

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 91,033

KING OCEAN CENTRAL AMERICA, :
S.A., :

Petitioner, :

vs. :

PRECISION CUTTING SERVICES, :
INC., :

Respondent. :

PETITION FOR DISCRETIONARY REVIEW OF A DECISION
OF THE THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT
PRECISION CUTTING SERVICES, INC.

James C. Blecke
Counsel for Precision Cutting
Deutsch & Blumberg, P.A.
New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

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INTRODUCTION

This answer brief is filed on behalf of the Plaintiff Appellant Respondent, Precision Cutting Services, Inc. (“Precision Cutting”), in support of the District Court reversal of the dismissal of its timely filed cause of action against the Defendant Appellee Respondent, King Ocean Central America, S.A. (“King Ocean”).

JURISDICTION

Discretionary review is predicated upon the District Court’s certification as a question of great public importance. Precision Cutting suggests otherwise. The question of Carmack applicability has only once before reached the appellate courts of Florida, in Harvest International, and the Third District decided the issue consistent with applicable Federal precedent. This case follows Harvest International, and applies settled precedent to the specific facts of the case. It is important only to the parties. Also, the applicable Federal law was materially altered with the ICC Termination Act of 1995. Carmack Amendment liability is now under 49 U.S.C. §14706(a) (1996), with a minimum two year limitations period under 49 U.S.C. §14706(e)(1) (1996).

The "Carmack Amendment" has undergone several changes in conjunction with changes in the overall regulation of interstate transportation. The old "Carmack Amendment," 49 U.S.C. §20(11), was limited to transportation "*from* any point in the United States *to* a point in an adjacent country (e.s.)." Prior to 1978, Carmack applied only to foreign export. In 1978, the "Carmack Amendment" was revised and re-codified into 49 U.S.C. §11707, with more liberal application to all transportation "subject to the jurisdiction of the Interstate Commerce Commission." The ICC jurisdiction extends to transportation *between* the United States and a place in a foreign country to the extent the transportation is in the United States under its continuation of foreign commerce provision.

In 1993, the date of this shipment, foreign import and export were both covered under Carmack, to the extent the transportation was in the United States. Under Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986), cert. den., 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987), the Carmack Amendment applies to the domestic leg of a foreign/interstate shipment. King Ocean's bill of lading contemplated inter-modal transport liability under separate inland carrier bills of lading, and accepted liability consistent with the inland carrier's bill of lading and the applicable Federal law.

Carmack is, generally speaking, a Federal question not a question of Florida law. The issue in this case will likely never arise again, given the ICC Termination Act of 1995, deregulation of the industry, and the current statutory scheme. While the case is important to the parties, it is not of great public importance in the jurisdictional sense.

International multi-modal transportation contemplates governance under the law applicable in the locale, the mode of transportation, and the stage of transport where the loss occurs. There are a variety of international agencies, United Nation Conventions and the International Chamber of Commerce, that have addressed network system multi-model

international transportation. Compliance with their pronouncements is voluntary and primarily contractual. As will be shown in the argument portion of this brief, the King Ocean bill of lading is consistent with multi-modal specific loss liability.

SUMMARY OF ARGUMENT

"The Carriage of Goods by Sea Act does not apply of its own force to cargo after it has left the ship's tackle." Federal Ins. Co. v. American Export Lines, Inc., 113 F.Supp. 540, 542 (S.D.N.Y. 1953). COGSA has no application to this loss of goods occurring on the inland leg of this shipment to Little Rock, Arkansas. COGSA does not supersede any part of any law applicable to the duties, responsibilities, and liabilities of the ship or carrier after the time the goods are discharged from the ship. 46 U.S.C. § 1311. The COGSA one-year statute of limitations is not applicable to this inland loss of goods. Suit was timely under Carmack.

King Ocean's own bill of lading renounces COGSA and adopts applicable Federal law for inland loss of goods:

(1) If it can be proved that the loss or damage occurred while the Goods were in the custody of an inland carrier the liability of the Carrier and the limitation thereof shall be determined in accordance with the inland carrier's contracts of carriage and tariffs, or in the absence of such contracts or tariffs, in accordance with the international law of the state where the loss or damage occurred.

The Carmack Amendment applies to the transportation of goods in the United States under the continuation of foreign commerce provisions of the Interstate Commerce Act. Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986), cert. den., 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987); Harvest International, Inc. v. Tropical Shipping and Construction Co., Ltd., 644 So.2d 112 (Fla. 3d DCA 1994).

ARGUMENT

The Carriage of Goods by Sea Act has no application to loss or damage to goods during inland transportation. Federal Ins. Co. v. American Export Lines, Inc., 113 F.Supp. 540, 542 (S.D.N.Y. 1953) ("The Carriage of Goods by Sea Act does not apply of its own force to cargo after it has left the ship's tackle"). 46 U.S.C. § 1301(e) expressly provides: "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. § 1311 provides: "Nothing in this Act shall be construed as superseding . . . any law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship." The trial court clearly erred in holding the COGSA statute of limitations applicable to this loss of goods occurring long after the time the goods were discharged from the ship.

King Ocean concedes that COGSA the *statute* has no application, thus the trial court necessarily erred in so holding. King Ocean argues instead a *contractual* adoption of COGSA as a new alternative not raised in the trial court. Unfortunately, the King Ocean Bill of Lading does not incorporate COGSA to control inland loss of goods. The contract in this case provides:

4. CARRIER'S RESPONSIBILITY

The Carrier undertakes responsibility from the place of receipt (if named herein) or from the port of loading to the port of discharge or the place of delivery (if named herein) as follows:

(1) *If it can be proved that the loss or damage occurred while the Goods were in the custody of an inland carrier the liability of the Carrier and the limitation thereof shall be determined in accordance with the inland carrier's contracts of*

carriage and tariffs, or in the absence of such contracts or tariffs, in accordance with the international law of the state where the loss or damage occurred. [e.s.].

(2) Where loss or damage has occurred between the time of receipt of the Goods by the Carrier at the port of loading and the time of delivery by the Carrier at the port of discharge, or during any prior or subsequent period of carriage by water, the liability of the Carrier shall be determined as follows:

- a) If the carriage is to or from the United States of America, the "Carriage of Goods by Sea Act of 1936" (COGSA) of the United States of America, shall apply.
- b) For carriage in all other trades, the "International Convention for Unification of certain Rules relating to Bills of lading", dated Brussels, August 25, 1914 (The Hague Rules, concluding Article IX), shall apply except when the "Hague Visby Rules" (dated Brussels, February 23, 1968) are compulsively applicable at the port of loading in which case the "Hague Visby Rules" shall apply.

(3) Where it cannot be established where the loss or damage occurred the liability of the Carrier shall be determined in accordance with sub-paragraph 2 above.

Under express contractual paragraph (2)(a), COGSA only applies where loss occurs during carriage by water to or from the United States. Since it is undisputed that the loss occurred while the goods were in the custody of an inland carrier, under paragraph (1) "the liability of the Carrier [King Ocean] and the limitation thereof shall be determined in accordance with the inland carrier's [Paradise Freightways'] contracts of carriage." In this case, there are no time limitations for filing suit under the Paradise Freightways' contract. The Paradise Freightways' bill of lading is governed by the Carmack Amendment.

Even if the Paradise Freightways' contract is ignored, liability is "in accordance with the international law of the state where the loss or damage occurred." The law of the

United States governing interstate motor transport is the Carmack Amendment and the rules of regulations of the Interstate Commerce Commission.

Under the express terms of King Ocean's own bill of lading quoted above, COGSA has no application to this loss occurring while the goods were in the custody of the inland carrier. The trial court's holding the COGSA statute of limitations applicable is unsalvageable under any theory.

The Carmack Amendment does not contain a statute of limitations as such. To the contrary, it precludes contractual limitations on commencement of suit. The Carmack Amendment provides: "A carrier or freight forwarder may not provide by rule, contract, or otherwise, . . . a period of less than 2 years for bringing a civil action against it under this section." 49 U.S.C. § 11707(e). This suit is timely under Carmack.

The Carmack Amendment applies to the circumstances of this case, i.e., the transportation of goods in the United States under the continuation of foreign commerce provisions of the Interstate Commerce Act. The controlling precedent in Florida is Harvest International, Inc. v. Tropical Shipping and Construction Co., Ltd., 644 So.2d 112 (Fla. 3d DCA 1994). Harvest International held the Carmack Amendment applicable to the loss of goods on the domestic leg of a foreign/interstate shipment from a foreign country into the United States. In that case, as here, the shipper issued a through bill of lading, with inland bills of lading covering the domestic leg of the shipment. "Therefore, the Carmack Amendment is applicable to this case." 644 So.2d at 113.

The Carmack Amendment states that a common carrier providing transportation "subject to the jurisdiction of the Interstate Commerce Commission under sub-chapter I, II, or IV of chapter 105 of this title" is liable for the actual loss of property caused by a carrier "over whose line or route the property is transported in the United States." 49 U.S.C.

§ 11707(a)(1). The jurisdiction of the Interstate Commerce Commission under sub-chapters I, II, and IV of chapter 105 is over (I) transportation that is "in the United States and is between a place in . . . the United States and a place in a foreign country," 49 U.S.C. § 10501(a)(2)(G); (II) transportation between a place in "the United States and a place in a foreign country to the extent the transportation is in the United States," 49 U.S.C. § 10521(a)(1)(E); and (IV) transportation "by water carrier and rail carrier or motor carrier between a place in the United States and a place outside the United States, to the extent that . . . the transportation is provided in the United States," 49 U.S.C. § 10541(a)(3)(A).

In Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986), cert. den., 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987), the court spelled out the statutory basis for Carmack applicability to circumstances as are present in this case:

The Carmack Amendment applies when the ICC has jurisdiction over the shipment in question, 49 U.S.C. § 11707(a). Among the shipments over which the ICC has jurisdiction are shipments "between a place in . . . the United States and a place in a foreign country to the extent the transportation is in the United States 49 U.S.C. § 10521(a)(1)(e) (the "continuation of foreign commerce" provision). [799 F.2d at 699].

ICC jurisdiction and the applicability of the Carmack Amendment cannot be manipulated or defeated with the presence or absence of separate bills of lading or receipts for goods in transit between a place in a foreign country and a place in the United States, to the extent the transportation is in the United States. Section 11707(a)(1) provides: "Failure to issue a receipt or bill of lading does not affect the liability of a carrier or freight forwarder."

Swift Textiles makes clear that Carmack Amendment applicability does not turn upon the vagaries or technicalities of the underlying bills of lading:

The nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by "the essential character of the commerce," [citation omitted], reflected by the "intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement." [799 F.2d at 699].

* * *

In our case, it cannot be disputed that the shipment was intended to begin in Switzerland and end in LaGrange, Georgia. There was no reason for the container to come to rest in Savannah other than for the consignee's customs broker to make arrangements for the Savannah to LaGrange leg of the journey. 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. [Citation omitted]. Thus, the shipment was a "continuation of foreign commerce," the Carmack Amendment applied to the shipment. [799 F.2d at 700].

See also, Fine Foliage of Florida, Inc. v. Bowman Transportation, Inc., 698 F.Supp. 1566 (M.D. Fla. 1988), aff'd., 901 F.2d 1034 (11th Cir. 1990), where the Carmack Amendment applied to the inland portion of a foreign/interstate shipment.

“The Carmack Amendment applies when the ICC has jurisdiction over the shipment in question, 49 U.S.C. §11707(a).” *Swift Textiles* . . . Not only does the ICC have jurisdiction over interstate shipments, but also it has jurisdiction over shipments “between the United States and a place in a foreign country to the extent the transportation is in the United States,” under its ““continuation of foreign commerce”” provision. [698 F.Supp. at 1571].

Here it is apparent that the movement of the container by motor carrier from Sun Terminal to Sun Depot to the Paradise yard, with the intent to complete its transport to Little Rock, Arkansas, was a shipment over which the ICC has jurisdiction under the "continuation of foreign commerce" provision. The Carmack Amendment applies and the trial court erred in holding otherwise.

King Ocean misplaces reliance upon Capitol Converting Equipment, Incorporated v. LEP Transport, Incorporated, 965 F.2d 391 (7th Cir. 1992) and Hiram Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1508 (11th Cir. 1989). Neither case involves a loss of goods during inland transportation. In Hiram Walker, the Tia Maria was spilled dockside due to the stevedore's negligence, while being transferred from tanks into the carrier's freight trailer. In Capitol Converting, the machinery was seized and sold by U.S. Customs upon arrival at Norfolk, Virginia. Neither case involved loss during inland motor carriage subject to ICC jurisdiction.

King Ocean's "Himalaya" clause argument is a non-sequitur. Himalaya clauses extend bill of lading limitations to intermediate carriers. King Ocean is the primary contracting party, not an intermediate carrier. King Ocean's contract adopts the liability of the inland carrier and local law, where it can be proved that the loss occurred while the goods were in the custody of the inland carrier. Here the loss indisputably occurred while the goods were in the custody of the inland carrier, inland transportation governed by the Carmack Amendment.

CONCLUSION

The summary final judgment on the statute of limitations was properly reversed, and the District Court decision should not be disturbed.

Rex B. Guthrie
Attorney for Precision Cutting
First Union Financial Center
Suite 4950
Miami, Florida 33130
(305) 358-4962

James C. Blecke
Attorney for Precision Cutting
Deutsch & Blumberg, P.A.
New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, FL 33132
(305) 358-6329

By _____
James C. Blecke
Florida Bar No. 136047

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon: REX B. GUTHRIE, ESQUIRE, Attorney for Precision Cutting, First Union Financial Center, Suite 4950, 200 South Biscayne Boulevard, Miami, Florida 33130; JOHN B. PAPPAS, ESQUIRE and SCOTT J. FRANK, ESQUIRE, Attorneys for Paradise, Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-5946; GERHARDT A. SCHREIBER, ESQUIRE, Attorney for King Ocean, 890 South Dixie Highway, Miami, Florida 33146; and RICHARD B. AUSTIN, ESQUIRE, Attorney for Martainer, Inc., 300 Rochester Building, 8390 N.W. 53rd Street, Miami, Florida 33166, this 15th day of September, 1997.

James C. Blecke
Counsel for Precision Cutting
Deutsch & Blumberg, P.A.
New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, FL 33132
(305) 358-6329

By _____
James C. Blecke
Florida Bar No. 136047