

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   KAWASAKI KISEN KAISHA LTD.,                   :

4   ET AL.,   :

5                               Petitioners                         :   No. 08-1553

6                   v.   :

7   REGAL-BELOIT CORPORATION, ET AL.                 :

8   - - - - - x

9   and

10   - - - - - x

11   UNION PACIFIC RAILROAD COMPANY,                 :

12                               Petitioner                         :

13                   v.   :   No. 08-1554

14   REGAL-BELOIT CORPORATION, ET AL.                 :

15   - - - - - x

16   Washington, D.C.

17   Wednesday, March 24, 2010

18

19                   The above-entitled matter came on for oral  
20   argument before the Supreme Court of the United States  
21   at 10:05 a.m.

22   APPEARANCES:

23   J. SCOTT BALLENGER, ESQ., Washington, D.C.; on behalf  
24       of Petitioners.

25   ANTHONY YANG, ESQ., Assistant to the Solicitor

1 General, Department of Justice, Washington, D.C.; for  
2 United States, as amicus curiae, supporting  
3 Petitioners.

4 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf  
5 of Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 08-1553, Kawasaki  
5 Kisen Kaisha, Ltd. v. Regal-Beloit Corporation, and the  
6 consolidated case.

7 Mr. Ballenger.

8 ORAL ARGUMENT OF J. SCOTT BALLENGER

9 ON BEHALF OF THE PETITIONERS

10 MR. BALLENGER: Mr. Chief Justice, and may  
11 it please the Court:

12 From its enactment in 1906 until very  
13 recently, it has been settled law for a century that the  
14 Carmack Amendment does not apply to the inland leg of an  
15 import through shipment. This Court had a factually  
16 identical --

17 JUSTICE SOTOMAYOR: Are you taking -- are  
18 you taking a position different than the U.S., that it  
19 applies to exports but not imports? I think the -- the  
20 Solicitor General's position is that it doesn't apply to  
21 any import or export.

22 Is it yours that it doesn't apply to  
23 imports?

24 MR. BALLENGER: I don't believe so, Your  
25 Honor. I think both of our position is that the current

1 scope of Carmack is consistent with its historic scope,  
2 which had a very limited, special application to exports  
3 to Canada and Mexico. Other than that, it doesn't apply  
4 to foreign trade at all.

5 JUSTICE SOTOMAYOR: Could you tell me  
6 something? Is there -- do you know if there's a  
7 railroad line from the U.S. through to -- through  
8 Mexico? I know there is one from New York to Canada, a  
9 freight line.

10 MR. BALLENGER: There certainly are rail  
11 connections between the United States and Mexico, yes,  
12 Your Honor.

13 JUSTICE SOTOMAYOR: There are?

14 MR. BALLENGER: Yes, absolutely.

15 This Court had a factually identical import  
16 case just a few years ago in Kirby, and, although it did  
17 not discuss the Carmack Amendment, this Court agreed  
18 unanimously on both reasoning and a result that are  
19 flatly inconsistent with Respondents' arguments here.

20 JUSTICE GINSBURG: I thought the government  
21 told us in this -- in that case that Carmack wasn't in  
22 the case because it was either waived or something. But  
23 the case was considered on the basis of, on the one hand,  
24 COGSA and, on the other, the law of 50 States.

25 MR. BALLENGER: That's correct, Justice.

1 The United States represented to this Court that -- that  
2 Carmack was not in the case, either because it was  
3 waived or because the traffic was moving under 49 U.S.C.  
4 section 10709, which of course is true here as well.

5 Our view has always been that this Court  
6 wouldn't have granted certiorari purely on the basis of  
7 a waiver. But in any event, this Court's reasoning in  
8 Kirby was that it's very important to foreign trade and  
9 to the uniformity of rules on a through shipment.

10 JUSTICE GINSBURG: Yes, but uniformity is  
11 one thing when you're talking about 50 States and  
12 another when it's just two Federal statutes.

13 MR. BALLENGER: That's absolutely true, Your  
14 Honor. But the -- for more than a century, the relevant  
15 Federal statutes have been construed harmoniously not to  
16 overlap in this particular situation. Foreign ocean  
17 commerce is governed by the Carriage of Goods at Sea  
18 Act, and the Carmack Amendment has always governed  
19 purely domestic traffic and exports to Canada and  
20 Mexico.

21 Now, Respondents say that the settled  
22 meaning of that statute changed dramatically in 1978,  
23 but Congress said that it didn't. And it's not really  
24 that hard to read the present language --

25 CHIEF JUSTICE ROBERTS: Well, what if --

1    what if Congress was wrong?  I mean, the language that  
2    they adopted sure looks quite different to me than what  
3    was applicable prior to 1978, and the boilerplate  
4    provision that, oh, when we codify this, we don't mean to  
5    change anything -- I mean, which prevails, the actual  
6    language they used or that boilerplate?

7                   MR. BALLENGER:  Your Honor, I think that  
8    this Court's task, as always, is to read the statute as  
9    a whole, which includes that language that Your Honor  
10   characterizes as boilerplate and also includes the  
11   language that we are here to construe.  And you would  
12   want to read it all together if possible.

13                   So let's look at the -- at the present  
14   language.  It appears at the back of Union Pacific's  
15   reply brief at page 6a.  Just like it always has,  
16   Carmack distinguishes between receiving carriers,  
17   delivering carriers, and connecting carriers.

18                   The simplest way to resolve this case is  
19   that I believe even Respondents would concede that for  
20   Carmack to apply, you need a receiving carrier that  
21   is a rail carrier.  "K" Line is the receiving carrier  
22   here, and they are not a rail carrier.  Numerous decisions  
23   of this Court and the Interstate Commerce Commission  
24   confirm what the statute plainly says, which is that a  
25   rail carrier is a party providing common carrier railroad

1 transportation, not --

2 CHIEF JUSTICE ROBERTS: Those are -- those  
3 are two different arguments, right; your rail carrier  
4 argument and your pre-1978 argument?

5 MR. BALLENGER: They are, Your Honor. The  
6 simplest way to resolve this case is that the present  
7 language, even taken on its face, requires a receiving  
8 carrier that is a rail carrier.

9 "K" Line is the receiving carrier here.  
10 They are not a rail carrier. This Court and the ICC  
11 have long held that merely subcontracting for common  
12 carrier service does not make you a common carrier.  
13 This Court held that in the American Railway Express  
14 case. The ICC made this crystal clear in the  
15 CSX/Sea-Land matter in 1987, where they held that the  
16 ocean carrier Sea-Land was not a rail carrier simply  
17 because it subcontracted for inland rail transportation  
18 and provided carrier containers to the inland rail  
19 carrier. So --

20 JUSTICE SOTOMAYOR: So your -- I'm sorry.  
21 I'm a little confused. Your position is that "K" Line  
22 -- you're representing whom here?

23 MR. BALLENGER: I -- my client is Union  
24 Pacific, but I am here today speaking for both of the  
25 Petitioners, "K" Line and Union Pacific.



1 JUSTICE SOTOMAYOR: You have a bit of a --

2 MR. BALLENGER: Yes.

3 JUSTICE SOTOMAYOR: -- conflict, don't you?

4 Because isn't "K" Line taking the position it's not a rail  
5 line? And who are you speaking for when you say it's --

6 MR. BALLENGER: For both of us, Your Honor,  
7 because that resolves -- actually resolves the case for  
8 both "K" Line and Union Pacific.

9 JUSTICE SOTOMAYOR: If it's considered what?  
10 If it's considered --

11 MR. BALLENGER: "K" Line -- the statute  
12 requires -- to be triggered, it requires a receiving  
13 carrier that is a rail carrier. "K" Line is the  
14 receiving carrier here, and they are not a rail carrier.  
15 So then the question becomes -- Union Pacific certainly  
16 is a rail carrier. The question becomes: Can you treat  
17 Union Pacific as the receiving carrier? You can't. The  
18 receiving carrier language has been in the statute since  
19 1906. It has never changed. And for a century it has  
20 always meant the carrier that receives the property from  
21 the shipper at the point of origin. The current  
22 language --

23 JUSTICE SOTOMAYOR: Where is that defined in  
24 Carmack? Where in the pre-1978 provisions or in the  
25 current statute is that to be read?

1           MR. BALLENGER: Well, there are -- there is  
2 not an explicit definition of the term "receiving  
3 carrier," Your Honor. It appears in the first sentence  
4 of 11706, where it has always appeared in the first  
5 sentence of Carmack, and then there are implications  
6 in -- throughout the rest of Carmack, which I'm happy to  
7 talk about.

8           JUSTICE SOTOMAYOR: I -- I'm trying to  
9 find it, statutorily.

10          MR. BALLENGER: Okay.

11          JUSTICE SOTOMAYOR: And what case says that?

12          MR. BALLENGER: Well --

13          JUSTICE SOTOMAYOR: What case of ours defines  
14 a -- a receiving carrier in that particular way?

15          MR. BALLENGER: Well, let's start with the  
16 statutory language, if we may. The first sentence of  
17 Carmack says that "A rail carrier providing  
18 transportation or service subject to the jurisdiction of  
19 the Board under this part shall issue a receipt or bill  
20 of lading for property it receives for  
21 transportation under this part."

22          JUSTICE SOTOMAYOR: The only one who's in --

23          MR. BALLENGER: That's how --

24          JUSTICE SOTOMAYOR: The only one who has --  
25 the board has jurisdiction over is the railroad. It

1 doesn't have jurisdiction over the ocean carrier  
2 receiving.

3 MR. BALLENGER: That -- that's correct, Your  
4 Honor. And then the question is --

5 JUSTICE SOTOMAYOR: And so you are the --  
6 you have to be the person -- the railroad has to be the  
7 person receiving the goods, correct?

8 MR. BALLENGER: No, Your Honor. The  
9 receiving carrier has always been the party at the point  
10 of origin of the shipment. And you can see if you look at  
11 the venue provision in the current language --

12 JUSTICE SOTOMAYOR: But you're not reading  
13 the language. Doesn't the language say the person who  
14 receives under the jurisdiction of the board?

15 MR. BALLENGER: No, Your Honor. It's --  
16 it's two separate requirements. It's always been  
17 understood as two separate requirements. Carmack  
18 requires that the receiving -- a receiving carrier is  
19 subject to the jurisdiction of the board, and then it  
20 also has to be the receiving carrier. The receiving  
21 carrier is the originating carrier. If you look at the  
22 venue provision --

23 JUSTICE SOTOMAYOR: I -- I keep going back  
24 to: What language tells me that particular point in the  
25 statute?

1           MR. BALLENGER: Because otherwise the -- the  
2 whole structure of the statute doesn't work. Carmack draws  
3 a distinction between receiving carriers, delivering  
4 carriers, and connecting carriers.

5           If receiving property directly from another  
6 common carrier and merely moving it for a portion of the  
7 journey and connecting that were enough to make you a  
8 receiving carrier -- and, of course, it is in common  
9 parlance; you are receiving goods in that circumstance.  
10 But this receiving --

11          JUSTICE SOTOMAYOR: That's my problem.

12          MR. BALLENGER: "Receiving carrier" has  
13 always been a term of art in this statute. If that were  
14 enough to make you a receiving carrier, then the  
15 statutory structure would fall apart, because every  
16 interim carrier in the line would be a receiving  
17 carrier. Every single one of them receives property --

18          JUSTICE SCALIA: Yes, but not --

19          MR. BALLENGER: -- property for transportation.

20          JUSTICE SCALIA: Not every -- where you are  
21 dealing with -- with intermodal transportation, not every  
22 receiving -- not every rail carrier would be the receiving  
23 rail carrier. I mean, this --

24          MR. BALLENGER: That --

25          JUSTICE SCALIA: Your client is the first

1 rail carrier to receive, right?

2 MR. BALLENGER: It's not how -- that's not  
3 how the statute is worded, Justice Scalia. The  
4 statute --

5 JUSTICE BREYER: Is this the language? It  
6 says the -- see if it helps with Justice Scalia's question.  
7 The language says "a rail carrier providing transportation  
8 or service subject to the jurisdiction of" the STB "shall  
9 issue a receipt or bill of lading for property it  
10 receives."

11 MR. BALLENGER: Correct.

12 JUSTICE BREYER: And so that's what it has  
13 to do, is a bill of lading for property it receives.  
14 And you are saying "receives" means receives from the  
15 shipper.

16 MR. BALLENGER: It has always meant --

17 JUSTICE BREYER: It does not mean receives  
18 from another carrier.

19 MR. BALLENGER: It has always meant that.

20 JUSTICE BREYER: Is that right?

21 MR. BALLENGER: That's correct, Your Honor.  
22 It has always meant that. It has to mean that, because  
23 otherwise, if you read it to mean receives from another  
24 carrier, then every single connecting carrier or delivering  
25 carrier in the chain would be a receiving carrier as

1 well as a connecting or delivering carrier and required  
2 to issue its own bill of lading, which would turn the  
3 historic purposes of Carmack on its head.

4           The purpose of Carmack was to require the  
5 first carrier in the chain to issue a single through  
6 bill of lading to the destination that would govern the  
7 whole voyage under uniform, consistent liability terms.  
8 No one else in the chain is supposed to issue a bill of  
9 lading, so there's only one receiving carrier. It's  
10 the first carrier who deals directly with the shipper.  
11 If you look at the venue provision, you can see that the  
12 statute uses the term "originating carrier"  
13 interchangeably with "receiving carrier," and it  
14 provides venue over that carrier only at the point of  
15 origin of the shipment. That would make absolutely no  
16 sense if someone downstream could be the receiving  
17 carrier. In this circumstance you would say, I suppose,  
18 that Union Pacific was the receiving carrier --

19           JUSTICE SOTOMAYOR: I -- I always thought  
20 that the purpose of Carmack was to ensure rail  
21 responsibility, rail carrier responsibility, so that it  
22 was one bill of lading with respect to all railroad  
23 connections. If that was the purpose of Carmack --

24           MR. BALLENGER: That's not quite correct,  
25 Your Honor.

1 JUSTICE SOTOMAYOR: Okay.

2 MR. BALLENGER: Historically, this Court  
3 explained in Atlantic Coast Line v. Riverside Mills and  
4 in the Ward case, the purpose of Carmack was to require through  
5 transportation, a through bill of lading, from the  
6 originating point to the destination point, a single  
7 bill of lading under consistent terms, so that the  
8 shipper does not have to prove where damage occurred.  
9 The point of Carmack --

10 JUSTICE SOTOMAYOR: But on the rail line.

11 MR. BALLENGER: On --

12 JUSTICE SOTOMAYOR: On rail -- on the rail  
13 transportation.

14 MR. BALLENGER: On any transportation,  
15 actually, Your Honor. The way that the statute works,  
16 it can --

17 JUSTICE SOTOMAYOR: Historically you say  
18 that?

19 MR. BALLENGER: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: In the pre-1978 Carmack,  
21 there is a -- if you want to take a look at it.

22 MR. BALLENGER: Sure.

23 JUSTICE SOTOMAYOR: It is in page 99a of  
24 your petition. It reads: "If the loss, damage, or  
25 injury occurs while the property is in the custody of

1 a carrier by water, that liability" -- "the  
2 liability of such carrier shall be determined by the  
3 bill of lading of the carrier by water and by and under  
4 the laws applicable to transportation by water."

5 MR. BALLENGER: Yes, Your Honor. That --

6 JUSTICE SOTOMAYOR: So --

7 MR. BALLENGER: That provision was  
8 introduced in the Transportation Act of 1920. It's  
9 talking about domestic water carriers. And it's still  
10 there in the statute. It's just in the -- the Carmack  
11 provision -- when Congress split Carmack into three in  
12 1995, it moved that provision to 14706(c)(2). And --

13 JUSTICE SOTOMAYOR: So explain to me what  
14 happens in domestic water cases. It says that you can  
15 have a different bill of lading for the water transport.  
16 That bill of lading controls your damage on the water,  
17 and it separates that out from damage on the rail side?

18 MR. BALLENGER: In domestic -- Congress drew  
19 a distinction between foreign and domestic commerce for  
20 a very long time, Your Honor. In domestic commerce, the  
21 rule has been that a rail carrier could interconnect  
22 with a domestic water carrier and the domestic water  
23 carrier could carry it for a leg of the trip, and the  
24 whole trip would still be governed by the Carmack  
25 through bill of lading. But if there was damage during



1 the water portion, it would be governed by the water  
2 law, which is the Harter Act.

3 JUSTICE SOTOMAYOR: And the railroad is  
4 covered by any damage that occurs on land?

5 MR. BALLENGER: The railroad is liable on a  
6 through transportation basis for the entire trip, but if  
7 the damage occurred during the water leg, its liability  
8 is limited and confined by the law that governs the  
9 water leg.

10 JUSTICE SOTOMAYOR: So there already is  
11 domestically two different forms of liability  
12 protection?

13 MR. BALLENGER: Congress made that  
14 compromise, because Congress was forced to choose  
15 between not having through bills of lading at all  
16 domestically or making -- or essentially repealing the  
17 Harter Act in circumstances where rail carriers interact  
18 with them. Congress made the choice to compromise and  
19 have kind of a hybrid arrangement.

20 But in foreign trade -- the geographics of  
21 Carmack was always confined -- that Carmack did not apply  
22 to imports at all, and it did not apply to exports except  
23 for exports to adjacent foreign countries --

24 CHIEF JUSTICE ROBERTS: Prior -- prior to  
25 1978. If I think you lose on that question under the law

1 as happens to be currently codified, but would prevail  
2 under the pre-1978 law, what -- what is your strongest  
3 case for the proposition that what I referred to earlier  
4 as the boilerplate language trumps the plain language of  
5 the currently codified version?

6 MR. BALLENGER: Your Honor, we don't think  
7 that this Court has ever interpreted language of that  
8 nature. But in a different context with a much weaker  
9 statutory language, the Fourco Glass line of cases, this  
10 Court applies a strong thumb on the scale that Congress  
11 didn't intend to change the law.

12 CHIEF JUSTICE ROBERTS: It's kind of a  
13 difficult -- I mean, if you're a shipper and you're  
14 trying to figure out, okay, let's ship some goods, and  
15 you pick up the law and it says, well, this is what the  
16 law says, who's going to tell you that, well, that you  
17 may think that's what the law says, but you're really  
18 governed by the pre-1978 law.

19 MR. BALLENGER: Well, Your Honor, we don't  
20 -- we don't think that it's -- it is necessary for this  
21 Court to read the statute in a counter-textual way.  
22 You just have to do what this Court has always done and  
23 read the statute as a whole, including giving some weight  
24 to that provision, which is in the text of the statute, and  
25 reading the rest of the statute in light of it.

1           And I think if you do that, particularly in  
2   this case, it's really not that hard to reconcile the  
3   pre-1978 law with the current law. Union Pacific can't  
4   be a receiving carrier because it didn't receive the  
5   goods at the point of origin. "K" Line isn't a rail  
6   carrier. That's enough to resolve this case, and this  
7   Court doesn't need to go any farther. Actually, that  
8   would, as a practical matter, mostly resolve the  
9   commercial problem that this Court granted certiorari to  
10   resolve.

11           JUSTICE KENNEDY: I have one question. I  
12   know that it's -- your white light is on. Can I assume  
13   that whether we rule for Petitioners or Respondents in  
14   this case, the shipping world, the cargo world, will  
15   immediately adjust to our decision? It's not going to  
16   be a problem. There are insurers, there are freight  
17   forwarders, there are form contracts. People will know  
18   exactly what to do. They will adjust in 1 week to what we  
19   do. Am I right about that? Or can you say that if we  
20   adopt the Respondents' position, it will be disruptive to  
21   the shipping trade and so forth?

22           MR. BALLENGER: Not exactly, Your Honor,  
23   because of course Respondents' position is that Carmack  
24   is a mandatory regime; there's no way to contract  
25   around it if it applies. So Respondents' position is

1     that Carmack mandatorily must govern the inland leg of  
2     any of these through shipments. The practical  
3     consequence of that is that true through bills of  
4     lading -- unity of responsibility in one shipper under  
5     consistent terms for the entire voyage -- will become  
6     impossible in foreign trade. So there won't be a way to  
7     correct that.

8                     CHIEF JUSTICE ROBERTS: Thank you, Mr.  
9     Ballenger.

10                    Mr. Yang.

11                    ORAL ARGUMENT OF ANTHONY YANG ON BEHALF  
12                    OF THE UNITED STATES, AS AMICUS CURIAE,  
13                    SUPPORTING PETITIONERS

14                    MR. YANG: Mr. Chief Justice, and may it  
15     please the Court:

16                    I'd like to address a few of the  
17     questions that have come up already. Justice Sotomayor,  
18     you asked what Supreme Court decision addresses the  
19     receiving carrier. There's a series of decisions which  
20     address receiving carriers and the nature of the  
21     receiving carrier as the initial carrier that receives  
22     goods from the shipper. I would -- Mexican Light and  
23     Power Company, 1947, is probably the best, but that  
24     traces its way back all the way to the 1910s, Galveston  
25     Wharf Company, Ward, Starbird, Blish Milling, Riverside

1 Mills. These cases are largely cited at our brief at  
2 page 27 to 28, footnote 10.

3           Regarding the geographic scope of Carmack on  
4 the current text, we believe that the current text,  
5 which is reproduced in the petition appendix at 69a --  
6 if you look at the combination of both the first and the  
7 third sentences of Carmack, we believe that that  
8 reproduces the historic scope as encompassing only  
9 domestic transportation, purely domestic transportation,  
10 and transportation to an adjacent foreign country when  
11 it's an export.

12           The first sentence requires that the rail  
13 carrier be providing transportation or service subject  
14 to the jurisdiction of the board and issue a receipt or  
15 bill of lading. The very purpose of Carmack from the  
16 very beginning, its core purpose, was to allow a shipper  
17 to sue the initial carrier. The initial carrier was  
18 responsible for the entire shipment. All the connecting  
19 carriers were deemed to be agents of the initial carrier,  
20 and, therefore, there was an easy defendant for the  
21 shipper, who dealt directly with that shipper -- that  
22 carrier and received a bill of lading from that carrier  
23 to sue. That --

24           CHIEF JUSTICE ROBERTS: I read -- I read  
25 your brief, like your friend's, as relying almost

1 exclusively on the pre-1978 language.

2 MR. YANG: Our brief addressed the first  
3 sentence briefly in, I believe, the prior page. Page 20  
4 to 21 deals with the first sentence, and then 22 deals  
5 with the third. But our point is that the first sentence  
6 sets an anchor in the United States as the -- as the  
7 origin of the shipment.

8 Part A jurisdiction -- this is reproduced at  
9 page 62a of the petition appendix. It does cover  
10 shipments that themselves transit United States and  
11 foreign countries.

12 JUSTICE SCALIA: Excuse me. What -- what are  
13 you referring to now?

14 MR. YANG: 62a of the petition appendix.  
15 This is section 10501, which defines Part A jurisdiction  
16 of the STB. And then I'm looking --

17 CHIEF JUSTICE ROBERTS: The Union Pacific  
18 petition appendix?

19 MR. YANG: They're both -- both of them are  
20 actually the same. Both the petition appendices are the  
21 same.

22 So I'm looking down at -- (a)(2) provides  
23 that the jurisdiction of the STB applies only to  
24 transportation into the United States when that's  
25 between -- you know, part of a larger transit between

1 the U.S. and a foreign country or even purely  
2 domestically.

3           So, a shipper -- or a carrier that is  
4 subject to STB jurisdiction has to be providing this  
5 U.S. transportation when it issues the bill of lading.  
6 So the -- again, the central purpose was to provide a  
7 carrier by which -- against whom the shipper can bring  
8 suit in a convenient forum, the person that the shipper  
9 dealt with. And that's now reflected in section -- the  
10 forum provision of Carmack, which is subsection (d)(2),  
11 it provides that a suit under Carmack may only be  
12 brought against the originating rail carrier in the  
13 judicial district in which the point of origin is  
14 located. Those -- and the prior provision says that  
15 that's a U.S. district court or a State court.

16           Carmack itself anchors the transportation  
17 as starting in the United States.

18           And then the third sentence explains the  
19 remainder of the historic scope. The third sentence --

20           JUSTICE GINSBURG: Where -- we're looking  
21 where, now?

22           MR. YANG: This is back to 69(a). It's  
23 Carmack, third sentence in subsection (b). It defines  
24 the liability under Carmack. It says the liability  
25 under this section is for damage "caused by the receiving

1 carrier, the delivering carrier, or another rail carrier  
2 over whose line or route the property is transited in  
3 the United States or from a place in the United States  
4 to a place in an adjacent foreign country."

5 So, what that does is that provides the  
6 center for the two bookends. The first bookend is the  
7 originating carrier, the receiving carrier that receives  
8 the goods in the United States, provides the bill of  
9 lading to the shipper.

10 The second bookend is the delivering  
11 carrier, and in between -- remember Carmack was intended  
12 to cover the entire carriage as a unified whole. The  
13 in-between is transportation in the United States or  
14 export transportation from the United States to a point  
15 in a foreign country.

16 We believe that that text, read as a whole,  
17 reflects the historic scope of Carmack that's existed  
18 since 1915 when it was extended beyond purely domestic  
19 transportation.

20 JUSTICE SCALIA: But why -- why doesn't the  
21 (2), (a)(2), the delivering rail carrier -- if what you  
22 say is true, that should be the delivering rail carrier  
23 delivering in a -- in an adjacent foreign country.

24 MR. YANG: Correct.

25 JUSTICE SCALIA: That -- that limitation is



1     strangely missing from (2).

2                   MR. YANG:   Well, we believe the portion of  
3     (a)(3), which now looks like it's in (a)(3), the "over  
4     whose line or route the property is" transited --  
5     "transported" actually applies to the receiving and  
6     delivering rail carrier.

7                   If you would turn to page 5a and 6a of the  
8     reply brief of Union Pacific, there's a side-by-side  
9     comparison.

10                  JUSTICE SCALIA:   Okay.   Wait a minute now.

11                  MR. YANG:   I'm sorry to have the --

12                  JUSTICE SCALIA:   The paragraphing you say is  
13     wrong?

14                  MR. YANG:   The -- from 5a to 6a, you'll see  
15     5a is the 1978 version of Carmack that was enacted in the  
16     1978 codification.

17                  JUSTICE SCALIA:   Right.

18                  MR. YANG:   The current version is reflected  
19     on the facing page.   There was no paragraph indentation  
20     in 1978.   And in 1995, when Congress changed the text, it  
21     did include a paragraph indentation, but the committee  
22     report -- the conference report is very clear that  
23     Carmack was not changed.   Also --

24                  JUSTICE SCALIA:   So all -- you're saying  
25     that -- I think what you're saying is that all we have

1 to use the statutory statement that nothing was meant  
2 to be changed or is to say, well, that paragraphing in  
3 3 is just wrong, right?

4 MR. YANG: Well, I don't know -- you mean  
5 the indentation?

6 JUSTICE SCALIA: The indentation.

7 MR. YANG: The indentation was inadvertent.  
8 And I would actually direct the Court to page 73a, which  
9 is the other part of Carmack that now exists for motor  
10 transportation and freight forwarders. There is no  
11 indentation. The current version of the other half of  
12 Carmack does not provide the indentation. The  
13 indentation is inadvertent. And in '95 -- the '95 Act,  
14 which --

15 JUSTICE SCALIA: I'm losing you. 73a?

16 MR. YANG: 73a -- (a)(1) reproduces what we  
17 were just looking for -- looking at in the rail carrier  
18 context.

19 JUSTICE SCALIA: Okay.

20 MR. YANG: It's a single paragraph. That's  
21 the way it's existed since, you know, 1915, basically,  
22 or 1927 when they added receiving carriers.

23 So, what the Court can do -- it's true,  
24 Carmack is less clear than it used to be. It was made  
25 somewhat less clear in '78 and in '95. But we believe

1 that when you take the text as a whole, particularly  
2 when read in light of the context of this Court's  
3 decision and the long-standing practice in the United States  
4 reflected in the STB -- the STB's decisions, that is the  
5 ICC's decisions, the predecessor, that at least the  
6 provision is ambiguous.

7 And if the provision is ambiguous, section  
8 3(a), the mandate that the statute should not be construed  
9 to make a substantive change in the law, should control.

10 CHIEF JUSTICE ROBERTS: This may not have  
11 anything to do with anything. Is there a reason the STB  
12 doesn't appear on your brief?

13 MR. YANG: The STB does not appear on our  
14 brief --

15 CHIEF JUSTICE ROBERTS: It did in the Kirby  
16 case just a few years ago.

17 MR. YANG: It did. It did. The STB has not  
18 taken a position about the current scope of Carmack and,  
19 therefore, decided not to join our brief.

20 JUSTICE BREYER: Is -- is there a way to --  
21 are you finished?

22 MR. YANG: No. I would say, though, that  
23 the ICC's decisions remain binding. This is 1995. The  
24 statute, ICCTA section 204(a), which is a note now to  
25 section 701 of Title 49, specifically provided that the

1 ICC's orders and determinations would remain binding  
2 unless changed by the STB. The STB just did not, at  
3 this point, come on record and take a position about the  
4 scope of Carmack.

5 JUSTICE BREYER: We don't even get into this  
6 problem if -- unless the ship line is a rail carrier?

7 MR. YANG: In part. There's -- if you --

8 JUSTICE BREYER: Well, it says, "A rail  
9 carrier providing transportation or service subject to"  
10 the STB "shall issue a receipt or a bill of lading."  
11 That's what leads us into the problem.

12 MR. YANG: That would take care of the  
13 initial carrier, what we believe is the initial  
14 receiving carrier in the case, "K" Line. However, I  
15 believe the argument is being made that Carmack could  
16 suddenly apply mid-carriage at the border.

17 JUSTICE BREYER: But mid-carriage -- it only  
18 talks about -- they use that word "received." That's  
19 why I thought possibly it didn't because it says --

20 MR. YANG: I believe the argument is that  
21 the first carrier who receives property in the United  
22 States would be deemed the receiving carrier.

23 JUSTICE BREYER: That's a separate argument?

24 MR. YANG: That's a separate argument.

25 JUSTICE BREYER: Did the Ninth Circuit pass

1 on that argument?

2 MR. YANG: You would have -- excuse me.

3 JUSTICE BREYER: Did the Ninth Circuit pass  
4 on that argument?

5 MR. YANG: It did not.

6 JUSTICE BREYER: It did not.

7 MR. YANG: It did not.

8 JUSTICE BREYER: So that's not right in  
9 front of us?

10 MR. YANG: That is correct.

11 JUSTICE BREYER: It's quite different.

12 MR. YANG: It is a different -- but we think  
13 it's clearly wrong in light of Carmack's historic  
14 purpose. This would be to divide the -- the -- if that  
15 were correct, it would divide the transportation in two.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. YANG: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Frederick.

19 Mr. Frederick.

20 ORAL ARGUMENT OF DAVID C. FREDERICK

21 ON BEHALF OF THE RESPONDENTS

22 MR. FREDERICK: Thank you, Mr. Chief

23 Justice, and may it please the Court:

24 It does not take great mental gymnastics to  
25 read the plain language of this statute and resolve it

1 the way the Ninth Circuit did in favor of Respondents.

2 The case is controlled by the plain language  
3 of several Federal statutes, and they have been adverted  
4 to, to some extent. But I would like to point out to  
5 the Court that in 2-1/2 pages of our merits brief,  
6 starting at page 26 and going over to page 28, we not  
7 only cite the full language in full of the Carmack  
8 Amendment and the jurisdictional provision of the STB,  
9 but explain how Union Pacific is a delivering carrier  
10 within the meaning of the Carmack Amendment; under the  
11 plain terms of the statute, they are liable for the  
12 loss; the Carmack Amendment applies to their receipt of  
13 the property; and the train derailment which was caused  
14 by their negligence comes within the plain terms of the  
15 Carmack Amendment.

16 JUSTICE BREYER: Then under that view, I  
17 guess that -- that any intermodal transport, China, all  
18 the goods coming from China, which tend to move under a  
19 single bill of lading, as soon as they get to the United  
20 States and go on a train for 50 miles, a new bill of  
21 lading must issue?

22 MR. FREDERICK: No. In fact, this Carmack  
23 Amendment --

24 JUSTICE BREYER: Why?

25 MR. FREDERICK: -- explicitly says, quote:

1 "Failure to issue a receipt or bill of lading does not  
2 affect the liability of a rail carrier." Carmack --

3 JUSTICE BREYER: All right, so you're saying  
4 they don't have to issue --

5 MR. FREDERICK: They do not have to issue a  
6 separate --

7 JUSTICE BREYER: Fine. If they don't have  
8 to issue a separate receipt, what we're talking about  
9 is the bill of lading that was issued by the ship.

10 MR. FREDERICK: That's correct.

11 JUSTICE BREYER: All right. Now, if that's  
12 correct and if the ship -- the only one that has to do  
13 that, it says, is a rail carrier, and a rail carrier is  
14 a person providing common carrier rail transport. And  
15 then that's defined to include intermodal equipment used  
16 by or in connection with a railroad. And my  
17 understanding -- which I'm asking you for correction  
18 if I don't -- is that the argument here is the ship is  
19 providing intermodal equipment used by or in connection  
20 with a railroad.

21 MR. FREDERICK: That's correct.

22 JUSTICE BREYER: And it's the words "used by  
23 or in connection with" that I am focusing on, because to  
24 apply those words here seems to me to bring every  
25 international shipment in the world, no matter how small

1 the American portion by rail and no matter how big the  
2 foreign part of this transport -- it brings it all within  
3 Carmack. And it means that the bill of lading issued  
4 by people throughout the world are all going to have to  
5 apply to meet the terms of the Carmack Amendment, which  
6 had the purposes of railroads in the United States, and  
7 that's going to be a nightmare.

8 MR. FREDERICK: No, it won't,  
9 Justice Breyer.

10 JUSTICE BREYER: Now, first, is it true what  
11 I said? And, second, if it is true why isn't it way  
12 contrary to the purpose and a nightmare?

13 MR. FREDERICK: It is not -- it is true and  
14 not true, but for different reasons. And if I could  
15 take a moment to explain, because I think it is  
16 important.

17 In 1978, the plain language of the statute  
18 defined what the STB's jurisdiction is. They do not  
19 dispute that the last part of the jurisdictional  
20 provision is the STB jurisdiction when a -- a shipment  
21 is in, quote, "between the United States and a place in  
22 a foreign country," but the STB only has jurisdiction to  
23 the extent the transportation occurs in the United  
24 States.

25 So it is true that imports into the United



1 States are covered by the Carmack Amendment, but only to  
2 the extent of the transportation being within the United  
3 States.

4 JUSTICE BREYER: No, but why don't they have to  
5 issue a bill of lading? That's what they say. So every  
6 company, the Finnish company, Chinese, every company,  
7 every shipowner, even if he's never been to the  
8 United States -- sad for him, but nonetheless -- every  
9 one of those is going to have to issue a bill of  
10 lading, whatever meeting whatever requirements are  
11 there, and we know at least one requirement you think  
12 applies.

13 MR. FREDERICK: Let me go back -- let me go  
14 back to the international point, Justice Breyer, because  
15 the railroads argued against an international uniform  
16 rule that would apply both to ocean carriage and inland  
17 carriage in the Rotterdam rules. And they made the  
18 representation to the international community: You don't  
19 need to have a uniform rule that applies to both ocean  
20 carriage and inland carriage, because we have this thing  
21 called the Carmack Amendment.

22 And they made the representation that the  
23 Carmack Amendment would apply to imports, as this Court,  
24 in the Woodbury case written by Justice Brandeis, decided  
25 in 1920, and a month earlier --

1 JUSTICE SCALIA: What are you arguing,  
2 estoppel?

3 MR. FREDERICK: No, I'm arguing that their  
4 position is inconsistent with their representations, and,  
5 therefore, the plain language of the statute --

6 JUSTICE SCALIA: Which one is right? That's  
7 what we are concerned about.

8 MR. FREDERICK: What I'm --

9 JUSTICE SCALIA: Which one is right? Their  
10 earlier position or their current position?

11 MR. FREDERICK: Their earlier -- their  
12 earlier position was correct under the plain  
13 language of --

14 JUSTICE SCALIA: Why don't you speak to that  
15 rather than the fact that they had an earlier position?

16 MR. FREDERICK: The plain language,  
17 Justice Scalia, as it is currently enforced, I think  
18 disposes of the case without any real argument.

19 JUSTICE SOTOMAYOR: Excuse me. Can I go back  
20 to Justice Breyer's question?

21 MR. FREDERICK: Yes.

22 JUSTICE SOTOMAYOR: And perhaps -- as I  
23 understand this, I think we are all forgetting that none  
24 of these liability provisions come into play until there  
25 is proof that an incident has occurred somewhere, either

1 on a railroad or on the ocean, correct?

2 MR. FREDERICK: Correct.

3 JUSTICE SOTOMAYOR: And so the issue becomes  
4 which set of rules governs that particular incident --

5 MR. FREDERICK: Correct.

6 JUSTICE SOTOMAYOR: -- where it happened.

7 MR. FREDERICK: Correct.

8 JUSTICE SOTOMAYOR: I think Justice Breyer  
9 asked you why it made sense that there would be two  
10 rules in effect for what happens on the ocean and what  
11 happens on land; and if we had it, wouldn't it create  
12 great difficulty? I think -- you may correct me.

13 JUSTICE BREYER: Your point was --

14 MR. FREDERICK: That's how the whole world --

15 JUSTICE BREYER: -- if it creates such  
16 difficulty, why were the railroads in favor of it  
17 before?

18 MR. FREDERICK: Correct. And that's how --  
19 that's how Europe operates. Europe has separate  
20 conventions for rail and road that apply to damage that  
21 occur on land, and the European nations have acceded to  
22 the various versions of Hague rules --

23 JUSTICE BREYER: Anything here that says on  
24 land? Anything in Carmack that says on land?

25 MR. FREDERICK: Well, it's transport --

1 JUSTICE BREYER: In other words, if it's in  
2 a ferry boat -- remember, we have a very broad definition  
3 of "rail" where "rail" includes all things that have  
4 nothing to do with rail.

5 MR. FREDERICK: But as --

6 JUSTICE BREYER: And so now we've got that  
7 broad definition, and I would have thought we traced  
8 through what has to be in the receipt, and then we get to  
9 the -- that section and where it's exempt, because they got  
10 -- want to get rid of it; then you have to put in -- you  
11 have to put in a certain kind of waiver, which is very hard  
12 to achieve. And that -- that's my understanding of it.

13 MR. FREDERICK: It's the Surface  
14 Transportation Board, Justice Breyer, that has the  
15 jurisdiction here.

16 JUSTICE BREYER: Yes, but they can't get rid  
17 of the thing you like.

18 MR. FREDERICK: No, they can.

19 JUSTICE BREYER: They can?

20 MR. FREDERICK: They can.

21 JUSTICE BREYER: How do they do it?

22 MR. FREDERICK: And I want to get to  
23 Justice Kennedy's question. They can. These are  
24 background rules that we're talking about, and they will  
25 be contracted around. After the Sompo decision was

1 decided in the Second Circuit, Union Pacific went right  
2 out and changed the contracts that they have with ocean  
3 carriers to ensure that the ocean carriers would  
4 indemnify them if they were liable and did not get the  
5 full benefits of contractual extensions. What we're  
6 talking about here --

7 CHIEF JUSTICE ROBERTS: Counsel, you don't --

8 MR. FREDERICK: -- is whether there's an  
9 American forum for American cargo interests for an  
10 American train that is derailed in the United States.  
11 That's what we are talking about.

12 CHIEF JUSTICE ROBERTS: But part of your  
13 argument -- you don't rely heavily on your plain  
14 language argument when it comes to deciding that these  
15 huge ocean vessels are rail carriers.

16 MR. FREDERICK: Let me go to that point now,  
17 Mr. Chief Justice. The Port of Long Beach is situated  
18 more than 20 miles from Los Angeles, and the port has  
19 60 miles of train track with intermodal, multimodal  
20 facilities that get the cargo containers which "K" Line  
21 owns on chassis that "K" Line owns, and they have to get  
22 from the Port of Long Beach 20 miles away to the Los  
23 Angeles train depot where Union Pacific picks them up.

24 Now, under "K" Line's theory of the case,  
25 they get to have a donut hole in the Carmack Amendment

1 liability provision for that 20-mile transport. We  
2 would submit as a factual matter, which of course would  
3 need to be done on remand, that there are facts that can  
4 be adduced to establish the functionality test which the  
5 ICC has long administered to look at the functions being  
6 performed as well as --

7 CHIEF JUSTICE ROBERTS: So that's a little  
8 bit different from your argument that they are a rail  
9 carrier because their bill of lading would cover the  
10 train ride to Chicago.

11 MR. FREDERICK: We didn't make that  
12 argument. Our argument was that, based on the functions  
13 and them holding themselves out to be a rail carrier,  
14 which they have done, they qualify under the normal ICC  
15 method of determining rail carrier.

16 CHIEF JUSTICE ROBERTS: If it weren't -- if  
17 it weren't for the -- for the track from Long Beach to  
18 Los Angeles, you would say then they're not a rail  
19 carrier?

20 MR. FREDERICK: The argument, as the ICC has  
21 defined it, also looks at things like the multimodal  
22 facilities, like the containers, and -- and the holding  
23 themselves out as a rail carrier in their advertising.  
24 Those are important parts of the functionality test.

25 JUSTICE KENNEDY: Well, how -- how does

1 the Chief Justice's hypothetical work with the language  
2 of the statute? They -- it just goes to Los Angeles and  
3 it -- there's a railroad track right by -- by the  
4 wharf, and it's the Union Pacific Railroad.

5 MR. FREDERICK: Well, there are -- there are  
6 two ways to read the text and resolve the case. One is  
7 to say "K" Line is the receiving rail carrier when it  
8 transfers from the international ocean carriage  
9 corporation to the American multimodal transportation  
10 operation and gets the goods from the Port of Long Beach  
11 up to Los Angeles, and then treat UP, Union Pacific, as  
12 the delivering rail carrier. Under the statute, UP is  
13 not required -- although the first part says you're  
14 supposed to issue a bill of lading, their liability for  
15 the train derailment does not turn on whether they  
16 issued a bill of lading or not.

17 JUSTICE SOTOMAYOR: Is your case -- does  
18 your case end if we hold that "K" Line is not a railroad  
19 carrier?

20 MR. FREDERICK: No.

21 JUSTICE SOTOMAYOR: All right.

22 MR. FREDERICK: "K" Line gets out of the  
23 case. We would have to go to Tokyo to pursue "K" Line  
24 under the bill of lading. But we could continue our  
25 suit against Union Pacific as a delivering rail carrier

1 under the Carmack Amendment.

2 JUSTICE SOTOMAYOR: As a delivering carrier.

3 MR. FREDERICK: Correct.

4 CHIEF JUSTICE ROBERTS: Well, unless we  
5 hold, as your friends argue on the other side, that they  
6 can opt out under 10709.

7 MR. FREDERICK: Well, you would need to  
8 reach the question of whether or not exempt carriage  
9 under 10502 takes away the option of a 10709 contract.

10 CHIEF JUSTICE ROBERTS: And that's a  
11 different question with respect to liability and claims  
12 and with respect to venue.

13 MR. FREDERICK: Correct. And let me address  
14 that, if I might.

15 JUSTICE SOTOMAYOR: Could I just -- just  
16 briefly before you answer the Judge --

17 MR. FREDERICK: Sure.

18 JUSTICE SOTOMAYOR: The Justice -- the Chief.  
19 In what capacity -- "K" Line is the contracting party with  
20 Union Pacific. Under what contract could the shipper sue  
21 Union Pacific?

22 MR. FREDERICK: Under the --

23 JUSTICE SOTOMAYOR: If "K" Line is -- is the  
24 shipper --

25 MR. FREDERICK: Directly under the Carmack



1 Amendment. And in fact, when Union Pacific removed this  
2 case from State court to Federal court, the Federal  
3 question was they said: There is a Carmack Amendment  
4 claim being asserted against us. That's how we get from  
5 State court to Federal court.

6 And when they -- when they sought to transfer  
7 the case from California to New York, they did so on the  
8 basis of the convenience of 28 of the 32 witnesses to their  
9 train derailment being American citizens.

10 So it's not like there needs to be some  
11 special -- there's a special cause of action within the  
12 Carmack Amendment, Justice Sotomayor, that provides a  
13 means of redress for damaged cargo interests to go  
14 directly against the railroad.

15 CHIEF JUSTICE ROBERTS: Perhaps --

16 JUSTICE SOTOMAYOR: Regardless of whether  
17 the shipment was by them directly or not?

18 MR. FREDERICK: Correct, if they caused the  
19 damage. That's the whole point of the Carmack  
20 Amendment.

21 CHIEF JUSTICE ROBERTS: Maybe now you could  
22 respond to my question about the distinction under 10502  
23 between claims and liability and venue.

24 MR. FREDERICK: Yes. The STB, in an  
25 authoritative determination that is entitled to our

1 deference, has said that when it issues an exemption for  
2 certain categories of rail carriage, which it has done  
3 with the multimodal shipments, those exemptions remove  
4 the possibility of a 10709 contract carriage.

5           And the reason for that is that, in both  
6 situations, the rail carrier has to provide an  
7 opportunity for Carmack-compliant terms to be given to  
8 the shipper. If it's exempt cargo carriage under 10502,  
9 10502(e) says that the carrier must provide  
10 Carmack-compliant terms in order to take advantage of  
11 the exemption and contract under the exemption. 10709  
12 provides contract carriage, but only if the rail carrier  
13 provides common carrier tariffs that a cargo interest  
14 could ship under.

15           Here, because the transportation is exempt  
16 under 105 -- 10205, there is no common carrier tariff  
17 that is applicable. And that's why the STB has said if  
18 there's no common carrier tariff applicable under  
19 11101, then there cannot be an opportunity for contract  
20 carriage. To do otherwise would be to make the statute  
21 a complete deregulation statute.

22           CHIEF JUSTICE ROBERTS: Well, but it's a  
23 little -- I mean, the -- I'm looking at page 64a of the  
24 petition appendix, where they're saying you can't exempt  
25 through contractual terms for liability and claims.

1 Venue is treated elsewhere, separately from liability and  
2 claims. So, again, under -- you're the plain language team,  
3 and that seems fairly plain that venue is not covered.

4 MR. FREDERICK: No -- well, liability, Your  
5 Honor, is where you can bring your suit and what your  
6 suit --

7 CHIEF JUSTICE ROBERTS: No, the liability is  
8 not where you can bring your suit. Liability is  
9 liability. Venue is where you can bring your suit.

10 MR. FREDERICK: The -- the way the board has  
11 construed this in the letter brief that they filed in  
12 the -- in the Second Circuit, which is entitled to our  
13 deference, says the Ninth Circuit in Regal-Beloit got it  
14 right with respect to the interplay between 10502,  
15 10709, and -- and contract carriage.

16 JUSTICE SCALIA: Wait. Excuse me. You say  
17 we have to defer to a letter --

18 MR. FREDERICK: No --

19 JUSTICE SCALIA: -- brief in another case?  
20 I think most of my colleagues would not defer to a  
21 letter brief in this case. And you're saying that we  
22 owe deference to a letter brief in another case?

23 MR. FREDERICK: That is what this Court  
24 held --

25 JUSTICE SCALIA: Mead, which I didn't agree

1 with, it seems to me --

2 MR. FREDERICK: Mead did not overrule Auer,  
3 and in Auer the Court -- this Court gave deference to a  
4 brief by the Federal Government that was setting forth  
5 the authoritative --

6 JUSTICE SCALIA: In another case?

7 MR. FREDERICK: In that case.

8 JUSTICE SCALIA: In that case.

9 MR. FREDERICK: But I don't know why --

10 JUSTICE SCALIA: Do we have a brief here?

11 MR. FREDERICK: It's a distinction without  
12 a difference, because here the Second Circuit invited  
13 the views of the STB to tell us what do you think is  
14 the interplay between these various provisions?

15 JUSTICE SCALIA: Right.

16 MR. FREDERICK: And the STB gave an  
17 authoritative view to the Second Circuit so that it could  
18 resolve a case in which the STB was not a party.

19 JUSTICE BREYER: There are two things here I  
20 don't understand I'm just trying to get clear. In the  
21 first part, 706(a), it talks about -- in the definition  
22 of "rail carrier" -- 102(6), I guess. It says railroad  
23 includes -- railroad transport will include intermodal  
24 -- intermodal equipment transport used in connection  
25 with a railroad.

1                   What is intermodal equipment?

2                   MR. FREDERICK: Those are the chassis. They  
3 are the containers that are used to --

4                   JUSTICE BREYER: Okay. So now, if we read  
5 it literally, to go back to my -- I'm trying to produce  
6 the worst example that frightens me the most. There is  
7 3 miles of railroad transport in the United States,  
8 but it carries the chassis, or it carries that big box,  
9 which has come all over the world, from all over the  
10 world. And if we read this with no limitation, this  
11 definition makes the ships that carried it from other  
12 places railroads, and once that's railroad  
13 transportation, we're into Carmack.

14                  And now, if STB exempts it, what happens is  
15 the provision comes into play that says you can't exempt  
16 an exempt carrier, in effect, from the liability  
17 provisions. And it means the ships that had to issue the  
18 bill of lading now have to allow the kinds of suits --  
19 now, here is the point I'm not certain about -- I would  
20 think against them, not just against a railroad carrier,  
21 and perhaps against them for anything that happens, even  
22 on the ocean, and not just the railroad carrier for  
23 something that happens within the United States.

24                  MR. FREDERICK: No.

25                  JUSTICE BREYER: Now, explain to me: What

1 is it that gets us out of that?

2 MR. FREDERICK: There -- the -- COGSA  
3 applies tackle to tackle. If the damage is occurring  
4 on a ship --

5 JUSTICE BREYER: Yes.

6 MR. FREDERICK: -- the STB has no jurisdiction  
7 over that. Carmack does not apply. It is only once the  
8 ship --

9 JUSTICE BREYER: Well, where does it say  
10 that? Because I'd better read that one.

11 MR. FREDERICK: Well, COGSA itself, which is  
12 set out in the --

13 JUSTICE BREYER: Yes. Yes. Where?

14 MR. FREDERICK: And under no condition --

15 JUSTICE BREYER: Do you know -- do you know  
16 offhand where it says that, just so I -- I'd better --

17 MR. FREDERICK: Yes. I can give -- the  
18 provision of COGSA that you are looking for is the  
19 definition of "carriage," which is set forth in --

20 JUSTICE BREYER: Good.

21 MR. FREDERICK: -- page 48a of the petition  
22 appendix, and it is 1(e). "The term 'carriage of goods'  
23 covers the period from the time when the goods are  
24 loaded on to the time when they are discharged from the  
25 ship." And as the Court in Kirby said --

1 JUSTICE BREYER: That's COGSA. That's not  
2 Carmack.

3 MR. FREDERICK: Right.

4 JUSTICE BREYER: So what gets us out of  
5 Carmack?

6 MR. FREDERICK: Carmack only applies if it  
7 is carriage and transportation within the STB's  
8 jurisdiction. The STB has no jurisdiction over COGSA  
9 carriers. That's the Federal Maritime Commission.

10 JUSTICE BREYER: Then why are we suing --  
11 why are we suing -- why does the ship being sued here?

12 MR. FREDERICK: The ship is performing two  
13 different functions, Justice Breyer.

14 JUSTICE BREYER: I see.

15 MR. FREDERICK: It is performing an ocean  
16 carriage function, and then once it's on land -- and  
17 there are thousands of "K" Line containers all over the  
18 United States right now where "K" Line is performing  
19 services, motor carriage and rail carriage services, here  
20 in the United States.

21 CHIEF JUSTICE ROBERTS: Is that because they  
22 have contracted for them?

23 MR. FREDERICK: They own them.

24 CHIEF JUSTICE ROBERTS: Well, they don't own  
25 Union Pacific's rail line.

1                   MR. FREDERICK: No, they own the containers  
2   that Union Pacific is pulling.

3                   CHIEF JUSTICE ROBERTS: So if I -- if I own  
4   a container being pulled by somebody else's train, I'm  
5   in the train business?

6                   MR. FREDERICK: Under the definition of  
7   functionality, where that is part of how the STB  
8   regulates. And to say otherwise, Mr. Chief Justice,  
9   would be to deny the Federal Government the regulatory  
10  authority over containers that come into this country  
11  representing approximately 80 percent of the trade.

12                  CHIEF JUSTICE ROBERTS: No, it wouldn't. It  
13  would just -- it may just mean that they don't have  
14  the regulatory authority because that container is a  
15  rail carrier.

16                  MR. FREDERICK: It's carrying --

17                  CHIEF JUSTICE ROBERTS: What's carrying it  
18  is the rail carrier. It's a container.

19                  MR. FREDERICK: But they -- well, at one  
20  level, Mr. Chief Justice, it's sort of academic, because  
21  the STB exempted from Part A, which includes the Carmack  
22  Amendment, those containers, and it did so in an  
23  exemption order which we've cited in our -- in our brief.  
24  So, at some level, there's an academic quality to this  
25  colloquy.



1 JUSTICE SOTOMAYOR: I -- I am a little  
2 bit confused now. Now, back to being confused.

3 You're suggesting that from the landing --  
4 it's an ocean carrier -- and the minute that the  
5 containers are unloaded from the vessel and put on land,  
6 it becomes a railroad carrier, even though its delivery  
7 contract may have ended at that point?

8 MR. FREDERICK: If its delivery contract  
9 ended at that point, it did not hold itself out --

10 JUSTICE SOTOMAYOR: No. Right. So what about --

11 MR. FREDERICK: -- as a rail carrier --

12 JUSTICE SOTOMAYOR: So what about -- what is  
13 it that you're arguing makes them a railroad carrier  
14 once they put it there. Let's assume the reverse of the  
15 hypothetical that you -- that you posited. They deliver  
16 to the dock, and Union Pacific is the one that owns  
17 those 3 to 6 miles of connection to its main railroad.  
18 It's the one who's going to provide the motor carriage.  
19 It's the one who's going to take it from the -- the dock  
20 and bring it in.

21 MR. FREDERICK: And can I just add to the  
22 hypothetical the fact, which is an important fact: Did  
23 the ocean carrier hold itself out to the public as a rail  
24 carrier in making the contract with the original  
25 shipper? Because that is an important fact that does

1 not help us resolve your particular hypothetical,  
2 Justice Sotomayor.

3 If UP is picking up the goods with its  
4 equipment, the ocean carrier is not a rail carrier under  
5 our theory of the case. There has to be functions being  
6 performed that are multimodal functions, and the ocean  
7 carrier has to hold --

8 JUSTICE SOTOMAYOR: So it's not merely that  
9 it has possession of the container that it has dropped  
10 somewhere. It has to transport it in some way in  
11 relationship to the railroad?

12 MR. FREDERICK: I think that's the best way  
13 to understand the statute.

14 JUSTICE BREYER: Can we go back one more  
15 second? Can you just give me the citation in Carmack --  
16 not COGSA, but Carmack -- that would get our intermodal  
17 shipment out of the board's jurisdiction?

18 Because what I'm thinking about is the  
19 intermodal shipment and the boat sinks near Hawaii.  
20 Okay? Now, on your reading of Carmack, not COGSA, what  
21 gets that shipment sunk in Hawaii -- or Midway or Guam  
22 or someplace -- what gets them out of Carmack?

23 MR. FREDERICK: Well, the --

24 JUSTICE BREYER: Which words?

25 MR. FREDERICK: On 62a --

1 JUSTICE BREYER: Yes.

2 MR. FREDERICK: -- the petition appendix  
3 defines the general jurisdiction.

4 JUSTICE BREYER: Yes, and it includes  
5 transport, just as you defined it, between the United  
6 States and another place -- United States and a place  
7 in a foreign country.

8 MR. FREDERICK: Yes.

9 JUSTICE BREYER: So that's what this is.  
10 This is a shipment between Shanghai and San Francisco  
11 or Oakland.

12 MR. FREDERICK: And at (a)(2) -- will you  
13 look at (a)(2), please?

14 JUSTICE BREYER: (a)(2).

15 MR. FREDERICK: (a)(2) says jurisdiction under  
16 paragraph 1 applies only to transportation in the United  
17 States.

18 JUSTICE BREYER: Oh, sorry. Between a place  
19 in -- oh, transportation in the United States.

20 MR. FREDERICK: In the United States.

21 JUSTICE BREYER: Between a place in.

22 MR. FREDERICK: Exactly.

23 JUSTICE BREYER: Thank you.

24 MR. FREDERICK: Yes, thank you.

25 (Laughter.)

1                   MR. FREDERICK: Now, it is not true that the  
2 law was settled prior to 1978. The Woodbury case  
3 applied the Carmack Amendment to imports. Union  
4 Pacific v. Burke applied it to imports. And in those  
5 cases, this Court made the determination that the words  
6 "from" and "to" were also meaning "between." And  
7 Congress, when it cleaned up the statute in 1978 and  
8 provided words that are very easy to understand now, was  
9 not changing what had been a well-settled practice of  
10 goods that were getting -- arriving at a port in the  
11 United States and then being transported by land means.

12                   And it's important to understand the context  
13 in which this arose, because I think our fundamental  
14 disagreement with the Solicitor General's presentation  
15 is that it ignores the container revolution that was  
16 occurring between the late 1950s and the '70s, when  
17 this Act was codified and cleaned up. And in that  
18 container revolution, prior to the time when containers  
19 were used for multimodal transportation, it was common  
20 for goods to be repackaged at ports in the United  
21 States. They were taken off ships; they were  
22 repackaged, put onto trains or trucks, and that required  
23 a separate contractual arrangement.

24                   Now, this Court, in Woodbury and Burke, had  
25 said it is not so important whether or not there is a

1    separate contract, so long as the function and the intent  
2    is clear that it is being moved by rail or road in the  
3    United States.

4                    The Carmack Amendment will apply, Justice  
5    Sotomayor. You are completely correct that the purpose  
6    of the Carmack Amendment was to hold railroads and motor  
7    carriers responsible for the liabilities caused by their  
8    loss. But when Congress then cleaned that up and put it in  
9    section 3, it was not intending to obviate the clear and  
10   unambiguous language of the statute. It was simply  
11   providing, you know, some boilerplate that I think is  
12   very difficult to cause the Court to override the  
13   plain language of the statute today.

14                   And in 1995, when Congress eliminated --  
15   terminated the ICC and enacted the ICC Termination Act,  
16   it reenacted that language. It did not encompass  
17   section 3 at that time, so the statute as it presently  
18   exists does not have a statutory pointer as to how you  
19   are to interpret the language. And under the normal  
20   canons that this Court has instructed for courts and the  
21   bar, the easiest way to practice law in this area is to  
22   look at the statute, see what it says, and not have to  
23   go back, not just through the last iteration of the  
24   statute, but the one before that, and not just to be  
25   able to look at what was in the U.S. Code, but to have

1 to go back to the Statutes at Large to see what other  
2 statutory provisions Congress had put into the statute.  
3 That would make the practice of law extremely difficult.

4 JUSTICE SCALIA: Can I ask you a question  
5 about -- about whether -- whether the shipper becomes a  
6 rail carrier? Suppose it's not 3 to 5 miles.  
7 Suppose the -- suppose the American rail carrier is  
8 waiting right at the foot of the wharf, and all these  
9 wharves have rails that go out to the ship, okay?  
10 And let's assume that that's owned by the -- by the  
11 shipping company. And a crane takes the -- the  
12 goods off of the ship, puts it on a -- on a car that  
13 rides along those rails for a couple of hundred yards.  
14 Is that enough to make the shipper a railroad?

15 MR. FREDERICK: I would -- I would concede  
16 the point of interchange at the port, Justice Scalia. I  
17 don't think it's necessary for the Court to reach that.  
18 I will concede that point, so long as, you know, we are  
19 talking about an immediate nexus between the vessel and  
20 the ship. And -- and that is not -- not a point that we  
21 have to prevail on to win in this case.

22 JUSTICE SCALIA: And you say here they own  
23 rail lines that --

24 MR. FREDERICK: There are 60 --

25 JUSTICE SCALIA: -- that go for --

1           MR. FREDERICK: Well, there was no discovery  
2 because this was decided on the pleadings as a matter of  
3 law. We believe that once discovery is permitted, if  
4 you allow the case to go back for factual development,  
5 that the facts would reveal that "K" Line was engaging  
6 in significant rail operations that at least get us  
7 beyond -- into the realm of legitimate advocacy.

8           JUSTICE SOTOMAYOR: When you say "engaging  
9 in," are you talking about vis-à-vis this shipment?

10          MR. FREDERICK: Yes.

11          JUSTICE SOTOMAYOR: Or is it just in  
12 general? Vis-à-vis you?

13          MR. FREDERICK: Yes. That's correct.

14                 When my colleague here says that we take  
15 the position that Carmack cannot be contracted around,  
16 that is not true. Our point here is that when there is  
17 exempt carriage, the STB has already defined this as  
18 something that can be provided by contract, but we believe  
19 that 10502(e) says that they have to provide  
20 Carmack-compliant terms.

21                 The industry will adapt to a decision by  
22 this Court in setting the background rules. We would  
23 submit that the simpler regime and the one that the  
24 railroad had advocated in the international community  
25 was there -- was for there to be a U.S. statute that

1 applies and not to allow complete deregulation through  
2 contracts --

3 CHIEF JUSTICE ROBERTS: Well, they -- they  
4 can't contract around liability for an event such as the  
5 one that happened here. Because they have to offer  
6 Carmack-compliant terms, and if the owner of the goods  
7 has the option of accepting those, they can't contract  
8 around that.

9 MR. FREDERICK: That's correct. And -- and  
10 the point here about the forum is an important one,  
11 because Union Pacific has never thought that in these  
12 ocean bills of lading that that entitled American cargo  
13 interests to have to go to a foreign country under the  
14 ocean carrier's bill of lading in order to vindicate the  
15 interests in damage to their cargo. That was an  
16 invention by "K" Line in this case after UP sought to  
17 remove it under the Carmack Amendment and transfer it to  
18 New York, and UP joined that motion and has argued  
19 throughout that the Carmack Amendment applies.

20 It would be unusual, to say the least, to  
21 allow UP now to take advantage of a contractual  
22 extension of COGSA where section 12 of COGSA, by its  
23 plain terms, in language that is completely ignored by  
24 the other side, says COGSA stops basically at the  
25 tackle-to-tackle period and does -- otherwise does not



1 affect otherwise applicable law. And there's a  
2 specific reference in section 12 to the Harter Act and  
3 any other applicable law. And in 1936, when Congress  
4 enacted COGSA to implement the United States -- of the  
5 Hague rules, it was aware of the Carmack Amendment.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Ballenger, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF J. SCOTT BALLENGER

10 ON BEHALF OF THE PETITIONERS

11 MR. BALLENGER: Thank you, Your Honor.

12 Even Respondents can't really bring  
13 themselves to say that Union Pacific is the receiving  
14 carrier here. It's obviously not. They say that  
15 somehow, UP could be liable as the delivering carrier  
16 under Carmack. But of course, if "K" Line is not a rail  
17 carrier, there is no receiving carrier who is obligated  
18 to issue a bill of lading under Carmack. No one is  
19 liable to under Carmack.

20 That is how the statute always worked from 1906  
21 to 1978. If the receiving carrier was not governed by Carmack,  
22 as it was not in any import case and in any export case except  
23 for Canada and Mexico, then Carmack did not apply to  
24 anyone. You can't parachute in midstream into the  
25 middle of a big movement and impose Carmack obligations at

1 the midpoint, because that would turn the historic purpose  
2 of Carmack completely upside down. It would read Carmack  
3 as mandating the commercial problem that Carmack was designed  
4 to solve.

5 The point of Carmack and of through bills  
6 under Carmack and COGSA is uniformity of responsibility  
7 under consistent terms for the whole voyage in one  
8 person.

9 And the reason is that in order to recover  
10 from anyone, the shipper has to prove receipt of the  
11 goods in good condition by that carrier, and if you  
12 break the chain of the through bill, then you would have  
13 to prove -- the shippers would have to prove that Union  
14 Pacific, for instance, received the property in good  
15 order, when as Respondents concede, all that Union  
16 Pacific gets is a sealed container. It has no idea at  
17 that point.

18 And -- and so the shipper would be left in a  
19 position at the end of the day; it opens the container,  
20 there's damage; no one knows where it occurs; and there's  
21 -- there's no source of law, no source of fact to  
22 figure out where the damage occurred.

23 Respondents raise a lot of questions about  
24 some track that they say "K" Line owns from Long Beach  
25 to Los Angeles. None of this is in the record, and it's

1   waived at this point, Your Honor.  It's not actually  
2   true.  That's not "K" Line; it's an affiliate, and they  
3   don't provide rail transportation.  It's a Union Pacific  
4   subsidiary that provides the rail transportation.

5               But the real point is that all of this is  
6   far too late.  This case was decided on a rule 12(b)(3)  
7   motion to dismiss for improper venue, and the lower  
8   courts have made clear, sensibly, that if you are  
9   confronted with a forum selection motion to dismiss, you  
10  are required to at least come forward with any factual  
11  disputes that you think need to be resolved before the  
12  district court can grant or deny that motion.  It's far  
13  too late to wait until the Supreme Court of the United  
14  States, and say we have discovered some X number of  
15  miles of track --

16              JUSTICE BREYER:  How -- how do you get out  
17  of the language that says that a rail carrier providing  
18  transportation "shall issue a receipt" for property it  
19  receives?

20              Now, the boat, oddly enough, is a rail  
21  carrier under the definition.

22              MR. BALLENGER:  The --

23              JUSTICE BREYER:  And, therefore, it should  
24  have issued -- since you agree it's a receiving  
25  character, it should have -- or -- it should have issued

1 a bill of lading, that then, if it's within Carmack, as  
2 I've just tried to put it, requires it to have certain  
3 things in it that they say aren't there.

4 MR. BALLENGER: Under the definitions, a rail  
5 carrier is a party providing railroad transportation.  
6 And this --

7 JUSTICE BREYER: Oh, yes, right; and now we  
8 see a rail carrier --

9 MR. BALLENGER: No --

10 JUSTICE BREYER: You can get the definition  
11 there, and it includes somebody who provides intermodal  
12 equipment. And you look at transportation, and transportation  
13 includes services related to that equipment.

14 MR. BALLENGER: The definitions of "railroad"  
15 and "transportation" have always been defined to include  
16 all of the equipment used by a real railroad. But that  
17 doesn't mean that anyone who happens to own that  
18 equipment is also a railroad. For instance, the  
19 purpose --

20 JUSTICE BREYER: Ah, now all right. Fine.

21 MR. BALLENGER: The purpose of those definitions  
22 from 1906 on was to make sure that railroads couldn't evade  
23 rate regulation by overcharging for the use of a bridge that  
24 it owned.

25 JUSTICE BREYER: But --

1 MR. BALLENGER: But that doesn't mean --

2 JUSTICE BREYER: Now just give me how -- what I  
3 would write in the opinion that would in fact -- because  
4 what they did here, the ship, is it took a container and  
5 put it on the train. Okay? So that's inter-service  
6 equipment. What's the language that does it your way?

7 MR. BALLENGER: A party providing rail  
8 common carrier transportation, the scope of the -- of  
9 that transportation is defined to include a container.  
10 But that doesn't mean that everyone who owns a container  
11 is -- meets the first part of the definition of  
12 providing railroad transportation. Otherwise, for  
13 instance, everyone who owned a bridge or a track or  
14 provided rail cars would be providing railroad  
15 transportation.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon at 11:06 a.m., the case in the  
19 above-entitled matter was submitted.)

20

21

22

23

24

25

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