



# Carmack or Cogsa?

## U.S. appeals court muddies the water over cargo liability limits

BY R.G. EDMONSON

**A** federal appeals court in New York has handed down a decision in a case that may reopen the question of whether the liability limits under the Carriage of Goods by Sea Act may be extended to inland carriers operating under an ocean carrier's through bill of lading.

On July 10, the 2nd U.S. Circuit Court of Appeals ruled in *Sompo Japan Insurance Co. of America vs. Union Pacific Railroad Co.* that the railroad was liable for full damages to freight under the 1898 Carmack amendment to the Interstate Commerce Act. The decision reversed the U.S. District Court for the Southern District of New York, which ruled that UP was covered by Cogsa's \$500-per-package limit because it was operating under a through bill from MOL.

The district court used the November 2004 Supreme Court decision in *Norfolk Southern vs. Kirby*, which declared that ocean carriers were able to extend Cogsa's liability limits to inland carriers on a through bill.

Chester D. Hooper, admiralty attorney with Holland & Knight in New York, said the Supreme Court's Kirby decision "assisted the industry in the way it operates today, the global transportation system, where door-to-door moves represent the great majority of movements, and you want one law to govern the entire move."

The appeals court's decision says a carrier extends Cogsa limits by contract, but contracts are trumped by the statutory authority of the Carmack amendment, said Hooper and Bill Byrne, who specializes in intermodal cases with Holland & Knight's Jacksonville, Fla., office.

"What the court said, whether or not it's to be agreed with, is the extension of Cogsa to the inland transportation is done as a matter of contract, and not as a matter of law," Byrne said. "In the court's opinion, the inland portion, even of a through bill of lading, despite the fact that it's not from an adjacent country, was governed by Carmack as a matter of law."

The case involves a UP derailment in Texas in the summer of 2002. The

accident damaged a containerized shipment of 32 Kubota tractors worth \$479,000 that originated in Japan, and was consigned to a dealer in Suwanee, Ga. Hooper and Byrne disagree with the appeals court's interpretation of the Carmack amendment, because Congress intended it to apply to shipments within the U.S., or originating in the U.S. to a destination in an adjacent foreign country.

Calling Japan adjacent to the U.S. is a stretch, but attorney David T. Maloof, who represented the insurance company in the case, said where the shipment originated is irrelevant. "The statute says that it covers shipments within the interstate commerce of the United States. Why should we care where they start? The intent of Congress is to regulate the railroads. Why would Congress care where the shipment starts, whether it starts in Canada or Japan? The railroads are supposed to be subject to a requirement of offering justice to shippers. Does the shipper deserve less justice when (the shipment) started in Japan?"

Hooper and Byrne said shippers could waive recovery of full damages that the Carmack amendment allows in exchange, for example, a lower rate on their freight. Byrne said it was notable that the appeals court sent the case back to the district court to determine if the shipper had been given the opportunity to waive its coverage.

"If you were talking about ocean transportation, I think Congress tried to keep Carmack out of the foreign ocean transportation," Byrne said. "This decision challenges the model in which intermodal transportation is conducted today."

"It's a really well-crafted decision. It's intellectually correct," Maloof said. "I think it will be followed by all the other circuits."

"The decision says when we're going to deal with railroads, federal law will be primary," Maloof said. "And the federal law that will be primary, unlike what the Supreme Court said in Kirby, will be the one that Congress drafted." ♦