Through Bills of Lading: Recent Trends Show Strong Enforcement in Favor of Downstream Rail Carriers

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The determination of whether a through bill of lading exists is an essential question for any rail carrier defending claims relating to an international shipment of cargo. Through bills of lading are documents of carriage that cover, in a single document, both the ocean and inland portions ("multimodal" transportation) of an international shipment of cargo.[1] Such documents are indispensable in modern international commerce–shippers and carriers can negotiate a single maritime contract that defines the rights and liabilities of the shipper, the carriers/merchants involved, and the consignee.

In shipments that originate overseas, the parties to a through bill are likely to include the shipper (the international manufacturer/seller of the cargo), the ocean shipping line that will transport the cargo to the United States, and a domestic cargo purchaser or importer. Downstream rail carriers are unlikely to be parties to such agreements because they are retained and compensated separately, sometimes by U.S.-based logistics companies that are themselves not parties to the through bill. Rail carriers are unlikely even to be aware that a through bill of lading exists, as they are not privy to the negotiations between upstream parties.[2]

When damage is alleged to occur during shipment, claims are often asserted against a rail carrier solely by reference to the Carmack Amendment to the Interstate Commerce Act.[3] The Carmack Amendment applies to rail carriers that issue, or are required to issue, domestic bills of lading for interstate transport of goods.[4] But this body of law does not apply when a through bill of lading governs and a rail carrier is merely providing transportation services in the midst of a larger multimodal shipment.[5] Where a through bill exists, the Carriage of Goods by Sea Act ("COGSA") is likely to apply.[6] COGSA applies to contracts of carriage to or from the U.S. in foreign trade, but parties can contract to have COGSA apply to the entire international transport of cargo through to its inland destination (a term that is routinely seen in the terms and conditions of through bills of lading). The determination as to which body of law applies is often not made until after a lawsuit is filed. Claimants are unlikely to volunteer the existence and substance of upstream contracts and are likely to argue aggressively that such agreements are not material when defining a rail carrier's liability.

The Supreme Court has rendered two significant decisions relating to through bills–the *Kirby* and *Regal-Beloit* cases. In these cases, the Supreme Court brought uniformity and certainty to an otherwise confusing matrix of decisions and authorities.[7] These decisions and their progeny have suggested a policy of near universal enforcement of the terms of through bills of lading.[8] Recently, the Sixth Circuit Court of Appeals extended this policy favoring enforcement of through bills even further. This new case provides that downstream subcontractors, like rail carriers, are entitled to the protections of the terms of a through bill without satisfying complex multi-factor tests to prove that a document is a through bill and further, that rail carriers are likely even to be entitled to recover attorneys' fees when claims are asserted against them despite the protections of a through bill.[9] This article briefly addresses the prevailing legal views on the enforcement of through bills and summarizes the most recent case law that provides the strongest protection for rail carriers yet.

Brief Primer on the Precedent Relating to Through Bills

In *Kirby*, the Supreme Court held that a subcontractor in a multimodal shipment, such as a rail carrier, has no duty to investigate upstream the underlying communications and arrangements between a shipper and its agents.[10] Rather, the subcontractor is entitled to rely on the plain text of the applicable contract for carriage (or bill of lading) and the liability limitations set forth therein.[11]

The Supreme Court considered whether the Norfolk Southern Railway ("NS") could invoke the liability protections contained in two bills of lading issued by: (1) intermediary freight forwarding company International Cargo Control ("ICC") to the shipper, Kirby; and (2) a German shipping company, Hamburg Sud, to ICC.[12] Both bills of lading were through bills and contained Himalaya Clauses that extended the benefit of their liability protections downstream. Hamburg Sud, through a subsidiary, thereafter contracted with NS to transport the cargo by rail. The train derailed and the cargo was lost.[13]

NS invoked the liability protections in

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both bills, arguing that as a subcontractor of both Hamburg Sud and ICC, it was entitled to the protections afforded by the Himalaya Clauses. The Supreme Court agreed, citing with approval COGSA's option to extend liability protections by contract.[14] As the Court held, NS was entitled to the protections of a liability limitation negotiated by the shipper's intermediary (Hamburg Sud), fashioning an "efficient default rule for certain shipping contracts": "When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed."[15] Indeed, according to *Kirby*, if the law required a subcontracting entity (such as a rail carrier) to seek out more underlying information prior to contracting with an intermediary, that task might be "very costly or even impossible."[16] Pursuant to *Kirby*, a subcontracting carrier is entitled to rely on the through bill as the contract for carriage; any finding to the contrary would undermine the principles of recognizing through bills.[17]

The Supreme Court's reasoning in *Kirby* has been applied in subsequent cases to reject the use of extrinsic evidence to alter the terms or enforcement of a bill of lading. These courts have refused to override the plain text of a bill of lading "based on private intentions and agreements" between the parties to the through bill.[18]

In *Regal-Beloit*, the Supreme Court addressed the issue that was omitted from *Kirby*–that is, the interplay between COGSA and the Carmack Amendment when goods are imported from overseas pursuant to a through bill of lading.[19] In that dispute, the shipper contracted with Kawasaki and its agent, K-Line, to move goods from China to inland portions of the U.S. K-Line thereafter issued four through bills of lading.[20] The through bills in *Regal-Beloit* contained a Himalaya Clause, a Clause Paramount calling for COGSA to apply, and a clause permitting K-Line "to subcontract on any terms whatsoever."[21] K-Line contracted with Union Pacific ("UP") for rail shipment and the UP train derailed.[22] At issue before the Court was whether the Carmack Amendment or COGSA applied to the inland portion of the international shipment under a through bill. The Court held that the Carmack Amendment does not apply to a shipment originating overseas under a through bill of lading.[23] The Supreme Court specifically rejected those decisions that premised application of the Carmack Amendment on whether a rail carrier actually issued a domestic bill of lading.[24] According to the Court, the decisive question was not whether the rail carrier actually issued a bill of lading, but rather whether the carrier *was required* to issue a bill of lading by the Carmack Amendment.[25]

Precedent Relating to the Determination Whether a Document Is a Through Bill

Since the *Kirby* and *Regal-Beloit* cases were decided, other courts have essentially uniformly enforced the terms of through bills of lading.[26] None of these cases and very few opinions from lower courts, however, addressed situations in which the parties dispute whether the contract at issue was a through bill. In many cases, like *Kirby* and *Regal-Beloit*, the parties appeared to stipulate that the document was a through bill and the contested issue related to whether the terms were enforceable or applicable. There are few cases in which courts directly considered whether a contract is a through bill. Certain decisions used a multi-factor test to make this determination.[27] Specifically, some courts applied the following factors (with some differences between decisions):

1. Whether the final destination of a multiple mode transportation is stated in the bill of lading;
2. The conduct of the parties;
3. How the freight was paid; and
4. Whether a domestic bill of lading was issued for the inland portion.[28]

After *Regal-Beloit*, some courts appeared to concede that the fourth factor was likely removed from the test, but it was not clear whether this factor test should continue to be applied.

The *Siemens* Case

The Sixth Circuit Court of Appeals (on appeal from E.D. Ky.) recently entered an opinion that reflects perhaps the most rigorous enforcement to date of a through bill to bar claims against a rail carrier.[29] In *Siemens Energy, Inc. v. CSX Transportation, Inc.*, the action arose from an international shipment of two electrical transformers from Germany to Ghent, Kentucky.[30] The arrangement of the shipment presented a somewhat complex scenario. Siemens AG, based in Germany, manufactures and sells transformers in the U.S. through its subsidiary, Siemens Energy. In order to transport the cargo, Siemens retained Kuehne + Nagel AG ("K+N AG") and its U.S. subsidiary, K+N Inc., to arrange the particulars with downstream subcontractors.[31]

K+N retained Kawasaki Kisen Kaisha (K-Line) to provide the ocean carriage of the cargo. K+N also retained Progressive Rail, a rail logistics coordinator, to arrange the land leg of the trip from Baltimore to Ghent, Kentucky. Progressive Rail separately contracted with CSX Transportation ("CSXT") to provide the rail carriage of the cargo.[32] K+N's non-vessel operating carrier arm, Blue Anchor Line, issued a bill of lading for the trip that purported to provide the terms of carriage. K-Line also issued its own waybill. Siemens AG, Siemens Energy, K+N AG, K+N Inc. and Blue Anchor were all parties to the Blue Anchor bill of lading.[33]

CSXT was multiple steps removed from the negotiation and was not aware of the existence of the through bill, having negotiated only with Progressive Rail. A separate domestic bill of lading was issued.[34] During the rail portion of the journey, the cargo was allegedly damaged. Both Siemens Energy and Progressive Rail sued CSXT under the Carmack Amendment in federal district court.

Is a Bill of Lading a "Through Bill"?

The bill in the *Siemens* case referred on its front page to "multimodal transport," defined as when "the Carrier has indicated a place of receipt and/or a place of delivery on the front hereof in the relevant spaces."[35] The Blue Anchor-issued bill of lading indicated that Bremerhaven, Germany, would be the port of loading; Baltimore, Maryland, the port of discharge; and Ghent, Kentucky, the "Place of Delivery."[36]

Siemens argued that the "Place of Delivery" notation was a mistake by K+N when it filled out the document. Siemens also contended that prior to the issuance of the through bill, Siemens AG and K+N AG separately negotiated and paid the ocean portion from the negotiation and payment between Siemens Energy and K+N Inc. for the land portion.[37] This argument seemed to find support in the case law (mostly pre *Kirby* and *Regal-Beloit*) addressed in this article that adopted multi-factor tests to analyze whether a document was a through bill.

Rejecting Siemens' arguments, the federal district court determined that the document was a through bill because the document, and the facts surrounding the negotiations, satisfied the multi-factor test outlined in the *NYK Lines* decision cited therein.[38] The analysis was highly complex. The court rejected Siemens' attempt to vary or negate the terms with extrinsic evidence, giving effect to the plain meaning of the terms. The court also determined that the effect of such a mistake, if one occurred, should be borne by the parties to the agreement, not the nonparty rail carrier.[39]

Is a Rail Carrier Exempt from Liability Under a Through Bill?

If a bill of lading is a through bill, the second question in any dispute, as discussed in the *Siemens* opinion, is whether the claims against a rail carrier are barred under the terms of the through bill.[40] The terms and conditions applicable to the bill are often missing from copies of the documents circulated in litigation, but the applicable terms are reproduced on the websites of the various carriers.

The answer to this second question depends on whether the bill contains a "Himalaya Clause" that extends liability protections to subcontractors.[41] If this clause is present, rail carrier liability is likely to be limited or barred, depending on the additional terms and conditions.

In *Siemens*, the Himalaya Clause allowed the carrier to "sub-contract" any part of the carriage, including by "rail . . . transport operators" as well as by "any independent contractors, servants or agents employed by the Carrier in performance of the Carriage and any direct or indirect sub-contractors, servants or agents thereof, whether in direct contractual privity with the Carrier or not."[42] It also provided every subcontractor with the "benefit of all provisions . . . benefiting the Carrier," including a "covenant not to sue." The covenant not to sue provided that the "merchants"–defined to include the shipper (Siemens AG) and the consignee (Siemens Energy)–agree that "no claim or allegation shall be made against any Sub-Contractor whatsoever, whether directly or indirectly, in connection with the Goods or the Carriage of the Goods."[43] The court held that Siemens Energy, a merchant, could not sue CSXT, a subcontractor, under this provision.[44] The district court held that under these clauses, the claims against CSXT were barred.[45]

The Sixth Circuit Appeal

On appeal, after briefing and oral argument, the Sixth Circuit held in favor of CSXT in a strongly worded opinion favoring enforcement of through bills. Although the result was the same as in the district court, the manner in which the appellate court proceeded was simpler and more favorable to parties seeking to dismiss claims under through bills. The court enforced the unambiguous terms of the through bill. The court stated that through bills are interpreted and enforced like any other contract and declined to review extrinsic evidence.[46] The court determined that the document was a through bill because it stated on its face that it was. The court did not undertake a multi-factor analysis at all.

Further, citing *Regal-Beloit*, the court held that the fact that a domestic bill of lading was issued is immaterial and did not require application of the Carmack Amendment.[47] Where a rail carrier is unaware of the existence of a through bill, the issuance of a domestic bill of lading is not unusual and has no effect on liability. The court also rejected Siemens' argument that it paid for each leg of the journey separately.[48] The court held that "[t]he method of payment does not alter the method of liability." Like the district court, the Sixth Circuit did not credit Siemens' arguments that the terms of the through bill were a mistake or unfair, stating that the document's effect was clear and the negotiations of the terms were routine.[49]

The opinion is significant in that it furthers the removal of the last vestiges of the multi-factor tests used to determine whether a document is a through bill. These tests have little relevance or use after *Kirby* and *Regal-Beloit* because they allow significant extrinsic evidence to contradict unambiguous documents; are contrary to the treatment of bills of lading like any other contract; and do not further the Supreme Court's stated policy of favoring through bills. The *Siemens* decision represents a major leap in the direction set forth by the Supreme Court.

Recovery of Attorneys' Fees

In perhaps the first decision of its kind, after the Sixth Circuit opinion was entered, the Eastern District of Kentucky awarded CSXT its reasonable attorneys' fees under the Himalaya Clause in the through bill.[50] Specifically, the Blue Anchor through bill obligated the merchant (Siemens) to indemnify the carrier (K+N/Blue Anchor Line) for all consequences of the merchant bringing a claim against a subcontractor in violation of the covenant not to sue.[51] The terms and conditions defined "[i]ndemnify" to include legal fees and costs.[52] The Himalaya Clause broadly extended to the subcontractor (CSXT) the benefit of all provisions in the Blue Anchor bill benefiting the carrier.[53] Because the obligation to indemnify was a provision benefiting the carrier, CSXT was entitled to the benefit of that provision, i.e., indemnity.[54] This decision shows that through bills of lading not only provide rail carriers with a potential shield against liability, but also a sword to seek affirmative relief against claimants that assert claims that are barred. This is particularly significant in the cargo claim context, where cases generally do not present an opportunity for a rail carrier to recover attorneys' fees.

Strategic Assessment for Claims Involving International Shipments

When any claim against a rail carrier is

made, it can be a natural reaction to assess the claims as asserted and consider likely defenses under the rail carrier's known bill of lading. Given, however, the potential effect of a through bill, it is a crucial first step to determine whether the rail carrier performed services as merely a part of a shipment that originated overseas. Cargo owners and claimants may be reluctant to disclose documents relating to upstream arrangements, but this should be an area of inquiry early in the claim process or if not feasible, as soon as the discovery process begins in a lawsuit. Most international carriers have standard terms and conditions that are similar to those referenced in this article. These terms, which may not initially be known to a carrier, could present an efficient avenue to seek the dismissal of claims and attorneys' fees.

Endnotes

1 *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 94 (2010); *Siemens Energy, Inc. v. CSX Transp., Inc.*, 981 F.3d 529, 532 (6th Cir. 2020).
2 *Norfolk S. Ry. Co v. Kirby*, 543 U.S. 14, 33-35 (2004).
3 49 U.S.C. § 11706 *et. seq.*
4 *Id.*
5 *Regal-Beloit*, 561 U.S. at 103-04.
6 46 U.S.C. § 30701.
7 *See Kirby* and *Regal-Beloit.*
8 *See, e.g., Royal SMIT Transformers BV v. Onego Shipping & Chartering, BV*, 898 F.3d 543 (5th Cir. 2018).
9 *Siemens Energy*, 981 F.3d at 532.
10 *Kirby*, 543 U.S. at 33-35.
11 *Id.*
12 *Id.* at 19-20.
13 *Id.*
14 *Id.* at 29.
15 *Id.* at 32-33.
16 *Id.* at 35.
17 *Id.* at 33-34.
18 *See, e.g., Royal SMIT*, 898 F.3d at 552; *U.S. ex rel. E. Gulf, Inc. v. Metzger Towing, Inc.*, 910 F.2d 775, 779 (11th Cir. 1990) (quoting *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332–33 (5th Cir. 1981)); *Mazda Motors of Am., Inc. v. M/V COUGAR ACE*, 565 F.3d 573, 579 (9th Cir. 2009).
19 *Regal-Beloit*, 561 U.S. at 103-04.
20 *Id.* at 93-94.
21 *Id.*
22 *Id.* at 94-95.
23 *Id.* at 100.
24 *Id.* at 103.
25 *Id.*
26 *See, e.g., Allianz CP Gen. Ins. Co. Ltd. v. Blue Anchor Line*, No. 02 Civ. 2238 (NRB), 2004 WL 1048228 (S.D.N.Y. May 7, 2004).
27 *Marine Office of Am. Corp. v. NYK Lines*, 638 F. Supp. 393 (N.D. Ill. 1985).
28 *Custom Rubber Corp. v. ATS Specialized, Inc.*, 633 F. Supp. 2d 495, 504 (N.D. Ohio 2009); *Marine Office of Am. Corp. v. NYK Lines*, 638 F. Supp. 393, 399 (N.D. Ill. 1985).
29 *Siemens Energy*, 981 F.3d at 532.
30 *Id.* at 531.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* at 533.
35 *Id.* at 532-33.
36 *Id.*
37 *Id.* at 533; 534.
38 *Siemens Energy, Inc. v. CSX Transp., Inc.*, No. 3:15-cv-00018-GFVT, 2020 WL 1161930, at *4-7 (E.D. Ky. Mar. 10, 2020).
39 *Id.* at *8.
40 *Siemens Energy*, 981 F.3d at 533-34.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Siemens Energy, Inc. v. CSX Transp., Inc.*, No. 3:15-cv-00018-GFVT, 2020 WL 1161930, at *7-8 (E.D. Ky. Mar. 10, 2020).
46 *Siemens Energy*, 981 F.3d at 533-34.
47 *Id.* at 533-34.
48 *Id.* at 534.

[49] *Id.* at 533.
[50] *Siemens Energy, Inc. v. CSX Transp., Inc.*, No. 3:15-cv-00018-GFVY, 2021 WL 1032298 (E.D. Ky. Mar. 17, 2021).
[51] *Id.* at *2.
[52] *Id.*
[53] *Id.*
[54] *Id.* at *3.