

OUTSIDE COUNSEL; Supreme Court Extends Admiralty Laws to Cover Train Wreck; News

New York Law Journal
April 27, 2005 Wednesday

Copyright 2005 ALM Media Properties, LLC All Rights Reserved Further duplication without permission is prohibited

New York Law Journal

Section: Pg. 28, (col. 4); Vol. 231

Length: 2579 words

Byline: David T. Maloof and Barbara Sheridan

Body

News

Supreme Court Extends Admiralty Laws to Cover Train Wreck

In its decision last fall in *Norfolk Southern Railway Co. v. James M. Kirby, Pty., Ltd.*, -- US --, 125 SCt 385, 160 LEd2d 283 (2004), the U.S. Supreme Court decided to apply maritime law to a case about cargo damaged in a train wreck.

The Court held that for the first time, and in contravention to prior appellate authority, admiralty jurisdiction applied to a shipment transported by rail in interstate commerce, because that rail movement was part of an overall transportation of the shipment under a single bill of lading contract which involved substantial ocean movement.

Carmack Amendment Ignored

Exercising this admiralty jurisdiction, the Court extended principles of maritime law in order to limit the shipper's recovery for cargo damage from the railroad. Perhaps even more surprising is that the Supreme Court ignored the fact that Congress had already provided for a non-admiralty law liability scheme applicable to railroads, particularly the Carmack Amendment.

Thus, with the stroke of a pen, and with no congressional mandate, admiralty lawyers, a plurality of which practice in New York, have suddenly found their area of law vastly expanded and have been called upon to master an entirely new industry over a century after its creation.

Kirby involved a shipment of machinery that Kirby, the shipper, needed to have transported from Australia to Huntsville, Ala. In order to ship the machinery, Kirby contracted with ICC, an Australian freight forwarder to arrange for transport of the shipment from Sydney through to delivery to an inland trucker in Huntsville, for ultimate delivery to the consignee. ICC, although only a paper carrier in the sense that it did not actually transport the shipment, issued a bill of lading covering the shipment between those two points. ICC then contracted with a steamship line to arrange for the actual carriage of the shipment, which company also issued its own bill of lading covering the shipment from Sydney to Huntsville. As the shipment involved inland transport to Alabama, the steamship line in turn contracted with Norfolk Southern Railway to transport the shipment by rail from Savannah to Huntsville.

The transport was uneventful until the shipment was in the possession of Norfolk Southern and the train transporting it derailed, causing \$1.5 million in damages to the shipment.

Both the ICC and steamship line bills of lading contained clauses applying a \$500 per package limitation of liability permitted by the Carriage of Goods by Sea Act (COGSA), 46 USC 1304(5),

to various stages of the transportation through what is known in the maritime industry as a Himalaya clause--a clause that extends the limitation of liability to other downstream parties to the transportation. The ICC Himalaya clause in this case further extended the limit to any servant, agent or other person (including any independent contractor) whose services have been used to perform the contract.

Ultimately, as a result of the Himalaya clause in the steamship line bill of lading, Norfolk Southern argued successfully that their limitation was only \$500 per package (the Court assumed there were 10 packages involved in the transport, so the entire limit could be as little as \$5,000). Kirby had contested this, arguing that it contracted with ICC, not Norfolk Southern, and did not agree to have the limit extended to Norfolk Southern, who was in effect, a subcontractor of ICC's subcontractor.

'Conceptual, Not Spatial'

Most notably for this analysis, applying a conceptual rather than spatial approach, Justice Sandra Day O'Connor, writing for a unanimous Court, explained that although the shipment was involved in interstate rail transport at the time of its damage, as it was the primary objective of the parties to accomplish the transportation of goods by sea, admiralty jurisdiction applied to this loss. Kirby, *supra* 125 S Ct at 392-96. Applying maritime law relating to Himalaya clauses, the Court further held that ICC acted as Kirby's agent for the limited purpose of entering into a liability limitation with the steamship line and that Norfolk Southern was a third-party beneficiary of that contract. As the terms of the steamship line's Himalaya clause broadly extended the limit to inland carriers, Norfolk Southern was covered by it and, under admiralty law, could limit their liability to \$500 per package. Kirby, *supra* at 125 S Ct at 398.

What is problematic with this decision is that it appears to entirely ignore the fact that Congress already evinced an intent to regulate intermodal shipments by water and rail by enacting a statutory scheme applicable to railroads which, under a plain English reading of the statutes, applies to the situation in Kirby. Part of this statutory scheme, the Carmack Amendment, 49 USC 11706, along with the Staggers Amendment, 49 USC 10502(e), applies to require that a full-liability option pursuant to Carmack be offered to shippers before a railroad can limit its liability. For reasons that are unclear, the Supreme Court failed to even consider these statutes in reaching its conclusion in Kirby.

The Carmack Amendment is generally considered to apply to rail shipments whenever the Surface Transportation Board has jurisdiction over the shipment at issue. *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F2d 697, 701 (11th Cir. 1986); cert. denied, 480 US 935; 107 S Ct 1577; 94 LEd2d 768 (1987) (holding that Carmack applied to shipments whenever the Interstate Commerce Commission (the predecessor governmental entity to the Surface Transportation Board) had jurisdiction over the shipment; *Berlanga v. Terrier Transportation, Inc.*, 269 FSupp2d 821, 827 (N.D. Tex. 2003); *Fine Foliage of Florida, Inc. v. Bowman Transportation, Inc.*, 698 FSupp 1566, 1571 (M.D. Fla. 1988), *aff'd*, 901 F2d 1034 (11th Cir. 1990) (same).

The Surface Transportation Board has jurisdiction over transportation by rail carrier that is by railroad and water if it is part of a continuous carriage or shipment, including transportation in the United States between a place in the United States and a place in a foreign country. 49 USC 10501(a). Whether the shipment is being imported or exported is inapposite, so long as it is between two points, one of which is in this country. *Berlanga, supra*, 269 FSupp at 827.

Foreign Commerce Extension

So long as the domestic rail transport is part of a larger transportation originating in a foreign country, it is a continuation of foreign commerce that fits the statutory requirement of being a ship-

ment between a place in the United States and a foreign country, and Carmack is applicable to it. *Project Hope v. M/V Ibn Sina*, 250 F3d 67, 74 (2d Cir. 2001) (applying Carmack Amendment to transport of shipment of medicine that was intended for a foreign country via truck and ocean transport);¹ see also *Swift Textiles, supra*, 799 F2d at 701; *Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Railway Co.*, 213 F3d 1118, 1119 (9th Cir. 2000) (applying Carmack to an intermodal shipment by water and rail from Indonesia to Tennessee covered by an intermodal bill of lading); *Berlanga, supra*, 269 FSupp2d at 830 (applying Carmack Amendment to domestic leg of transport of goods from Mexico to Texas); *Canon USA, Inc. v. Nippon Liner System, Ltd.*, 1992 WL 82509 at * 6 (N.D. Ill. 1992) (applying Carmack Amendment to a shipment from Japan to Illinois which traveled by vessel, train and truck and was damaged by the trucker in Illinois).

In *Kirby*, the shipment was clearly damaged in the train derailment while it was involved in a continuation of foreign commerce. Therefore, the Carmack Amendment and its related statutes were by their terms applicable to the shipment. Prior to *Kirby*, an earlier string of cases held (it would seem erroneously, based upon the statute's own terms) that Carmack did not apply unless a separate inland bill of lading was issued by a carrier. See, e.g., *Swift Textiles, supra*, 799 F2d at 701.

Until 1980, rail carriers could not without full disclosure limit their liability to shippers to less than full (Carmack Amendment) liability. That was further emphasized when Congress passed the Staggers Amendment, 49 USC 10502, which authorized the issuance of exemption orders allowing rail carriers to enter into contracts which contained limitations of liability. The Staggers Amendment specifically contains a provision, at 49 USC 10502(e), which specifically requires that as a pre-condition of any railroad limiting its liability for cargo damage, the railroad must first offer a shipper the option to choose to pay for full Carmack Amendment liability. The purpose of the Staggers Amendment requirement that Carmack liability must be offered to shippers along with limited liability options was to protect shippers and preserve shippers' option to insist upon strict liability for railroads, so long as shippers are willing to pay for it. Augello, William J., *Transportation Logistics and the Law*, 1st Ed., 2001, Transportation Consumer Protection Council Inc., p. 24-25.

Intermodal Shipments

That the statutory scheme was intended to apply to intermodal shipments such as the one at issue in *Kirby* was made clear in the Interstate Commerce Commission's Exempt Order 390, 46 FedReg 14348 (1981), where it was explained that 49 USC 10502(e) applied to trailer on flatcar/container on flatcar (TOFC/COFC) shipments. As COFC shipments refer to the rail carriage of ocean containers and TOFC shipments refer to the rail carriage of motor carrier trailers, the commission in effect made clear that intermodal transportation was encompassed by Staggers. Similarly, the Commission Rule at 364 ICC 391 clarified that railroads applying for exempt services must offer Carmack liability or obtain a shipper's consent to any limit of liability. Again, the Supreme Court did not even consider these Executive Branch reiterations of congressional intent.

In *Kirby*, it is undisputed that no such offer of Carmack liability was ever made to the shipper. Although COGSA gives the shipper an option of declaring a value for the goods, 46 USC App 1304(5), and paying a higher shipping rate, there are several important differences between full Carmack liability and the opportunity to declare a value under COGSA.

COGSA Liability

Indeed, COGSA liability is far more lenient than Carmack liability. For example, COGSA allows for no liability where a carrier has exercised due diligence to care for the goods, see 46 USC

1304(1), whereas Carmack imposes liability even if due diligence is exercised. Compare *Eat-omad, Inc. v. Carolina Freight Carriers Corp.*, 1996 WL 499334 at *4 (SDNY 1996) (Carmack Amendment imposes strict liability) with *Mente & Co. v. Isthmian S.S. Co.*, 36 FSupp 278, 283-84 (SDNY 1940) (shipowner who exercised due diligence was not liable for damage to cargo caused by undiscovered latent defect in vessel).

In holding that the train wreck in Kirby fell within the Court's admiralty jurisdiction, the Court thus overlooked an entire statutory scheme that Congress had already enacted to regulate the railroad industry. As noted above, the Court's ruling has the potential of denying shipper's significant rights that should be available to them pursuant to these statutes. This is particularly troublesome in that just four railroads² account for 95 percent of the industry's traffic in this country. William J. Augello, *Transportation Logistics and the Law*, supra, p. 31. Indeed, these four railroads control over 107,500 miles of railroad track, and, as to be expected, their dominance has been enormously profitable for them; in 2002, they had a combined revenue of \$35.6 billion. See www.ologopolywatch.com/2003/11/01.html, Industry brief: US railroads. The net result of having such few railroads control the vast majority of the industry's business is that a virtual oligopoly exists in the industry, thus providing shippers with a single alternative to transport goods by rail in that region.³ In exchange for such privileges, it can be said that Congress has required those railroads offer their shippers options such as Carmack liability.

The Kirby decision further flies in the face of other Supreme Court pronouncements over the years that federal courts are required to wield their grant of constitutional authority restrictively. See e.g. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 US 630, 640; 101 SCt 2061, 2067; 68 LEd2d 500 (1981) (instances where the Court creates federal common law should be few and restricted).

'Kirby': Watershed Decision

Kirby is thus a watershed decision with respect to transportation law. Not only does it re-write the applicable law governing millions of cargo shipments each year, it also would seem to create a new tension between the legislative and judicial branches of government regarding who is the proper arbiter of commercial regulation. Article I, 8, Cl. 3 of the Constitution states that Congress has the authority to regulate Commerce with foreign Nations, and among the several States. However, in Kirby, the Court said that the grant of admiralty jurisdiction contained in Article III, 2, Cl. 1 enables it to exercise jurisdiction over matters like the type of interstate rail carriage at issue in Kirby.

Ultimately, it is the shipper who has the most to lose in this struggle between the branches of government, since Congress in its Carmack legislation set stricter guidelines for common carriers to follow in offering shippers a range of transportation terms.

Since the Supreme Court has historically reviewed maritime cargo law only at irregular intervals of many years, the lower courts are now left with a plethora of questions to resolve in the wake of the revolutionary Kirby decision. For example, when does the Carmack Amendment now apply, and how are intermodal movements where (unlike in Kirby) separate inland bills of lading are issued to be handled? And how far can judges go in applying the special powerful procedural remedies available only under admiralty law pursuant to the 1966 Supplemental Rules for Admiralty and Maritime Claims--such as the power to make pre-judgment property attachments and in rem arrests to railroad companies? If not a Pandora's box, then at least an admiralty treasure trove of questions now appears on the horizon.

1. Although Project Hope dealt with the Carmack Amendment as applicable to interstate trucking as opposed to the railroad provisions, the language of the statutory provisions are virtually iden-

tical in both substance and effect, so that decisions involving the trucking aspects of Carmack should apply with equal force to cases involving rail transport. See *Kyodo USA, Inc. v. Cosco N. Am., Inc.*, 2001 WL 1835158 at *5 (C.D. Cal. 2001) (applying interpretation of rail portion of Carmack to a shipment by motor carrier).

2. These four railroads are Union Pacific, Burlington Northern Santa Fe, CSX Corp., and Norfolk Southern. Augello, *supra*, Transportation Logistics and the Law, p. 31, note 50.

3. Union Pacific and Burlington Northern Santa Fe largely dominate the West and CSX and Norfolk Southern dominate the East and South. See www.oligopolywatch.com/2003/11/01.html.

David T. Maloof is senior partner at Maloof Browne & Eagan, which specializes in maritime and transportation law, sale of goods law and insurance coverage issues. Barbara Sheridan, an associate at the firm, is a graduate of Fordham University School of Law.

Classification

Language: ENGLISH

Publication-Type: Newspaper

Subject: ADMIRALTY LAW (94%); TRANSPORTATION LAW (90%); DECISIONS & RULINGS (90%); LAW COURTS & TRIBUNALS (90%); SUPREME COURTS (90%); TRANSPORTATION INDUSTRY LAW (90%); RAIL TRANSPORTATION (90%); SETTLEMENTS & DECISIONS (90%); MARINE VESSELS (89%); MARINE SHIPPING (89%); TRAINS (78%); TRANSPORTATION SUPPORT SERVICES (76%); GENERAL FREIGHT TRUCKING (75%); INTERSTATE COMMERCE (73%); FREIGHT BROKERS & FORWARDERS (71%)

Company: NORFOLK SOUTHERN RAILWAY CO (92%); NORFOLK SOUTHERN CORP (52%)

Organization: SUPREME COURT OF THE UNITED STATES (92%)

Ticker: NSC (NYSE) (52%)

Industry: NAICS482111 LINE-HAUL RAILROADS (92%); SIC4011 RAILROADS, LINE-HAUL OPERATING (92%); NAICS484121 GENERAL FREIGHT TRUCKING, LONG-DISTANCE, TRUCKLOAD (52%); NAICS484110 GENERAL FREIGHT TRUCKING, LOCAL (52%); SIC4213 TRUCKING EX. LOCAL (52%)

Geographic: HUNTSVILLE, AL, USA (90%); SYDNEY, AUSTRALIA (90%); ALABAMA, USA (92%); NEW YORK, USA (79%); UNITED STATES (92%); AUSTRALIA (87%)

Load-Date: August 7, 2011