How Swiftly the Carmack Amendment is Washed Away (Or Why J. Sotomayor Was Right in K-Line v. Regal Beloit, 130 S.Ct. 2433 (2010))

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“HOW SWIFTLY\(^1\) THE CARMACK AMENDMENT IS WASHED AWAY (OR WHY JUSTICE SOTOMAYOR WAS RIGHT IN KAWASAKI KISEN KAISHA LTD. V. REGAL-BELOIT CORP., 130 S.CT. 2433 (2010)\(^2\))

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I. INTRODUCTION

A. SCOPE

The Supreme Court on June, 21 2010 issued a long awaited decision affecting international shipping interests and insurers, specifically as to imports of intermodal shipments into the United States. The Court’s decision in *K-Line* no doubt was meant to put an end to a long-standing split among the Circuits. This split concerned the particular legal regime governing cargo shipping losses occurring during the inland segment of transportation in the U.S., as the continuation of an import shipment from overseas. The Court held the Carmack Amendment to the Interstate Commerce Act\(^3\) does not apply to the inland leg of an overseas shipment covered by a through bill of lading, at all (regardless of whether a separate inland bill of lading is issued in a supplementary fashion).\(^4\)

\(^1\) Taken from Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986), where I believe the entire controversy that has led to our current demise originated: If it were not for the appendage ("dictum" some say) in the holding of that case, requiring a separate inland bill of lading on a multimodal import shipment for Carmack to even apply, then we would not have had the Circuit split, which wouldn't have led to the Supreme Court's recent, and I think somewhat misguided, holding in *K-Line*.


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\(^3\) 49 U.S.C. §11706 (2011) (rail carriage); 49 U.S.C. § 14706 (2011) (motor carriage). The Carmack Amendment was originally enacted in 1906 (34 Stat. 593, 595). It amended § 20 of the Interstate Commerce Act, which had been enacted in 1887 (24 Stat. 379, 386). The Carmack Amendment provides full liability for loss or damage to cargo by rail or motor carriers subject to the jurisdiction of the Surface Transportation Board ("STB," formerly Interstate Commerce Commission (ICC), see ICC Termination Act of 1995). It has been codified from time to time in different locations of the U.S. Code and with some changes and variations. From 1926 to 1978, it was codified at 49 U.S. § 20(11). In 1978 it was recodified as 49 U.S.C. § 11707. In 1995, as part of the ICC Termination Act, it was codified as 49 U.S.C. §§ 11706 (rail) and 14706 (truck, motor carrier), and that remains its present codification.

\(^4\) See Reider v. Thompson, 339 U.S. 113, 70 S.Ct. 499, 1951 AMC 38 (1950); see also Union Pacific’s Master Intermodal Transportation Agreement ("MITA") § 1, General Rules and Policies, Rule I (2003) (mentioning any inland Bill of Lading issued for its carriage as
Instead, it said COGSA’s protections should apply, as extended by Himalaya clauses and other contractual extension provisions in the initial, “single through bill of lading,” suggesting any supplemental bills of lading issued in a supplementary fashion, are null and void.

The Court’s decision will have a dramatic impact in the shipping industry. International shipping, as it affects the United States and its trading partners is a multi-trillion dollar business including both imports and exports. Intermodal rail service accounts for about 21% of all U.S. railroad revenue (that revenue was somewhere in the vicinity of U.S. $63 billion in 2008). Roughly 60% of all U.S. intermodal carriage involves international shipments (in volume terms (by TEU’s) this figure consists of about 60% in imports and 40% in exports). In dollar terms,
one economist’s indications show industry revenues amounting to about $18.8 billion in 2008 from intermodal imports including all modes of surface transportation (i.e., local drayage, long-haul trucking, and rail), and about $13.5 billion in 2008 from intermodal exports using the same modes of transportation (total in 2008 of about $32.3 billion). The total value of cargo on a customs valuation basis entering the U.S. by ocean vessel in 2008 came to over $1.15 trillion.

The Court’s decision abrogates Carmack’s application to at least that value on imports. Its decision may well reach intermodal exports, as well. That would mean that Carmack, and its potential of full liability protection, will be inapplicable to shipments amounting to nearly $32.3 billion of intermodal carriage revenue in the U.S. On the rail side alone, shipments amounting to at least 13% of all industry revenue will not be covered by Carmack. This is no small matter.

In the name of establishing “uniformity” as the pinnacle value in the international shipping industry, the Supreme Court has managed to restructure Congressional intent regarding the Carmack Amendment, and at the same time, due to its misapprehension of some facets of the industry, will not likely accomplish the uniformity it seeks. Interestingly, the majority shifted away from an earlier but recent articulation of the issue dividing the Circuits, in Altadis USA, Inc. v. Sea Star Line, LLC, to reach a more fundamental question concerning the nature of through bills of lading in general, and their use in current commercial practice. In articulating its general rule on the nature of through bills of lading, and explaining why Carmack would not apply to inland carriage under them, the Court ignored an earlier, and well-suited “intent test” regarding the “continuation of foreign commerce.” This test would have also easily resolved the controversy in the Circuits in a more principled fashion, but with an entirely different result. If the intent test ignored by the Court had been applied, Carmack should have applied to any inland segment on an intermodal import under a single bill of lading, so long as the inland carriage was “intended” as a “continuation of foreign commerce” -- something a through bill of lading clearly already contemplates.


10 Wolfe, supra note 9 at 62, 65. That makes the total direct revenue value about $32.3 billion; the total secondary value added to GDP (including to trade-related industries and services also benefitting) from both intermodal imports and exports in 2008 was estimated to be about $61.5 billion. Id. at 61-69 (Tables 18, 21, 24, 25).


12 Coal carriage accounts for about 25% of all rail annual revenue, and intermodal, about 21%, of which 60%, in volume, is for imports or exports (the rest is somehow “domestic”). Some calculate this 60% volume in intermodal imports and exports to generate about $8 billion in intermodal rail revenue (see AAR, supra notes 8, 9), others (i.e., Wolfe) say earnings are about $9.5 billion (see Wolfe, supra notes 9,10), which is closer to 15% (not 13%) of all rail revenue, in 2008.

This intent test served as the basic rationale supporting Carmack’s application on these kinds of shipments, since *Swift Textiles*, if not sooner. Courts that held otherwise were fixated on the “dicta” of *Swift*, calling for actual issuance of separate inland bills of lading for Carmack to apply (a concept in fact contrary to the interpretation of Carmack in *Swift*), but were not necessarily intending a wholesale denial of Carmack’s application in through bill cases, at all. *Swift* actually relied on earlier cases including those from the Supreme Court in articulating the intent test so its interpretation was not new. Still, *Swift* raises some thorny interpretive issues in the through bill context, which I believe led to the Circuit split and the *K-Line* decision.

This article will examine the Supreme Court’s majority decision in *K-Line*, and why I think it is incorrect. (I) I will first look at the Court’s slight shift in its statement of the issue dividing the Circuits to reach its more fundamental issue regarding intermodal, “through bills of lading” and why it thinks Carmack cannot apply to inland carriage under them. I critique the majority’s view on its own terms. In so doing, I will be including some of the just criticisms in Justice Sotomayor’s dissent as well.¹⁴ (II) My critique also includes analyzing the statutory text of Carmack, as well as the current context of the shipping industry. (III) I will also suggest the suitability of the *Swift* “intent test” which the Court seems to have ignored. (IV) Next, I shall examine the real culprit I think leading the Court in the wrong direction: excessively indulgent Himalaya clauses. (V) After that, I shall examine some implications of the Court’s decision, including issues it refused to resolve (like what happens on intermodal exports?). In that connection, I also hope to consider some likely areas of confusion that will continue in the aftermath of the opinion, and suggest some possible solutions. (VI) Lastly, I will take a short look at the ironies coming from both the majority and minorities views, especially given the strict constructionist angle favored by those in the majority camp, and the generally liberal concepts of statutory construction typically championed by the dissenters.¹⁵ At the outset, it should help to set the stage on the kinds of shipments typically involved.

B. THE USUAL SCENARIO

The typical international shipment touching U.S. soil today travels under a “through (or “multimodal,” or “intermodal”) bill of lading” and is transported among various “modes” of transportation, such as ocean carriage, and land

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¹⁴ Actually three were in dissent: Justice Sotomayor, joined by Justices Ginsberg, and Stevens.

¹⁵ Some additional substantive issues from the *K-Line* case are discussed but only as tangents, to the extent applicable to the Carmack application issue. These include, for instance, the “opt-out” issue in Carmack (49 U.S.C. §10709—an issue raised in the case but not decided), and the holding that Kawasaki Kisen Kaisha Ltd. (“K-Line”) the ocean carrier itself, is not a railroad. I believe this second holding is correct.
carriage of various sorts, including rail and likely truck (motor) carriage. In a
typical scenario, a shipper of goods, say in Korea, will either directly or indirectly
contract with an “ocean carrier” for “through transportation” from the point of
origin in Korea, to destinations inland in the United States.

If the contract is indirect, the shipper will first contract with a transportation
intermediary, such as a “freight forwarder” or “NVOCC” (non-vessel operating
common carrier), who will then contract with the ocean carrier on the shipper’s
behalf. Initial contracts through such intermediaries are most common. If the
shipper contracts initially with a freight forwarder, the forwarder will only
“arrange” the transportation and contract with the ocean carrier, as if standing in
the shoes of the shipper; if an NVOCC is used, the NVOCC will not only
arrange the transportation, but also serves as a carrier in its own right, and likely issues its
own international through bill of lading. In addition, it enters into a separate
contract with the ocean carrier on the shipper’s behalf.

At this point, the ocean carrier will issue an international through bill of lading for
this transportation to either party it contracted with (either the shipper directly, or
its intermediary). The ocean carrier will assume responsibility for the cargo over all
modes. The ocean carrier’s through bill of lading will obligate the ocean carrier to
provide safe transport during the entire journey, including both ocean and land
segments. If an NVOCC was involved, this same responsibility will likely be
assumed via its own through bill of lading. A through bill will explain that the
ocean carrier (including an NVOCC) is free to subcontract with various carriers and
handlers, including motor carriers and rail carriers in either the country of origin or
destination. It will specify the legal regime and liability limits that will apply to it
for any of this inland transportation (a Clause Paramount, or “Responsibility
Clause” is used for this purpose). Each through bill will also claim that these

16 See supra note 6; see also 1 T. Schoenbaum, 1 Admiralty & Mar. Law, § 10-4 (Westlaw
version at 3-5; 4th ed. 2004) (hereinafter “Schoenbaum”), (describing multimodal
(sometimes called “intermodal”) shipments between land and sea, and typically employing
either an “international through bill of lading” or a “combined transport bill of lading.”
(emphasis in original) In each case the idea is for the bill of lading (or “contract of
carriage”) to provide transportation services over more than a single mode of
transportation).

17 In effect, an NVOCC is like a freight forwarder (agent of the shipper) in one respect, and
is considered the ocean carrier’s “shipper,” just as is any freight forwarder. In another
respect an NVOCC is considered a “carrier,” from the view of the initial shipper, and is
subject to the Shipping Act of 1984. The distinctions between pure freight forwarders and
NVOCC’s are maintained and regulated by the Federal Maritime Commission in the U.S.
(also other land-centered freight forwarders exist and are separately regulated in the
U.S.). See Schoenbaum, supra note 16, § 10-7 (describing roles of these entities); see
also Kirby 543 U.S. at 18, 125 S.Ct. at 390, 2004 AMC at 2707 (describing freight
forwarders).

18 Schoenbaum, supra note 16, §§ 10-4, 10-7 n.13, 10-8.

19 This can be one joint clause, or two separate clauses. See infra Part IV, discussing three
“types” of clauses involved in extending COGSA inland; Schoenbaum, supra note 16, §§
benefits (i.e., liability limits) of the applicable law will apply to its subcontracting inland carriers (in a Himalaya Clause). In shipments to the U.S. the law usually chosen by contract to extend to the inland segment as well as to the inland carriers for that segment is usually U.S. COGSA, via its section 7.

Once an imported shipment has been discharged from the vessel and entered the Port, it will inevitably be transported to some inland motor or rail carrier. Sometimes this might involve a truck to rail move (local “drayage”). Usually after the rail move, a truck carrier is needed to complete carriage to the final destination (also called “drayage”). In each case, the inland carrier may issue some form of interchange receipt, waybill, or bill of lading, indicating its contract and terms for hauling the shipment over its line or route.

10-7, 10-8 (describing same three clauses: Clause Paramount, Responsibility & Himalaya Clauses).

20 Id.

21 Id. at § 10-4 n.25 and accompanying text, § 10-8 nn.31-35. In this writer’s view, the Supreme Court in recent cases seems to have shown difficulty appreciating the differences between at least two of these distinct clauses in intermodal imports, a Clause Paramount (or a Responsibility Clause) and a Himalaya Clause. I believe this confusion has impacted its decision in K-Line. The Court seems to lump these clauses together to create an extension of COGSA’s carrier protections to the subcontracting carriers and then seeks to fit that additional extension within COGSA’s statutory framework, as if to give COGSA’s extension to inland carriers some sort of statutory imprimatur. See Kirby, 543 U.S., at 29-30, 125 S.Ct. at 396, 2004 AMC at 2714-51 (sandwiching the mention of a Himalaya clause “cover[ing] both sea and land carriers downstream,” between a couple of the Court’s announcements of COGSA’s seemingly unqualified statutory right to be extended inland by contract (citing 46 U.S.C.App. § 1307, COGSA’s earlier codification of section 7)). In K-Line also, the Court quoted Kirby, but with alterations, suggesting COGSA statutorily permits its extension to just “a carrier” with responsibility inland (such as a railroad?). See 130 S.Ct. at 2440, 2010 AMC at 1526. But section 7 of COGSA says no such thing and its extension is clearly stated to be only for ocean carriers. The Court also later states in K-Line the bills of lading (and COGSA with them) applied inland through a “Himalaya Clause” (instead of a Clause Paramount/Responsibility Clause)—again showing a muddying in what the statute allows and ignoring important distinctions in what these separate clauses intend. Id. at 2448, 2010 AMC at 1538; see COGSA § 7, 46 U.S.C. § 30701 Note (2011) (indicating this inherent limitation on its extension). In summary, COGSA allows its extension to benefit an ocean carrier for its inland responsibility, up to a point (under a Clause Paramount), but that is quite different from its extension to any subcontracting carriers under a Himalaya Clause. The latter extension has no authority in COGSA, as it is purely a court-supported convention created through contract, and not a statutory right. See Robert P. Force, Carmack versus COGSA, 36 Transp. L.J. 1, at 18 (2009) (noting same); see also Part IV infra.

22 See Union Pacific’s Master Intermodal Transp. Agreement (MITA 2-A 2008), Item 110-A, General Rules C, D, E, and I (referencing intermodal documents, waybills, etc., and including references to the Uniform Intermodal Interchange & Facilities Access Agreement (UIIA) and the UIIA Addendum) available at www.up.com (last viewed Feb. 5, 2011); these documents are commonly employed by rail carriers and indicate their standard terms and conditions of carriage. Some of these items may be issued electronically, but that
COGSA, by its terms, applies only to the ocean leg of a U.S. import or export, although it may be extended to cover the ocean carrier’s obligation inland. This extension inland, while permitted by the section 7 of the statute, is only an extension by contract, and so does not have the mandatory force of law in a statute. 23 This means when COGSA applies to a particular inland carrier, by contractual extension in a Himalaya clause, this intended extension must yield to a mandatorily applicable federal statute governing the inland carrier’s liability if the extension would conflict with the statute.24 Until the Supreme Court’s decision in K-Line, that was precisely the conflict occurring all too often. The Carmack Amendment to the Interstate Commerce Act, by its wording since 1978, was the applicable liability regime for inland carriers, and its provisions often conflicted with COGSA’s inland extension to subcontracting carriers via Himalaya clauses. Conflicts happened in areas such as statutes of limitations, damage limitations, and standards of liability. The Supreme Court changed all that and resolved (it supposes) any conflicts in these situations by pronouncing that the Carmack Amendment simply does not apply to inland carriers on an intermodal import in the U.S. covered by a “single, through bill of lading.”25 But this is not a fair reading of the statute, and its holding shows this Court has significantly re-characterized the issue previously splitting the Circuits.

II. THE DIFFICULTY WITH THE K-LINE DECISION

A. WHAT HAPPENED IN K-LINE?

In K-Line, separate cargo interests in China contracted with Kawasaki Kisen Kaisha, Ltd. (“K-Line”) under four through bills of lading (4 separate shipments) to bring the cargo from China to various destinations in the U.S.26 The arranged carriage was from Shanghai to Long Beach California by ocean carriage on a K-Line vessel; then carriage was to proceed by rail to some Midwest cities.27 After the shipments arrived in Long Beach, apparently without incident, K-Line’s American agent booked the shipments with Union Pacific Railroad (UP) for through carriage to the

![Image](https://example.com/image)

hardly seems to matter—they are written in English and are intended as the terms of carriage. See also infra note 67 and accompanying text.

23 It does not apply “ex proprio vigore.” An exception is the so-called “coastwise trade,” as is commonly the case, for instance, between Puerto Rico and the U.S., and where COGSA’s incorporation into a contract is considered to have statutory force. See 46 U.S.C. 30701 Note, § 13.

24 See also Michael P. Sturley, Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo, 40 J. Mar. L. & Comm. 1, at 25 (explaining the interplay in COGSA section 7 and 12, as section 12 seems to limit COGSA’s extension inland in any case where it conflicts with other applicable law; hereinafter “Sturley”).

25 130 S.Ct. at 2442, 2010 AMC at 1529.

26 Id. at 2439, 2010 AMC at 1523-25.

27 Id.
final destinations, all according to plan. \(^{28}\) UP contracted with K-Line, through its American agent, via UP’s Exempt Rail Transportation Agreement (“ERTA”), and its Master Intermodal Transportation Agreement (“MITA”), to which the ERTA is subject, and pursuant to any bills of lading as indicated in the MITA. The shipments in question derailed in Tyrone, Oklahoma. \(^{29}\)

Cargo interests sued both K-Line as through carrier, and UP, over whose rail the cargo was injured. \(^{30}\) Four suits were originally brought in California State Superior Court. \(^{31}\) The K-Line through bill contained a “Responsibility” clause (and Clause Paramount) declaring for shipments going to or from the U.S., COGSA is the applicable legal regime (Clause 4). \(^{32}\) It also contained a “Himalaya” clause, extending all benefits of its bill of lading to subcontracting carriers, like UP (Clause 5, “Sub-Contracting”). That clause also said K-Line could contract with those subcontractors on any terms it desired. This clause as written would therefore bring the inland extension of COGSA to the benefit of UP, an inland carrier. \(^{33}\) In Clause 2, the K-Line through bill also contained a forum selection clause, calling for suit in Tokyo Japan, and a Japanese choice of law clause, subject to any other law in the bill of lading. \(^{34}\)

K-Line and UP removed the case to federal court, and then moved for dismissal because of the Japanese forum selection clause. \(^{35}\) The trial court agreed that Carmack applied to the inland leg but found, as UP contended, the parties had properly contracted out of Carmack as permitted by 49 U.S.C. § 10709 (permitting special contract arrangements). \(^{36}\) The 9th Circuit disagreed and reversed to see if § 10709 had been properly followed in first offering the shipper full liability under Carmack, and to see if the shipper knowingly declined this offer. \(^{37}\) If not so offered, it said, UP and K-Line would answer for the loss under Carmack’s full liability and venue provisions. \(^{38}\) The 9th Circuit’s analysis followed along similar lines of the thorough analysis of the Second Circuit in Sompo Japan Insurance Co. of America v. Union Pacific Railroad. \(^{39}\) That case gave a detailed history of the Carmack Amendment, and why it should apply to the inland leg on an ocean through shipment. \(^{40}\) The thinking of the Second and Ninth Circuits was almost the same,

\(^{28}\) Id.
\(^{29}\) Id.; and see Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., 557 F.3d 985, 989-990, 2009 AMC 305, 309-11 (9th Cir. 2009).
\(^{30}\) 130 S.Ct. at 2439-40, 2010 AMC at 1523-25.
\(^{31}\) Id.
\(^{32}\) See 557 F.3d at 989-90, 2009 AMC at 309-11.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) 130 S.Ct. at 2440, 2010 AMC at 1525.
\(^{36}\) Id.
\(^{37}\) Id.; 557 F.3d at 988, 2009 AMC at 308-09.
\(^{38}\) 557 F.3d at 1000, 2009 AMC 327-29.
\(^{39}\) Sompo Japan Ins. Co. of America v. Union Pacific R. Co. 456 F.3d 54, 2006 AMC 1817 (2d Cir. 2006).
\(^{40}\) Id. at 61-69, 2006 AMC 1825-36.
save for one notable difference, and that was the Ninth Circuit's additional conclusion that Carmack may apply to certain ocean carriers engaged in intermodal rail activities. 41 The Second Circuit rejected that position initially in Sompo, and again later. 42 It seems cases in the Eleventh Circuit reflect the same view as the Second on this issue. 43 So Carmack’s application to ocean carriers has also been an issue of some controversy among the Circuits, yet this seems far less controversial than the issue of its application to inland carriers on a single through shipment. 44

41 This seems counter-intuitive and contrary to common sense, since Carmack excludes water carriage outside the U.S., and ocean carriers in general, from its coverage. See 49 U.S.C. § 13521 (a) (3) (domestic water carriage), § 10102 (5) (definition of rail carrier) (2011); 130 S.Ct. at 2452-53, 2010 AMC at 1544-46 (Sotomayor, J. dissenting) (explaining in greater detail the regulatory framework for these exclusions). I do not read the Supreme Court in K-Line to be saying that an ocean carrier can never also be a railroad in an appropriate case. In K-Line, however, the rail activity seemed fairly incidental. See Id. It is conceivable, sometime soon, that a large transportation conglomerate could offer both its own ocean and rail services. What the Supreme Court would do in that instance is a bit unclear. Such a conglomerate should conceivably be subject to COGSA for its ocean carriage and subject thereafter to Carmack as a rail carrier under a single through shipment. However, the Court's K-Line holding seems to permanently cut against this result. In effect, although such a transportation enterprise might ordinarily fit the statutory definition of a railroad (see 49 U.S.C. § 10102(5),(6),(9)), it conceivably will never be subject to Carmack since it could never be a "receiving railroad" (instead having received the shipment abroad). All this is according to the Supreme Court's definition in K-Line and is one of the chief reasons I disagree with its decision. See also 130 S.Ct. at 2452, 2010 AMC at 1544; Mitsui Sumitomo Ins. Co., Ltd. v. Evergreen Marine Corp., 621 F.3d 215, 219, n.4, 2010 AMC 2775, 2780 n.4, (2d Cir. 2010) (suggesting an ocean carrier's qualification as a Carmack railroad is essentially moot, since it would still not be a "receiving" rail carrier; and reversing Mitsui Sumitomo Ins. Co., Ltd. v. Evergreen Marine Corp., 578 F.Supp.2d 575, 2008 AMC 2265 (S.D.N.Y.2008) (attempting to show that Evergreen (an ocean carrier), was also a rail carrier; id. at 584)).

42 See also Rexroth Hydrauldyne B.V. v. Ocean World Lines, Inc., 547 F.3d 351, 357 n.6, 2008 AMC 2705, 2711-12 n.6 (2d Cir. 2008) (indicating Carmack's application for domestic, not international water carriage; abrogated by K-Line on other grounds).


44 In this author's view, until the Supreme Court's ruling in K-Line, the 9th Circuit was only half-right (right on Carmack applying to UP on the inland leg, but wrong on its application to the ocean carrier, K-Line) and cases in the 11th Circuit were also only half-right (right on Carmack not applying to the ocean carrier, but wrong on Carmack not applying to the inland carrier unless it issued a separate bill of lading). In my view, the Second Circuit has been most accurate on both issues, in Sompo, before the Supreme Court's ruling in K-Line.
Both defendants appealed and the Supreme Court reversed the Ninth Circuit, holding that Carmack simply does not apply to imports coming into the U.S. under a single through bill of lading.\textsuperscript{45}

\textbf{B. WHAT WAS THE ISSUE SPLITTING THE CIRCUITS?}

The issue in \textit{K-Line}, and in the courts below essentially involved a contest over what law should apply to the inland leg between two competing regimes. The cases seemed to agree this contest was between COGSA, applying via a contractual extension in most bills of lading, including its application to inland carriers through a Himalaya clause, and the Carmack Amendment, applying with the force of a statute to inland carriers as the default rule for their transportation services within the U.S. It seemed like a no brainer: If the Carmack Amendment applied, it has the weight of statutory law; so any contractual extension of COGSA to the same inland carriage at odds with Carmack must yield to Carmack.\textsuperscript{46} In a more specific sense, and prior to \textit{K-Line}, the issue splitting the Circuits seemed to be whether Carmack applied automatically inland, or applied only if a separate bill of lading was issued inland, in conjunction with, or supplementing the through bill.\textsuperscript{47}

The Court resolved the instant conflict between COGSA’s contractual extension and Carmack’s statutory application simply by finding Carmack does not, and cannot apply to intermodal shipments under a single through bill of lading. In a sense, the Supreme Court simply took the position that in an intermodal import under a single through bill of lading, there can only be one bill of lading. Any others issued by inland carriers, such as railroads are void, and so their carriage cannot be subject to Carmack.\textsuperscript{48}

Specific identification of the issue splitting the Circuits has not been easy, and it appears sometimes the courts have been inconsistent in framing that issue. Yet it seems the most accurate articulation of this issue dividing the Circuits before \textit{K-Line}, was \textit{not} so much the issue(s) the Supreme Court in fact decided in \textit{K-Line}

\begin{footnotesize}
\item[45] 130 S.Ct. at 2440, 2442, 2010 AMC at 1525, 1529. It appears the Court shied away from the issue whether K-Line may also be a railroad, and only Justice Sotomayor addressed this issue. Id. at 2452, 2010 AMC at 1544-45.

\item[46] This is similar to the earlier concern with Carmack’s extension against the Harter Act’s mandatory application in the segments pre-loading and post-discharge (up until the time of delivery). See COGSA section 12 (46 U.S.C. § 30701 Note); Harter Act, 46 U.S.C. § 30701-07. Most of these tensions were resolved by cases finding COGSA and the Harter Act are basically consistent, so very few conflicts would emerge between these two statutes in the first place. See, e.g., PT Indonesia Epson Indus., 219 F.Supp. 2d at 1269-70 (comparing similar standards of liability).

\item[47] At least this was the crux of the debate when Altadis USA, Inc. v. Sea Star Line was decided in the Eleventh Circuit and then went up for appeal to the Supreme Court in 2007, in accordance with the evolution of the case law as it existed at this time among the Circuits. \textit{Id.} 458 F.3d at 1291-1292, 2006 AMC at 1849-50.

\item[48] 130 S.Ct. at 2443, 2010 AMC at 1530.
\end{footnotesize}
(i.e., whether Carmack can apply at all inland to an import shipment under a single through bill of lading, and whether any subsequent inland bills were void). Instead, it seems the specific issue had more to do with whether a separate bill of lading must be *physically issued* in order for Carmack to apply to an import shipment. Again, the issue concerned the circumstances *under which* Carmack may apply in a single through shipment, and not *whether* it could apply at all (since several courts had already given indications it could). 49 For instance, the Second and Ninth Circuits held the position a separate inland bill of lading need not be issued, if the shipment was intended as a continuation of foreign commerce: Sompo led the charge in the Second Circuit, and *Neptune Orient Lines v. Burlington N. and Santa Fe* and *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha* led the way in the Ninth. 50 Each of the cases involved through bills of lading. Their holdings may have anticipated that in through bills, a separate “supplemental” inland bill of lading may or may not be issued, but this would not matter since the shipment was a continuation of foreign commerce. 51

In the Fourth, Sixth, Seventh, and Eleventh Circuits, we had an assortment of issue statements on the Carmack application issue. In the Seventh and Fourth Circuits, the cases seem to base the issue on whether there is a single through bill, in which case Carmack cannot apply since no inland carrier’s bill of lading (or receipt, which they ignore) would have any effect. 52 However in the Sixth and Eleventh Circuits, the issue was really more clearly whether a separate inland bill of lading had to be *physically issued* for Carmack to apply, and they held it did, even on a though bill of lading. 53 This of course acknowledges such inland bills of lading (or receipts) can be issued even under a through bill of lading. I suggest this view reflected the state of affairs, and summarized the prevailing view at the time the Eleventh Circuit decided *Altadis*, just prior to its appeal to the Supreme Court in 2007. 54

In *Altadis*, for instance, the Eleventh Circuit stated its conclusion this way:

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49 See cases infra, this section and in next note.
51 Supra note 50.
“In light of the Supreme Court’s opinion in *Norfolk Southern*, the almost uniform case law and dicta in our own *Swift* decision, we hold that—in the absence of a separate domestic bill of lading covering the inland leg—the Carmack Amendment...does not apply to [a] maritime contract covering a shipment pursuant to a single through bill of lading . . . .”

This wording is clearly suggestive of a possible additional bill of lading being issued even under a through bill, and the issue was really a question of whether the inland carrier had, in supplemental fashion, issued one.

In *K-Line*, the Supreme Court sidestepped this issue. Its approach to the controversy over whether a separate bill of lading had to be physically issued sounds dismissive, as if just a distraction (which I agree it was). In *K-Line* it said:

“The language in some on the Courts of Appeals’ decisions . . . could be read to imply that Carmack applies only if a rail carrier actually issued a separate domestic bill of lading [citing cases]. This may have led to some confusion. The decisive question is not whether the rail carrier in fact issued a Carmack bill but rather whether that carrier was required to issue a bill by Carmack’s first sentence [and if not, Carmack would not apply].”

The implication in the Courts’ language is that in a through bill of lading situation, issuance of any secondary bill of lading is not “required” (indeed is “void”). So Carmack would not apply.

In any event, some of these Circuits above had held to a firm view a separate bill of lading had to be issued, and this view was integral to the Circuit split at the time of *Altadis*. Although there are several things I did not agree with in *K-Line*, at least one good aspect of the opinion was its rejection of this implausible idea that in order for Carmack to apply, a separate inland bill of lading had to be *physically issued*. It makes little sense to hinge Carmack’s application on the fortuity of an inland carrier issuing paper. Avoiding Carmack in that situation would be all too simple according to a carrier’s decision not to issue it.

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55 Altadis, 458 F.3d at 1294, 2006 AMC at 1853.
56 130 S.Ct. at 2444, 2010 AMC 1531.
57 Id.
58 Id. Some commentators have noted the strange intransience on this insistence by some in issuing an actual bill of lading. See, e.g., Sturley, supra note 24, at n.100. Such insistence also ignores that a simple “receipt” (i.e., not just a bill of lading) may be issued.
59 Id. Nor has any appellate court seriously contended Carmack could not apply to “imports,” including those coming from non-adjacent foreign countries. That would be impossible since even the Supreme Court acknowledged Carmack’s application to an imported shipment in *Reider*, while traveling as a separate inland shipment after importation; see also Swift Textiles, 799 F.2d at 700-701 (imported shipment of machinery, and Carmack applied inland as a “continuation of foreign commerce”); see Brief of Respondent in Opposition, Petition for Writ of Certiorari, in *K-Line*, 2009 WL
C. WHAT WENT WRONG IN K-LINE? THE “RECEIVING CARRIER” ISSUE

In reaching the Court’s holding, Justice Kennedy said two requirements were necessary for inland carriage to be governed by Carmack: (1) the carriage must be subject to the jurisdiction of the Surface Transportation Board, under 49 U.S.C. § 10501 (§ 13501 for motor carriage), and (2) the carrier must be a receiving carrier, for which a bill of lading or receipt must be issued. Kennedy defined a carrier who receives a shipment as meaning the first carrier to ever receive the cargo for shipment in its entire journey (i.e., from point of origin). Kennedy’s idea was that on an import traveling under a single through bill, the receiving carrier would be overseas, and since this carrier would not be a U.S. inland railroad or trucking company, a bill of lading would not have to be issued by any inland carrier in the U.S. for the inland leg. Consequently Carmack would not apply. This has a nice tidy logic to it, but it is not accurate and is not indicative of industry practice.

This first requirement above is actually an important clarification from the Supreme Court. In effect, this acknowledges that the current version of the Carmack Amendment (if not also prior ones) is tied directly to the STB’s (formerly ICC’s) jurisdiction over the specific transportation. This means a carrier’s responsibilities, and its liability under Carmack, is determined in the first instance by whether the specific transportation in question is subject to the STB’s jurisdiction.

The second requirement above, that there must be a receiving carrier in the U.S., as Kennedy defines it, is completely problematic. Kennedy says in order for Carmack to apply, there must be a “receiving” rail carrier who must issue a receipt or bill of lading, and a receiving carrier is one who receives the goods from the initial shipper, at the point of origin (somewhere overseas I suppose). He offers absolutely no authority for this definition of “receives” and another view is equally plausible, if not better. I hope to develop this below.

In K-Line this meant that K-Line’s carriage was not subject to Carmack liability (for its inland undertaking), since it is not a carrier subject to the STB’s jurisdiction anyway. It is not a railroad. That is not a problem, but Kennedy also said UP was not a receiving carrier, either, because it did not “receive” the shipment from the

3023517, at *7-8 (2009) (noting the Petitioners’ implausible and odd suggestions that Carmack does not and never has applied to imports from non-adjacent countries).
60 130 S.Ct. at 2443, 2010 AMC at 1530.
61 Id. at 2443-44, 2010 AMC at 1530-31.
62 Id.
63 Both the majority and dissent seem to acknowledge this STB jurisdictional basis for Carmack’s application. Id. at 2443, 2450-51, 2455, 2010 AMC 1530, 1541-43, 1549 (STB jurisdiction may even be broader than Carmack’s in some instances, applying itself extraterritorially, but Carmack’s reach is contingent on the jurisdictional reach of the STB).
64 Id. at 2443-45, 2010 AMC at 1530-33.
initial shipper at origin in China, but merely took it from K-Line, the ocean carrier, as part of a through voyage.65 The Supreme Court accordingly held Carmack would not even apply to UP, as the inland carrier.66 Among other things, the Court failed to consider industry custom in which the initial ocean carrier is considered the inland carrier’s “[s]hipper,” and this inland carrier in fact “receives” the shipment from that shipper. UP’s own MITA 2-A amply explains this and defines these terms.67 I elaborate next on a few more points showing, I believe, how the majority’s formula for interpreting Carmack is incorrect:

1. The Majority Assumes A Through Bill Of Lading Cannot Have A Valid, Supplemental Bill Of Lading, Or Another Contract Of Carriage, Or A Simple Receipt Issued In Association With It

This is simply not true, in law or practice. I will explore a few sub-points on this.

a. The Legal Stretch Issue

The Court’s authority for this rule is summarized primarily in a single case, Mexican Light & Power v. Texas Mexican Ry. Co.68 (a case involving a through export shipment from Texas to Mexico). In that case, the Supreme Court held a second bill of lading issued from Laredo, Texas into Mexico was invalid (void), even though it was used to help clear the goods at delivery, because of the existence of a through bill of lading all the way from Sharon, Pennsylvania to destination in Mexico.69 According to the summary of legal principles articulated in that case, the subsequent carrier’s bill is considered void for lack of consideration and the initial carrier’s through bill governs the entire transportation in Carmack. As a result, Kennedy’s idea is that any subsequent bill of lading issued by UP on the carriage would be void due to K-Line’s already existing ocean through bill; so Carmack would not apply to UP, since it did not issue a valid bill of lading.70

65 Id. at 2444-45, 2010 AMC at 1531-33.
66 Id. at 2445. Carmack’s non-application to K-Line, as an ocean carrier, may be sensible, but its claimed non-applicability to UP goes too far, and is the centerpiece driving this article.
67 Supra note 22 (MITA 2-A, 2008), Item 1000-D, Appendix A, Definitions, giving salient definitions, such as: “Receiver,” “Shipment,” and “Shipper” (usually the one who sends the shipping instructions to UP, and can be the agent of the cargo owner, such as an initial carrier) and supporting this interpretation; see also Kirby, 543 U.S. at 32, 125 S.Ct. at 398, 2004 AMC at 2718-19 (intermediaries and ocean carriers act as cargo owners’ agents in subsequent inland transportation).
69 Id. Justices Reed and Vinson joined in a rather persuasive dissent regarding consideration given for the second bill of lading.
70 130 S.Ct. at 2443, 2010 AMC at 1530. This writer has seen some additional cases seemingly in support of the rule that a second bill of lading issued subsequent to an initial carrier’s through bill in Carmack is void, including cases referenced by Sotomayor in her dissent (i.e., those cited by the majority and the U.S. (amicus curiae); see 130 S.Ct. at 2453, n.2, 2010 AMC at 1544, n,2). However, only a small handful of the cases specifically
However the holding in Mexican Light & Power and cases like it only applies to a situation already within Carmack’s purview and simply means that the second or delivering rail carrier would not be considered the initial carrier for purposes of determining an initial carrier’s liability under Carmack. The Court still applied Carmack to the entire shipment, including its analysis of the second carrier’s liability (concluding it was not liable since the loss did not occur on its road).\footnote{71} Quite unlike what it did in K-Line, the Court in Mexican Light & Power in fact did apply Carmack to the entire shipment, even for the transportation section where it said the second bill of lading was void.\footnote{72}

Shedding some light on the purpose of the rule in Mexican Light & Power (and similar cases) should assist in explaining the Court’s error in applying it to overseas intermodal imports like K-Line. The central thrust in Mexican Light & Power and similar cases is the idea that the initial carrier in Carmack is liable for all the others. This is the so-called “unity of responsibility” principle, and is intended to save the shipper from the sometimes “impossible” task of having to determine which carrier is actually responsible for the loss; it is a unique and defining feature of the Carmack Amendment.\footnote{73} It applies solely within Carmack’s interstate scheme inside the U.S. itself, but not to shipping arrangements between an international ocean carrier and its initial inland carrier. Also, what the Supreme Court has not mentioned in K-Line is the point of this rule is to prevent an initial rail or motor carrier inside the U.S. from “terminating its liability” by shifting responsibility to a secondary carrier issuing its own bill of lading.\footnote{74} That is a value inherent and contained within Carmack itself. It is meant to help shippers and makes their lives easier by having to pursue only one inland carrier, without

\footnote{71}{331 U.S. 734-735, 67 S.Ct. 1441-42.}
\footnote{72}{Id.}
\footnote{73}{See id. at 1441-42, and S.C. Johnson v. L & N Ry. Co., 695 F.2d at 258.}
\footnote{74}{See S.C. Johnson, 695 F.2d at 258.}
denying them the chance to pursue connecting inland carriers if that would be advantageous (such as when the loss was clearly on the connecting carrier’s road).

This concern is entirely irrelevant to an intermodal import situation as in the K-Line case. K-Line as the initial ocean carrier was not seeking to “terminate its liability” as the initial carrier under Carmack; it was not seeking to shift its liability onto the next carrier (UP). Instead, the K-Line shows shipping interests simply seeking to include a claim against the inland carrier (UP)—something Kirby already indicated was permissible (see Kirby, 543 U.S. at 35). In the K-Line case, the Supreme Court’s declaration the second bill of lading is void did nothing to serve the purpose of that rule to protect the shipper, in accordance with the way it was intended to in Carmack. Its use there actually hurt the shippers, and that was not the intent.

In K-Line, the Supreme Court grabbed a rule appropriate only within Carmack’s through shipments (that a subsequent bill of lading to the initial carrier’s through bill of lading is void), and then applied it to a context outside of Carmack (the interchange between an ocean carrier and inland carrier on an ocean carrier’s through bill of lading). It did this in order to find that Carmack doesn’t apply to the inland carriage. In essence, the Court took a Carmack rationale to defeat Carmack’s application to the inland carriage on intermodal imports—an incredible irony. It should not have happened.

In her dissent, Justice Sotomayor compared the majority’s cases and noted their inapplicability in the current context. Specifically, she indicated the cases cited by the majority and the United States (as amicus curiae) suffer from the same inability to declare with certainty a “receiving carrier” must be one that initiated the shipping, and in an import situation, asserting this can only be the initial carrier overseas.75

In summary, Mexican Power and Light and similar cases are far removed from the context of the intermodal moves coming into the U.S. from overseas today, as seen in K-Line. Mexican Light & Power dealt only with rail transportation to an adjacent foreign country, and is distinct from the situation at issue involving two entirely different modes of transportation on an import. Each of these modes is subject to different administrative, regulatory and statutory systems: the FMC’s regulations and COGSA apply to ocean carriers; and the STB’s governance and Carmack apply to U.S. inland carriers.76 Cases like Mexican Light & Power are not suitable precedents for determining rights under differing regulatory schemes for intermodal imports.

75 See 130 S.Ct., at 2453, 2454-55 n.2, 2010 AMC at 1546, 1547-50 n.2.
76 Id. at 2459, 2010 AMC at 1555 (Sotomayor, J. dissenting; discussing different regulatory regimes).
The Supreme Court’s standard approach to all through bills of lading has a certain appeal to it: “treat all through bills the same and life with be much smoother.” In addition to ignoring the different legal and administrative schema inherent in intermodal imports, in my view, the Court’s ruling seems a bit out of touch with everyday commercial reality.

Inland carriers issue all the time interchange receipts, waybills, or bills of lading for their services as part of their daily routine, regardless of whether they are functioning on a through bill basis with an ocean carrier, or not. The idea that inland carriers do not, or should not, issue their carriage documents because of a through bill from overseas, is a complete fiction. 77

When a railroad receives a trailer on flat car (“TOFC”) from a first motor carrier, or a container on flat car (“COFC”) from a vessel, for instance, and then agrees to the carriage of that container according to its stated terms with its shipper, it has entered into a contract of carriage for that merchandise with its own shipper. It does so regardless of whether carriage was initially arranged under a single through bill. This is a serious contractual undertaking to carry goods. Once the carrier has the goods in hand, it provides a necessary transportation service, according to its stated or accepted terms with the prior carrier. 78 It does not carry goods in a contractual vacuum and does not just “piggyback” terms from the first carrier; some thought goes into this and ends up getting written into carriage agreements. 79 These may be located in tariffs (no longer required to be filed), circulars, exemption agreements, master agreements, receipts and bills of lading—as examples. The inland carrier expects to be paid for its services and it provides terms to ensure that. It is a contract carrier, operating under a real contract with its shipper. This is the nature of its intermodal business. In K-Line, in accordance with UP’s own MITA and standard nomenclature in the industry, UP actually “received” the shipments from “K-Line,” its own shipper in the U.S. In UP’s own

77 In this attorney’s practice, a normal claim file on a cargo case often contained an assortment of very standard carriage documents, including rail interchange receipts, waybills, delivery receipts, warehouse receipts, and trucker’s bills of lading.
78 Inland carriers operate under these terms or special terms, even when there is a through bill of lading. That’s a given. See supra notes 22, 67. While operating as a subcontracting carrier on a through bill of lading, their agreed terms are expected to be incorporated into the through arrangement. Id. These terms exist and have effect; they simply cannot be ignored, although they may not contradict those expected and subsumed within the through carriage arrangement. See id. (discussing references in UP’s own MITA and ERITA); see also supra Brief of Respondent note 59 at 13 (noting rail carriers’ recent inclusion of indemnification provisions in their standard contracts, calling for payment against ocean carriers if they fail to give notice of Carmack liability to original shippers).
words, a “Shipper” is one who sends UP an intermodal unit (including one initially carried by someone else), at which point UP calls itself the “Receiver” of that shipment. According to industry standards, including those in UP’s own information, Carmack should have applied in \textit{K-Line}. All Carmack calls for is that a rail or motor carrier providing transportation subject to the jurisdiction of the Board issue one of the above documents reflecting its contractual carriage undertaking according to agreed terms. Having an initial through bill of lading should not change any of that. In practice, it doesn’t.

Somehow the Supreme Court has gotten this idea that liability should not vary along modes in a through, intermodal shipment. But that is an acceptable practice, and probably a fairer one too. This simply involves what’s called a “network system” of carrier liability, in which the carrier’s liability varies with the law applicable to a particular mode of transit (for instance, COGSA may apply to the ocean transportation, and Carmack may apply to the inland transportation). It’s not uniform, but it is common. Networking systems are likely to continue in effect in various other places in the world due to the application of mandatory law to certain sections of carriage. In Europe for instance, this would be true because of mandatory rail and road regimes that have been in play for several years (i.e., CMR convention, 1956, for road carriage, and CIM rules, 1980, for rail carriage.)

\begin{itemize}
  \item MITA 2-A (2008), Item 1000-D, Appendix A, Definitions. See \textit{supra} notes 22, 67.
  \item Supra notes 77-80; see also \textit{K-Line}, 130 S.Ct. at 2456 n.8, 2010 AMC at 1551-52 n.8; Schoenbaum, supra note 16, § 10-4 n.55 (citing two illustrations, in which I agree somewhat, except for the indications in the second where the authors suggest Carmack does not apply inland, despite use of an inland bill of lading (citation omitted))
  \item See Schoenbaum, supra note 16, § 10-4 (electronic version at 5) (explaining varying liabilities and uses of interline documents in network systems). Schoenbaum also describes similar systems set up under a “combined transport bill of lading,” where the liabilities of a multimodal transport operator (MTO) or combined transport operator (CTO) may vary according to the mode of transit involved. \textit{Id}. Although Shoenbaum claims the networking system’s future may be “in doubt” (because of the Shipping Act of 1984; see id. at 6), this should only be interpreted in view of ocean carriers trying to limit their liability to the regime covering only their section of actual physical carriage, but not to variations (“segments”) in liability regimes that vary according to changes in the kind of carrier involved (i.e., vessel vs. railroad)—that aspect of “networking” systems is completely different, and should remain viable. \textit{Id}. I sometimes use the terms “networking” and “segmenting” systems interchangeably, but I do not intend to say the ocean carrier’s liability should vary along different segments (I do not consider this necessary and it is a matter of contract anyway). I am saying the liability of different kinds of carriers should vary according to the actual segments of their carriage and the differing administrative systems under which they operate, until those legal systems are changed. I do not think the Supreme Court should change this itself.
  \item The Convention on the Contract for the International Carriage of Goods by Road is the “CMR” (see 399 U.N.T.S. 189); the Uniform Rules concerning Contract for International Carriage of Goods by Rail is the “CIM.” These Rules are part of the Convention Concerning International Carriage by rail, known as “COTIF” (May 9, 1980; see 1987 Gr. Brit. T.S. No. 1 (Cm. 41)). COTIF was amended by a Protocol for Modification in 1999. See Sturley, supra note 24, at 3, nn. 8-9. See Hartford Fire Ins. Co. v Orient Overseas Containers Lines
\end{itemize}
I am suggesting here allowing uniformity for ocean carriers’ “through” liability is fine, but not for inland carriers, whose liability is often subject to different administrative structures and laws.84

Several carriers’ through bills of lading already adopt a varying liability approach, including K-Line’s (outside the U.S.), indicating that the ocean carrier’s liability will shift from COGSA to any mandatory law that may apply to inland carriage on a through bill of lading.85 The subcontracting carriers are getting that same liability, according to applicable law in those jurisdictions. In K-Line, the Supreme Court is simply declaring that Carmack cannot be that liability law in the U.S., on its own. (It can of course always be incorporated separately into a contract.)

In K-Line, the majority’s own formula of “a single through bill means no other bills are valid” is also plainly undercut by Kirby on which it so often relies. As I’ve already stated, and as Justice Sotomayor noted in dissent, lots of through bills of lading have other bills of lading issued supplemental thereto as part of other modes of carriage contemplated.86 In such cases, the through bill is really only intended to govern the liability of the through carrier to its shipper, and is not necessarily intended to cover liability of subcontracting carriers, nor liability between carriers. Some shipments, as in Kirby, have more than one through bill of lading in play. In Kirby, we first had a freight forwarder (ICC) issuing to the original shipper a through bill of lading all the way to destination, and then a second one from the vessel operating ocean carrier for the exact same route.87 If we applied Kennedy’s K-Line approach to Kirby, the second through bill for Hamburg Süd (the actual ocean carrier) should have been void because an initial through bill (ICC’s) already existed. But that would have been absurd, and Kirby

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84 Supra note 82; see 130 S.Ct. at 2453, 2459, 2010 AMC at 1546, 1555 (Sotomayor, J. dissenting) (discussing different regulatory regimes).

85 As to K-Line’s “Combined Transport Bill of Lading” (Standard Form for Containers), and Clause 4 in its entirety (Responsibility Clause), see Joint Appendix, Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corporation, 2009 WL 5083465, at *144-45; see also K-Line, 130 S.Ct. at 2461, 2010 AMC at 1558 (Sotomayor, J. dissenting) (discussing in several global areas, an “applicable international convention,” or required “national law” will apply to the inland portion). Other bills of lading using a varying liability regime according to sea or land transport, even as to the initial through carrier within the U.S., include the Hanjin bill of lading, Clause 4 “Responsibility” (available at http://www.hanjin.com/en/container/shipping/original_bl_term.pdf) (last viewed Mar. 28, 2010), the BIMCO and FIATA bills of lading (see descriptions in Shoenbaum, supra note 16, text at nn. 49-50; and several other examples on various carriers’ websites; see also Hartford Fire Ins. Co., 230 F.3d at 555-56 (discussing similar clauses in that carrier’s bill of lading).

86 K-Line, 130 S.Ct. 2456 n.8, 2010 AMC 1551-52 n.8 (citing Kirby, 543 U.S. at 30-33, 2004 AMC at 2715-18).

87 543 U.S. at 18-20, 30-33, 125 S.Ct. at 390-391, 397-398, 2004 AMC at 2707-08, 2716-18.
would have made no sense. Instead, both through bills are given effect, as they each applied to different carriers. 88

c. Addressing Kennedy’s Big Concerns: “Outlawing” Through Bills, Suit Issues, and Difficulties of Proof

Kennedy says giving some validity to a second inland bill of lading raises several concerns. At this juncture it may be a good idea to consider some of these. The three in the heading here are among his chief concerns and are his strongest reasons for invalidating inland carriage documents. Each is considered separately.

i. Outlawing Through Bills

Kennedy is sincerely concerned that giving vitality to supplemental bills of lading will undo through bills. He says: “If a carrier, like Union Pacific, . . . was, counterintuitively, a receiving carrier under Carmack, this would in effect outlaw through shipments under a single bill of lading.” 89

This is hardly correct and ignores practice, as already indicated. What Kennedy really means is if we allow supplemental bills of lading to have some vitality under through bills, then through bills would cease to be through bills. This is not correct either. The liability of the ocean carrier will remain as it always has been under its through bill, from point of origin to final destination. The liability of the inland carrier will be in accordance with the law, and its agreed terms under contracts for intermodal shipments. Justice Sotomayor noted this was the proper understanding of how things should work after Kirby. 90 In that case, the Court held “that an intermediary binds a cargo owner to the liability limitations it negotiates with carriers downstream,” and added it “was merely ensur[ing] the reliability of downstream contracts for liability limitations.” 91 Rather than abrogate downstream contracts, Kirby seems to affirm them, especially when the liability of a downstream carrier is at stake.

In applying these principles to K-Line, the ocean carrier simply issued its through bill of lading to cover its responsibility all the way to destination. This, however, would not stop UP from issuing it’s own through bill of lading (or any bill of lading or similar carriage document) all the way to the Midwest in its capacity as the carrier receiving the goods for inland carriage in the U.S. This is what it is likely to do in the ordinary course. 92

88 Id.
89 130 S.Ct. at 2445, 2010 AMC at 1533-34.
90 Id. at 2456, n.8, 2010 AMC 1551-52, n.8 (citing Kirby).
91 Kirby, 543 U.S. at 34, 125 S.Ct. at 399, 2004 AMC at 2718-19. In that case, ICC the first through carrier, contracted with Hamburg Süd, the actual ocean carrier, and the terms of that second contract of carriage were binding and reached even the liability of Norfolk Southern (the third carrier). The Court said it wasn’t violating principles of agency, but was merely affirming the validity of downstream contracts.
92 See Union Pacific’s Exempt Rail Transportation Agreement (ERTA) with K-Line (2003), and its Master Intermodal Transportation Agreement (MITA 2); excerpts in the K-Line case,
ii. Kennedy’s Concern with Standing to Sue

In this regard, Kennedy wonders if shippers can sue the inland carriers according to the terms in their inland bills of lading, (or suggests maybe the inland carriers cannot be sued at all). Specifically, he notes, “it is unclear whether the cargo owners . . . would be able to sue under the terms governing under that [second] bill especially in light of their different through bill with ‘K’-Line.” Why not? As Sotamayer points out in her dissent, this is precisely what Kirby said was permissible, and has been a long-standing practice in this industry. Even UP’s MITA 2-A acknowledges a Shipper or Beneficial Owner’s right to sue UP according to its terms, which should be incorporated in any “Intermodal document” involving carriage of the shipment. Kennedy’s suggestion cargo interests might not be able to sue inland carriers is senseless, and breaks with custom and practice and with what the Supreme Court has already indorsed in Kirby.

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93 130 S.Ct. at 2445, 2447, 2010 AMC at 1533-34, 1536.
94 Id. at 2445, 2010 AMC at 1533-34.
95 Id. at 2456, n.8, 2010 AMC at 1551-52, n.8.
97 Id. Having more than one liability regime would simply allow cargo interests to recover against the ocean carrier at one level of liability, and perhaps obtain more from the inland rail carrier under Carmack limits. That would allow the cargo interests (including insurers) at least potentially, to come closer in realizing the true value of their loss, and is more just. I am of course aware that most of these shipments are exempt, and liability is limited accordingly, but Carmack’s full liability and other limits should at least be available, and are, according to UP’s MITA 2-A (see § 320-A). Given varying liability regimes, the ocean carrier and inland carriers can simply work it out amongst themselves as to who has to pay
iii. Kennedy’s Concern with Difficulty in Proving the Loss

Assuming suit is available against inland carriers, Kennedy’s next concern is the seemingly difficult job in determining where the loss occurred if more than one liability system should apply. Kennedy notes courts would have to apply different liability regimes (COGSA or Carmack) depending on where the loss occurred, and he says often this determination cannot be made. He voices a valid concern, but it is not nearly as insurmountable as he makes it sound.

In a number of cases, such as in K-Line and Kirby, it will be easy to tell. Anyone can see a train wreck. In other cases, a shipper may simply sue the ocean carrier under the through bill and be content with that. This could happen when it sees no advantage in suing the inland carrier, such as in the common situation where the carriage is exempt anyway, and the shipment traveled under alternative terms, with limited liability at a reduced rate. In such “exempt” cases, Carmack still provides the baseline limit of full liability unless opted out of at the reduced carriage rate. In still other cases, where a shipper sees an advantage in suing whom in indemnity for any excess. See Kirby, 543 U.S. at 34-36, 125 S.Ct. at 399-400, 2004 AMC at 2718-20 (plaintiff has a right to sue ICC (the first carrier) for any deficiency in recovery against inland or other carriers); Altadis, 458 F.3d at 1290, 2006 AMC at 1848 (ocean carrier seeking indemnity from inland motor carrier); Sankyo Seiki (America) Inc., 556 F.Supp. at 343, 1984 AMC at 1795 (citing a history of cases involving similar inter-carrier indemnity claims).

In fact, this “difficulty of proof” issue is not directly tied to the issue of having a separate viable inland bill of lading (it is a concern more about Carmack’s application in general), but these issues are indirectly connected, and the issue of proof correlates well with suit issues generally, so I cover it here.

K-Line, 130 S.Ct. at 2447, 2010 AMC at 1536-37 (quoting Kennedy: “Rather than making cargo claims easier to resolve, a court would have to determine where the damage occurred to determine which law applied. As a practical matter, this requirement could often not be met.”).

See 49 U.S.C. § 10502 (e), (f) (2011) (indicating the Board may exempt certain rail carriage as “part of a continuous intermodal movement” (i.e., TOFC and COFC carriage, like the carriage involved in K-Line, Kirby, etc.), but requiring an offer of full Carmack liability before alternative rates and reduced liability can be agreed to). See also 49 C.F.R. § 1090.2 (2011) (the actual exemption issued by the Surface Transportation Board).

A simplified summary statement of the fairly convoluted opt-out provisions, which the Court refused to clarify, is as follows: (1) For exempt rail carriage under 49 U.S.C. § 10502 and 49 C.F.R § 1090.2, transportation at lower liability limits and carriage rates is available only if Carmack liability at higher rates is first offered the shipper. If not offered, full Carmack liability attaches. See 130 S.Ct. at 2463, 2010 AMC at 1561-62 (Sotomayor, J. dissenting). Since the exemption is for rail carriage as part of a continuous intermodal movement, it is for TOFC and COFC moves (and the latter is typically indicative of a sea to rail movement). See id. (2) For non-exempt, rate-regulated carriage we are likely to see special contracts with lower liability limits than in Carmack, and Carmack’s full liability need not first be offered. This is under 49 U.S.C. § 10709; however, such a special contract option would not apply to COFC intermodal shipments such as those at issue in K-
the inland carrier (such as a motor or rail carrier offering greater liability limits, or if venue or statute of limitation benefits exist) its prima facie case can often still be established by conventional methods (i.e., it can determine shortages from weighing, checking exceptions on interchange receipts, eye witness testimony, etc.).\textsuperscript{102} If the shipper cannot establish a prima facie case against the inland carrier under Carmack it probably won’t bother or that claim will eventually be dismissed. These same concerns would attend any of the various inter-carrier indemnity claims anyway, and this issue of proving where the loss occurred is not going to vanish simply because of carriage under a through bill.\textsuperscript{103} So Kennedy should not worry so much about separate liability regimes, and should not deprive a shipper of being able to sue inland carriers under the STB/Carmack liability system when in its best interests. In many kinds of cases in our system, determining where a loss occurred is difficult, but justice requires that judges and fact finders do their job and try. Some inconvenience in that effort is not an excuse. In situations where cargo interests see an advantage in suing both the ocean through carrier and the inland rail carrier who may be responsible, they should be able to do so.\textsuperscript{104}

\textit{Line} and similar cases. So § 10709, as an opt-out, is irrelevant to the kinds of shipments at issue in this article. (3) Lastly, a rail carrier cannot claim it is excused from Carmack’s liability scheme under § 10709, if it is exempt and carrying under § 10502’s opt-out provision. See id. I’m not going to address the issue of whether Carmack’s full liability offer should be made to the original shipper or just the immediate contracting party, as shipper. Suffice it to say I agree with the suggestion of some on this point, that disclosure of Carmack’s full liability to an intermediate shipper should serve as notice to any shipper upstream, and the intermediate shipper/carrier has a duty to notify its own shippers upstream. See Kirby, 543 U.S. at 32-35, 125. S.Ct. at 398-399, 2004 AMC at 2717-19 (notice is achieved through “limited agency” of intermediate carrier); \textit{K-Line}, 130 S.Ct. at 2464, 2010 AMC at 1563 (Sotomayor, J. dissenting); 557 F.3d at 1002, 2009 AMC at 330-31 (Ninth Circuit opinion in \textit{K-Line}).

\textsuperscript{102} See Sankyo Seiki (America) Inc., 556 F.Supp. at 339, 1983 AMC at 1788-89 (discussing use of a railroad security report noting 3 unidentified men disembarking from the subject train car). Otherwise, if rail security can be proven to such an extent as to rule out pilferage with a railroad, so be it. Weight tickets and interchange receipts can also be used to show changes in cargo weight and volume, and eyewitnesses can observe substances improperly leaking from refrigerated containers from spoilage. See Gordon H. Mooney, Ltd. v. Farrell Lines, Inc. 616 F.2d 619, 1980 AMC 505 (2d Cir. 1980), for an excellent example of the effort employed to show fault between ocean and inland carriers on a spoiled import (Dover sole) from Holland. The nature of the goods often determines the ease or difficulty of proof. See id. Sometimes an entire container is obviously stolen, as in Altadis. See 458 F.3d at 1289-90, 2006 AMC at 1846-49 (driver left the truck unattended overnight). This is a case by case inquiry called for in our system of justice, and simply is the judge’s duty.

\textsuperscript{103} Supra note 97.

\textsuperscript{104} As indicated, supra note 97, indemnity issues between the carriers can be worked out \textit{inter sese}. See Union Pacific’s MITA 2-A, General Rules, O (ocean carrier’s indemnification duty to UP if it fails to notify initial shipper of UP’s intermodal liability limitations). Indemnity could mean the ocean carrier, having a package limitation, might have to pay the railroad for any excess it had to pay, but so what? That would be pursuant to its own agreement if it did. Id. I do not here ignore the sometimes difficult situation of having
In addition, railroads and other inland carriers have also bargained for some of this additional inconvenience in proof issues anyway (although proof is the plaintiff’s job, it also affects carriers on their indemnity claims, yet Carmack lightens that burden inland anyway). This is what the railroads have asked for in supporting a non-uniform system of liability under the “Rotterdam Rules,” and in seeking to have Carmack apply independently of those Rules as their inland liability regime. Clearly, the Association of American Railroads’ (AAR’s) international lobbying efforts in favor of Carmack is entirely inconsistent with its position in _K-Line_ and in the courts. If proof of loss issues are harder due to segmented liability systems (an unproven contention anyway), this is something the AAR fully anticipated in its statutory lobbying efforts supporting Carmack against earlier “uniform” versions of the Rotterdam Rules. Stories of the AAR’s inconsistency in supporting Carmack internationally, against its position in the courts, are surely well known by now.  

2. All That Is Required For Carmack To Apply To Inland Carriage Under A Through Bill Is That The Inland Rail Or Motor Carrier Issue A “Receipt” For The Carriage (Not A Separate Bill Of Lading)

The statute simply says: “A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. . . .”

All that is required is issuance of a receipt, not a separate bill of lading (although that is permissible), and this is according to the clear wording of the statute in virtually every single version in which it has appeared. This is a point consistently ignored by the courts below (very few even discuss it) and is now ignored by the Supreme Court.

The most glaring error in Kennedy’s interpretation of Carmack on a single through bill of lading could be he has missed the word “receipt” in § 11706 (a). He has

separate suits overseas against some ocean carriers, and U.S. suits against rail carriers; sometimes that will happen, but it better serves justice (which is not always about convenience), and is going to happen anyway in some indemnity suits between carriers.


106 See Sturley, supra 24 at 36-39, 130 S.Ct. at 2461, 2020 AMC at 1556 (Sotomayor, J. dissenting); Brief for the Transportation and Logistics Council, Inc. and the American Institute of Marine Underwriters (AIMU) as Amici Curiae Supporting Respondents, supra note 7 at 22-26.


108 See Sturley, supra note 24, at 12, 27, nn. 10-16, 66, 82, 178; see Statutory Appendix hereto.
strained too hard to exclude Carmack’s natural application to the loss by fixating on the words “bill of lading” as the necessary thing to be issued. Congress did not make it so hard. Yet the Supreme Court and almost every court below who has ever dealt with this issue has missed this fundamental ease of applying Carmack (as intended) and as expressed in its language.

A more appropriate application of the statute is that on an import through shipment having only a single bill of lading, Carmack would still apply when the inland carrier issued its intermodal receipt, or some document reflecting its earnest undertaking of carriage of the shipment, and incorporating its terms.

On an import that is not shipped under a through bill, and two connected shipments are involved, a separate bill of lading will be issued and Carmack would apply. In contrast, if a through bill of lading were issued, that would not preclude issuance of a simple interchange receipt, or a waybill, or a supplemental bill of lading, or even another through bill of lading. In each case, something is going to be issued to acknowledge undertaking of the carriage, and Carmack should apply. A “receipt,” including an interchange receipt is all it takes for Carmack to apply, and something akin to that should be issued by an inland carrier in any event.

3. In Order For Carmack To Apply, An Inland Carrier Is Not Required To Receive The Goods In The U.S., As The Point Of “Origin,” And The Court Offers No Authority In Support Of This Idea

The K-Line majority says Carmack applies when we have a receiving rail carrier, and this is someone who initially receives the goods in the United States as the origin point of the journey (i.e., “receives,” necessarily invokes a U.S. point of origin for Carmack to apply). Kennedy said: “A receiving rail carrier is the initial rail carrier, which ‘receives’ the property for domestic rail transportation at the journey’s point of origin.” He cites no authority for this except the statute itself. In this author’s view, Kennedy has overlooked some important concepts. An equally plausible, if not better interpretation of § 11706 (a) is that a carrier who “receives” property for transport is a reference to the first inland carrier receiving the property in the U.S. In this view, Carmack’s point of origin should mean the initial shipping point on U.S. soil, and not the initial shipping point overseas (i.e., Carmack’s origin means the origin of transportation for the railroad or motor carrier). Justice Sotomayor in dissent notes the weakness in Kennedy’s

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110 See § I,C,1,b supra, including notes therein.
111 See Quasar Co. v. Atchison, Topeka, & Santa Fe Railway Co., 1984 WL 2758, *2 nn.2-3 (N.D. Ill. Feb. 17, 1984) (considering a trailer or interchange receipt as a possible contract of carriage invoking Carmack on an intermodal import from Japan to Chicago); see also Union Pacific’s MITA-2A, General Rules, C (mentioning its Special Commodity Quotes (“SCQ’s”) as one kind of intermodal carriage document it issues).
112 130 S.Ct. at 2443, 2010 AMC at 1530.
113 Id.
seemingly exclusive definitions and the plausibility of what I have just said. Yet Kennedy offers several explanations (not authorities) for his views, which I address in turn.


Kennedy protests that “receives” cannot mean “receives” in the “colloquial sense” as that would mean any Carmack carrier in the chain would be a “receiving carrier,” and would have to issue a bill of lading, which he says defeats the “one bill of lading” idea in Carmack as part of its purpose. That purpose is to spare shipping interests from having to sue each carrier in the inland chain of carriage (i.e., only one inland carrier receives and has to issue its receipt of bill of lading for the carriage; that carrier and the delivering carrier are liable, and possibly a connecting carrier if the loss was clearly on its route, but a shipper need not pursue several carriers in the chain). Kennedy’s concern is not valid under the alternative and better interpretation offered above. If a “receiving carrier” for purposes of Carmack is still the first carrier to receive the shipment within the U.S., as I suggest, we still spare the shipper from having to sue each of the carriers in the chain; (i.e., we don’t count them all as “receiving carriers,” only the first one in the U.S.)

In interpreting Carmack, the Court should have considered another purpose as well. This is Carmack’s purpose as the default liability regime for rail and motor carriage crossing on U.S. soil, and is a governing purpose which should not change with a shipment’s “origin.” This other purpose has been stated in various cases throughout Carmack’s history and is implicit in its design. Accordingly, all

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114 Id. at 2451-52, 2010 AMC at 1542-46.
115 Id. at 2443, 2010 AMC at 1530-31.
116 Kennedy seems to take an all or nothing approach: either one carrier “receives” (his idea) or all “receive,” which is untenable. He ignores that we can have more than one receiving carrier in an international shipment without making all of them receivers (i.e., one or more for the entire through carriage, and only one for Carmack’s application in the U.S.).
117 Reider, 339 U.S. at 119, 70 S.Ct. at 502, 1951 AMC at 42.
118 The Reider Court stated it this way, against an attempt to exclude Carmack from interstate rail carriage in the U.S. simply due to a shipment’s foreign origin: “To hold otherwise than we do [i.e., to exclude Carmack inland] would immunize from the beneficial provisions of the Amendment all shipments originating in a foreign country when reshipped via the very transportation chain [i.e. rail] with which the Amendment was most concerned.” Id. See St. Louis, Iron Mountain & S. Ry. v. Starbird, 243 U.S. 592, 595, 37 S. Ct. 462, 464 (1917) (Carmack’s function is to “embrace the liability of the carrier in interstate commerce,” of which the cases in issue would certainly be an example); see also Adams Express Co. v. Croninger, 226 U.S. 491, 33 S.Ct. 148 (1913); Oscar Mayer Foods Corp. v. Pruitt, 867 F.Supp. 322 (D.Md.1994) (citing Adams Express and noting a key purpose of Carmack is to provide a “uniform scheme” for carrier liability on interstate commerce); and see, Texas & N.O. Ry. Co. v. Sable Tram Co., 230 U.S. 352, 33 S.Ct. 729
carriage subject to the STB’s jurisdiction, on U.S. soil, is within the sphere of Carmack’s concern. If the stated purpose of Carmack is to regulate interstate carrier liability/responsibility while a shipment is on U.S. soil (and it is), this interpretation of “receives,” referring to the initial carrier in the U.S. even on a through bill, is entirely sensible. In Carmack, the only point of origin we really care about is the inland carrier’s for its carriage in the U.S. pursuant to an international through shipment. The carrier that receives goods at that point, and the other subsequent carriers in the chain, should be subject to Carmack’s scheme.

Kennedy indicates the Court’s holding in Reider v. Thompson is not contrary to his definition of “receives.” In fact it is contrary. In Reider, goods “originated” in one segment from Argentina to the U.S. at New Orleans. They were then shipped under a separate bill of lading to Boston. The Court held these were two separate shipments, although it was clear when the goods left Argentina, they were intended for inland destination in the U.S. The Court held Carmack applied to the interstate U.S. shipment form New Orleans to Boston, as it normally would. The Court noted this situation did not involve a through bill of lading, and expressly declined to address that issue in the case. What it did say is particularly contrary to Kennedy’s view. The Court asked: “Does the fact that the shipment in this case originated in a foreign country take it without the Carmack Amendment? We think not . . . The test [of Carmack’s application] is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated.” (emphasis added)

Foreign origin is irrelevant. An “origin” of some kind is important according to the Court in Reider, but it is not the origin of the shipment. The only important origin is that of the receiving carrier for its “obligation,” and that does not start until the shipment is on U.S. soil. Issuance of a new bill of lading for a new shipment should not change anything. In either one shipment or two, the inland rail carriage still originates in the U.S. and the inland carrier receives the shipment there.

The inland carrier has an obligation for carriage of goods it receives for transportation from overseas. This is what it has contracted for, and its obligation alone invokes Carmack. The existence of a through bill of lading does not alter its contractual carriage obligation. It would stretch things too far if the shipment of “wool and skins” in Reider had travelled under a through bill of lading, and the respondent there (Missouri Pacific Railroad Co.) had done the same thing and carried the goods to Boston, to then say that it did not “receive” the property for transportation. The happenstance of carriage under a through bill of lading would

(1913) (explaining “interstate or foreign commerce” under the ICA includes “intrastate” carriage in the U.S. if part of an intermodal export; here, logs to Europe).

120 Reider, 339 U.S. at 118-19, 70 S.Ct. at 502, 1951 AMC at 40-42.
121 Id.
122 Id. (in other words, foreign origin is irrelevant)
123 Id.
Accordingly, Carmack should apply to the receiving carrier in the U.S. whether under a through bill or not, and it should have applied in *K-Line*.

Several other authorities squarely contradict Kennedy’s commercial definition of “receiving” for Carmack purposes, and I include a short list of some of these in a note, including UP’s own definitions. Also among these contrary indications is normal commercial common sense, as indicated in subsection c, just below.

*b. Kennedy’s Concerns Over The Venue For Suit Provisions In Carmack Do Not Support His Conclusions On Shipment Origin And The Point Of Receiving*

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124 Interestingly, the Court in Reider reversed the Court of Appeals for the 5th Circuit, which asserted a position similar to the majority’s in *K-Line*. The Court in Reider not only reversed on the facts, but refused to endorse the 5th Circuit’s statement of the law. According to the 5th Circuit, the shipment in Reider was a single continuous through shipment, and the railroad issued a supplemental bill of lading to cover the land transport of this shipment. The 5th Circuit declared Carmack does not apply to such shipments. The Court in Reider refused to embrace this interpretation, attacking the 5th Circuit’s use of certain precedents to derive this rule. See id. at 115, 70 S.Ct. at 501, 1951 AMC at 39. If the Supreme Court had wanted to, it could have simply affirmed the 5th Circuit’s rule, and just distinguished *Reider* on the ground it did not involve a through bill of lading. Yet it refused to embrace the 5th Circuit’s rule, criticizing its construction, and declined to address its suitability in cases involving through bills such as Alwine v. Penn. Ry Co, 15 A.2d 507 (Pa. Super. Ct. 1940) (an intermediate State Court decision).

125 See (1) Union Pacific’s own glossary of terms and customs in the industry (Definitions, App. A, MITA 2-A), supra note 22, 67 (glossary defining itself as a “Receiver,” on intermodal imports from “Shipper[s],” including carriers and agents of an initial Shipper or Beneficial Owner); (2) ICA, 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(2)(a) (1964) (indicating the ICC’s jurisdiction applies to transportation wholly in one State when the “receiving” of the property in that State was due to its being “shipped to or from a foreign country”) (cited and discussed in Long Beach Banana Distributors, Inc. v. ATSF Railway Co., 407 F.2d 1173, 1175-76 (9th Cir. 1969) referring also to the import shipment of bananas into California in that case as a “through movement” in which the bananas were also considered *received* for rail transit in California); see also Goldberg v. Delaware, L. & W.R.Co., 180 Misc. 176, 180 (N.Y.Mun. Ct. 1943) (rail carrier on an international shipment from Canada into U.S. “receives” the shipment domestically); (3) Galveston Wharf Co. v. Galveston, H. & S.A. Ry. Co., 285 U.S. 127, 52 S.Ct. 342, 1932 AMC 463 (1932) (wharf company with rail cars “received” an imported shipment on behalf of inland rail carriers); (4) Gordon H. Mooney, Ltd., supra note 102, 616 F.2d at 621, 623, 1980 AMC 505, 509-10 (2d Cir. 1980) (inland truck carrier indicated it “received” shipment of frozen fish from Holland in a certain condition, in addition to initial receipt in Holland). To be fair, I have seen a couple of cases supporting Kennedy’s interpretation of “receive,” as referring only to the initial shipping point, but I believe these suffer from the same logical defect as his view: (i) Marine Office of Am. Corp., 638 F.Supp. at 396, 1987 AMC at 655 (criticized supra in this article at note 70), and (ii) Kenny’s Auto Parts, Inc. v. Baker, 478 F.Supp. 461 (E.D.Pa.1979) (criticized (I agree) by Berlanga, supra note 50, 269 F.Supp.2d at 827 as “no longer good law”).

126 Infra, at subsection c. of this section.
Kennedy makes another argument that a receiving carrier is only the one at the point of the shipment’s origin (in this case China), and he relies on Carmack’s venue for suit provisions. Carmack §11706 (d) provides in part that suit can be brought “(i) against the originating rail carrier, in the judicial district in which the point of origin is located.” He says this forecloses Carmack’s application under imported through shipments, because then venue would have to be overseas (China in this case).  

Again, the wording, “originating rail carrier” and “point of origin” can just as easily refer to the originating rail carrier on U.S. soil and that point of origin in which U.S carriage starts. This is equally sound, if not a better interpretation, given Reider’s statement that the origin of the shipment (if abroad) doesn’t even really matter. Kennedy protests that since the point of origin of the shipment is overseas (in China), and no U.S. district court sits there for venue, then Carmack could not be intended to apply to these kinds of shipments because the venue provisions won’t make sense. This is of course true only if we accept his definition of origin and “originating,” which we should not. Instead, venue should be had in the district court of the originating carrier in the U.S. Sotomayor properly criticized Kennedy’s anamolous and restrictive interpretation, and suggests the same one above.  

c. Kennedy’s Assertion That Industry Custom And Practice Supports His Understanding Of The Word “Receives” Is Contradicted By Industry Reality  

A more striking and fundamental problem exists in Kennedy’s definition on when a carrier “receives [goods] for transportation” in the U.S. It simply defies common sense. If we accept Kennedy’s definition of a receiving carrier as one who receives the shipment at its origin in the U.S., this would disqualify most shipments from ever having a “receiving rail carrier,” since few in fact “receive” the property for transportation in the sense Kennedy speaks of. This is simply because classic Carmack rail carriers are almost never the first carriers to handle shipments at the initiation of their journeys. This is so even in purely domestic carriage situations. Few, if any interstate rail or truck carriers would be subject to Carmack according to Kennedy’s definition, since few actually, initially “receive” the cargo from the shipper. See also these cases as basic illustrations: Comsource Independent Foodservice Co.’s, Inc. v. U.P.R.R. Co, 102 F.3d 438, 440-441 (9th Cir. 1996) (short-line service provider had to transport vegetables from Modesto to Stockton, California for UP to transport them interstate; two different sorts of bill of lading were also employed on a single shipment); Tokio Marine and Fire Ins. Co., Ltd. v. Amato Motors, Inc., 996 F.2d 874, 875 (7th Cir. 1993) (“Hub City” a

127 130 S.Ct. at 2446, 2010 AMC at 1534 (calling this an “awkward fit”).  
128 130 S.Ct. at 2459-60, 2010 AMC at 1555-56.  
129 See AAR, Rail Intermodal Keeps America Moving, at 1, (May 2010), supra note 8, explaining “Rail Intermodal” is a long-haul movement usually combined with a “much shorter” movement by truck “at one or both ends.” This is also called “drayage,” and Kennedy’s definition of “receives” ignores that it exists in the U.S. and internationally. Few, if any interstate rail or truck carriers would be subject to Carmack according to Kennedy’s definition, since few actually, initially “receive” the cargo from the shipper. See also these cases as basic illustrations: Comsource Independent Foodservice Co.’s, Inc. v. U.P.R.R. Co, 102 F.3d 438, 440-441 (9th Cir. 1996) (short-line service provider had to transport vegetables from Modesto to Stockton, California for UP to transport them interstate; two different sorts of bill of lading were also employed on a single shipment); Tokio Marine and Fire Ins. Co., Ltd. v. Amato Motors, Inc., 996 F.2d 874, 875 (7th Cir. 1993) (“Hub City” a
short-line hauler, local or intermediate trucker, etc.) has to bring the cargo to the Carmack rail carrier initially, in most cases.\textsuperscript{130} UP cannot come to every XYZ Corp. in America to “receive” the property for transportation in the first place.\textsuperscript{131} Instead, another initial or intermediate carrier has to pick up the shipment and transport it to the intended rail carrier. I suppose this initial carrier is actually the “receiving carrier” in Kennedy’s interpretation. According to Kennedy’s system, a classic rail carrier, like UP (BNSF, Norfolk Southern, etc), would then rarely, if ever, be Carmack’s “receiving carrier,” simply because it would not have been an initial carrier actually receiving the shipment at the start of its journey. Unfortunately, this situation would hold true even on shipments initiated in the U.S., since such classic Carmack rail carriers are seldom the initiating carriers in that setting.\textsuperscript{132} I cannot imagine Kennedy intended this to happen.

4. The Majority Opinion Suffers From Circular Reasoning, In Particular, Misguided Elevation Of Supposed Industry Practice Over Statutory Language (Practices Should Bend To The Statute, Not The Other Way Around)

Kennedy’s interpretation of Carmack is based on circular reasoning, especially as he suggests Carmack’s application depends on when a bill of lading should be issued. In essence Kennedy acknowledges Carmack applies when a carrier is undertaking transportation which is subject to the STB’s jurisdiction, in which case, the carrier shall issue a receipt or bill of lading. Therefore, he says, if a carrier is not required to issue a bill of lading or receipt (i.e., in the instance of a through bill of lading) Carmack does not apply.\textsuperscript{133} Stated slightly differently: since the inland rail or motor carrier on a through import is not a receiving carrier (according to Kennedy), it would not be required to issue a receipt or bill of lading. If it is not required to issue a receipt or bill of lading, Carmack doesn't apply.\textsuperscript{134} So nicely and

\textsuperscript{130} Supra note 129; drayage is also defined in Union Pacific’s Intermodal Glossary, available on its website, supra note 67; see also therein, the definitions of “door to ramp” and “ramp to door” services (roughly equivalent to meaning a ‘pick up from a customer’s location to the railroad’, and a ‘delivery from the railroad to the destination customer,’ respectively).

\textsuperscript{131} I used to believe Santa Claus came to every chimney—I later learned some homes don’t have chimneys and there is no Santa Claus who goes to every house anyway.

\textsuperscript{132} Some big commercial players do have rail lines connecting directly from their warehouses to the rail lines. Some have even seen them, but it’s not the backbone of U.S. import/export trade. See Brief for the Transportation and Logistics Council, Inc. and the American Institute of Marine Underwriters (AIMU) as Amici Curiae Supporting Respondents, supra note 7 at 2 (indicating the value of small businesses, and showing that 97.3% of all American exporters are small businesses).

\textsuperscript{133} Jurists and commentators are consistently ignoring the simple “receipt” language, without any explanation or justification.

\textsuperscript{134} Kennedy looks to Carmack to determine when a bill of lading (or receipt, he ignores) is required in order to determine if Carmack applies. That’s not what Carmack says. The proper approach, is if Carmack applies, a bill of lading or receipt should be issued.
swiftly, he has snatched the railroads (and motor carriers) away from Carmack’s reach on these inbound intermodal shipments.

The circularity in Kennedy’s reasoning is caused by his reliance on when he supposes a bill of lading shall be issued by a “receiving” carrier, as indicative of the ultimate test to determine Carmack’s application. This is improper. *Vice versa*, the proper reasoning is to look at when the Carmack Amendment applies and then require a receiving carrier to issue a receipt or bill of lading. Issuing a receipt or bill of lading is a responsibility of a carrier under Carmack, not the test of when the carrier is under Carmack. From that standpoint, the liabilities of the respective receiving, delivering and/or connecting carriers are next set forth in the rest of the statute.

All this is plain from the statute. The first sentence of §11706(a) indicates Carmack applies when the inland carrier is “providing transportation or service subject to the jurisdiction of the [STB] under this part,” meaning the jurisdiction it has over U.S. inland carriage and carriers. The Court has already acknowledged Carmack’s application is derived from the STB’s jurisdiction.  

The general jurisdictional statute for the STB (49 U.S.C. § 10501), says in relevant part: “(2) Jurisdiction [over a rail carrier] in paragraph (1) applies only to transportation in the United States between a place in – . . . (F) the United States and a place in a foreign country.” The transportation in *K-Line* was clearly between the United States and a foreign country (China), and the STB had jurisdiction over that transportation within the United States. Accordingly UP’s move was subject to the jurisdiction of the STB. Carmack should have applied, and UP should have issued a receipt or bill of lading for the transportation. Its liability and that of any delivering or connecting carrier was then set out in the remainder of the Carmack Amendment. That should have been the end of the story.

What should have been done here is UP should have issued a receipt or bill of lading under *K-Line*’s through bill, for UP’s own inland carriage. In a contest between the practice of the industry (failing to issue those bills of lading) and the statutory requirements, the practice should bend to the dictates of the statute unless Congress changes them. That means if Carmack applies, and inland carriers somehow decide not to issue receipts or proper subcarriage documents (or neglect to do so) for shipments under through bills, it should not really matter. Does this really kill through bills? Hardly. The ocean/through carrier is still liable all the way through to destination under their through bills. The inland carriers are liable on their subcontracted terms to cargo interests entitled to bring a claim. *Kirby* supported all this.

135 130 S.Ct. at 2443, 2010 AMC at 1530.
136 This is for railroads; the same jurisdictional statute for motor carriers is currently 49 U.S.C. § 13501 (2011).
137 130 S.Ct. at 2445, 2010 AMC at 1533-34 (Kennedy’s lament).
138 543 U.S. at 33-34, 125 S.Ct. at 399, 2004 AMC at 2707.
5. Kennedy’s Interpretation Fosters a Schizophrenic Application of Carmack Between Imports and Exports, Suggesting It Took the Wrong Course

Although the Supreme Court (incredibly) decided to leave for another day the issue of Carmack’s application to intermodal exports, plenty of cases already exist in which Carmack is assumed to apply to the inland leg on these exports. See for instance, *Project Hope v. M/V IBN SINA*, \(^{139}\) as a well known example.

A potential conflict in Carmack’s application between imports and exports is irrational. In addition to this potentially irrational rift between imports and exports, the different treatment is without textual support, undercuts uniformity, and is likely just going to confuse the industry. If uniformity was the goal of the decision, any different treatment between intermodal imports and exports fails to achieve that, and strongly suggested the majority just interpreted Carmack incorrectly. I suppose the Court could just overrule some of the prior cases applying Carmack to intermodal, through exports, but toward what practical end? I do not see any. \(^{140}\)

In addition to the above, the statute’s text, in its context, as well as certain historical precedents, would certainly seem to support Carmack’s application to intermodal imports under through bills. The Supreme Court seems to have either ignored or overlooked these. I consider them in the sections below.

### III. TEXTUAL INTERPRETATIONS AND CONTEXTUAL APPLICATIONS OF CARMACK SUPPORT ITS APPLICATION TO INTERMODAL IMPORTS UNDER THROUGH BILLS OF LADING, AS IN *K-LINE*

A straightforward reading of the Carmack Amendment as it appears today supports its application in through bill situations like *K-Line*. It did so in prior versions as well, but with the aid of precedents interpreting it. Since Petitioner (UP) in *K-Line* made much ado about the 1978 and 1995 changes to Carmack being non-substantive, I will attempt to show how the pre-1978 version of Carmack also supported its application under through imports like the one in *K-Line*.

I start first with the current version of Carmack as it appeared in *K-Line*. \(^{141}\)


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\(^{139}\) 250 F.3d 67, 2001 AMC 1910 (2d Cir. 2001).

\(^{140}\) See Part V, para. 2, infra.

\(^{141}\) Although much has already been written on this, I offer what I hope are some separate insights.
The full text of these sections of Carmack is set out in the Statutory Appendix. I will be focusing on the rail version, but the analysis for motor carriers is the same.

The salient text is in § 11706(a). It states:

A rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—
(1) the receiving rail carrier;
(2) the delivering rail carrier; or
(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.
Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

Accordingly, if a carrier’s service is subject to the jurisdiction of the STB, it must issue a receipt or bill of lading for the transportation, and then the liability mechanism for the receiving, delivering and connecting carriers activates under Carmack. Relief is for those having rights under the receipt or bill of lading (including cargo owners). However, a carrier’s failure to issue a receipt or bill of lading will not excuse it from Carmack’s liability.\(^{142}\)

In turn, the STB’s jurisdiction over transportation, which triggers the liability mechanism in Carmack, includes any “transportation in the United States between a place in . . . the United States and a place in a foreign country.”\(^{143}\) (emphasis added). Since Carmack’s application in the U.S. hinges literally and completely on whether the transportation is subject to the jurisdiction of the STB, and that jurisdiction covers the inland segment of transportation between the United States and foreign countries, that should have been the end of the case.

In \textit{K-Line}, since the transportation was between a place in the United States and a place in a foreign country (China), UP should have issued a receipt (or a

\(^{142}\) 49 U.S.C. § 11706 (a).
\(^{143}\) 49 U.S.C. § 10501 (2) (F).
supplemental bill of lading or similar carriage document). Accordingly, Carmack should have applied to its carriage, and the case should have been resolved in favor of the Respondents.

Again, the issue is resolved by the use of the word “between” in 49 U.S.C. § 10501. This is clearly a “bi-directional” term, covering both imports and exports. Although much has been written about this clear bi-directional wording in the current statute, it has never been seriously controverted.\(^{144}\) Section 10501 also has no modifying requirement that the foreign country be an "adjacent" one (i.e., Canada or Mexico). That qualification exists only in Carmack itself (in 49 U.S.C. § 11706(a)(3) for rail) and for an entirely different reason than its general application. Section 11706(a)(3) (including also its earlier versions in Carmack), intends only to indicate a specific situation in which Carmack applies (in a context where it may otherwise appear Carmack does not apply); i.e., where the inland leg of the shipment stretches beyond the U.S. border. However, § 11706(a)(3) was never intended as a defining restriction on the entire scope of Carmack’s application to international shipments.\(^{145}\)

Also, when the word “between” is used in other parts of § 10501, it is clearly bi-directional. This can be seen in its straightforward applications “between . . . State[s]”, and “between . . . a State . . . and a territory . . . of the United States.”\(^{146}\) In those instances, we are not concerned with the direction in which the cargo

\(^{144}\) See history in Sompo, 456 F.3d at 64-67, 2006 AMC at 1829-34; Sturley, supra note 24, at 29-32.

\(^{145}\) Carmack, 49 U.S.C. 11706 (a) (3) only mentions an “adjacent foreign country” in the context of a connecting carrier whose route may go beyond the border to Canada or Mexico, to point out that liability will not be excused merely because a connecting carrier is crossing the border. It’s a Carmack “reach” provision for certain connecting routes, but not an entire “applicability” provision, which is covered instead in the 1st sentence above. Justice Sotomayor reiterated this in her dissent. See 130 S.Ct. at 2455 n.6, 2457, 2010 AMC at 1549 n.6, 1552-53. Further, the language in the first sentence of Carmack since its 1915 version (“ or from any point in the United States to a point in an adjacent foreign country”) has been deleted from Carmack itself since the 1978 revision and codification. See Sompo, 456 F.3d at 68, 2006 AMC at 1834; Sturley, supra note 24, at 34.

\(^{146}\) Several examples exist in 49 U.S.C. § 10501 (2) (A) – (F), for instance:  
Subsection (A), says the STB’s jurisdiction is for transportation “between . . . a State and a place in the same or another State. . . .” (regardless of origin or the direction involved).  
(B) is “between . . . a place in a State and a U.S. territory or possession” (with no distinctions between inbound and outbound shipments).  
(C) is “between . . . a territory or possession of the United States and a place in another such territory or possession” (same), and so on.  
(F) is “between . . . the United States and a place in a foreign country.”  
If “between” is used throughout § 10501 (i.e., in subsections (A) – (E)) without distinguishing inbound and outbound shipments it should apply in either direction in (F) as well.
is moving (East-West, etc.), nor if it is inbound or outbound from an overseas U.S. Territory involved.

In addition, ever since the case of *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury*, 41 S.Ct. 114 (1920) (hereinafter, *Woodbury*) the Interstate Commerce Act’s general jurisdictional statute has been interpreted to apply in either direction. This meaning was most likely also intended to apply to the direction of shipments in Carmack itself.¹⁴⁷ Of course the Supreme Court completely ignored this historical case and the jurisprudential fact of its interpretation in reaching the conclusion Carmack does not apply to intermodal imports.¹⁴⁸


The Supreme Court in *K-Line* seems to have adopted UP’s protestations that the 1978 recodification of Carmack (also the 1995 recodification) was not intended to create any substantive changes to the meaning of Carmack.¹⁴⁹ So be it. This only establishes that whatever Carmack says now is what it also meant before. UP’s self-serving interpretation of the pre-1978 version seems to have had some impact on the Court’s view.¹⁵⁰ I address my issues with that in the next section (Part II, C). But first, I have a couple of points to make on the 1978 Amendments: (1) The first concerns some very interesting word changes in their own right seen in the 1978 versions of Carmack and the ICC’s jurisdictional statute. (2) The

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¹⁴⁷ See Sompo, 456 F.3d at 65-66, 2006 AMC at 1831-32 (noting the ICC’s jurisdiction and the Carmack Amendment first became coextensive with the passage of the First Cummins Amendment in 1915 (38 Stat. 1196, 1197)). At that time, Carmack and the ICC’s jurisdiction both covered shipments “from any point in the U.S. to an adjacent foreign country.” The opinion further explains how the Woodbury case interpreted the “from . . . to” language in the ICC’s jurisdictional statute at that time to apply to imports as well as exports, and how this logically gave the new “from . . . to” language in Carmack the same meaning (i.e., applying to imports as well as exports). Sompo’s detailed analysis further explained how Congress, shortly after the Woodbury decision, codified Woodbury’s holding in the Act of February 28, 1920, c. 91, 41 Stat. 456, 474. As a result, in 1920 the ICC’s jurisdiction covered transportation “from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.” Id. The ICC’s general jurisdiction statute maintained this formulation until 1978, when it was simplified by substituting the word “between.” Id. at 65-66, 2006 AMC at 1831-32.

¹⁴⁸ It had to ignore this precedent to reach the result it did. In fact, the Court’s majority nowhere mentions Woodbury, either critically or favorably. In addition, the detailed historical analysis in Sompo, supra note 144, appears never to have been questioned by the Supreme Court in *K-Line*. Instead the Court rested its analysis on the supposed lack of a viable supplemental bill of lading under a single through bill. See 130 S.Ct. at 2443-45, 2010 AMC at 1530-34.

¹⁴⁹ 130 S.Ct. at 2446-47, 2010 AMC at 1535-37; Petition for Writ of Cetiorari, Union Pacific, 2009 WL 1759040, at *26-27 (No. 08-1554) (June 18, 2009).

¹⁵⁰ 130 S.Ct. at 2446-47, 2010 AMC at 1535-37. It still seems the Court’s opinion primarily hinges on its view that through bills of lading don’t (can’t) validly have subsequent bills of lading attached to them (see supra, Part I).
second concerns the growing case law post 1978 applying Carmack to exports and imports involving overseas countries.

1. Interesting Wording Changes In Carmack’s 1978 Version And The ICC’s Jurisdictional Statute

The salient part of the 1978 version of Carmack is:

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

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

The relevant part of the ICC’s general jurisdictional statute, 49 U.S.C. § 10501 is addressed below.

“General jurisdiction
(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation . . .
(2) to the extent the transportation is in the United States and is between a place in . . .
(G) the United States and a place in a foreign country. (italics added to show relevant changes)

Based on these excerpts above, two relevant and unique changes immediately come to mind, in 1978, in regard to the ICC’s jurisdictional statute and the Carmack Amendment. First, in the ICC’s jurisdictional statute, the cumbersome
“from . . . to” and “to . . . from” language for carriage between U.S. and foreign countries had been replaced with the simpler word “between.” Imports and exports alike are covered by the word “between” as indicated above. Second, in Carmack itself, the language existing since 1915, indicating that it also applied “from any point in the United States to a point in an adjacent foreign country,” has been entirely deleted. Instead, Carmack stated its application was directly and clearly tied to the jurisdiction of the ICC, and that jurisdiction had to be consulted to see if Carmack applied.

In summary, the 1978 language changed prior wordings by scrapping all “from . . . to” language in the ICC jurisdictional statute, and by dropping any supposedly limiting references to “adjacent” foreign countries in Carmack itself. A singular exception to what I have just said is in Carmack § 11706 (a)(3), which in fact uses both the “from . . . to,” and the “adjacent foreign country” language. But in its context, this language only deals with a particular instance of Carmack’s application, not the totality of its application, and it involves a situation which is irrelevant to the one involved in K-Line (as I’ve already mentioned above in section A). Accordingly, since 1978, Carmack has simply said it applies if the carriage was subject to the ICC’s jurisdiction. So, it applies inland within the U.S., as long as the shipment was between the U.S. and any foreign country, without regard to whether that country is adjacent. Since it is clearly worded this way, Carmack should have applied in K-Line.

2. Case Law In The Post-1978 Era, And To Some Extent Earlier, Supported Carmack’s Application To Exports (Initially) And Eventually Also To Imports, Involving Non-Adjacent Foreign Countries

It seems some courts naturally started to develop this broader interpretation of Carmack in the 1978 era, if not sooner. Initially, a line of cases starting before 1978 strongly influenced this expanding interpretation of Carmack. Although these cases concerned the ICC’s jurisdiction on various trade issues, they employed certain standard meanings of “interstate or foreign commerce” which are pertinent and applicable to an understanding of the same terms used in Carmack. Evidently this line of cases influenced an interpretation of Carmack to include inland carriage associated with imports and exports. I believe this influence was entirely appropriate. Swift Textiles, for instance, relied on several of these ICC cases in applying its “intent test” to Carmack, since it held Carmack applies to inland transit if the inland transportation was originally intended as a “continuation of

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152 I actually do not believe the language altered from 49 U.S.C. § 20(11), “from any point in the United States to a point in adjacent foreign country,” ever constituted a limiting restriction on Carmack’s application in the sphere of international shipments. Instead, it has always served as one specific enumeration of Carmack’s application, which was preserved in the 1978 amendment and simply recast as § 11706(a)(3) (in which it is even more clearly just a specific enumerated situation). I have addressed this in the text above (including Section II., A, and in note 145 supra). In regard to Carmack’s dependence on ICC jurisdiction, see specifically Sompo, 456 F.3d at 68; Sturley, supra note 24, at 28, 34.
foreign commerce” (according to the meaning of “continuation of foreign commerce” as initially developed in this ICC line of cases). I suggest the influence of these ICC cases should not be understated in the interpretation of Carmack, so I note some of the important ones here, in summary.\(^{153}\)

Generally speaking in these cases, a dispute often arose as to whether a shipment should be governed by ICC scheduled \textit{interstate} rates, versus local \textit{intrastate} rates. This dilemma emerged especially when the land segment was purely intrastate, but had been part of an import or export shipment.\(^{154}\) In several of these cases, a shipment was determined to be interstate (and interstate rates applied), since it was a “continuation of foreign commerce,” even though it only moved intrastate.\(^{155}\) In my view, these cases were instrumental in giving meaning to

\(^{153}\) See such cases as:
1) Texas & N.O.R.R. Co. v. Sabine Tram Co., 227 U.S. 111, 33 S.Ct. 229 (1913) (lumber shipments on local bills of lading within Texas but destined for various ports in Europe were held to be “interstate” and subject to ICC-filed rates for interstate commerce);
2) US v. Erie R. Co., 280 U.S. 111, 50 S.Ct. 51 (1929) (foreign shipments of wood pulp arriving by steamship and traveling within New Jersey are under the ICC’s jurisdiction as interstate commerce, even though separate local bills of lading were issued for the in-State moves.)
3) State of Texas v. Anderson, Clayton & Co., 92 F.2d 104 (5th Cir. 1937) (movement of cotton wholly within Texas but for through carriage to other states and foreign destinations (Japan and England) is “interstate” or “foreign commerce” and subject to ICC interstate carriage rates on file.) This case specifically states the character of a shipment, as “interstate/foreign commerce” is determined by the initial intent for the carriage; also, “the form of the bill of lading” used is immaterial. (emphasis added) Id. at 106-107;
4) Long Beach Banana Dist., Inc. v. Atschison, Topeka & Santa Fe R. Co., 407 F.2d 1173, 1176-77 (9th Cir. 1969) (the ICA applied to imports of bananas from Costa Rica, Equador, and Panama as “interstate commerce” even though carriage in the U.S. was only in California). The court referred to the carriage as involving “through movements” reflecting interstate commerce, even though separate carriers and their rates applied to the land and water carriage. Id. (applying ICA, 24 Stat. 379 (1887), as amended, 49 U.S.C. sec. 1(2)(a) (1964));
5) N.C.U.C v. United States, & ICC, 253 F.Supp. 930 (E.D.N.C. 1966) (importing steel products (nail, etc.) from Belgium is interstate commerce via an intentional “continuation of foreign commerce,” although distribution was only within North Carolina under local truck bills of lading. This case indicates through bills of lading would only strengthen a position the truck carriage was “interstate” in its essential character. Id. at 936 (citing Manlowe T. & D. Co. v. Dept. of Pub. Serv., 18 Wash.2d 754, 155 A.L.R. 928 (Wa. 1943) (import of Philippine sugar to Seattle and distribution on to other cities in Washington State is interstate commerce));
6) See also Atlantic Coast Line R. Co. v. Standard Oil of Ky., 275 U.S. 257, 48 S.Ct. 107 (1927) (noting the mere form of billing or of contracts is insufficient in establishing the essential character of commerce as interstate or foreign commerce (not finding it in this case), and stating: “[t]he change from rail to ship has often been held consistent with a continuity of interstate or foreign commerce, even though there may be only local billing.” Id. at 268 (citations omitted)).
\(^{154}\) See cases supra note 153.
\(^{155}\) See cases supra note 153.
“interstate or foreign commerce” (as distinguished from “intrastate commerce”) and heavily shaped the meaning of that for Carmack, since Carmack only applies to “interstate commerce,” including any “continuation of foreign commerce.” These cases show that interstate commerce includes shipments imported from or exported to foreign countries—even non-adjacent ones. The meanings of these terms in either the ICC jurisdictional cases or Carmack cases is the same, and these cases appropriately set the stage for the meaning of “interstate commerce” in Carmack, to include the inland leg of imports or exports with non-adjacent foreign countries. *Swift* understood this “intent” connection in the ICC statutory system; the Supreme Court has not.\(^{156}\)

In time, then, a few courts began adopting this understanding of “interstate” commerce in Carmack cases involving either imports or exports. The most well-known of these on the export side is probably *Project Hope v. M/V IBN SINA* in the Second Circuit\(^ {157}\); another is *Fine Foliage of FL, Inc. v. Bowman Transportation, Inc.*\(^ {158}\)

To the chagrin of the Supreme Court, several courts began applying Carmack inland even on imports from non-adjacent foreign countries. Some involved through bills, some did not.\(^ {159}\) Some said Carmack could apply even under a

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\(^{156}\) *Swift Textiles*, 799 F.2d 697, 699-700 (citing noted cases above); see generally K-Line, 130 S.Ct. at 2446, 2010 AMC at 1535 (ignoring any discussion of “interstate commerce” including a “continuation of foreign commerce”).

\(^{157}\) 250 F.3d 67, 2001 AMC 1910 (2d Cir. 2001) (employing the *Swift* “intent test” to determine a shipment of insulin, intended as an export, was interstate, and applying Carmack; also citing several ICC cases, supra note 153; see id. at 74-75, 2010 AMC at 1917-18).

\(^{158}\) 698 F.Supp. 1566 (M.D.Fla. 1988). In *Fine Foliage*, at least two bills of lading were issued inland for a shipment of ferns traveling from DeLeon Springs to Jacksonville, FL and thence to Savannah, GA and intended for export to Japan. Id. at 1568. In this case, the ocean carrier (Mitsui), essentially hired the Defendant trucker (Bowman), for the Jacksonville to Savannah leg, and the trucker then issued its own bill of lading. Id. The court held the inland shipment was interstate commerce under the intent test of *Swift*, as a clear “continuation of foreign commerce” pursuant to Carmack and 49 U.S.C. § 10521; in addition the court noted the issuance of a separate inland bill of lading. Id. at 1571. It is surprising there are not more cases applying Carmack for exports to non-adjacent countries, given the clear indication of its suitability via cases like State of Tex. v. Anderson, Clayton & Co., and Texas & N.O.R.R. v. Sabine Tram that such shipments are “interstate commerce” within the Interstate Commerce Act. See supra note 153, and compare F.J. McCarty Co. v. Southern Pacific Co., 428 F.2d 690, 9 A.L.R. Fed. 953 (9th Cir. 1970) (export of grapes from N.Y. to Venezuela via California, but shipped under separate bills of lading)).

\(^{159}\) I’ll try to examine this litany in categories:

1) Some of the known cases allowing Carmack to apply to imports generally include:

a) *Reider v. Thompson*, 339 U.S. 113, 70 S.Ct. 499, 1951 AMC 38 (1950) (separate bill of lading, but explicitly not ruling out Carmack’s application inland under an ocean through bill of lading);

b) *Swift Textiles, Inc.*, supra note 1;
through bill, so long as a supplemental bill of lading (receipt) was also issued inland. Some (very few) said that can’t happen.\textsuperscript{160}

One of the more thoughtful opinions supporting Carmack’s application to an inland carrier, even on an imported through shipment, is \textit{King Ocean Central America, S.A. v. Precision Cutting Services., Inc.}\textsuperscript{161} The shipment originated in Costa Rica for import into Miami and then moved via truck to Little Rock, Arkansas. In addition to the ocean carrier’s (King Ocean’s) through bill of lading, the inland

c) PT Indonesia Epson Indus., v Orient Overseas Container Line, Inc., 219 F.Supp.2d 1265, 2002 AMC 2769 (S.D.Fla. 2002) (allowing Carmack’s possible application to an inland truck carrier, but not the ocean carrier for the inland carriage under its through bill, according to the seminal case in Florida in the matter, King Ocean Central America, S.A. v. Precision Cutting Svcs., Inc., 717 So.2d 507,512, 1998 AMC 2372, 2378 (Fla. 1998)).

2) Some of the known cases, in the past, allowing Carmack to apply to imports even under a through bill of lading (or stating the rule in favor of it doing so), included: Sompo, 456 F.3d 54, 2006 AMC 1817 (2d Cir. 2006) (abrogated by \textit{K-Line}); Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., 557 F.2d 985, 2009 AMC 305 (9th Cir. 2009) (reversed in \textit{K-Line}); Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co., 213 F.3d 1118, 1119, 2000 AMC 1785 (9th Cir. 2000); Berlanga v. Terrier Transp., Inc., 269 F.Supp.2d 821, 829-30 (N.D.Tex.2003); Canon USA, Inc. v. Nippon Liner Sys., Ltd., 1994 AMC 348, 1992 WL 82509, at *6-8 (N.D.Ill.1992); Gordon H. Mooney, Ltd. v. Farrell Lines, Inc., 616 F.2d 619, 1980 AMC 505 (2d Cir. 1980) (it’s hard to tell from the facts of the case precisely if a through bill of lading was involved, although that appears to be the case.); Russell Stover Candies, Inc., v. Double VV, Inc., 983 F.Supp. 1359, 1361 (D. Kansas 1997) (saying it is inclined to agree that under a continuation of foreign commerce, a separate inland bill under a through bill is not necessary for Carmack’s application, citing cases); Chubb Group of Ins. Co.’s v. H.A. Transp. Systems, Inc., 243 F.Supp.2d 1064, 1068 n.3 (C.D.Cal. 2002) (stating Carmack applies to the inland leg of an overseas shipment (imported cigarettes) regardless of whether carriage is under a through bill or separate bills of lading); Vesta Forsikring AS v. Mediterranean Shipping Co., S.A., 2001 WL 1660255, at *2, *3, 2001 AMC 2594, 2596-97 (S.D. Tex. 2001) (applying Carmack to the inland leg on a single through bill of lading of a machine shipment from England to Louisiana, and indicating a supplemental bill of lading that was also issued for the inland carriage was immaterial); King Ocean Central America, S.A., 717 So.2d at 512, 1998 AMC at 2378 (citing Swift Textiles, and relying on J. Cope’s special concurrence in the case below, in 699 So.2d 824, 828-29); see also Am. Trucking Assn’s v. I.C.C., 656 F.2d 1115, 1118, 1122 (5th Cir. 1981) (strongly inferring Carmack’s application to imports via ocean carriage, in connection with the ICA’s exemption provisions for COFC shipments, which exemptions specifically retain Carmack’s application to those import shipments; see infra notes 186, 188 and accompanying text for more information, in Part II, D).

3) Some pre-1978 examples applying Carmack to imports include: Goldberg, 180 Misc. 176 (holding in a through rail carriage from Canada to the U.S., the inland carrier is subject to Carmack liability whether or not it issues a second U.S. bill of lading, and extending Woodbury’s bi-directional understanding of the ICA, § 1 into Carmack as well); Watson v Canadian Pac. Ry. Co., 237 Ill. App. 478, (Ill. App. 1 Dist. 1925) (same).

\textsuperscript{160} See infra notes 164, 165.

\textsuperscript{161} 717 So.2d 507, 512, 1998 AMC 2372, 2378 (Fla. 1998).
trucker, “Paradise Freightway” issued its own inland bill of lading. In relying on Judge Cope’s special concurrence in the case below, the Florida Supreme Court affirmed Judge Cope’s view that Carmack should apply to the inland carrier (not to the ocean carrier—at least not statutorily).

In addition, even several of the cases fomenting the Circuit split and used in support of the recent K-Line decision actually held that Carmack could apply inland on an import shipment from a country overseas, under a through bill, just so long as a separate inland bill was issued. I note some of these as well. The cases claiming that it would be impossible for Carmack to apply under a through bill at all, are actually rather sparse.

3. In Summary After 1978

The 1978 Amendment and cases interpreting it (some earlier cases as well) show a natural interpretation of Carmack calling for its application to either imports or exports, even with non-adjacent foreign countries. Certainly not all courts interpreted things this way, but application of Carmack in these situations was growing, and legally sound.

If the 1978 amendments in Carmack’s recodification worked no substantive changes, then its valid application to imports and exports simply reflected its

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162 Id. at 509, 2998 AMC at 2373.
163 Precision Cutting Svcs, Inc. v. King Ocean Central America, S.A., 696 So.2d 824, 829 n.5 (Cope, J. specially concurring; however the ocean carrier agreed in its through bill of lading to be vicariously liable, including under Carmack, for the conduct of its inland carrier in any event).
164 See Altadis USA, Inc., 458 F.3d 1288; Swift Textiles, 797 F.2d at 701 (although it’s not clear Swift fits here, since its holding is unclear, and Swift actually may not require a separate inland bill of lading under its “intent test” and the “continuation of foreign commerce” rationale it actually adopted); Shao, 986 F.2d at 701-704, 1993 AMC at 1862-66; Am. Road Serv. Co., 348 F.3d at 569; Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391, 394, 1993 AMC 1609, 1611-13 (7th Cir. 1992) (Carmack would not apply (normally) under a through bill import, “unless” the domestic leg is covered by a separate bill of lading also); Condakes v. Smith, 281 F.Supp. 1014 (D. Mass 1968) (I put this one in this category, rather than in the category of “impossibility” for Carmack to apply in a through bill situation (see infra note 165), because I believe the case simply found there was no evidence of a second bill of lading which could invoke Carmack).
165 I could call these “pure rejection” of Carmack cases. Apart from the Supreme Court’s recent decision in K-Line, these may include: Toshiba Int’l Corp. v. M/V Sea-Land Express, 841 F.Supp. 123, 128, 1994 AMC 995, 1001 (S.D.N.Y. 1994) (court would probably not apply Carmack if a single through bill issued); Marine Office of Am. Corp., 638 F.Supp.at 398, 1987 AMC at 658 (likely would not apply Carmack in a through bill situation, but issue was not decided); Nebraska Wine & Spirits, Inc. v. Burlington Northern R. Co., 1992 WL 328938, at *6 (W.D.Mo.,1992) (Carmack would not apply); Alwine v. Penn. R. Co., 141 Pa. Super. 558, 15 A.2d 507 (1940) (same). In actuality, authority either way on the entire issue is sparse, as only a handful of cases even address the issue.
This interpretation comports perfectly with Sompo’s explanation of what happened in 1920, when the ICC’s jurisdiction and Carmack itself (via interpretation of the same wording) were each held applicable to imports. Accordingly, since Woodbury and the Act in 1920, Carmack should have applied to imports from non-adjacent foreign countries, just as it did on some imports from Canada and Mexico, and just as the ICC’s jurisdiction extended similarly to imports from non-adjacent foreign countries.

In any case, the plain wording in Carmack and the ICC’s general jurisdictional statute since 1978 shows that Carmack should apply to the inland leg of intermodal imports into the U.S., such as in K-Line. Either that is what Carmack has always meant since early 1920, or the 1978 version worked a substantive change. In either case, several courts in this era showed a clear understanding Carmack was intended to apply to inland carriage involving inbound and outbound shipments with overseas countries. Carmack has simply said so since 1978.


The assumption of the Supreme Court in K-Line, and UP’s argument, was that the pre-1978 Carmack Amendment would not allow Carmack’s coverage on intermodal through shipments in situations like K-Line. I disagree with that.

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166 See cases, supra note 159, para. 3 (specifically Goldberg, 180 Misc. 176 and Watson, 237 Ill. App. 478).
167 Goldberg and Watson cases, supra note 159; Sompo, 456 F.3d at 66, 68, 2006 AMC at 1832, 1834-35 (citing Smith v. City of Jackson, 544 U.S. 228, 125 S.Ct. 1536 (2005)); see also Northcross v. Bd. of Ed. of Memphis City Sch., 412 U.S. 427, 428, 93 S.Ct. 2301 (1973) (interpreting language in one area of a statute the same as in another area of that statute); and see Sturley, supra note 24, at 31.
168 Supra note 153 (ICC’s jurisdictional cases), and note 159, para. 3 (imports from adjacent countries).
169 See Sturley, supra note 24, at 29, 32 in which he discusses either possibility, including an analysis of when historically, a codification statute actually intends to change substance and when it does not (citing Fourco Glass Co. v Transmirra Prods. Corp., 353 U.S. 222, 77 S.Ct. 787 (1957)). Sturley also explains the impact of the Woodbury case on Carmack (that it applies bi-directionally) and has since 1920. Id.
170 The language in early Carmack, "from any point in the United States to a point in an adjacent foreign country" (49 U.S.C. § 20 (11)), even though applicable also to imports via case law, has been absent for over 30 years, since 1978. Since 1978, Carmack simply says its application completely depends on whether the transportation is subject to the jurisdiction of the ICC (now STB), and sets forth no other criteria. Since 1995, like the ICC, the STB’s jurisdiction covers any transportation (in the U.S.) between the U.S. and any foreign country.
171 This codification version came in 1926. At that time, the general jurisdiction statute for the ICC was codified at 49 U.S.C § 1. The pre-1978 codification version of Carmack remained virtually the same from about 1915 to 1978, with some key changes in 1920 as indicated from case law, including Woodbury. Carmack had earlier versions but the codified ones and cases interpreting these are sufficient for this analysis.
I have two chief arguments in this regard: (1) A straightforward reading of the Carmack Amendment prior to 1978 calls for its application on any interstate commerce regardless of where it came from before it traveled within the U.S. (2) Carmack has always applied to intermodal shipments coming overseas from U.S. States and Territories, and this is the important, analogous scenario for its application to intermodal imports coming from other countries.

1. This Early Version Of Carmack Has Always Covered Any State To State Transportation Within The U.S., And The Indication Of Carmack’s Application For Exports To “Adjacent Foreign Countries” Is Only One Specific Instance Of Carmack’s Application, Not The Only One.173

In essence, I am arguing here that a straightforward reading of the pre-1978 Carmack would allow it to be applied in a case like K-Line because the shipment there traveled between States. In that instance it should apply.174

Again, this earlier version of Carmack (49 U.S.C. § 20(11)), states in relevant part:

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

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172 I attribute the almost complete scarcity of cases before 1978 as due in some good measure to a lack of information by attorneys about Carmack in an expanding sea of commercial globalization. See for instance, Project Hope v. M/V IBN Sina, 250 F.3d 67, 73, 2001 AMC 1910, 1915 (2d Cir. 2001) where the court surprisingly noted that none of the attorneys initially considered Carmack’s application in their briefs, in what might have been considered an average maritime case. In short, admiralty lawyers might not have been thinking intermodally and considering the implications of “modern” carriage, as the case law was evolving to deal with new situations under current statutes. In effect, nobody really had all the answers or even saw the issues since the beginning.

173 The State to State application of Carmack is unconcerned with whether the shipment was initially imported or ultimately exported.

174 See 130 S.Ct. at 2457, 2010 AMC at 1552 (Sotomayor, J. dissenting, also expressed this view.)
transportation company from the liability hereby imposed . . . .” (1976) (emphasis added to show applicable language)

As indicated above, Carmack’s application trigger in the pre-1978 version is when a carrier is “subject to the provisions of this chapter.” (emphasis added) Following the Act of 1920, 49 U.S.C. § 1 explains when a carrier is subject to the provisions of this chapter. It says in material part: “The provisions of this chapter shall apply to common carriers engaged in . . . transportation . . . from or to any place in the United States to or from, a foreign country. . . .” The K-Line case transportation fits that description. Then we go back to Carmack (49 U.S.C. § 20(11)) in the first sentence, and read: “[said carrier] receiving property for transportation form a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor. . . .” UP certainly would have received property for transportation in the U.S. from “one State to another State” and Carmack would have applied to it in this version. This is according to the better definition of “received” I have offered than Kennedy’s. This should even work if the shipment were moving from China, through the continental United States, and all the way into Canada. UP in that case would simply be receiving the property for transportation from a point in the United States (Long Beach California) for transit to an adjacent foreign country—a situation already contemplated in the statute, as I have just shown. So the pre-1978 version of Carmack should have easily applied to UP in a situation like K-Line. Again, the same would hold true in the current version at issue in that case. As a result, Petitioners’ arguments based on historical issues in the statute should not have availed much and should not have led to the result it did.

Some (the railroads, specifically) would protest that the first sentence of this version, 49 U.S.C. § 20(11), contains the restriction that Carmack applies in international shipments only to transportation “from any point in the United States to a point in an adjacent foreign country.” The statute does not say that, and several other reasons exist, showing the incorrectness of this view:

   a) The clause “from any point in the United States to a point in an adjacent foreign country,” is only a modifier on a particular type of through carriage by rail; it is not intended as a comprehensive restriction on the instances of Carmack’s application to shipments involving international commerce. The wording indicates a description of one particular instance, in its attempt to keep Carmack applicable to U.S. rail carriage where the rail carriage will go beyond the U.S. border. The idea is this is something that North American geography makes

175 The second reference to “adjacent foreign country” in 49 U.S.C. § 20 (11), and in every version of Carmack since 1978 (see 49 U.S.C. § 11706 (a) (3)) is not indicative of its application, but simply describes the routes of some connecting rail carriers who may be liable for losses on that route. See 130 S.Ct. at 2455 n.6 2010 AMC at 1550, n.6.

176 130 S.Ct. at 2455 n.6, 2458 n.11, 2010 AMC at 1550 n.6, 1554 n.11 (discussing the same language in the current statute). For further discussion, see the main text in Part II, A, and B, 1, and note 145 supra.
possible, and this geographical feature should not inhibit Carmack’s application within the U.S. while the cargo ends up somewhere across the border in either Canada or Mexico. Describing that specific instance was the purpose of this wording, and that alone.\textsuperscript{177}

b) Also, the noted language is actually and clearly in the disjunctive, in a list of other situations: “[Carmack applies from State to State, etc.]. . . , or from any point in the United States to any point in an adjacent foreign country.” (emphasis added) The “adjacent foreign country” language is listed in a series of other applications of Carmack which precede it (State to State, or Territory to State, etc.). Each indicates a separate instance when Carmack should apply, and the one we are concerned with in international shipments is “State to State.” The “adjacent foreign country” setting is not indicative of the only time Carmack applies, and should not disqualify the other applications listed above it.\textsuperscript{178} Since the cargo in \textit{K-Line} traveled from one State to another State (or was at least a “continuation of foreign commerce”) Carmack should have applied within the United States. If the cargo was going to move through the U.S. to Vancouver, Carmack still would have applied within the United States. This is how this version of the statute should be read.

c) The “adjacent foreign country” language, as of the Supreme Court’s holding in \textit{Woodbury} and the 1920 Act had already been interpreted to include imports from those countries as well, as I have indicated already in sections II, A, and B, 3 above. So it could not have had the restrictive interpretation Petitioners in \textit{K-Line} ascribed to it.

d) As indicated above, even in the pre-1978 version of Carmack, courts began applying it to imports as well as exports.\textsuperscript{179} Eventually Carmack was applied to inland U.S. carriage on shipments involving non-adjacent countries.

e) The strongest evidence this wording above would not preclude application of Carmack to inbound shipments from non-adjacent foreign countries may just be the 1978 Amendment itself.\textsuperscript{180} This Amendment says it has not substantively changed the existing law, and yet clearly speaks of coverage for U.S. land transportation in connection with either imports or exports involving non-adjacent foreign countries.\textsuperscript{181} The 1978 amendment, in all likelihood, simply recognized

\textsuperscript{177} Id.; see also supra nn. 145, 152 and accompanying text; see also especially the summary in the text in section B.1, supra.
\textsuperscript{178} Id.
\textsuperscript{179} Supra note 159.
\textsuperscript{180} See 130 S.Ct. at 2456, 2010 AMC at 1551 (Sotomayor, J. dissenting), where she captions this as the “best evidence” of what Carmack has always meant. Based on the Congressional position of “no substantive change” intended by the 1978 amendment, she would be correct. See id. See also the historical explanation in Sturley, supra note 24, at 30.
\textsuperscript{181} Supra note 180.
Carmack should be construed to cover shipments to or from any foreign country, and simply codified that understanding already developing in case law.182

2. Since Carmack Applies To An Intermodal Import From A U.S. State (Non-Adjacent) Or Territory (It Always Has), It Should Apply Equally To An Import From A Non-Adjacent Foreign Country

Another thing is clear about the pre-1978 version of Carmack: it would have covered inland transportation in the U.S. of intermodal shipments coming from U.S. territories and non-contiguous States, and this is the important analogy for cases like K-Line.

The relevant wording in 49 U.S.C. § 20(11) provides in part: “Any common carrier, railroad, or transportation service company subject to the provisions of this chapter [see 49 U.S.C. § 1] receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State [or] Territory [or] District of Columbia . . . shall issue a receipt or bill of lading therefor . . . .” (emphasis added). The bi-directional wording in the Territory to/from State clauses is clear. Some of these inbound shipments from a U.S. Territory (such as Guam or Puerto Rico) invariably must have been under through bills of lading, were via ocean, and according to this wording, Carmack would definitely apply to the land leg.183

This scenario is precisely what happened in the Altadis case from the Eleventh Circuit. In that case, a shipment of cigars came from Puerto Rico to Jacksonville, Florida, and then were to be trucked inland to Tampa, under a single through bill of lading. The cargo was lost by the driver of trucker ATF en route to Tampa. If that shipment had occurred under the pre-1978 statute, as a shipment from a U.S. Territory to a State, the inland carrier would have been required to issue a bill of lading or receipt, and its liability would have been determined under Carmack.184

If the Altadis court had not been so fixated on following the Swift dicta in its decision, it should have come to this result. This application of Carmack between a U.S. Territory and a State, also completely eviscerates Kennedy’s understanding of a receiving carrier. If the receiving carrier was only the ocean carrier in Guam, and could not be a U.S. mainland trucker or railroad (says Kennedy), then Carmack could not have applied to that inland carriage (Kennedy would say) which renders the wording in the statute that it does apply completely meaningless. His interpretation of a “receiving carrier” in the territorial context (or between States like Hawaii and California) squarely contradicts the statute’s intentions. The issue

182 Id.; see also cases supra note 159; and see K-Line, 130 S.Ct at 2457, 2010 AMC at 1552 (Sotomayor, J. dissenting) (in the end, “it is the current” version of the statute that should govern); Sturley, supra note 24, at 31 (same).

183 Similar Territory-State clauses also exist in the general jurisdiction provisions, 49 U.S.C. § 1. The same analysis would hold true for ocean inbound shipments from Hawaii and Alaska to the mainland. Carmack would have to apply to the U.S. inland carriage, and the method of ocean shipping by which the cargo gets here is immaterial.

in Carmack’s application is not the political status of the original shipping point but the same intermodal (ocean to land) nature of the shipment that is important. Thus on an intermodal shipment into the U.S. via ocean carrier, Carmack should have covered the inland leg.

In terms of textual/contextual arguments against the majority’s holding in K-Line, at least one other aspect is worth noting. This involves the “opt out” issue never reached by the majority in K-Line, but indicative all the same.

D. THE CARMACK “OPT OUT” ARGUMENTS OF THE PARTIES MAKE NO SENSE UNLESS CARMACK APPLIES TO THIS KIND OF INTERMODAL SHIPMENT IN THE FIRST PLACE

This additional argument supporting Carmack’s application to import intermodal shipments such as that in K-Line comes straight from Carmack’s “opt out” provisions. Although the parties briefed this issue in K-Line, and the majority alluded to it, the Court did not reach the issue because of its decision on Carmack’s inapplicability. However, the arguments raised by both parties on Carmack’s opt out provisions (the two of these being 49 U.S.C. §§ 10502 and 10709) presuppose Carmack’s application. UP contemplated this as a legal reality—the only issue being whether it complied with the law and properly opted out of Carmack liability in this case. In honest thinking, it simply isn’t possible for a carrier to opt out of the STB’s regulatory jurisdiction, including supposedly Carmack liability, via an exempt intermodal shipment, unless Carmack applied to the intermodal transportation in the first place.

UP first argued § 10709 allows it to offer specific rate contracts of carriage free from Carmack liability; it claimed this as an independent statutory right, exerciseable at its choice. Its § 10709 argument is weak, given the general consensus in the cases that § 10709 should only apply to carriage still subject to

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185 COGSA likely applies to the ocean segment in either a shipment from another country or from a U.S. territory, such as Puerto Rico, due to the “coastwise exception” of COGSA (see COGSA § 13). In this situation, where COGSA is contractually extended to coastwise trade, it will apply with the force of a statute. Id. Carmack should similarly apply to the inland rail or vehicle carrier regardless of the shipment’s “origin” in a U.S. territory, a non-contiguous U.S. State (HI., AK.), or in another country. See Altadis, 458 F.3d at 1293 n.12, 2006 AMC at 1853 n.12 (stating the sameness of these situations in the current statute).

186 All the more reason to consider the Supreme Court’s result so surprising, given the parties’ serious entertainment, including UP’s, of the idea Carmack applied to its inland transit (hence UP’s vigorous arguments suggesting it properly contracted out of Carmack).

187 See Am. Trucking Assn’s, 656 F.2d at 1118-20, 1122 (strongly implying Carmack applies on the inland legs of overseas shipments as “continuous intermodal movements” from water (called “ex water”), by construing § 10505 (earlier version of the opt-out provision, now § 10502), which clearly applied to such moves, and also retained Carmack’s protection to these moves (if desired) under § 10505(e)); see supra note 159.

188 See generally 130 S.Ct. at 2463, 2010 AMC at 1561-62 (Sotomayor, J. dissenting, summarizing UP’s arguments).
STB regulatory control (i.e., it only applies to carriage not exempt from STB regulations).\(^{189}\)

UP also argued under § 10502(a) it had properly contracted out of Carmack’s liability in this case.\(^{190}\) That section and § 10502(f) specifically, give the STB authority to exempt from regulation, if it wishes, certain “transportation that is provided by a rail carrier as part of a continuous intermodal movement.”\(^{191}\) Such is precisely the sort of transportation that was involved in \textit{K-Line}.\(^{192}\) The STB exercised its option to deregulate such continuous intermodal movements in issuing its regulations in 49 CFR §§ 1090.1\(^{193}\) (important definitions, such as


\(^{190}\) See 130 S.Ct. at 2463, 2010 AMC at 1561-62.

\(^{191}\) See cases, supra note 189.

\(^{192}\) See Am. Trucking Ass’ns, Inc., 656 at 1118-1122 (explaining a “continuous intermodal movement” includes TOFC/COFC intermodal service from ocean carriers, and clearly contemplating this service is ordinarily covered by Carmack absent contracting out); Sompo Japan Ins. Co. v. Norfolk So. Ry. Co., 540 F.Supp.2d at 486, 2009 AMC at 1217, supra note 189 (Asia to California via ocean carriage and then rail inland is a “continuous intermodal movement” subject to opting out of Carmack (implying it applies) under § 10502).

\(^{193}\) The regulation provides in pertinent part: § 1090.1 Definition of TOFC/COFC service.

(a) Rail trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service means the transportation by rail, in interstate or foreign commerce, of--

(1) Any freight-laden highway truck, trailer, or semitrailer . . .

(4) Any freight-laden intermodal container comparable in dimensions to a highway truck, trailer, or semitrailer and designed to be transported by more than one mode of transportation, or

(5) Any of the foregoing types of equipment when empty and being transported incidental to its previous or subsequent use in TOFC/COFC service.

(b) Highway TOFC/COFC service means the highway transportation, in interstate or foreign commerce, of any of the types of equipment listed in paragraph (a) of this section as part of a continuous intermodal movement that includes rail TOFC/COFC service, and during which the trailer or container is not unloaded. (emphasis added)
“TOFC,” “COFC,” etc.) and 1090.2\(^{194}\) (specifically containing this exemption), et. seq. Such deregulation could excuse carriers from Carmack liability, if certain conditions are met, for instance by first offering shippers full Carmack liability, at likely higher carriage rates. Section 10502(e) first provides that “[n]o exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title,” indicating clearly that Carmack liability continues. However, the statute also states, “[n]othing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms,” indicating Carmack liability can also be varied.\(^{195}\)

Looking at these statutory provisions and regulations together, carriers like UP providing rail TOFC/COFC carriage services as “continuous intermodal movements,” including from ocean carriage, are exempt from the requirements of subtitle IV (“Interstate Transportation,” in which Carmack is included); however, they are not automatically excused from Carmack’s liability provisions as § 10502(e) clearly states.\(^{196}\) Instead, if a carrier wishes to perform carriage outside of Carmack’s liability scheme, § 10502(e) dictates that it must first offer the shipper full Carmack liability. If this offer is made, but rejected (likely because of the higher freight rate), the carrier is released from full Carmack liability; however, if the carrier never offered full Carmack liability terms to the shipper to begin with, even though the carrier is exempt in other respects, it will be liable in the event of a loss at Carmack’s full liability standards.\(^{197}\)

Accordingly, Carmack provides baseline protection to shippers and this must at least be offered by even exempt rail carriers (and could actually be accepted by shippers). This is of course for “continuous intermodal shipments,” such as

\(^{194}\) This regulation, containing the exact exemption, states in relevant part: § 1090.2 Exemption of rail and highway TOFC/COFC service. Except as provided in 49 U.S.C. 10505 (e) and (g), 109229(1), and 10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. (emphasis added)

\(^{195}\) Section 10502(e) applies to carriers who have received regulatory exempt status from the STB, as permitted by § 10502(f); i.e., it applies to those carriers exempt pursuant to the STB’s regulation at 49 C.F.R. § 1090.2, as part of a “continuous intermodal freight movement” (such as in TOFC/COFC service).

\(^{196}\) Supra notes 187-195 and accompanying text.

\(^{197}\) See cases supra note 189.
TOFC/COFC shipments, just as in *K-Line*. The above shows Carmack is intended to apply to any inland rail or motor carriage on such a “continuous intermodal shipment,” including subsequent to an ocean voyage, in which COFC service is going to be employed (i.e., “ex water” service). This would have to be the case, in order for Carmack to be contracted out of in those situations in the first place. This understanding of Carmack’s ongoing application was established a long time ago by the ICC, specifically in issuing its “clarification” of the matter. The Supreme Court should have deferred to the ICC’s own administrative interpretation. Instead, it restated the law, ignoring the correct administrative position.

IV. **SWIFT’S “INTENT TEST” SHOULD HAVE BEEN APPLIED—EVEN ON A THROUGH BILL OF LADING**

All this confusion could have been avoided if the Court had simply used the intent test, which was applied in *Swift*, as the touchstone for its analysis. Instead, it ignored the case.

In *Swift*, a shipment a shipment of textile spinning machinery was sent from the seller in Switzerland for final destination in LaGrange, Georgia. The goods were containerized in Switzerland, then traveled by rail to Hamburg, Germany, where an ocean carrier then transported them to Charleston, South Carolina. From there, apparently on the same ocean bill of lading, the goods were trucked to Savannah, Georgia. Here, they were temporarily stored until on-carriage to LaGrange had been arranged. Swift Textiles’ customs broker arranged for the additional inland trucking with defendant Watkins Motor Lines for the final destination in LaGrange,

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198 Am. Trucking Ass’ns, Inc., 656 F.2d at 1120 n.8 (“TOFC/COFC service is a prime example of a continuous intermodal movement.” Of course it is used after ocean carriage.)

199 Id. at 1122 (explaining “Ex-Water TOFC/COFC Service”).

200 See id. at 1124 (“This concern has been addressed by the Commission in a “Clarification of Notice of Final Rule (Exemption) dated June 10, 1981, essentially providing that the exemption does not and could not relieve rail carriers from the provisions of 49 U.S.C. s 11707. [Carmack] 46 Fed.Reg. 32257 (1981).”) See also Co-operative Shippers, Inc., 613 F.Supp at 791 (citing same clarification as “Ex Parte No. 230 (Sub-No. 5) Improvement of TOFC/COFC Regulation, and the I.C.C. Report to Congress (1981), at 11-12”). Accordingly, Carmack applies to COFC/TOFC “continuous intermodal movements” from overseas unless properly contracted out of (see 49 C.F.R. §§ 1090.1, 1090.2, supra notes 193, 194).

201 See Co-operative Shippers, Inc., 613 F.Supp. at 793 (Congress has committed the matter on liability limitations to the ICC, and its interpretation “is entitled to the deference from this Court”); see also Tokio Marine and Fire Ins. Co. Ltd., 966 F.2d at 878 (deference should be given “to the agency responsible for the statute’s administration, unless [its] interpretation is ‘arbitrary, capricious, . . .,’ ” citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 487 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984)).

202 It appears from the court’s recitation of facts that a through bill of lading was thus employed, at least until Savannah. See 799 F.2d at 698.
Georgia. Watkins issued a short form bill of lading to Swift’s customs broker for the transportation. The short form bill of lading incorporated by reference a Uniform Domestic Straight Bill of Lading, on file with the ICC. It contained a two year and 1 day statute of limitations for any claims, in accordance with the requirements of Carmack. A container slid off a truck en route to LaGrange, and Swift filed a claim more than two years later. The seminal issue was whether the Carmack Amendment applied to Watkins’ carriage, thus entitling Watkins to set a statute of limitations at 2 years and one day, instead of having to comply with state law.\textsuperscript{203}

The court held that it did apply.\textsuperscript{204} In so doing, it relied upon the intent test based on prior precedents involving the ICC’s reach on intermodal shipments overseas.\textsuperscript{205} It was also applying the then current version of the Carmack Amendment (49 U.S.C. § 11707)\textsuperscript{206} and the ICC’s general jurisdiction provision (then at 49 U.S.C. § 10521). At that time, § 11707 contained the same basic language following the 1978 codification amendments: “A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission. . . . shall issue a receipt or bill of lading for property it receives for transportation . . . .”\textsuperscript{207}

As noted above, this version of Carmack contains no references of carriage from the U.S. to an adjacent foreign country, as this language was stricken in the 1978 amendments. The general jurisdiction provision then in effect, also had the 1978 amended language, and stated in pertinent part, that the ICC had jurisdiction over carriage “between a place in . . . the United States and a place in a foreign country to the extent the transportation is in the United States.”\textsuperscript{208} The court dubbed this jurisdictional provision a “continuation of foreign commerce” provision, after the ICC jurisdictional cases it relied upon.\textsuperscript{209}

The idea clearly in \textit{Swift} was that Carmack applied if the ICC had jurisdiction over the carriage (application is coextensive with ICC jurisdiction). It would because the shipment was a “continuation of foreign commerce” under 10521(a)(1)(E).\textsuperscript{210} The intent test is used at the inception of the carriage to determine whether the inland portion was intended as part of a total voyage initially intended to reach that final destination, without regard to whether a separate bill of lading was ever issued.\textsuperscript{211} Under the facts, clearly that was the situation in \textit{Swift}, as the machinery was only temporarily stored in Savannah, but had always been intended for LaGrange as the final destination. It did not matter that the Savannah to LaGrange motor carriage under Watkins’ contract of carriage was purely intrastate (when Carmack ordinarily would not apply), or that the separate inland bill of lading had in fact

\begin{footnotes}
\item[203] Id.
\item[204] Id. at 701.
\item[205] Id. at 699-701; see cases, supra note 153.
\item[206] Changed to the current § 11706 in the 1995 recodification.
\item[209] 799 F.2d at 699-700 (citing cases); see supra note 153.
\item[210] 799 F.2d at 700-701.
\item[211] Id. at 700.
\end{footnotes}
been issued, since it fell within a “continuation of foreign commerce,” according to parties’ intent, under 10521 (a)(1)(E).\(^{212}\) This intent is examined at the beginning of the voyage to determine if the inland portion is a separate shipment altogether or merely a continuation of foreign commerce. If the latter, Carmack applies as per the statutes indicated.\(^{213}\)

Since *Swift* really set things in motion in the modern era, and was cited by several jurisdictions as the seminal case, it was highly influential.\(^{214}\) Some courts have continued to rely on its intent test to determine if there was a “continuation of foreign commerce,” under which Carmack had to apply.\(^{215}\) Others ignored the intent test, and based their holdings on *Swift’s* anomalous “articulated holding” (anomalous because if differs from its analysis, as much has already been written about).\(^{216}\)

*Swift* simply stands for the proposition that Carmack applies to any inland segment of an import which is a continuation of foreign commerce. In other words, the *Swift* court said the fact Watkins did issue a short form bill of lading for the carriage is really irrelevant, since the inland, intrastate carriage was intended as a continuation of foreign commerce, and Carmack applies.\(^{217}\)

Given that understanding of *Swift’s* analysis, at least 4 solid rules can be derived from it, which should apply in any situation imaginable. These are sound and reliable, based on *Swift’s* intent test and a straight-forward reading of Carmack. I have added a fifth one, exemplifying the dilemma in *K-Line*; it embodies the

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\(^{212}\) Id.

\(^{213}\) Id. at 699-701.

\(^{214}\) Sturley, supra note 24, at 10-11.

\(^{215}\) See cases, supra notes 159, 163-166.

\(^{216}\) See cases subscribing to the “articulated holding,” supra notes 164-165. That articulated holding is: “We therefore hold that when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading.” 799 F.2d at 701 (emphasis added). This of course does not square with the court’s stated analysis just a few paragraphs earlier: “Applying the ‘intent’ analysis, the fact that Watkins issued a separate bill of lading for the final intrastate leg of the journey is not significant.” (emphasis added) Id. at 700 (citing *Erie R.R. Co.*, 280 U.S. at 102, 50 S.Ct. at 53). As to the anomalous nature of the stated holding, see cases supra note 159, para. 2, and see especially Sompo, 456 F.3d at 62-63, 2006 AMC 1827-28. Sompo calls the seeming insistence on a “separate bill or bills of lading,” in the holding as “nonsensical” and an “inadvertent error,” citing also to Canon USA, 1992 WL 82509, at *7, 1994 AMC at 356 (suggesting the Swift holding contains a “typographical error” in that it should say Carmack applies under the intent test “even if” a separate domestic bill of lading is issued, instead of “as long as” a separate inland bill is issued). I believe *Swift* has an error in its holding but it is not inadvertent or typographical. I also believe the court did not register any inconsistency between its holding and analysis, as I will explain in the text below.

\(^{217}\) 799 F.2d at 700.
situation on through carriage that has created the problems in the courts, although it should not have. According to Swift’s intent test:

(1) If an inland leg is intrastate, but is a continuation of foreign commerce, Carmack would apply (think Swift itself, United States v. Erie R. Co., 280 U.S. 98 (1929), North Carolina Util. Comm’n v. United States, 253 F.Supp 930 (E.D.N.C. 1966), etc.);²¹⁸

(2) If an inland leg is intrastate, but is a completely separate shipment, Carmack would not apply (the shipment is not interstate and is not a continuation of foreign commerce) (same cases, inverse situation);

(3) If the inland leg is a completely separate shipment from the one overseas (that came to the U.S.) but is also interstate, Carmack would apply (it’s an interstate shipment) (think Reider);

(4) If an inland leg is interstate, and is a continuation of foreign commerce, Carmack would apply as a continuation of foreign commerce (see and compare Swift and cases in (1) above);

(5) If the inland segment is part of a through shipment involving overseas carriage (a continuous intermodal shipment) Carmack SHOULD apply.

Number (5) is the rub, and this could explain all the controversy in Swift’s articulated holding as it was applied to through bills in several subsequent cases.²¹⁹ As I mentioned, some courts have viewed Swift’s “articulated holding” as an inadvertent error, while other Circuits have adopted the Swift holding as a hard and fast rule which cannot be departed from, although without giving any real analysis in support.²²⁰

I have a somewhat different take on Swift’s mysterious holding. I believe the Swift court knew what it was saying. What it really meant was that Carmack required issuance of a bill or bills of lading for a bona fide (legitimate and real) move by a subsequent inland carrier for an ocean shipment which is actually intended for final destination beyond the port of discharge. And this would be in contrast to an incidental move (such as switching services within the port area), or one that is not part of the transportation to the intended final destination. That is, when the inland carrier is entering into a serious contract of carriage—an undertaking to get the goods to the intended final destination—then Carmack applies to that, as the continuation of foreign commerce. The statute, at this point, requires such an

²¹⁸ Cases Swift relied upon. See also cases supra note 153.
²¹⁹ Supra notes 52, 53, 159, 164, 165 (showing each line of thinking in the cases).
²²⁰ Supra note 219; see supra note 216 (“inadvertent error” view) and Sturley, supra note 24, at 10 (same); see also cases supra notes 164, 165 (listing cases mimicking Swift’s articulated holding in the 4th, 6th 7th and 11th Circuits).
inland carrier to issue a receipt or bill(s) of lading.\footnote{221} I read the reference to a “Bill or bills of lading” in the case as signifying exactly such a serious contractual undertaking to get the goods to their intended destination. But inferred in this reference in its holding may be something more, even supporting cases like \textit{Capitol Converting}, and now the Supreme Court, in \textit{K-Line}. \textit{Swift} may be inferring, or assuming, in a through bill of lading situation, there would not be a separate bill of lading so Carmack would not apply.\footnote{222} I base this on \textit{Swift’s} short discussion and description of \textit{Condakes v. Smith}, involving a shipment of cantaloupes from Mexico to Boston under a single through bill of lading, in which that court held Carmack inapplicable.\footnote{223} \textit{Swift} seems to characterize the case as supporting a rule that Carmack would not apply to the inland part of a shipment under a single through bill of lading.\footnote{224}

I do not believe \textit{Condakes} states the rule \textit{Swift} says it does. In my view \textit{Condakes} merely said Carmack would not apply because there was no evidence of a separate bill of lading apart from the through bill issued.\footnote{225} In any event, the \textit{Swift} court has articulated its view in its characterization of \textit{Condakes}, and this may shed some light on the confusion in its articulated holding. \textit{Swift} may have added the qualification of having a separate “bill or bills of lading” to exclude from its holding situations involving through bills (consistent with its interpretation of \textit{Condakes}). In other words, the \textit{Swift} court may have taken the view that the intention of a shipment as a continuation of foreign commerce applies to overseas shipments, except when a though bill is involved. In \textit{Swift}, the court essentially applied Carmack regardless of whether Watkins actually issued a separate inland bill of lading, since the court saw a continuation of foreign commerce, and because Watkins’ inland carriage was not under a through bill.\footnote{226} While this explanation may account for some of the mystery in the seeming inconsistencies of \textit{Swift’s} holding, it does not make its added step in that holding at all correct.

Specifically, what would be the purpose in fashioning a rule with a distinction between through carriage and non-through carriage, especially if the intent test is paramount? I suggest none. If the intent test is used to determine whether an inland leg was “intended” as a continuation of foreign commerce (or alternatively

\footnote{221} I am sure the \textit{Swift} court would say a carrier’s inadvertent failure to issue a separate bill of lading would not bar Carmack’s application, since the statute clearly says so.\footnote{222} I am aware this interpretation seems to support the Supreme Court’s view in \textit{K-Line}, but I still believe this apparently exceptional view in the case of through carriage completely defies the rationale of applying Carmack to shipments intended as a continuation of foreign commerce. An exception should not be carved out when through bills of lading are issued. \textit{Swift’s} rationale should be applied regardless of the form of bill(s) of lading issued, or even if one was not issued. See 799 F.2d at 700; see also Standard Oil of Ky., supra note 153 (the form of the bill of lading is inconclusive as to the essential character of a shipment as a continuation of foreign commerce).\footnote{223} 281 F.Supp. 1014, 1015 (D.Mass 1968).\footnote{224} 799 F.2d at 700.\footnote{225} 281 F.Supp. at 1015.\footnote{226} 799 F.2d at 791.
was really intended as a completely separate shipment), there is no better way to exemplify that intent than with a “through bill of lading.”

By definition, a through bill contemplates an inland leg in the continuation of foreign commerce. If the Swift court really had this distinction in mind, then it was not a rational one, and the distinction should be rejected. Carmack should apply just as much to inland carriage under a through bill, as it would for the inland leg as a continuation of foreign commerce in the absence of a through bill. In addition, as stated in Part I above, even under through bills of lading, subsequent carriers will often issue supplemental receipts or bills of lading as a real contractual undertaking.

In sum, Swift’s analysis is correct, but its apparent exception in the situation of a single through bill of lading (i.e., its “dicta”) is not justifiable. Its influence continues in its intent test, and the Supreme Court should have considered that.

V. THE REAL CULPRIT: BLOATED HIMALAYA CLAUSES

In the end, the Supreme Court essentially decided in favor of COGSA’s extension inland to even subcontracting carriers, like UP, and even across the entire continental United States (and beyond) instead of Carmack’s intended application, as reflected in the Swift intent test. This choice would not have been necessary if the Himalaya clauses had not grown so “fat” to begin with. It seems the Supreme Court and other lower courts have acquiesced in a process that really is not even a part of COGSA.

In some language of the Supreme Court in both the Kirby and K-K-Line decisions, we hear the Court saying that Congress intended this contractual extension of COGSA beyond the “tackle to tackle” (ocean carriage)

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227 This is common sense, and exemplifies a traditional view. See cases exemplifying this principle, supra note 153.
228 Several cases have offered various definitions of a “through” or “intermodal bill of lading,” but they all include this element of some internal land carriage.
229 See Robert P. Force, COGSA v. Carmack, 36 Transp. L.J. 1, 18 (2009) (a Himalaya clause is a creature of contract, given its special name by the courts). In general, some analysts say three kinds of clauses in a bill of lading, in conjunction, are necessary to extend COGSA inland to subcontracting carriers, but they are distinct (despite the Supreme Court’s tendency to sometimes meld them together or blur them, see supra note 21): 1) A “Clause Paramount” (essentially indicating what version of the Hague-Rules or other regime applies to the carriage—and which is usually redundant in U.S. trade, as COGSA applies ex proprio vigore); 2) A “Responsibility Clause” (indicating the applicable liability regime to the carrier for the time the goods are in its care, beyond the tackles, and which can be a separate clause or simply embedded in the Clause Paramount; this would seem more to have its impetus from section 7 of COGSA); 3) the “Himalaya Clause” (extending the forgoing carrier’s benefits to subcontracting inland carriers). See Richard W. Palmer & Frank K. Degiuilo, Terminal Operations and Multimodal Carriage: History and Prognosis, 64 Tul. L. Rev. 281, 345-51 (1989); Thomas R. Dennisto et. al., Liability of Multimodal Operators and Parties Other than Carriers and Shippers, 64 Tul. L. Rev. 517, 521-23 (1989) (same analysis).
period, even to subcontracting carriers over large swaths of land. COGSA says nothing of the sort. And the Court has simply hoisted its interpretation of industry conventions and practices, in the parties’ carriage agreements, above Carmack’s mandated statutory application.

In the first place, section 7 of COGSA, permitting the parties to contractually extend COGSA to the periods “before loading and after discharge” was probably never intended for an extension across the continental United States. Section 7’s permission is restricted, intentionally, by section 12’s requirement that the parties cannot contract contrary to applicable mandatory statutes, such as the Harter Act (or Carmack). In addition, any COGSA extension initially was likely associated with localized carrier activity in and around the port area. After all, the Harter Act would have taken over after discharge in the U.S., and gone inland until delivery (in a local sense).

Second, extension of COGSA’s benefits to subcontracting carriers in a Himalaya clause is not even mentioned in COGSA itself. A Himalaya clause is a contractual and court-contrived convenience. Its reach traditionally was also limited to

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230 See Kirby, 543 US at 28-29, 125 S.Ct. at 396, 2004 AMC at 2715 (attempting to give any inland extension the benchmark of Congressional approval under section 7 COGSA (formerly 46 U.S.C. § 1307)); K-Line, 130 S.Ct. at 2440, 2010 AMC at 1525 (citing Kirby), 2448, 2010 AMC at 1529 (suggesting Congress’ enactment of COGSA somehow constituted the exercise of an option favoring single through bills of lading (interesting), and implicitly authorized COGSA’s extension for the entire through carriage).


232 See Sturley, supra note 24, at 25, n.138 (explaining history and interplay of sections 7 and 12 in COGSA).

233 Any COGSA extension, while overlapping with Harter, may not conflict with it, or displace its mandatory aspects (it usually doesn’t). See PT. Indonesia Epson Indus., 219 F.Supp.2d at 1270, 2002 AMC at 2772. See also, Jagenberg, Inc. v. Georgia Ports Authority, 882 F.Supp. 1065, 1995 AMC 2333 (S.D.Ga. 1995) (discussing the rather localized sense of delivery under Harter, such as to a “fit & customary wharf,” to a customs/port authority, or to an independent trucker for on-carriage elsewhere, and indicating Harter’s very short span as a result). Some commentators have noted the waning significance of Harter, which is sensible given its short geographic application. See Sturley, supra note 24, at n.44.

234 Supra note 229.

235 The name is coined from the English case involving a personal injury, 1Q.B 158 (C.A. 1954), in which a carrier’s exemption was held inapplicable to certain personnel on the steamship, “Himalaya.”
stevedores and port workers associated with discharge operations, not to sub-
subcarriers inland.\textsuperscript{236}

In \textit{Robert C Herd & Co., v. Krawill Machinery Corp.}, the Supreme Court first
started showing appropriate caution in allowing liability limitations to extend to
carrier’s agents, such as stevedores.\textsuperscript{237} In that case, the Court denied the
stevedore the $500 COGSA package limitation, and indicated the need for care in
preventing the application of COGSA’S benefits too broadly to other parties.\textsuperscript{238} In
\textit{James N. Kirby, Pty Ltd., v. Norfolk Southern Ry. Co.},\textsuperscript{239} the Eleventh Circuit gave
an excellent summary of its own cases and other Circuits’ attempts to restrict
Himalaya clauses, culminating in two primary rules: It held in order for
subcontractors to have the chief carrier’s benefits through a Himalaya clause, the
subcontractors had to be in privity with the chief carrier, or the Himalaya clause
had to specify a “well-defined class of readily identifiable” beneficiaries to which
the subcontractor belonged.\textsuperscript{240} The court highlighted the importance of a narrow
construction of Himalaya clauses, under its “clarity of language” test, and in
applying it to this case, it held Norfolk Southern was not entitled to COGSA’s
benefits in the applicable (“ICC”) Himalaya clause in its separate through bill of
lading.\textsuperscript{241} In so doing, it compared tests of the Ninth Circuit and others, including a
“comparison-of-services” rule (i.e., to see if the subcontractor’s services are
similar to the carrier’s), and this was also the sort of restrictive test preferred by
the dissent.\textsuperscript{242}

All this was completely undone by the Supreme Court in \textit{Kirby}, holding Norfolk
Southern was entitled to limitations under Himalaya clauses, not because it
applied a different kind of narrow construction, but precisely because a Himalaya
clause (ICC’s) was so broad (i.e., disregarding scrutiny of the clause as too vague
or broad, but rather condoning it as the parties clear agreement). The Court

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{236} See James N. Kirby, Pty Ltd., v. Norfolk Southern Ry. Co., 300 F.3d 1300, 1309-1310, 2002 AMC 2113, 2124-25 (11 th Cir. 2002) (the initial case before appeal to the Supreme Court, explaining the historical application to stevedores and other port services).
\item \textsuperscript{237} Id., 359 U.S. 297, 79 S.Ct. 766, 1959 AMC 879 (1959).
\item \textsuperscript{238} Id., 359 U.S. at 304, 79 S.Ct. at 771 1959 AMC at 885 (calling for strict construction of
contractual limitations of liability).
\item \textsuperscript{239} Supra note 236.
\item \textsuperscript{240} 300 F.3d at 1308-1310, 2002 AMC at 2123-25. Specifically, the Eleventh Circuit said
privity was necessary only for unspecified, relational entities (such as “agents,” ”servants,”
or “independent contractors”), but in specifically described categories (such as
“stevedores,” “terminal operators,” etc.) privity is not necessary, as the requisite
specificity and identification is sufficient. Id. at 1309 n.11, 2002 AMC at 2124 n.11.
\item \textsuperscript{241} Id. at 1308, 2002 AMC at 2123. It also held the same on a separate Himalaya clause in
the ocean carrier’s (Hamburg Süd’s) through bill of lading, but there on different grounds
involving agency law (id. at 1306-1307, 2002 AMC at 2120-21), and this is not my primary
concern.
\item \textsuperscript{242} 300 F.3d at 1307-1310, 2002 AMC at 2122-25 (various Circuit tests), Id at 1312, 2002
AMC at 2127 (Siler, J. dissenting; citing Akiyama Corp. of Am. v .M.V. Hanjin Marseilles,
162 F.3d 571, 574, 1999 AMC 650, 653 (9th Cir. 1998) (determining beneficiaries by
comparison of “the nature of the services performed”)).
\end{itemize}
\end{footnotesize}
specifically mentioned the wide latitude of the clause as binding on the parties, instead of challenging it, as it should have done.\textsuperscript{243}

Essentially what the Court did in its recent cases was to take the contractual agreements of parties in this industry and convert them to hard and fast law without the consent of Congress (superseding existing statutes with existing contracts). Instead of strictly construing Himalaya clauses and confining them to their traditional spheres, the Court seems to be using the vehicle of through bills of lading to expand their bite, swallowing whole chunks of land transportation law (Carmack) in the process.

It is one thing to take Carmack out of the contest between what was thought by many to be a straightforward bout between a mandatorily applicable statute, and a mere extension inland of COGSA by contract (it sidelined Carmack and that is serious enough).\textsuperscript{244} It is still another matter for the Court to exercise its power to give that contractual extension (and its interpretation of industry custom) the imprimatur of uniform law.\textsuperscript{245} This is spurious ground for these shipments to travel on. The very nature of these contractual extensions, as creatures of contract, means they are subject to change based on party negotiations. It's not as if COGSA will always be the agreed upon inland regime.\textsuperscript{246} This is subject to change, and may change fast due to growing frustration of cargo interests, their insurers, and their financial interests.\textsuperscript{247}

In the end, allowing the parties to attempt extending COGSA to inland carriers across America may not be the greatest problem. The more serious problem is nixing Carmack’s application to inland rail and truck carriers (to whom it should apply), and swooping these carriers into the fold of benefits in COGSA because of overindulgent Himalaya clauses, which the Court has now dubbed to be the law.

VI. WHAT’S NEXT? (WHAT ARE SOME OF THE OUTCOMES AND UNRESOLVED ISSUES?):

Having said everything I have as to why I believe the Supreme Court was mistaken in \textit{K-Line}, it’s important to assess the implications of its holding. For one thing, we now have some clarity. In my view, the Court is simply articulating a

\begin{itemize}
\item \textsuperscript{243} 543 U.S. at 30-31, 125 S.Ct. at 397, 2004 AMC at 2716.
\item \textsuperscript{244} The Court disqualified Carmack from that contest, simply saying it doesn't apply. See 130 S.Ct. at 2443, 2010 AMC at 1530. And we all know Carmack would have won the bout against conflicting bill of lading clauses, if it had been given the chance to compete. Id. at 2441-42, 2010 AMC at 1528-30.
\item \textsuperscript{245} It's not going to improve unity. See Sturley, supra note 24, at 21-24, n.133.
\item \textsuperscript{246} Consider the Rotterdam Rules, about to be enacted as of the time of this writing.
\item \textsuperscript{247} I anticipate a lot of negotiating will be going on by adamant shipping interests to undo these broad Himalaya clauses, now that Carmack is confirmed as no longer applicable as a baseline of statutory protections in the shipping industry. So much for the Court’s efforts at uniformity. It will change (see next section).
\end{itemize}
new rule (not one always there in Carmack from inception). The rule is that in intermodal through shipments of imports, only one bill of lading counts (the through bill). In other words, we have only one contract of carriage: between the shipper and the through carrier (usually an ocean carrier). Intermediate bills of lading, or receipts, despite the terms on them, really don’t matter. What are the implications of this?:

1. Vanishing Suits Against Inland Carriers

In the short run at least, we will probably see suits against inland rail carriers disappear. I suggest this is so even when it is obvious the rail carrier is responsible, as in a train derailment.\(^{248}\) Since the Supreme Court gives virtually no benefit to shipping interests in suing the rail carrier, based on current Himalaya clauses, suits against the inland carriers by cargo interests will inevitably drop. In *K-Line*, since the Court has given some sort of special legal sanction to Himalaya clauses, COGSA’s liability system, including its $500 per-package limitation, extends to the inland carriers as well. So if that’s all the shipper can get from the inland “subcontracted” carriers, no advantage remains in suing them, even when the loss occurred on their leg. Shippers will simply sue the ocean carrier, who can then possibly pursue the inland carrier for indemnity. (Under what liability regime, I have no idea, since Carmack would apparently not apply even to the guilty inland carrier in indemnity, according to this Court’s interpretation.)\(^{249}\)

2. Impact on Exports

The Court limited its holding to imports, and refused to address exports.\(^{250}\) This does little to help clarify matters. The Court’s reasoning suggests however, exports should be treated no differently. At first blush, the hint seems to cut the other

\(^{248}\) Justice Sotomayor picked up on this implication in her dissent when she noted the Court had always entertained the shipper’s ability to sue the inland carrier—a prospect now threatened by Carmack’s expulsion. See 130 S.Ct. at 2456 n.8., 2010 AMC at 1551 n.8 (citing Kirby, 543 U.S. at 30-33, 2004 AMC at 2715-18).

\(^{249}\) Presumably that indemnity liability will be indicated in the railroad’s transportation agreements and circulars, but under shifting standards. It seems the Kennedy majority ignored this implication of its decision affecting indemnity. See Altadis, 458 F.3d at 1290, 2006 AMC at 1848. Indemnity suits will also run one way now: from the ocean through carrier to the actually-at-fault inland carrier, and not *vice versa*, despite what the industry sometimes envisions and what the railroads have anticipated in their circulars and agreements (see UP’s MITA 2-A, General Rule O).

\(^{250}\) The Court also said it would save for another day addressing imports coming from Canada or Mexico. I can’t imagine how that would make any difference. If the Court ends up deciding these imports are governed by Carmack for the U.S. inland part, the Court would have a very hard time justifying its decision in *K-Line*. The issue whether shipments are imported by sea from abroad or by rail from Canada or Mexico lacks any philosophical difference in Carmack’s application. If the Court would apply Carmack inland for such rail carriage from Mexico or Canada, it would have to apply it for shipments coming from overseas—and it should.
way: that exports are different.\textsuperscript{251} According to Kennedy, for Carmack to apply to imports, the inland carrier would have to “receive” the shipment from the original shipper in the U.S. It would then be required to issue a bill of lading (“receipt or bill of lading”), at which point Carmack would only then apply.\textsuperscript{252} In an export situation, that could happen (the inland rail or motor carrier may in some cases receive a shipment directly from the shipper). In rail carriage exports, however, the situation is much less clear. In significant numbers of shipments, the rail carrier never actually “receives” the shipment in the U.S., as Kennedy defines it.\textsuperscript{253} That is because the railroad is incapable of picking up the goods from every business in America. Instead some other initial motor or water carrier hauls the cargo to the railroad depot.\textsuperscript{254} If the Supreme Court is to remain consistent in those cases, Carmack should not apply to the rail carriage, because some other initial carrier “received” the cargo first.

In addition, the initial issuer of a through bill of lading on these exports is not likely to be one of those initial carriers picking up the goods. It is more likely to be an ocean carrier, or no actual carrier at all, but maybe a freight forwarder, or an NVOCC who typically issues the through bill of lading for export. Accordingly on exports traveling on a through bill via ocean carriage to overseas destinations, the inland carrier would not be issuing a through bill (i.e., the one that counts for applying Carmack liability), and it would also not be a “receiving carrier.”\textsuperscript{255}

If the Supreme Court intends to allow Carmack to apply to intermodal exports overseas, it would be acting inconsistently with its rationale on imports, and would undermine its interest in uniformity. If it acts consistently with intermodal imports, the Court takes another giant chunk out of Carmack’s relevance to interstate and foreign commerce in ways I surmise it never imagined. I suggest a better approach: Erase the mistakes in \textit{K-Line}, treat imports and exports the same, and allow Carmack to keep applying bi-directionally to inland U.S. carriers, regardless of the issuance of through bills of lading by the ocean carriers/intermediaries (allow those bills to apply to the ocean through carriers, not to the liability of inland carriers).

3. Impact on Transportation Intermediaries

It seems the Supreme Court’s analysis in \textit{K-Line} is limited to the singular situation of a single shipper contracting with an ocean carrier on a single through bill of

\textsuperscript{251} Although treating exports differently would defy its uniformity goals.

\textsuperscript{252} 130 S.Ct. at 2444, 2010 AMC at 1530.

\textsuperscript{253} See supra Part I, C, 3.

\textsuperscript{254} Id.

\textsuperscript{255} In actuality, if the Court continues its anomalous course on definitions, Carmack should never apply to international intermodal exports under through bills, since (like “receiving carriers”), the “connecting” and “delivering” carriers would be operating over water and in some other country. Carmack cannot apply in the U.S. on these shipments according to Kennedy’s logic, as seen in the situation involving “receiving” carriers.
lading, who then subcontracts with inland carriers. The Court’s *K-Line* formula on “receiving carriers” lacks any serious consideration of the varieties of intermodal shipping arrangements available and taking place everyday in the industry, including through the initial use of transportation intermediaries. These might include freight forwarders and NVOCC’s, and Combined or Multi-Transport Operators (CTO’s or MTO”). Specifically, the Court’s analysis shows little appreciation of the role of such intermediaries in intermodal shipping and gives these intermediaries little guidance through its holding in *K-Line*.

In so many cases, a shipper enters into some kind of contract with an intermediary or forwarder, and is not in direct privity at all with an ocean carrier on a “single through bill of lading.” A shipper’s rights after a loss may accordingly best be determined against the intermediary with whom it knows it has a contract. A shipper often knows nothing of the subsequent subcontracting carriers or their terms, including any systems and limitations on liability in their contracts. I realize *Kirby* indicates a “freight forwarder” or intermediary acts as the “agent” of the shipper in binding him to the ocean carrier’s terms, but that does not at all answer the question as to the shipper’s claim directly against the intermediary. The liability of the intermediary can be very different than that of the ocean carrier, especially if the intermediary is from abroad (like “ICC” in *Kirby*), and is subject to foreign law. It is simple and common to have a shipment with different liability structures imposed against the intermediary and the ocean carrier. Yet this lack of uniformity seems inconceivable to the Court, and outside the scope of its vision.

In addition, things can get a little more confusing for the inland carriers under the *K-Line* formula when intermediaries are also involved. Suppose an intermediary issues a contract of carriage on a through basis with a “Himalaya clause” vastly different than the ocean carrier’s, say precisely because it incorporates foreign standards on liability. Imagine also in this scenario the ocean carrier’s bill of lading is not a through bill of lading at all, or perhaps it is but does not have a Himalaya clause reaching the inland carrier (i.e., a carrier like Norfolk Southern in *Kirby*). In that situation, again, we would have varied legal regimes applying. COGSA would apply to the ocean carrier, and some other standard, including foreign law, would apply to the inland segment, affecting both the foreign intermediary and an inland carrier entitled to claim the intermediary’s benefit under its Himalaya clause. In

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256 Its holding is clearly limited to “single through bills.” 130 S.Ct. at 2442, 2010 AMC at 1528.
257 See Kirby, 543 U.S. at 34, 125 S.Ct. at 399, 2004 AMC at 2719.
258 *Kirby* indicates the cargo owners were also suing ICC in Australia, likely pursuant to its through bill. 543 U.S. at 36, 125 S.Ct. at 400, 2004 AMC at 2720.
259 This would be exactly the situation in Kirby, except for the ocean carrier not issuing a through bill or having a sufficient Himalaya clause to reach a particular inland, subcontracting carrier. In *K-Line*, the Supreme Court has not addressed this scenario or even the similar one involved in Kirby. It actually incorrectly discusses Kirby as if it had a single through bill of lading. See 130 S.Ct. at 2442, 2010 AMC at 1528 (Part III, referring to “the Kirby bill” of lading in the singular). In the scenario I have presented, the ocean
that case it would have made more sense to just have Carmack apply. If the Court believes its ruling will eliminate separate liability regimes, and promote uniformity, I think it is mistaken. Its mistake is the result in part of ignoring the role and liability of transportation intermediaries.

The Supreme Court did not explain how its rules in *K-Line* apply in variations, such as when more than a “single through bill of lading” is issued and ocean and other intermediaries are involved, issuing their own carriage documents (just as in *Kirby*). I could surmise what it might hold based on its agency rule in *Kirby* (i.e., nothing changes), but I am not the Supreme Court, and it has not squarely addressed this issue.

It’s as if the Supreme Court sees variations and segments in liability systems in intermodal shipping as some kind of scourge. Everything has to be uniform. That’s not the way it is now, in reality (thanks to transportation intermediaries), and that’s not the trend in a global economy. As noted by Sotomayor and others, in Europe, for instance, varying “network” or segmented liability is expected via the CIM-COTIF (uniform rules for international rail carriage) and CMR (Convention for international road carriage); and similar rules apply in Asia and North Africa. One set of liability rules applies to land, and another to water transportation, etc. And why should that not be so? Transportation by sea is very different than transportation by land. Even the Rotterdam Rules have been changed from their original design to provide one single liability regime across all modes of transport to prefer a segmenting system, where mandatory inland carriage law would apply. The railroads sought after this segmented system in draft sessions of the Rotterdam Rules. Indeed they have argued for it, selecting Carmack as the preferred system intended to cover their liability. By giving the railroads a single liability regime of COGSA on intermodal shipments, the Court has given the railroads more than they’ve asked for. The rest of the global shipping community, and even typical carriers’ bills of lading, recognize the network system or varying legal regimes by agreeing to be liable according to “other laws” that may mandatorily apply to any given segment of the intermodal shipment. Such was true with the through bill in *K-Line*, if applying outside the U.S.

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260 I am not at all opposed to sound efforts to improve uniformity and consistency. I am just convinced those efforts should come from well-thought-out statutes, and contracts alone cannot safely provide the ground for uniformity.

261 See 130 S.Ct. at 2461, 2010 AMC at 1560-61; Sturley, supra note 24, at 3, nn. 8, 9, and at 36 (explaining).

262 See 130 S.Ct. at 2461, 2010 AMC at 1560-61; Sturley, supra note 24, at 36-39 (citing history and AAR lobbying efforts).

263 This ironic duplicity is well-known (see supra Part I, C, 1, c, iii); Sturley, supra note 24, at 36-39.

264 Supra note 85; 130 S.Ct. at 2461, 2010 AMC at 1560-61 (Sotomayor, J. dissenting, citing a common clause in K-Line’s bill).
4. Impact on Railroad Cargo Safety

At least potentially, railroad cargo accidents could increase. Although business incentives may remain to continue enhancing railroad safety, judicial incentives seem less important today. The rail carriers are mostly deregulated, and now have limited liability under COGSA ($500 per “package”) in most cases. What is the governing law to keep inland truckers and railroads to a high level of accountability and care in carriage of goods? Certainly not the COGSA $500 per package limitation. The inland carriers will not be sued often by shippers, and they will not owe much money if they are sued, perhaps not more than an occasional indemnity to the ocean carrier. Carrier liability is already considered artificially low due to COGSA’s antequated damage formula, irksome specifically to the marine cargo insurance industry.

5. Expect Less Uniformity

This is likely overall, including eventually in the negotiation of Himalaya and inland Responsibility clauses. By elevating currently worded Himalaya and COGSA contractual extension clauses almost to the level of statute, the Court has actually opened up the prospect of greater variance in these clauses. Expect cargo insurance interests to start fighting like heck to change some of these clauses in bills of lading. Sooner or later, cargo interests are going to insist on greater inland liability than what COGSA offers. The inland liability can be anything the parties agree to. Instead of agreeing to COGSA (predominantly so far), they can agree to common law liability, or they can certainly agree to Carmack, or even some other foreign regime, or extending the Rotterdam Rules. It’s purely a matter of contract. But without Carmack serving as a bedrock, guaranteed default level of liability for inland carriage (since the Court has now foreclosed this), expect cargo and their insuring interests to lobby stringently for changes in the inland responsibility clauses. I would not be surprised if cargo/insurance interests started demanding network style inland liability to be incorporated into these clauses, since what is in the bill of lading seems to be law.

In addition, we are on the verge of having the Rotterdam Rules enacted in the U.S., and these will incorporate something more akin to a segmented intermodal system. It is just not entirely clear what the liability is going to be for the inland segment, since inland carriers, including the rails, seem out of its reach. The Supreme Court has not added clarity here. In fact the Supreme Court was outright dismissive of the eventual impact of the Rotterdam Rules on its holding. Irksome again to many.

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265 The Court’s efforts to show inland intermodal shipments are still subject to appropriate regulation is unconvincing. See 130 S.Ct. at 2448, 2010 AMC at 1560-38. No federal law appropriately governs their liability in this situation, after K-Line.

266 Stark examples are common. See the comparison in dollar figures in Kirby, when COGSA and other damage limitations apply, against the actual damages suffered.

6. Increasing Creativity in Contracting

Related to point 5, it may even be some shippers and their insurers will begin to seek getting around the Court’s ruling by insisting that the carrier not issue a through bill of lading. Someone may arrange separate individual shipments for each necessary leg, and thereby circumvent the liability limitations imposed by the Supreme Court under its “through bill of lading” analysis. After all, all that is needed to defeat the Court’s ruling is to issue some paperwork and turn a single shipment into two. The rates could be sequenced to cost about the same. I doubt this may happen immediately, specifically because of the convenience of the current arrangement, but it has probably entered somebody’s imagination.

7. Congressional Intervention

I expect all this will ultimately end in some Congressional initiatives to address the whole matter. Instead of having Supreme Court justices conjecture what Congress must have meant years ago (at a time when intermodalism was not even born), Congress ultimately should and I think will, answer the question of Carmack’s applicability. It is their prerogative to do so, not the Court’s.\footnote{268} I would not be surprised if Congressional clarification someday does not “reverse” the Supreme Court. After all, there is really no point in having Carmack inapplicable to inland intermodal imports, and yet possibly apply to exports, when the real purpose is to govern motor and rail carrier liability on U.S. soil, regardless of which direction the cargo is moving in. Congress is going to have to act to set this straight.

VII. THE IRONY OF JUDICIAL ACTIVISM

I have tried to show that the Supreme Court has re-drafted the Carmack Amendment to suit its own interpretation. I believe the Supreme Court has argued for a Congressional intent which it cannot prove was ever within Carmack, given changes in the intermodal industry that Congress initially probably did not even consider. But through custom and industry reality, and cases construing Carmack in that light, Carmack came to take on a meaning that later became part of its plain meaning as currently written. That meaning includes its application to intermodal shipments imported from overseas. The current wording simply reflects that. It is good enough at that. So the Court is giving Carmack a meaning, in the name of a legal policy of uniformity, which it cannot prove was ever Congress’ intent. The Court has also ignored its own precedents, in cases like Woodbury v.

\footnote{268} See Sturley, supra note 24, at 39-40 (suggesting Congressional steps). See Kirby 543 U.S. at 36, 125 S.Ct. at 400, 2004 AMC at 2720 in which Justice O’Connor said: “It is not, of course, this Court’s task to structure the international shipping industry,” perhaps not realizing how much her views in Kirby have indeed impacted the industry (O’Connor’s sentiments were of course also echoed by Sotomayor in K-Line (see 130 S.Ct. at 2464, 2010 AMC at 1563-64)).
Galveston, which have already informed Carmack’s meaning. This is judicial activism, in a commercial setting, as Sotomayor rightly pointed out in quoting Kirby’s declaration that “[i]t is not . . . this Court’s task to structure the international shipping industry.”

The shocking irony in all this, is some of the judges who have given Carmack a meaning of their own choosing, are the ones you would least likely expect. This includes the likes of Justice Scalia who has long championed the cause against judicial activism or legislating, in favor of interpreting statutes, and not inventing something new in them. Kennedy’s definition of a “receiving carrier” is not supported in the text of the statute, nor in its appropriate context. This interpretive task is really hard to achieve though when the Court has no real evidence to support the Congressional intent being claimed. In those instances, it should let Congress speak.

VIII. CONCLUSION

Carmack, as it has evolved through changes in the shipping industry, including a history of interpretation that began with Woodbury v. Galveston and including also early statutory changes, in its plain language today, should apply to intermodal shipments imported into the U.S. This is so, whenever the imports are intended simply as continuations of foreign commerce, which is usually the case. This should not change according to whether a bill of lading is a “through bill of lading,” a combined transport bill of lading, or is issued in any other way. This comports better with a varying system of liability recognized in the rest of the global shipping industry. I agree Carmack should not apply to ocean carriers (an exception being the rare case when it actually is also a railroad or trucker—not in this case). I also do not see an enormous problem with extending COGSA inland to ocean carriers; but to strip Carmack away from inland rail and motor carriers operating on U.S. soil, so they can obtain the ocean carrier’s benefits under a

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269 Supra note 147 and accompanying text. Some said Woodbury itself improperly stretched the meaning of the ICC’s jurisdictional statute beyond its intent (that view is debatable). See Sompo, 456 F.3d at 65 (citations omitted).

270 130 S.Ct. at 2464, 2010 AMC at 1563-64. Sotomayor’s comment interestingly highlights a special irony of its own. This was remarkably captured in a recent article. See John Paul Rollert, Reversed on Appeal: The Uncertain Future of President Obama’s “Empathy Standard”, 120 Yale L.J. Online 89, at 99-100 (2010) (indicating Sotomayor was quoted at a graduation speech in 2005 as saying, the “court of appeals is where policy is made,” yet recanting in that view before the Senate Judiciary Committee, stating “[t]he task of a judge is not to make law, it is to apply law.” Id. (citations omitted)). I agree with her application, ironic as it sounds, in K-Line, in which she honored her Senate-hearing view.

Himalaya clause, is simply untenable and unjustifiable, in my view. The Supreme Court should not have given Carmack its own preferable meaning based on a so-called policy of uniformity via contract. This is wrong because uniformity is actually a fiction in intermodal shipments, and cannot be achieved by contract clauses, as these are subject to change according to party agreement (uniformity, if it is sought, is best achieved by statutory regimes). In the end, Congress will have to say what the law is, and it should attempt to clarify the value of having a concrete default liability system for inland carriage of overseas shipments on U.S. soil, instead of leaving that up to parties’ “chosen” liability regimes, which can change with the wind, and cannot be the solid ground needed to build a uniform policy affecting intermodal shipping.