

**SUPREME COURT
OF FLORIDA**

CASE NO. 91,033

KING OCEAN CENTRAL AMERICA, S.A.,

Petitioner,

vs.

PRECISION CUTTING SERVICES, INC.,

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT

OF APPEAL CASE NO. 96-1463

INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

a. Jurisdiction

This case is brought to this court by way of the certification of the District Court of Appeal, Third District, that the issue ruled on by it and presented by this instant proceeding is of great public importance. Art V, §3(b) (4), Fla. Const.; Florida Rule of Appellate Procedure 9.125 (a).

b. General Basis for Certification

The case arises out of a set of facts which are repeated through out the State of Florida thousands of times a day. Cargo originating at a point outside the United States arrives at a United States landing point (either a seaport or international airport) moving on a bill of lading issued at the foreign point of origin by the foreign common carrier for delivery to a point in the United States. The origin and destination named requires the use of multiple forms of transportation. It is generally referred to as multimodal or intermodal transportation service. It involves multiple transportation formats such as ocean carrier-motor carrier-rail carrier or air carrier-motor carrier or any combination of two or more forms of carrier service.

c. Nature of the Case

Costa Rican subsidiary of Precision Cutting loaded a shipping container with 990 cartons of finished Levis Docker slacks. (R. 147). King Ocean took delivery of the container in Tres Rios, Costa Rica, and transported it by motor carrier to Puerto

Limon, Costa Rica, for shipment to Miami and for further transport to Little Rock, Arkansas (R. 147). King Ocean issued its combined multimodal through bill of lading from Costa Rica to Little Rock. (R. 147). Under the terms of the contract for carriage King Ocean was responsible for the delivery of the cargo to Little Rock, Arkansas and for all inland transportation. King Ocean's bill of lading extended "the full benefit of and right to all limitations of or exemptions from liability " provided in COGSA "during the entire period of time that the Carrier may have responsibility under the contract of carriage" Paragraph 4 of the bill of lading. King Ocean also agreed that its liability and limitation would be determined by the inland carrier's contract and tariff if the loss occurred while the goods were in the custody of the inland carrier. Paragraph 4.1 of the bill of lading.

The goods arrived in Miami on May 27, 1993. King Ocean arranged for the inland transportation and on May 28, 1993, the inland carrier picked up the container and transported it to its freight yard for further transportation to Little Rock, Arkansas. The inland carrier prepared its bill of lading. The container was stolen from the inland carrier's freight yard before it was transported to Little Rock, Arkansas.

The cargo was to be delivered to the consignee on June 3, 1993.

d. Course of Proceedings and Disposition

On June 13, 1994, Precision Cutting sued King Ocean, among others, alleging that King Ocean was liable for the loss under the Carmack Amendment and alternatively under COGSA. The trial court ruled that King Ocean's liability was governed by COGSA and since the suit was filed more than one year after the date

that the cargo should have arrived found that the claim was time barred and entered summary judgment in favor of King Ocean.

Precision Cutting appealed arguing that King Ocean's liability is governed by the Carmack Amendment. The appeals court agreed with Precision Cutting and on March 19, 1997, reversed and remanded the trial court's order of dismissal. On June 25, 1997, the appeals court denied King Ocean's motion for rehearing and motion for rehearing en banc but certified the following question of great public importance:

WHERE AN OCEAN CARRIER ISSUES A THROUGH BILL OF LADING WHICH INCLUDES INLAND TRANSPORTATION IN THE UNITED STATES BY MOTOR CARRIER, AND WHICH PROVIDES THAT THE OCEAN CARRIER WILL BE VICARIOUSLY LIABLE FOR ANY LOSS WHILE THE GOODS ARE IN THE CUSTODY OF THE INLAND MOTOR CARRIER, AND THE GOODS ARE LOST WHILE IN THE CUSTODY OF THE INLAND MOTOR CARRIER WHO HAS ISSUED A SEPARATE BILL OF LADING, IS THE OCEAN CARRIER AS A MATTER OF LAW SUBJECT TO THE CARMACK AMENDMENT AND THE CARMACK TWO-YEAR STATUTE OF LIMITATIONS FOR THE INLAND LEG OF THE JOURNEY, OR IS THE OCEAN CARRIER'S LIABILITY GOVERNED BY THE CARRIAGE OF GOODS BY SEA ACT (COGSA), THE TERMS OF THE BILL OF LADING, AND THE COGSA ONE-YEAR STATUTE OF LIMITATION ?

SUMMARY OF ARGUMENT

The United States Congress and the various states have established laws and created administrative agencies and provided for them to promulgate regulations governing the duties, responsibilities and liabilities of carriers in transactions between shippers and common carriers. The lines between the various carriers, sea, air, and domestic (interstate and intrastate) inland, are clearly defined by the statutes and the regulatory framework created to control the different types of transportation services available to the commercial world. Carriers of goods by sea are governed by COGSA, not the Carmack Amendment.

ARGUMENT

WHERE AN OCEAN CARRIER ISSUES A THROUGH BILL OF LADING WHICH INCLUDES INLAND TRANSPORTATION IN THE UNITED STATES BY MOTOR CARRIER, AND WHICH PROVIDES THAT THE OCEAN CARRIER WILL BE VICARIOUSLY LIABLE FOR ANY LOSS WHILE THE GOODS ARE IN THE CUSTODY OF THE INLAND MOTOR CARRIER, AND THE GOODS ARE LOST WHILE IN THE CUSTODY OF THE INLAND MOTOR CARRIER WHO HAS ISSUED A SEPARATE BILL OF LADING, THE OCEAN CARRIER'S LIABILITY AS A MATTER OF LAW IS GOVERNED BY THE CARRIAGE OF GOODS BY SEA ACT (COGSA), THE TERMS OF THE BILL OF LADING, AND THE COGSA ONE-YEAR STATUTE OF LIMITATION

The United States Congress and the various states have established laws and regulations governing the transactions between shippers and common carriers. The Carmack Amendment, 49 U.S.C. § 11707, governs domestic common carriers subject to the jurisdiction of the Interstate Commerce Act; the Carriage of Goods By Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, governs ocean common carriers to or from ports of the United States in foreign trade; the Warsaw Convention, 49 STAT. 3000, governs air carriers in international trade; while the individual states govern intrastate transportation.

The liability of ocean common carriers is governed by the terms and conditions of the carrier's bill of lading and COGSA. The carrier may contractually extend COGSA's applicable period, *Brown & Root, Inc., v. M/V Peisander*, 648 F.2d 415, 1982 AMC 929 (5th Cir. 1981); may, via the "Himalaya" clause, extend the benefits

of COGSA to its stevedores, agents, and independent contractors; may under a combined multimodal through bill of lading assume the responsibility for the carriage of the goods from the point of reception to final destination; and may incorporate the inland carrier's tariff.

The Carmack Amendment covers

the liability of railroads, motor carriers, and freight forwarders under receipts and bills of lading . . .

The liability of water carriers for cargo loss and damage was not and is not covered by the Carmack Amendment provisions, but is determined by the bill of lading issued by the carrier by water. Liability of carriers of goods by sea is governed by the U.S. Carriage of Goods by Sea Act. Saul Sorkin, *Goods in Transit* § 1.19, at 1-126 to 1-127 (1996) (footnote omitted).

For goods transported by sea from a foreign country to the United States with subsequent inland interstate transportation the question has arisen whether the domestic inland carrier is subject to the Carmack Amendment or via the "Himalaya" clause COGSA. The resolution of the question rests upon whether the goods were transported under a through bill of lading (one contract between the carrier and shipper) or whether a separate and distinct bill of lading (more than one contract) was issued for the domestic inland transportation.

The federal decisions addressing this issue are *Capital Converting Equipment, Inc. v Lep Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992); *Swift Textiles, Inc. v Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied* 480 U.S. 935, 107 S.Ct. 1157, 94 L.Ed.2d 768 (1987); and *Hiram Walker & Sons, Inc. v Kirk Line, et.*

al., 877 F.2d 1508 (11th Cir. 1989).

In *Swift Textiles*, Swift was an American company which brought goods from a Swiss manufacturer. 799 F.2d at 698. The goods were shipped by ocean carrier to Charleston, S.C., and trucked to Savannah, Georgia, for temporary storage. Swift's customs broker then hired the defendant, Watkins Motor Lines, a Georgia trucker, to move the containers from Savannah, Georgia, to LaGrange, Georgia, which was the final destination. *Id.* There was an accident during Watkins' Savannah to LaGrange part of the trip, and Swift sued Watkins.

The legal issue was whether Watkins, a Georgia intrastate trucker, was covered by the Carmack Amendment, given that Watkins' contract only covered intrastate transportation. Construing the then existing version of the Carmack Amendment, the *Swift Textiles* court stated:

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).

. . . .

Thus, the critical inquiry is not whether the domestic leg of the shipment crossed a state border but rather it is whether the domestic leg of the shipment was intended to be part of a larger shipment originating in a foreign country . . .

We therefore hold that when a shipment of foreign goods is sent to the United States with the intention that it come to a 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 a separate bill or bills of lading. *Id.* at 699, 701.

Swift Textiles is quite clear that the Carmack Amendment applies only to the domestic carrier on the United States leg of the journey as long as the domestic leg is covered by a separate bill of lading. *Swift Textiles* did not impose liability on the ocean carrier, which was not a party to the appeal.

In *Capitol Converting*, the court set forth the factors to be considered in making the determination as whether the goods were carrier under a through bill of lading: (1) whether the final destination is shown on the original bill of lading; (2) the conduct of the shipper and the common carriers; and (3) whether the connecting carriers were compensated by the payment made to the initial carrier or by separate consideration from the shippers.

In *Capitol Converting*, the bill of lading was issued in Italy showing LEP as the consignee, Chicago as the ultimate place of delivery, designated the move as house to house, and indicated that the ocean carrier was to arrange for and compensate domestic transporters. The court found that on its face the bill appears to "contemplate" the use of other carriers to effect inland transportation and to refer "at least indirectly to through transportation". On these facts, the court said:

The Carmack Amendment is an amendment to the Interstate Commerce Act that imposes liability on certain carriers for loss of goods. 49 U.S.C. §11707; . . . It applies to "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.” 49 U.S.C. §11707. This jurisdiction does not extend to shipments by water, rail or motor carriers from a foreign country to the United States, see 49 U.S.C. §10501, 10501, 10561, unless a domestic segment of the shipment is covered by a separate domestic bill of lading. *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S. Ct. 1577, 94 L. Ed. 2d 768 (1987). A bill of lading issued in a foreign country to govern a shipment throughout its transportation from abroad to its final destination in the United States is termed a “through” bill of lading. Because such a “through” bill of lading includes no separate domestic segment as described above, the Carmack Amendment is inapplicable. See *Swift Textiles*, 700 F. 2d at 701; . . . 965 F. 2d at 394.

Since the carriage was governed by a through bill of lading the *Capital Converting* court held that the Carmack Amendment did not apply to the United States domestic inland carrier.

There is absolutely no language, express or implied, in either *Capital Converting* or *Swift Textiles* that would authorize the application of the Carmack Amendment to the ocean carrier.

In *Hiram Walker*, the court held that the ocean carrier's agent's liability would be determined by the application of COGSA.

Hiram Walker involved the transportation of cargo from Jamaica to Miami with anticipated inland transportation from Miami to New Jersey, a continuation of foreign commerce. Kirk Line a foreign ocean carrier issued its bill of lading from Jamaica to Miami. Kirk was responsible to deliver the cargo to the care of Hiram

Walker's agent Indian River - the domestic inland carrier. Kirk hired Eller & Company, a stevedore, to complete its delivery obligation. During the delivery to the inland domestic carrier the cargo was destroyed.

Hiram Walker sued Jamaica Line, the vessel owner; Kirk, the ocean common carrier; Eller & Company, the independent contractor; and Indian River the domestic inland carrier. The district court dismissed Jamaica Line and Kirk and granted summary judgment against Eller and Indian River. The parties appealed the summary judgment but did not appeal the dismissal of Jamaica Line and Kirk.

The Eleventh Circuit held that the complaint sufficiently plead a claim against Indian River under the Carmack Amendment. The court also stated that "... the Carmack Amendment would not support the claims against Eller ..." *Id.* at 1508, and by inference Kirk. The court, although agreeing that Eller was negligent, reversed the summary judgment against Eller. The reversal was based on the court's application of the law of COGSA as to Eller. The court held that if Eller was acting as an independent contractor under Kirk's bill of lading to complete Kirk's delivery obligation then Eller would be protected by the "Himalaya" clause of the bill of lading. As to the inland carrier the court stated "For Indian River, federal law governs the determination of liability and the measure of damages under the Carmack Amendment . . ." *Id.* at 1512.

The court's holding was in accordance with the dividing lines established by

Congress - COGSA governs the ocean carrier and its agents; the Carmack Amendment governs the domestic inland carrier.

In the case at bar, King Ocean issued its through bill of lading for carriage from Costa Rica to Little Rock, Arkansas; King Ocean hired and compensated the domestic inland carrier and delivered the cargo to the inland carrier. The inland carrier issued its bill of lading for the domestic leg of the journey. By contract King Ocean extended the applicability of COGSA “during the entire period of time that the Carrier may have responsibility under the contract of carriage”. Paragraph 4 of King Ocean’s bill of lading. By contract King Ocean also agreed that “. . . the liability of the [ocean] Carrier and the limitation thereof shall be determined in accordance with the inland carrier’s contract of carriage and tariff’s . . .”. Paragraph 4 (1), *Precision Cutting v. King Ocean*, 22 FLW(D) 707 (Fla. 3d DCA 1997), at 709n1..

The Third District court relying on *Harvest International, Inc. v. Tropical Shipping & Construction Co., Ltd.*, 644 So.2d 112 (Fla. 3d DCA 1994) held that the ocean carrier’s (King Ocean) liability was governed by the Carmack Amendment to the Interstate Commerce Act. However, *Harvest International* was wrongly decided.

In *Harvest International*, the Third District Court of Appeals misread and misapplied the holdings of *Capital Converting* and *Swift Textiles* by finding the ocean carrier liable under the Carmack Amendment. In so holding, the court crossed over the well defined dividing lines for the various carriers established by Congress and

since most, if not all, cargo is transported under a bill of lading *Harvest International* effectively overruled both COGSA and the Warsaw Convention. i.e. the air carriers and ocean carriers when operating through Florida ports would either be delivering carriers (off loaded goods) or receiving carriers (on loaded goods) subject to the Carmack Amendment and not as directed by Congress the Warsaw Convention and COGSA.

Harvest International is plainly wrong, must be overruled and does not support the court's holding in this matter.

King Ocean's contractual agreement to be vicariously liable for loss of the goods while in the care of the inland carrier does not effect the outcome. As Judge Cope referring to the incorporation of the inland carrier's tariff in King Ocean's bill of lading stated in his concurring opinion "The problem is that King Ocean bill of lading does not extend the statute of limitations. Consequently, Precision Cutting's lawsuit had to be filed within the one-year limitation period of COGSA." *Id.* at 709n5.

CONCLUSION

There are no federal decisions that find as a matter of law that a ocean common

carrier's liability is governed by the Carmack Amendment. To do so would contravene the statutory scheme established by Congress to govern the liabilities of the various types of transportation. Additionally, uniformity of admiralty and maritime law would be destroyed. Also, since the law of the State of Florida would be at odds with the federal decisions and laws, the laws of the other states of the United States, and the major foreign commercial maritime nations major ocean and air cargo carriers would probably avoid shipments of cargo to and from the State of Florida.

Based on the above, the question certified by the Third District Court of Appeal must be answered that where a ocean carrier issues a through bill of lading which includes inland transportation in the United States by motor carrier, and which provides that the ocean carrier will be vicariously liable for any loss while the goods are in the custody of the inland motor carrier, and the goods are lost while in the custody of the inland motor carrier who has issued a separate bill of lading, the ocean carrier's liability as a matter of law is governed by the Carriage of Goods by Sea Act (COGSA), the terms of its bill of lading and the COGSA one-year statute of limitations and that in accordance therewith that the case of *Harvest International v. Tropical Shipping & Construction Co., Ltd.* be overruled and the Third District Court of Appeal be directed to enter judgment in favor of King Ocean in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief was mailed this 21st day of August, 1997 to: **Rex B. Guthrie, Esq.**, 4950 First Union Financial Center, Suite 4950, Miami, Florida 33130 (305)358-4962; **James C. Blecke, Esq.**, Deutsch & Blumberg, P.A., New World Tower, Suite 2802, 100 N. Biscayne Blvd., Miami, Florida 33132 (305) 358-6329; **Scott J. Frank, Esq.**, Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-5946; **Paul C. Huck, Esq.**, Hozyak Tropin & Throckmorton, P.A., 2800 First Union Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131; and, **Manuel A. Garcia-Linares, Esq.**, Richman Greer Weil Brumbaugh Russomanno, Mirabito & Christensen, P.A., Miami Center, 10th floor, 201 South Biscayne Blvd., Miami, Florida 33131.

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