IN THE SUPREME COURT OF FLORIDA

Case Number 91,033

KING OCEAN CENTRAL AMERICA, S.A.,

Petitioner,

v

PRECISION CUTTING SERVICES, INC.,

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL, CASE No. 96-1463

PETITIONER'S REPLY BRIEF

RICHARD B. AUSTIN, Esq.
300 Rochester Building
8390 NW 53d Street
Miami, FL 33166-7900
(305) 592-0036
Attorney for Petitioner

GERHARDT A. SCHREIBER, Esq.
Rice Fowler, L.C.
890 South Dixie Highway
Miami, FL 33146
(305)662-5550
Attorney for Petitioner

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STATEMENT OF THE CASE

This is the reply brief of the petitioner, King Ocean Central America, S.A.(King Ocean), to the answer brief filed by the nominal respondent, Precision Cutting Services, Inc. (Precision), in connection with this court's consideration of the question certified, pursuant to Florida Appellate Rule 9.030(a)(2)(A)(v), in Precision Cutting Services v King Ocean Central America, 696 So.2d 824, 829(Fla 3d DCA 1997) as follows:

> "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 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 LIMITATIONS?"

Jurisdiction is in this court by reason of Article V, §3(b)(4) of the Florida Constitution.

SUMMARY OF PRECISION'S ARGUMENTS

Precision makes its first argument by postulating the Third District was wrong in determining this is an question of great public importance and making arguments as to the status of the Carmack Amendment to the Interstate Commerce Act and its history which King Ocean believes does not correctly set forth the history and current viability of the Carmack Amendment.

The Precision brief then argues the limited applicability of the Carriage of Goods by Sea Act (COGSA) (46 USC §1300 et Seq.) and, finally, the provision of King Ocean's bill of lading re-

ferred to in the certified question set out above.

PRECISION'S ARGUMENTS

I - JURISDICTION:

Precision asserts the District Court's certification of the above question as one of great public interest is not correct.

It supports this argument by asserting that the question of Carmack applicability has only been decided once in the Florida courts and that "Federal law" on the issue (i.e.: the Carmack Amendment) has been greatly altered by the recent Congressional amendment (The ICC Termination Act of 1995).

Neither position is supported by law or facts.

It has long been the law of Florida that the district courts right to certify a question as being one of great public interest is absolute and not subject to challenge. Susco Car Rental System of Florida v Leonard, 112 So.2d 832, 835(Fla 1959). Precision cannot contest the certification.

Further, Precision's argument that Harvest International v Tropical Shipping & Construction Co., 644 So.2d 112(Fla 3d DCA 1994) is the only Florida case which has addressed the issue raised (i.e.: the application of COGSA and Carmack to intermodal or multimodal shipments) is not correct. The First District in Florida East Coast Railway v Beaver Street Fisheries, 537 So.2d 1065, 1068(Fla 1st DCA 1989), dealt with a freight damage claim involving a multimodal movement from Jacksonville, FL to Providenciales, BWI with the only difference being the inland carrier was a railroad and the through bill of lading

was issued in the US showing a foreign destination. The foreign carrier was an ocean carrier.

Although the Beaver Street Fisheries Case, supra, does not mention the Carmack Amendment by name the First District, in analyzing liability and responsibility of the inland and ocean carriers relied on several Federal cases dealing with multi-modal ocean - inland carrier movements.

One case, Beautifax v Puerto Rico Marine Management, 611 F.Supp 537, 545-6(USDC MD 1985), involved a rail carrier, motor carrier and a freight forwarder subject to the Interstate Commerce Act (read Carmack) and covered the Fridley, MN to Baltimore, MD portion of a Fridley, MN to San Juan, Puerto Rico inland - ocean movement.

The second case, Gordon H. Mooney, Ltd v Farrell Lines, 616 F.2d 619, 624(2d Cir 1980), is even more factually pertinent. A shipment of frozen seafood moved from Amsterdam, Netherlands, via New York, NY to Toronto, Canada, by ocean carrier to New York and by motor carrier from there to Toronto. The seafood arrived in a deteriorated condition at Toronto.

In finding both the ocean and motor carrier partially responsible the court applied COGSA to the ocean carrier and Carmack to the inland carrier.

The Beaver Street Fisheries court, supra, 1069, relied on these cases in apportioning responsibility between the rail and ocean carrier for the damage to the shipment during its movement from Jacksonville to the British West Indies.

These rulings fit perfectly into the congressionally man-

dated regulatory plan of a different and distinct level and type of responsibility for ocean carriers under COGSA (and to a lesser degree the Harter Act) and the Interstate Commerce Act (and the Carmack Amendment) for motor and rail carriers.

The characterization of the Carmack Amendment in Precision's answer brief as being "materially altered" is not borne out by the statutes. Although the Interstate Commerce Commission (ICC) was itself abolished by the ICC Termination Act of 1995 the Interstate Commerce Act continues and is now administered by the Federal Highway Administration (FHWA) and, in so far as Carmack is concerned the only change was to make the Carmack Amendment as it existed in 1993 (when the instant shipment moved) (i.e.: 49 USC §11707) apply by §11707 to Part I carriers (railroads) and a second similar section (49 USC §14706) apply only to Part II (Motor carriers) and Part IV (freight forwarders) carriers as now regulated by the FHWA. Other than this division into separate sections of the IC Act the essence of Carmack remains the same. COGSA was not addressed in any way by the ICC Termination Act of 1995.

II - COGSA:

Precison's next argument is that COGSA only applies while the cargo is on the ship citing Federal Insurance Co v American Export Lines, 113 F.Supp 540, 542(USDC SD NY 1953) COGSA "....does not apply of its own force to cargo after it has left the ship's tackle." . This statement fails to take into consideration the well established rule that the parties to the ocean bill of lading can extend the applicability of COGSA's terms to cover the movement of the cargo far beyond the ship's tackle.

Capitol Converting Equipment v LEP Transport, 935 F.2d 391, 394(7th Cir 1992); Certain Underwriters at Lloyds' v Barber Blue Sea Line, 675 F.2d 266, 270(11th Cir 1982). See also 16 Tulane Maritime Law Journal 179. These provisions are commonly known as the Himalaya Clause and the Clause Paramount.

Precision's argument, although technically correct, does not tell the whole story. COGSA extends, and has for many years without any interference from Congress, well beyond the ship's tackle., as it does in this case.

III - CARMACK AMENDMENT:

Precision argues that the Carmack Amendment applies to all shipments and, by inference, to allparticipants to a movement covered by a through bill of lading citing Harvest International v Tropical Shipping & Construction Co., supra, and the 2 Federal cases it relied on for this proposition. Capitol Converting Equipment v LEP Transport, supra, and Swift Textiles v Watkins Motor Lines, 799 F.2d 697, 699(11th Cir 1986).

King Ocean believes this argument (which is refuted in fine detail by Judge Cope's specially concurring opinion in Precision Cutting v King Ocean Central America, supra, 827-8) fails to give proper consideration to the parameters and scope of the Carmack Amendment.

The US Supreme Court in Missouri Pacific Railroad v Elmore & Stahl, 377 US 134, 137-8, 84 S.Ct 1142, 1144, 12 L.Ed2d 194 (1964) pointed out the Carmack Amendment is the codification of the common law responsibility and liability of the inland carrier plus making any rule, regulation or

other limitation of the carrier's liability unlawful. The only other change was the shipper was relieved of the burden of proving which participating Carmack Amendment governed carrier was actually responsible for the loss of or damage to his cargo. Carmack allowed the shipper to sue either the origin or delivering carrier. Reider v Thompson, , 339 US 113, 119, 70 S.Ct 499, 502, 94 L.Ed 698 (1950).

The language of the Carmack Amendment and characterization of its scope and purpose clearly delineate its objectives and application. In Reider v Thompson. supra, 114, 500, the court stated Carmack applied to "Any common carrier, railroad, or transportation company subject to the provisions of this chapter..." (emphasis supplied) and Capitol Converting Equipment v LEP Transport, supra, 863, where Carmack was limited to a:

> "...common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, and IV of chapter 105 of this title." (Emphasis supplied).

These quotes are set out for the purpose of stressing what is obvious from reading the Carmack Amendment and understanding the intent of Congress from the intent and purpose of the Interstate Commerce Act (the regulation and control of the inland transportation industry for the purpose of serving the general public and maintaining a solid reliable service industry for the economic benefit and safety of the citizenry of the US.

The differences in COGSA starts with the element involved

(the oceans) and the method by which the industry is regulated (Federal Maritime Commision [FMC]) and the different statutory approaches (i.e.: 1 year statute of limitation; $500. per package valuation limitation; seawothiness issues; etc.) from that of the Interstate Commerce Act.

It is obvious that Harvest International v Tropical Shipping & Construction Co., and Precision's theory of imposing the constraints of Carmack on an ocean carrier such as King Ocean is the legal equivalent of trying to pound a square peg into a round hole. It does not compute.

IV - BILL OF LADING CLAUSE:

The provision of the King Ocean bill of lading which is the subject of part of the question raised by the certified question and discussed in Precision Cutting v King Ocean Central America, supra, 825, fn 1, 829 fn 5, poses some puzzling questions which Judge Cope resolved, in his comprehensive concurring opinion by determining it did not apply to the statute of limitation issue which was the basis of resolution at the trial court level.

The subject clause reads 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."

The District Court's decision and opinion presume that the respondent, Precision, who was the appellant before the district court and the respondent before the trial court on King Ocean's motion for summary judgment produced and presented evidence of a contract and tariff in the name of the

inland carrier. There is nothing in the record to support this assumption by the district court.

Presuming the absence of the designated contract and tariff we are left with the saving clause which is:

> ". . . (the liability of the Carrier will be determined) . . . . in accordance with the international law of the state where the loss or damage occurred." (parenthetical insertion ours)

The only applicable "international law" is COGSA.

Assuming, arguendo, the applicability of a contract and tariff an examination of the phrasing demonstrates clearly it is limited to monetary liability and even this interpretation has its limitations.

If the inland carrier has a release rate which is less than the ocean carrier's statutory minimum of $500. per package the clause would be unenforce-ble by the ocean carrier because it cannot enter into a contract which reduces its legal liability to an amount less than the Congressional mandate in COGSA.

The very best reading of the clause is that if: (a) the inland carrier has an exposure in excess of that of the ocean bill of lading; (b) it can be proven the loss occurred while in the possession of the inland carrier; then (c) the ocean carrier will be liable for the higher value.

The determination by Judge Cope that this clause did not include contemplation of such matters as a different statute of limitations than the COGSA limitation is the only conclusion supportable by the clause.

CONCLUSION

The Third District's approach to the quandary created by its opinion in the Harvest International Case, supra, was the posing of a certified question which, upon careful evaluation, appears to obliquely address what the concurring opinion characterizes as a result of the Harvest International court "misreading of certain federal decisions." Harvest International'v Tropical Shipping § Construction Co., supra, 826.

For reasons not readily apparent the Third District seems to be unable toresolve this problem internally and has promulgated the instant certified question which addresses the problem raised by the Harvest International Case and its unfortunate breach of the carefully constructed regulatory web for the separate regulation and operation of the several transportation systems necessary for the proper functioning of the American economy. This aberration must be corrected in order for the master plan and Florida's place in it can function with and in conformity with the rest of the Nation.

The clause in the King Ocean bill of lading which is, in essence, included in the parameters of the certified question as to what statute of limitations is applicable.

It is clear the clause, when analyzed, deals with liability in a monetary sense rather than a clause which seeks to invoke the entire statutory scheme of the Carmark Amendment.

The court must find King Ocean and its activities, from the standpoint the facts and the bill of lading, are governed by the COGSA one-year statute of limitations in answering the certified question. In addition to reversing the decision of the district court in the instant case this court shouldoverrule the

Harvest International Case and affirm the principles set out in Beaver Street Fisheries and the cases cited therein.

CERTIFICATE OF SERVICE

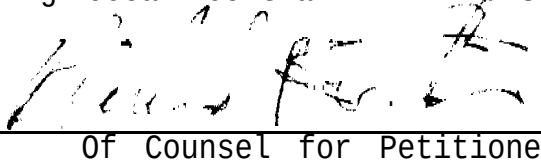
I DO CERTIFY that a copy of the foregoing has been delivered to James C. Blecke, Esq. attorney for respondent, 2802 New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132; and Scott J. Frank, Esq., attorney for Paradise Freightway, Inc., co-defendant; and Rex B. Guthrie, Esq., attorney for respondent, 4950 First Union Financial Center, 200 South Biscayne Boulevard, Miami, FL 33130 by mail this 31 day of October, 1997.

GERHARDT A. SCHREIBER, Esq.
890 South Dixie Highway
Miami, FL 33146
FBN: 194655

RICHARD B. AUSTIN, Esq.
300 Rochester Building
8390 NW 53d Street
Miami, FL 33166-7900
FBN: 002697
MAILING ADDRESS:

P. 0. Box 830310
Miami, FL 33283-0310

Attorneys for Petitioner
King Ocean Central America, S.A.



Of Counsel for Petitioner