[109] However, as also noted earlier, exempt transportation remains subject to the liability provisions, including the Carmack Amendment. Cases that have considered § 10502 alone generally hold that claims concerning intermodal traffic moving under 49 U.S.C. § 10502(f), which requires a rail carrier to offer full Carmack Amendment liability under § 10502(e), are governed by *Sompo I*.[110]

The more interesting argument is whether § 10709 allows for "contract carriage" that is wholly exempt from Part A of the Interstate Commerce Act.[111] On this point, the Court in *Mitsui Sumitomo* stated:

> Contracts entered into pursuant to 49 U.S.C. § 10709 are expressly made not subject to 'this part' —i.e. to Part IV (Interstate Transportation)[112] of the

§ 30701(13) (2006) (which allows parties to adopt COGSA to domestic water transportation by express statement in the bill of lading).

106. *Regal-Beloit*, 557 F.3d at 992 (internal citations omitted).

107. *Kirby*, 543 U.S. at 28-29.

108. *See Sompo I*, 456 F.3d at 75. ("We cannot interpret the Kirby Court's language concerning the policy underlying COGSA . . . as implying that a contract extending COGSA inland should supersede an otherwise applicable federal law.").

109. 49 U.S.C. § 10502(f) (2006); 49 C.F.R. § 1090 (2009) ("transportation that is provided by a rail carrier as part of a continuous intermodal movement").

110. *Mitsui*, 578 F. Supp. 2d 575 (decided prior to *Rexroth* or *Regal-Benoit*).

111. *See* 49 U.S.C. § 10709 (2006).

112. *Mitsui*, 578 F. Supp. 2d at 581. (Interestingly, "Part" as used in Title 49 refers to "Part A – Rail." The reference to "IV" in Title 49 is to subtitle IV, Interstate Transportation.).

> Interstate Commerce Act. Both Carmack and Section 10502(e), which limit the ability of the STB to exempt carriers from Carmack unless they offer shippers the alternative Carmack coverage, are found in Part VI of the Act. Therefore a § 10709 contract is subject to neither section.[113]

Nevertheless in *Mitsui Sumitomo*, the court held that the shipper was not a party to the "§ 10709 contract" and therefore the shipper's rights continue to be governed by Carmack, as held in *Sompo I*. In reaching this determination, the court reviewed the sea waybill and commented:

> Not only does the sea waybill fail to disclose the terms of the ERTA[114] (and the MITA[115] that it incorporates), it does not even disclose the fact that there was a contract between [the ocean carrier] and [the rail carrier]! Rather, it states, "*in the event there is a private contract between the Carrier and a Sub-Contractor*, responsibility for such Through Transportation will be governed by the terms and conditions of said contract which shall be incorporated herein . . . ." (emphasis in original). As this court concluded on remand in *Sompo I*, the sort of five-times-removed-incorporation-by-reference, to a contract whose existence is purely hypothetical as far as the shipper is concerned, fails to charge the shipper with notice of what it is that he is "agreeing" to, and cannot be relied on to bind the shipper.[116] Such a conclusion is compelled by the longstanding rule that contractual provisions purporting to limit a carrier's liability are enforceable only if they are reasonably communicative so as to result in a fair, open, just and reasonable agreement.[117]

Additional discussion on the interplay of § 10502(f) and § 10709 may be found in *Sompo II*, a companion case to the *Yang Ming* case discussed in Section III (c). In that case, Judge Chin reviewed a number of cases struggling with the appropriate means of identifying a § 10709 contract and concluded that:

> "[I]t would be nonsensical for (1) § 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full

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113. *Id.*

114. Evergreen-UP Exempt Rail Transportation Agreement.

115. UP's Exempt Circular Master Intermodal Transportation Agreement.

116. Sompo Japan Ins. Co. v. Union Pac. R.R. Co., No. 03 Civ. 1604, 2007 WL 2230091, at *5 (S.D.N.Y. Aug. 2, 2007); *see also* Sompo Japan Ins. Co. v. Union Pac. R.R. Co., No. 02 Civ. 9523, 2007 WL 4859462 at *5 (S.D.N.Y. Sept. 26, 2007).

117. Nippon Fire & Marine Ins. Co. Ltd. v. Skyway Freight Sys., Inc., 235 F.3d 53, 59-60 (2d Cir. 2000) (The court rejected the argument that the shipper should have asked for the rules circular. In doing so, the court referred to the affirmative obligation under the circular for the ocean carrier to inform its customers of terms of the rail circular. At least one Class 1 freight railroad has amended its intermodal circular to provide that if the railroad's customer fails to notify its own customer of the limitations of liability in the circular and the limitations are not upheld, the railroad's customer shall indemnify the railroad for the delta between the damages awarded and what the damages would have been had the limitation been upheld); *see also Mitsui*, 578 F. Supp. 2d at 583 (Where the court noted that contractual indemnification for the difference between COGSA and Carmack is not precluded.).

> Carmack liability and (2) § 10709 to permit the *same category of rail contracts* to offer specific rates and terms with no such requirement of an initial offer of full Carmack liability."[118]

In addressing this interplay, the Ninth Circuit adopted the argument that a § 10709 contract *cannot* be made with respect to transportation made exempt by the STB.[119]

> "We therefore hold that a carrier providing nonexempt transportation may contract under § 10709 without offering Carmack protections, but a carrier providing exempt transportation must proceed under § 10502, which does require such an offer.[120] Accordingly, Defendants here could not have entered into a § 10709 contract notwithstanding the MITA's clause declaring otherwise. Defendants accept that § 10502 covers exempt transportation, but argue that carriers providing exempt transportation could nevertheless still choose to contract under § 10709. Our interpretation of the relationship between § 10502 and § 10709 forecloses this argument."[121]

One question not seemingly addressed in the various arguments made with respect to the interplay of § 10502 and § 10709 is what is meant by "exempt."[122] It is not necessarily clear that exempt transportation is exempt from the "jurisdiction" of the Board rather than exempt from the authority of the Board to regulate that transportation. In other words, the movement of intermodal containers is exempt from the regulations of the Board but remains within the broad grant of jurisdiction under § 10501. A similar interpretation has been made with respect to the jurisdiction of the Board over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to

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118. *Sompo III*, 578 F. Supp. 2d at 596 n.7; *see also* Shoemann Produce Co. v. Burlington N. Santa Fe Ry., 420 F. Supp. 2d 757, 761 (S.D. Tex. 2006) (". . .section 10709 by its terms does not apply to exempt shipments"); *see also Tamini*, 2003 WL 135722; *cf.* Tokio Marine & Fire Ins. Co. v. Mutsui O.S.K. Lines, Ltd., No. CV-02-3619, 2003 WL 23181013, at *1 (C.D. Cal. June 27, 2003) (stating "transportation undertaken pursuant to a contract entered into under § 10709(a) is not subject to Carmack").

119. *Regal-Beloit*, 557 F.3d at 1002 (emphasis added).

120. *Id.*

121. *Id.* (Because the district court analyzed the case under § 10709 and not § 10502, the Ninth Circuit remanded the case to the District Court to determine in the first instance whether alternative terms were properly offered by Defendant).

122. *Sompo I*, 540 F. Supp. 2d at 498 (In rejecting both parties' contentions and adopting its own, the Ninth Circuit noted "The parties' confusion is understandable given the 'muddled state of the law.') (citing '[s]everal courts [that] have noted that this issue has not been adequately addressed") (Congress has not provided any guidance regarding how to read § 10502 and § 10709 in tandem and very few courts have squarely confronted the question." The Court also cited case law in support of each of the parties' arguments "The parties have therefore been forced to rely on unpublished district court decisions to support their respective arguments); *see Tamini*, 2003 WL 135722 (supporting plaintiffs' argument); *see Tokio Marine*, No. 2003 WL 23181013 (supporting defendants' argument).

be located, entirely in one State" under § 10501(b)[123] but its inability to regulate spur, industrial, team, switching, or side tracks under § 10906. Title 49 USC 10906 provides:

> Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.
>
> The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.[124]

Thus, although 49 U.S.C. § 10501(b) states that the Board has *jurisdiction* over spur, industrial, team, switching, or side tracks, 49 U.S.C. § 10906 states that the Board does not have *authority* to regulate spur, industrial, team, switching, or side tracks. The absence of authority to regulate has not been interpreted to mean the absence of jurisdiction.[125] Similarly, the exemption of the Board's regulation of intermodal transportation does not necessarily mean that it is outside the jurisdiction of the Board under the broad definition of transportation upon which the Ninth Circuit relied in its analysis of the ocean carrier's status. Interpreting § 10501 as enlarging the jurisdiction of the STB to ocean carriers in foreign trade from non-adjacent countries while simultaneously interpreting § 10502 as exempting that transportation from the jurisdiction of the

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123. 49 U.S.C. § 10501(b) (2006) states:

> b) The jurisdiction of the Board over—
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive.

124. 49 U.S.C. § 10906 (2006).

125. Port City Props. v. Union Pac. R.R. Co., 518 F.3d 1186 (10th Cir. 2008); United Transp. Union III – Lelis Bd. v. Surface Trans. Bd., 183 F.3d 606, 612 (7th Cir. 1999); *see also* County of Dutchess v. CSX Transp., Inc., No. 7:09-cv-05606-CS (S.D.N.Y. filed Sept. 10, 2009) ("At first blush this provision [49 U.S.C. § 10906] seems to contradict Section 10501(b), which gives the STB exclusive jurisdiction over such tracks, but most courts have reconciled these provisions as follows: "When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management." *Port City Props.*, 518 F.3d at 1188 (quoting Cities of Auburn & Kent, 2 S.T.B. 330, 1997 STB LEXIS 143, at *23 (1997)) (alteration in original). Thus, while the STB has exclusive jurisdiction over these tracks, and thus no other entity may regulate them, even the STB may not exercise authority over such tracks, and rail companies may dispose of them as they see fit. See id. at 1189 (STB authorization not required to abandon spur and industrial tracks)."

STB (and thus prohibiting the parties from agreeing to a § 10709 contract) appears internally inconsistent.

If, instead, the jurisdictional grant, exemption and contract sections were read together, (i) intermodal transportation would be within the jurisdiction of the STB under § 10501 but (ii) free from regulation by the STB under § 10502, other than the default application of § 10502(e) (the obligation to offer Carmack), as with all exempt transportation, and (iii) the parties to exempt transportation, including intermodal transportation, could act affirmatively and electing to contract out of § 10502 and the entirety of Part A – Rail as provided by § 10709. Allowing the parties to do so would also be consistent with the de-regulatory policy of the United States since the late 1970s.

(B) THE STB AND § 10709

Although arising apart from the competing court decisions described in this article, it is noteworthy that the STB has also been addressing the issue of how to define a § 10709 contract. In a decision served March 12, 2008, the STB discontinued STB Ex Parte 669, in which the STB had sought public comments on its proposal to interpret the term "contract" in 49 U.S.C. § 10709 as embracing "any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities."[126]

The STB explained that in reviewing the comments of both carriers and shippers in STB Ex Parte 669, it was ". . .persuaded that the proposed rule would not adequately resolve the concerns that motivated the proposal, and could well result in unintended consequences that are best avoided."[127]

Instead, the STB instituted a separate rulemaking proceeding to consider imposing a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under §10709. According to the STB:

> "The statement would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board. Moreover, it would advise the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly,

126. *Interpretation Of The Term "Contract" In 49 U.S.C. 10709*, STB Ex Parte 669 (served March 12, 2008).

127. *Id.*

and such a rate might be open to challenge before the Board. The proposal would also require that, before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options."[128]

It is noteworthy that in its notice the Board (i) stated that transportation subject to a § 10709 contract would "not be subject to a regulation by the Board," not that the Board had abandoned its jurisdiction over the transportation entirely, and (ii) said nothing that would indicate that exempt transportation cannot be the subject of a § 10709 contract.

IV. The Rotterdam Rules

The United States played an active role in negotiating a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which was recently completed by the United Nations Commission on International Trade Law (UNCITRAL) and approved on December 11, 2008 by the United Nations General Assembly.[129]

The United States proposed to the working group that drafted the treaty, UNCITRAL Working Group III on August 7, 2003, in A/CN.9/WG.III/WP.34[130] that the law governing the door-to-door carriage of goods should be as uniform as possible.

The United States stated its position as follows with reference to the 2003 draft of the Convention at A/CN.9/WG.III/WP.21:

I. Scope of application and performing parties
5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier's liability to the cargo interests would always be resolved under the Instrument's own substantive liability provisions (including the Instrument's own limitation and exoneration provisions) except when the network principle

128. Comments by various shippers, rail carriers and others may be found at the STB website http://www.stb.gov.

129. The text of the Convention, which will be known as the Rotterdam Rules after a September 2009 signing ceremony in Rotterdam, The Netherlands, may be found at Annex 1, pages 86-132 of the Report of UNCITRAL, Forty-first session (16 June-3 July 2008) to the General Assembly, http://www.uncitral.org (follow "Commission Session" hyperlink; then follow "41st session" hyperlink). The General Assembly's approval of the Convention was announced by the General Assembly at http://www.uncitral.org (follow "Highlights" hyperlink; then follow "12/12/2008: General Assembly adopts Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" hyperlink). Holland & Knight partner Chester D. Hooper was a member of the United States delegation to UNCITRAL Working Group III. Much of this Section IV is quoted verbatim from the Brief Amicus filed by Holland & Knight LLP in the appeal to the Second Circuit of Judge Hellerstien's decision in Royal Sun & Alliance.

130. http://www.uncitral.org (follow "Working Group III" hyperlink; then follow "12th Session, 6-17 October 2003, Vienna" hyperlink)

> applies to supersede these provisions. To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.

Proposal by the United States of America, A/CN.9/WG.III/WP.34 (Aug. 7, 2003). The "network exception" referred to a desire by European Nations to have their road and rail conventions, CMR and CIM/COTIF, govern damage or loss on European roads or rails.

While the Convention will govern a multimodal carrier's liability during U.S. inland carriage, it will not apply directly to the railroad or trucking company acting as subcontractor to the carrier. The United States indicated that the carrier's Himalaya Clause should preserve uniformity by applying the carrier's defenses to the railroad or motor carrier:

> 7. With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention such as CMR. In others, it may be a mandatory or nonmandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier's rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.[131]

Inland United States carriers should be able to rely on Himalaya clauses in the bills of lading issued by multimodal carriers. To interpret Carmack contrary to the clear meaning and intent expressed by Congress in the 1978 Recodification bill would severely harm the uniformity sought by the United States in the future Rotterdam Rules, and would increase the expense of U.S. foreign trade. It is obviously far more efficient and preferable to govern multimodal carriage with one law rather than many. If the law were to change with the geographical location of the cargo or with the mode of transportation, the liability would not be uniform or predictable. The cost of insurance and the cost of international trade would increase.[132]

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131. *Id.*

132. See Third Party Defendants' Memorandum in Support of Their PLC, Motion to: 1. Dismiss the Claims Against Them on Grounds of a Mandatory and Exclusive Foreign Forum Selection Clause, or 2. Dismiss the Claims Against Djuric on Grounds of a Covenant Not to Sue, or 3. Limit Their Liability, if any, to $500 Per Package/, Royal & Sun Alliance Ins., PLC v. Ocean World Lines, 572 F. Supp. 2d 379 (S.D.N.Y. 2008) (No. 07-CV-2889) (brief available at 2007 WL 4845736).

VII. CONCLUSION

The century old Carmack Amendment has survived regulation, deregulation, and a debate over its applicability to inland transportation of goods originating in a non-adjacent country. It remains a steadfast embodiment of common law, if not Roman law. Just as rail transportation is experiencing a Rail Renaissance, so, too, is the Carmack Amendment and the jurisprudence that has accompanied its development, including the debates fostered by the interplay of *Sompo* and *Kirby*, and now the interplay of § 10502 and § 10709. Although the field of loss and damage in rail carrier transportation remains a vibrant one, we can look forward to the Supreme Court's granting of a writ of certiorari in a proper case and, perhaps, the resolution of one or more of the many issues only touched upon in this article.