No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,
v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

J. S. SCOTT BUSBY
CHARLES ROBERT SHARP
BOVIS, KYLE & BURCH, LLC
53 Perimeter Center East
Third Floor
Atlanta, Georgia 30346
(770) 391-9100

Counsel for Respondents

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QUESTIONS PRESENTED

1. Does a bill of lading contract that a transportation company concludes with a manufacturer as a "carrier," thereby agreeing to assume responsibility for the carriage of the manufacturer's goods, rather than as an "agent," authorize that carrier to bind the cargo owner to a subcontract of carriage with another carrier?

2. Does a Himalaya clause in a bill of lading using general language mentioning servants, agents, and independent contractors adequately specify a sub-sub-subcontractor with "sufficient clarity," as required by *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959)?

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents James N. Kirby Pty Limited d/b/a Kirby Engineering and Allianz Australia Insurance Limited state the following:

James N. Kirby Pty Limited d/b/a Kirby Engineering, an Australian corporation, has no parent company, and no publicly owned company owns 10% or more of its stock.

Allianz Australia Insurance Limited, which was known as MMI General Insurance, Ltd. when this litigation began, is a wholly owned subsidiary of Allianz AG, Munich, a German public stock corporation. Allianz AG has no parent company, and the only publicly owned company that owns 10% or more of its stock is Münchener Rückversicherungs-Gesellschaft AG.

For the convenience of the Court when referring to the parties in the case, we will continue to refer to co-respondent Allianz Australia Insurance Limited as "MMI General Insurance, Ltd." (or "MMI"), which was the name in use at the time of the relevant transactions.

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Throughout the world, commercial parties rely on freedom of contract to define their obligations and to limit their liabilities to each other. This case involves the interpretation of two bills of lading issued in Australia to evidence two contracts for the carriage of goods. Under normal principles of contract interpretation, one contract (the Hamburg Süd bill of lading) cannot limit respondent Kirby's rights to recover in tort for the negligence of petitioner Norfolk Southern ("NS"): Kirby is not a party to that contract, and International Cargo Control Pty Ltd. ("ICC"), the party with whom Hamburg Süd contracted, was not Kirby's agent for any purpose. The other contract (ICC's bill of lading) *is* binding on Kirby, but the Himalaya clause in that bill does not benefit NS: the contract language lacks the requisite clarity and specificity to extend to sub-sub-subcontractors or inland carriers. The Eleventh Circuit meticulously analyzed those contracts to reject NS's effort to limit its liability to $5,000 from a train derailment with a loss of approximately $1.5 million.

Advancing an argument it never made below (or in any other court before now, for that matter), NS crafts an elaborate federal common law rule that it asserts should trump the rights of commercial parties to contract. At many different levels, NS's concoction is so obviously a post-hoc invention of its lawyers that it bears no relation to the real world. Under its own Rail Circular, NS agreed to carry the cargo without knowing its value in exchange for a limit on liability *in excess of* the damage it caused. It seeks to escape its own commercial expectations and carriage responsibilities by implausibly asserting that it is the beneficiary of an old federal common law rule supposedly affording primacy to the ocean bill of lading of the "actual carrier," which it represents was Hamburg Süd. But even if there were such a rule – and NS has made no such showing – Hamburg Süd in fact did not "actually" carry anything but the paperwork: like ICC, it contracted as "carrier" and performed its contract by procuring space aboard a vessel (the *Queensland Star*) owned and operated by a company with which Hamburg Süd had a slot chartering arrangement. NS's argument is based on a carefully crafted, but fatally flawed, series of assumptions that are

simply false. If accepted, NS's argument would completely upset commercial expectations around the world and chart the United States on a solitary course apart from that of every other major maritime nation.

STATEMENT

1. In this interlocutory appeal of a summary judgment entered for NS in which discovery was limited to the cause of the derailment, this Court is obliged to accept the facts alleged in the complaint as true and to draw all necessary inferences in respondents' favor. Because NS has shifted the focus of the questions presented from those granted certiorari,[1] it is important to clarify certain factual matters NS has erroneously represented. Respondents do so based on public record materials, discovery materials produced by NS, and correspondence that would be available in discovery.

In the spring of 1997, James N. Kirby Pty Ltd ("Kirby") solicited bids from four Australian transportation companies to carry engineering equipment to General Motors' Delphi Saginaw plant in Athens, Alabama. Some of this equipment could be shipped in normal containers, but the 10 container loads at issue in this case involved overdimensional loads – equipment that exceeded the height of the containers and therefore needed to be carried in "open top" containers. *See* JA 105. In June 1997, two months before this shipment, Kirby finalized its contract of carriage with ICC, which included ICC's taking responsibility to truck the goods from

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[1] In its merits brief, NS changed the wording of both questions in material respects. The reformulated Question 1 stresses the carriers that "actually transport" the goods, whereas petition Question 1 did not. *Compare* NS Br. i ("carriers that actually transport the owner's goods") *with* Pet. i ("carriers to provide that transportation"). We address the significance of that change at page 15, *infra*. NS has completely reformulated Question 2, dropping the reference to "federal maritime law" controlling the disposition so that the reformulated question is strictly a question of contract interpretation, and obscuring a critical omission (*see* Opp. 24) in petition Question 2, which ignored the alternative holding of the Eleventh Circuit on this issue that constitutes an independent basis for affirming the judgment. *See infra* at 42.

Kirby's plant to the port in Sydney and from the Huntsville rail ramp to the Delphi Saginaw plant in Athens.

On August 27, 1997, ICC issued a bill of lading that evidenced its contract with Kirby to carry the 10 containers from Sydney to Huntsville. A Himalaya clause (*see* Pet. App. 2a & n.1) purported to extend the issuer's defenses to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." *Id.* at 67a. ICC subcontracted with Hamburg Süd for carriage of the goods from Sydney to the Huntsville rail ramp. *See* JA 32. Hamburg Süd, in turn, "arranged for the waterliner service through its subsidiary, Columbus Line USA, Inc., which then subcontracted with [NS] for the inland carriage of the goods from the terminal at Savannah, Georgia to the Huntsville ramp." *Id.*

Hamburg Süd contracted for Kirby's cargo to be carried aboard the *Queensland Star*, a vessel that was owned and operated continuously by Blue Star (North America) Ltd. from 1991 until its demolition in 2003. *See* www.bluestarline.org/act/act6,html; Lloyd's Register of Ships, 1997-98, at 307 (1997).[2] Pursuant to an arrangement between Blue Star and Hamburg Süd, Hamburg Süd obtained space for Kirby's cargo aboard the *Queensland Star*, apparently under a "slot charter," whereby one carrier charters container slots on another's vessels. The agreements authorizing such transactions are on file with the Federal Maritime Commission

[2] The court below assumed that Hamburg Süd owned the *Queensland Star*. *See* Pet. App. 4a. Respondents have consistently maintained (as they do here) that ownership of the vessel that carries the goods is (and always has been) legally irrelevant in determining the "carrier" and the rights of the cargo owner. Until now, respondents have perceived no need to ascertain the irrelevant fact of what company owns and operates the *Queensland Star*. Until its brief on the merits, NS had not made the carrier that "actually transports" the goods the fulcrum of its argument. *See supra* at n.1. Accordingly, now that NS has injected this new issue into the case, respondents have ascertained the true facts of the *Queensland Star*'s ownership, which are publicly available.

("FMC").[3] Every major ocean liner is engaged in such agreements, which reportedly govern the carriage of approximately 90% of all container goods among the major trading nations of Asia, Europe, and North America.[4]

To evidence its contract of carriage with ICC, Hamburg Süd issued a bill of lading to ICC when the goods were loaded aboard the *Queensland Star*. JA 48 (designating ICC as shipper and ICC's U.S. agent, Air Sea International Forwarding Inc., as consignee). After the *Queensland Star* arrived in Savannah, Kirby's cargo was loaded on a NS train pursuant to a contract between NS and Columbus Line USA Inc. ("Columbus Line"), the separately incorporated U.S. subsidiary of Hamburg Süd. *Id.* at 105-09. En route to Huntsville, the train derailed, causing substantial damage to Kirby's equipment. The train, tracks, and crew were all under NS's control. *Id.* at 32. In any event, NS must be presumed negligent, as alleged in the complaint. *Id.* at 33-34.

After the train derailed, NS personnel recorded their expectations of NS's liability. An internal letter dated October 10, 1997, advised that "[o]ur liability is limited by the NS Intermodal Rails Circular to $250,000 per container, and there is a possibility we may receive a claim exceeding our estimate of $820,000." App., *infra*, 1a. Kirby claimed compensation of AUS$2.065 million. JA 36. NS informed Kirby that, "[u]nder [NS's] Circular No. 1-A, which governed this shipment, . . . [NS] shall not be liable for loss damage or delay to lading to any party other than the Rail Services Buyer. NS will not be under any obligation to process any claim by any person other than the Rail Services Buyer." JA 102. The "buyer" under that contract was Columbus Line. "You

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[3] *See* 58 Fed. Reg. 43,360, 43,361 (Aug. 16, 1993) (describing agreement between Hamburg Süd and Blue Star); 52 Fed. Reg. 31,446, 31,446 (Aug. 20, 1987) (describing agreement among Blue Star and other carriers); 50 Fed. Reg. 15,224, 15,225 (Apr. 17, 1985) (same).

[4] *See* Mary Reilly, *Identity of the Carrier: Issues Under Slot Charters*, 25 Tul. Mar. L.J. 505 (2001). NS has admitted that vessel sharing and slot charter arrangements are "increasingly prevalent" in the industry. *See* Pet. 27 n.10 (citing Reilly).

should look to Columbus Line for recovery." *Id.* Under the Rail Circular, NS fixed its liability limit at $250,000 per container, or US$2.5 million for the 10 containers in the shipment. *See* Opp. to Mot. for Partial Summ. J., Ex. 5, R. 16.B.4(d).[5] Nothing in NS's Rail Circular ties its rates to the limitation of liability amount of $250,000 per container or imposes as a precondition that the shipper denominate the cargo's value to obtain that liability amount. *Id.*

Kirby sued ICC and Hamburg Süd in Australia (JA 19), and NS was impleaded into that action. NS challenged jurisdiction. The New South Wales Supreme Court rejected NS's argument, upheld jurisdiction against NS, and assessed costs against NS for bringing a meritless challenge. *James N. Kirby Pty Ltd. v. International Cargo Control Pty Ltd.* [2000] NSWSC 289 (10 Apr. 2000). NS refused to pay the court-ordered costs or to engage in subsequent litigation there.

Along with its insurer, Kirby brought this action in the Northern District of Georgia, where NS denied liability and moved for partial summary judgment. NS argued that its liability (if any) was limited to $5,000, based on the limitation and Himalaya clauses in the ICC and Hamburg Süd bills of lading. The court granted NS's motion. Pet. App. 38a.

2. In an interlocutory appeal, the court of appeals reversed. NS contended that ICC had to be Kirby's agent because it could not be a carrier (not having registered with the FMC). Pet. C.A. Br. 25-29. The court of appeals rejected that argument. Pet. App. 10a n.9. Kirby argued that ICC, as a "carrier," was a "principal" in its relationship with Kirby and therefore ICC could not bind Kirby to the contract evidenced by the bill of lading issued by Hamburg Süd to ICC. The court of appeals agreed. Because "Kirby did not itself agree to the terms of the bill," *id.* at 6a, the "pivotal question" was

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[5] In NS's currently applicable rail circular, it agrees to "be liable for that portion of the loss or damage caused by NS carrier negligence." Rail Circular No. 2, R. 8.3(d), *available at* http://www.nscorp.com/intermodal/ShowDoc/english/intermodal/system_information/general/intermodal_rules_circular.pdf. Its liability limit per container is still $250,000. *Id.*

whether ICC "had authority to and did bind Kirby to the terms of the bill, including its package limitation and its Himalaya clause." *Id.* at 6a-7a. After a detailed factual analysis of the relevant contracts in the transaction, the court determined that ICC was not acting as Kirby's agent to contract with Hamburg Süd and that Kirby was therefore not bound to the Hamburg Süd bill. *Id.* at 7a.

The court then addressed whether NS was entitled to the liability limitation defenses in ICC's bill of lading. The court explained that *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), required that a clause purporting to limit a third party's liability had to be drafted "with sufficient clarity to specifically identify those parties." Pet. App. 11a. The court initially concluded that the phrase "other person" was too vague to satisfy *Herd*'s clarity-of-language requirement, so the question was whether NS was covered by the words "servant, agent, or . . . independent contractor." *Id.* Applying well-established doctrine, the court then offered two independent grounds for holding that the ICC Himalaya clause was insufficiently clear to extend the ICC liability limit to NS. *First*, the court held that the clause must be understood to apply only to ICC's own servants, agents, and independent contractors. Because ICC had not engaged NS, it did not fall within the class of beneficiaries. "If Kirby and ICC had intended for the protections of the ICC bill to extend to sub-sub-contractors, they could have said so." *Id.* at 13a.

Second, the court held in the alternative that, "[i]n addition to not having been 'engaged by the carrier,' " NS could not benefit from the Himalaya clause because it was an "inland carrier." *Id.* at 15a. The court explained that, because a Himalaya clause was primarily intended to benefit maritime entities, "a special degree of linguistic specificity" was necessary "to extend the benefits of a Himalaya clause to an inland carrier." *Id.* at 16a. Because rail carriage has its own liability regime, the court reasoned that the Himalaya clause protections were intended to apply only to "parties who are, so to speak, between liability regimes, at the fringes of the sea regime – stevedores, terminal operators, and the like."

Id. at 17a. Accordingly, "if the Himalaya clause is to extend inland, it must say so with specificity, as, for example, did the Himalaya Clause in the Hamburg Süd bill when it clearly identified as among its beneficiaries 'all participating (*including inland*) carriers.' " *Id.* Such a specificity requirement, in the court's view, better comported with "*Herd*'s principle that liability limitations in bills of lading must be narrowly construed." *Id.* at 18a.

SUMMARY OF ARGUMENT

I. Under established principles of agency law, ICC was Kirby's independent contractor. Kirby had no control over ICC's subcontracts of carriage and ICC owed no fiduciary duty to Kirby. Kirby therefore was not bound to the Hamburg Süd bill of lading.

No federal common-law rule trumps that understanding of basic agency principles. No holding of this Court stands for the proposition that a duly issued bill of lading by one carrier can be simply disregarded due to another carrier's bill. The quartet of cases NS cites for its proposed rule – *New Jersey Steam*, *York*, *O'Connor*, and *Acme* – all involved a forwarder acting in its classic role as the cargo owner's agent. This Court thus applied ordinary agency law in holding the cargo owner bound to the terms of the contract entered into by the forwarder as agent for the owner. Even if NS had a plausible theory for a common law rule under this Court's cases, it founders in any current application for multiple reasons, each dispositive: the common law did not allow carriers to contract out of their own negligent acts; any federal common-law rule did not survive *Erie*; and the deregulation of the sea, rail, and air regimes makes highly implausible NS's claim that federal common law has sprung back into existence (after nearly a century of extensive federal regulation) to bind Kirby to a bill of lading to which it is not a party.

The government's preemption argument is similarly novel and similarly unsupported. The government purports to base its preemption theory on a federal "policy" not encapsulated in any statute. The government cites no case from this Court supporting its extraordinary position that Kirby has no rem-

edy in tort for full damages under this "policy" against discrimination in rates, a policy that is all the more anomalous in view of deregulatory statutes that allow the free market to engage in precisely the "discrimination" the government decries. Given the government's own concession that such discrimination is permitted in this case for NS's contract carriage, there is no way this particular suit could stand as an obstacle to any articulable federal purpose.

II. Because the ICC bill of lading is the only contract that is binding on Kirby, the Court must determine whether its Himalaya clause protects NS with the requisite clarity and specificity. Under well-settled canons of contract interpretation explained in *Herd*, limitation of liability clauses must be strictly construed and must specify a well-defined class of beneficiaries. The ICC bill fails to protect NS for two reasons: first, the term "independent contractors" was intended to cover only ICC's independent contractors, not sub-sub-subcontractors such as NS. Second, the term "independent contractors" also lacks the clarity necessary to extend traditionally maritime liability limits to an inland carrier.

III. Kirby's state law tort suit for damages is completely consistent with both parties' reasonable expectations. Virtually every country accepts the "network" principle of liability for intermodal shipments, pursuant to which the liability regime for the particular mode determines compensation for a loss that occurs in that segment. NS reasonably would have expected to be held liable for its negligence, because this Court's decisions for 150 years have precluded carriers from contractually limiting their liability for or exonerating themselves from negligence. NS reasonably would have expected to be sued in tort. Such suits are accepted in every major maritime trading nation against carriers with whom the cargo owner does not have contractual privity, and the theory accepting a tort suit for a negligent actor underlay this Court's decision in *Herd*. NS reasonably would have expected to pay the full loss, because its own Rail Circular – the terms NS imposed as a condition for carrying the goods – committed NS to paying up to $250,000 per container. That amount ex-

ceeds the total value of Kirby's claim. If sustained, petitioner's effort to limit its liability to one-third of 1% of the total loss would create grave disincentives for carriers to take care to handle goods properly and would shift the entire risk of loss to shippers. Finally, Kirby would have had no way of knowing that the Hamburg Süd bill would issue for its goods: that company did not own or operate the vessel that carried Kirby's cargo. Under normal slot chartering arrangements, a cargo owner simply will not know who is the "actual" carrier, thus making NS's putative rule completely impracticable in the realities of commercial shipping.

ARGUMENT

I. KIRBY IS NOT BOUND BY THE HAMBURG SÜD BILL OF LADING

A. ICC Was Not Kirby's Agent But An Independent Contracting "Carrier"

1. It is a longstanding and ironclad principle recognized throughout common-law jurisdictions all over the world that "'[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.'" *Logue v. United States*, 412 U.S. 521, 527 n.5 (1973) (quoting *Restatement (Second) of Agency* § 2(3) (1958)). An actor that is subject to such control is an agent, but, "[u]nder the law of agency, a principal may be bound by the acts of an agent *only* if that agent acted with actual or apparent authority." *Heckler v. Community Health Servs.*, 467 U.S. 51, 65 n.21 (1984) (citing *Restatement (Second)* §§ 145, 159) (emphasis added).[6] This Court has noted that "the core of agency is a 'fiduciary relation' arising from the 'consent by one person to another that the other shall act on his behalf and subject to his control.'" *General Bldg. Contractors Ass'n*

[6] The law in Australia, where the Kirby-ICC contract was made, is exactly the same. *See* G.E. Dal Pont, *Law of Agency* §§ 1.6-1.7 (Butterworths Australia 2001) (collecting cases); Resp. Supp. Br. 1 n.1 (explaining why Australian law governs construction of this contract).

v. Pennsylvania, 458 U.S. 375, 393 (1982) (quoting *Restatement (Second)* § 1). The foregoing rules govern the relationship between Kirby and ICC, because non-agent independent contractors "may be anyone who has made a contract and who is not an agent." *Restatement (Second)* § 14N cmt. b.

2. Under the ICC bill of lading, ICC was an independent contractor – a principal in its own right – and not Kirby's agent. The ICC bill of lading made ICC responsible for ensuring that Kirby's goods were delivered to Huntsville. It does not otherwise specify the means of shipment or reserve any control to Kirby. *See* Clause 2.1(a), JA 86 (ICC undertook "to perform . . . the entire transport" itself, or "*in [its] own name* to procure the performance of the entire transport") (emphasis added).[7] The ICC bill of lading confers no authority on ICC to act as Kirby's "agent" with respect to any aspect of the carriage.[8]

The form contract the parties used also demonstrates their decision that ICC would not serve as Kirby's agent in any respect. Through industry practice and custom, the "Negotiable FIATA Multimodal Transport Bill of Lading" (abbreviated "FBL"), *see* JA 78-80, is a document evidencing the forwarder's relationship as a "carrier" to the cargo owner. *See* Jan Ramberg, *The Law of Freight Forwarding* 20-21, 42 (2002); Peter Jones, *FIATA Legal Handbook on Forwarding* 41 (3d ed. 2001). The Eleventh Circuit thus correctly concluded that ICC had no power to bind Kirby to any contract between ICC and any other party. Pet. App. 8a-9a.[9]

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[7] Clause 2.2 reinforces that undertaking, specifying that ICC assumes responsibility "for the acts and omissions of" its subcontractors. JA 86.

[8] NS concedes as much, because it cites no language in the ICC bill of lading for the view that Kirby consensually empowered ICC to act as Kirby's agent. The government acknowledged that "ICC was not Kirby's 'agent' as that term has traditionally been understood at common law, since no fiduciary relationship existed and Kirby lacked authority to direct and control ICC in its performance of the contract." U.S. Br. 12, 27.

[9] Use of the FBL benefits both forwarders and shippers. For forwarders, it enables them to charge a higher rate, to perform additional duties than they would otherwise be able to do for simply arranging transport of

Had ICC and Kirby wanted ICC to act as Kirby's agent – and thereby bind Kirby to subsequent contracts of carriage – they would have used the FIATA form, "Forwarder's Certificate of Transport" ("FCT"). "[A] forwarder issuing an FCT clearly states it does not act as a carrier." Jones at 120. Rather, the forwarder under the FCT acts as the shipper's *agent*, with the FCT "confirm[ing] the forwarder's authority to enter into contracts of carriage on the usual terms of a carrier selected by the forwarder. The forwarder does not assume any responsibility for acts or omissions of carriers in performance of the contract of carriage." *Id.* The FCT also "clearly states that the forwarder is not a carrier," so a forwarder using that form would not subject itself to the "jurisdiction of the [FMC]," *id.* at 120-21, as it would when acting as an NVOCC.

The ICC bill of lading thus falls well within the established principle that an independent contractor is not "rendered an agent simply because he is compensated by the principal for his services. The [principal] must also enjoy a right to control the activities of the [contracting party]." *General Bldg.*, 458 U.S. at 395. *See also In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091, 1099-100 (CA9 1997) (concluding that no agency relationship existed because putative principal's "only right of control with respect to [putative agent] CCS was to require CCS to perform its contracts").[10] Where such

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the shipper's goods, and to have flexibility in responding to business demands. For the shipper, the FBL – with the forwarder acting as principal for carriage – enables the shipper to work through one carrier to handle all of its transportation needs without being forced to accept contracts from faraway carriers with whom the shipper has little or no contact. It also benefits the shipper because the FBL is a negotiable instrument and appropriate tender for letter of credit terms.

[10] *See also, e.g., Bonk v. McPherson*, 605 A.2d 74, 78 (Me. 1992) (concluding that a timber cutter was not "an agent for whose actions [the land management company] can be held liable," because the timber cutter had " 'contracted to accomplish physical results not under the supervision of the one who has employed [it] to produce the results' ") (quoting *Restatement (Second) of Agency* § 14N cmt. b) (second alteration in original). *See also Anderson v. Badger*, 191 P.2d 768, 770-71 (Cal. Ct. App.

control is missing – as it is here – courts deny an agency relationship and hold that the putative agent's actions are not binding on the putative principal.[11] For that reason, this Court has rejected the notion that an independent contractor relationship gives the principal the requisite control over the contractor's actions, because "a rule equating" the independent contractor with the principal-agent situation "would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines." *General Bldg.*, 458 U.S. at 394.

3. By its own concessions, NS acknowledges that ICC could not be Kirby's agent in this transaction. NS has observed (Br. 6) that a forwarder in ICC's position would "profit" from the "rate differentials" between what it would be charged for subcontracting carriage and what it would charge Kirby. Yet such a profit method – in which ICC would not disclose to Kirby the rates that subcontracting carriers would charge – is strong evidence that ICC does not have the requisite "fiduciary relation" to Kirby and that Kirby is not manifesting control over ICC's actions. *General Bldg.*, 458 U.S. at 393. *See also Meyer v. Holley*, 537 U.S. 280, 286 (2003) (agency requires "not only control" but also consent by both parties that the agent will act on the principal's behalf); 1 Floyd R. Mechem, *Law of Agency* § 46, at 29 (2d ed.

1948) (concluding that "no relationship of principal and agent was created by the agreement" of defendant to deliver a machine ordered by plaintiff, because "[p]laintiff had no right of control over the actions of defendant"; rather, "defendant was to accomplish a certain purpose or result, he alone to choose and follow the means by which it would be accomplished").

[11] *See Servis v. Hiller Sys. Inc.*, 54 F.3d 203, 208 (CA4 1995) (contractors hired to perform repairs and maintenance aboard a vessel "were merely non-agent independent contractors of the United States" because "the United States exercised no operational control over [the contractors'] day-to-day performance of their contractual duties"); *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 445 (CA5 1982) (contractor engaged to perform maritime salvage work was not an agent of the U.S. that could subject government to liability under the Jones Act because the U.S. "exercised no operational control over the work" and "[a]ll plans for the salvage work were made by [the contractor]").

1914) ("Who is to be affected by fluctuations in price is often significant. If the one who is to supply the goods is to do so at a fixed price regardless of market fluctuations, there is strong evidence of sale rather than of agency."). Given the clarity of the ICC bill of lading's language – and the absence of any argument from NS that Kirby agreed by contract for ICC to act as its agent – there is no basis for this Court to void the freedom of contract Kirby and ICC enjoyed.[12]

B. Federal Common Law Does Not Trump Kirby's Contract With ICC

NS argued in the court below that ICC must be Kirby's agent because it could not be a carrier. *See* Pet. C.A. Br. 27 ("ICC Ltd. could, therefore, only act as Kirby's agent."). NS does a complete about-face in this Court, arguing that, even though ICC *is* a "carrier," it nonetheless has the power to bind Kirby to its contracts by operation of law. That argument was never presented to the courts below and therefore has been waived. *See, e.g.*, *Meyer*, 537 U.S. at 291-92 ("[I]n the absence of consideration of that matter by the Court of Appeals, we shall not consider it."). *See also* Opp. 11-13.

In any event, NS's newfound theory is rich in irony: it devises an "actual" carrier rule not so that it can benefit from its own terms and conditions of carriage, but rather so that it can evade them. Under its Rail Circular, NS would be liable for Kirby's entire loss. NS prefers, therefore, to bind Kirby to a

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[12] If there were any ambiguity in establishing ICC as independent contractor and not Kirby's agent, that ambiguity must be construed in Kirby's favor. A bill of lading is a contract of adhesion drafted by the carrier, with the shipper getting the benefit of any ambiguity in it. *See Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441-42 (1889) (stipulation limiting liability of carrier deemed "contrary to public policy, and consequently void," because shipper "has no alternative" but "to accept any bill of lading ... or to abandon his business"); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 553 (1995) (Stevens, J., dissenting) (maritime "bills of lading . . . are commonly recognized as contracts of adhesion"). *See* 3 Saul Sorkin, *Goods in Transit* § 13.14, at 13-236 (2004) (provisions are "narrowly and strictly construed against the carrier" particularly where the bill contains "special provisions . . . prejudicial to the shipper" that are "not required by statute").

contract with a carrier, Hamburg Süd, with whom neither Kirby nor NS directly contracted. NS's effort to achieve that result *as a matter of law* must fail. No contract or statute compels that result. NS asks this Court to impose – through judge-made federal common law – a rule that will apply to any transportation intermediary regardless of the intermediary's contractual relationship with the shipper.[13] There are a plethora of substantive and legal problems with NS's newly concocted approach, which it appears never to have advocated before in any other court at any other time. The flaws start with NS's rewording of Question 1.

1. Reworded Question 1 is not presented by this case

Between the filing of its certiorari petition and its merits brief, NS evidently discovered that no cases support an argument that in all circumstances a freight forwarder binds a cargo owner when the forwarder acts as carrier and subcontracts with another carrier to carry the goods. As has been the industry norm for decades, a "carrier" is one that promises to deliver the goods and accepts liability in the event of loss. *See* Ramberg at 25. For that reason, the legal rules that have developed over decades have not rested on which carrier "actually perform[s] the transport," but rather on which

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[13] NS cites a comment in Bugden's treatise to the effect that a forwarder can be both principal and agent with respect to the same contract. *See* NS Br. 36 (citing Paul M. Bugden, *Freight Forwarding and Goods in Transit* § 2-01, at 8 (1999)). The only case cited by Bugden in fact involved a very different situation. *See Etablissement Biret et Cie S.A. v. Yukiteru Kaiun KK (The Sun Happiness)*, [1984] 1 Lloyd's Rep. 103. That case involved a charter party (not a freight forwarding) contract in which a party was designated in a sue and be sued clause, which the court held was sufficient under the terms of that contract to deny the putative agent status solely as an agent. Although in other functions and duties the contract specified that party's role as agent for the principal, as to this one the imposition of liability on it as a principal was considered dispositive. That holding does not help NS, however, because, unlike in *The Sun Happiness*, nothing in the ICC bill of lading empowers Kirby to exercise control over ICC or to create a fiduciary duty by ICC to Kirby as to *any* functions performed by ICC.

carrier has "undertaken to procure the performance of the multimodal transport." *Id.* at 26.

In its merits brief, NS changes the wording of Question 1 to focus on whether a forwarder can bind a cargo owner when it enters into a contract with another carrier that "actually transport[s]" the goods. NS Br. i That formulation is absent from the petition. *See* Pet. i ("carriers to provide that transportation"). This case does not present NS's new question, which is outside the scope of the question this Court granted to review. *See Thornton v. United States*, No. 03-5165, slip op. at 8 n.4 (U.S. May 24, 2004) (declining to address new issues raised outside scope of question presented). Quite simply, Hamburg Süd no more "actually transport[ed]" Kirby's goods than ICC did. Hamburg Süd neither owned nor operated the *Queensland Star*, the vessel that carried Kirby's goods. Given the posture of this interlocutory appeal without discovery being complete, it would be inappropriate for this Court to assume that Hamburg Süd was an "actual" carrier. This was simply not a relevant issue until NS's change of course in its merits brief. Moreover, if accepted notwithstanding the facts, NS's improbable rule of law has the ironic consequence that a forwarder-carrier's bill of lading is superseded by the bill of lading of an ocean carrier that itself does not own or operate the vessel that carries the cargo. Even NS's attempted rationalizations for its newfound theory do not support *that* extreme and unprincipled rule.

2. NS's supposed "150-year-old" rule is a fiction

NS weaves together various materials as supposed evidence that for 150 years the rule has been that a forwarder always binds a cargo owner to another carrier's bill of lading even when the forwarder issues its own bill of lading as carrier. Not only do the *holdings* of this Court's cases not support such a notion, in many instances the very same cases would support a tort suit by a cargo owner in Kirby's situation against a negligent carrier that damaged the goods. Indeed, this Court's cases support the distinction that the rest of the world makes between a forwarder acting as the carrier's agent – when the forwarder has the agency authority to bind

the cargo owner – and when the forwarder acts as carrier, in which case it lacks that power to bind.

a. The holding of *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344 (1848), for example, is unrecognizable from the description by NS. (Notably, the government appears to agree by omission that this case is irrelevant.) That case involved a freight forwarder, Harndon, acting as agent for a bank. It thus falls squarely within the principle that an *agent* can bind its principal to a contract, but it provides no support for the view that an independent contractor has that power.

Harndon had a contract with the owners of *The Lexington* reserving a crate for his use so that he could ship goods on each voyage for a flat fee of $250 per month. *Id.* at 379. Harndon sold his services to the public as "a forwarding agent for the community generally," *id.* at 418 (Woodbury, J., concurring), in the traditional manner as a shipper's agent. Both Harndon and the vessel owners sought to limit their liability by contract. *Id.* at 346-47 (contracts set forth in preface to Court's opinion). The owner's bill of lading sought to limit its liability to $200 per package. *Id.* at 347.

Harndon operated under instructions from the Merchants' Bank of Boston to collect large sums in New York from various banks and to transmit those funds to Boston. Harndon's crate, the value of which "was not made known to the carriers, nor a proportionate price paid for its transportation" (*id.* at 419 (Woodbury, J., concurring)), contained $18,000 worth of checks, gold, and silver (*id.* at 379-80). During the voyage, fire broke out and the crate containing the bank's cargo was lost. *Id.* at 351, 378-79.

The bank sued the carrier for the loss of the cargo. As the case came to this Court from a circuit court judgment awarding full damages plus interest for the bank, the carrier made essentially two arguments. First, the carrier sought to deny a right of action to the bank on the ground of a lack of contractual privity: the forwarder (Harndon) had contracted "in his own name" with the carrier. *Id.* at 380. The plurality rejected that argument, because it concluded that Harndon was

the bank's agent: "[I]t was a well-established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it." *Id.* at 381.[14] The plurality also concluded that "[t]he cases are numerous in which the general owner has sustained an action of tort against the wrongdoer for injuries to the property while in the hands of the bailee. Those cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person." *Id.*

Second, having concluded (consistent with longstanding agency principles) that the bank was bound to the carriage contract (through Harndon's agency), the plurality then rejected the carrier's argument that it could "restrict his obligation even by a special agreement" in that contract. *Id.* at 382. That question, the plurality reasoned, had been "fully considered" in previous cases "and the conclusion arrived at that he could not." *Id.* (collecting cases). As the plurality noted, if the carrier was a common carrier holding itself out as such to the public, the common law operated to make the carrier "an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance." *Id.* at 381. If, on the other hand, the carrier was acting in a private capacity through contract carriage, the carrier "incurs no responsibility beyond that of an ordinary bailee for hire,

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[14] It has long been settled law that an agent cannot act for an undisclosed principal unless an agency relationship exists. *See Restatement (Second)* § 186 cmt. a; *Restatement (First) of Agency* § 186 (1933) ("An undisclosed principal is bound by contracts and conveyances made on his account by *an agent acting within his authority*") (emphasis added). As the commentary to § 186 explains: "It is not enough that the proof shows that the one negotiating the contract acted generally for the benefit of the one sought to be charged or because of something initiated by him. *The proof must be that the one making the contract was acting as agent in a matter entrusted to him as agent.*" *Restatement (First)* § 186 cmt. b (emphasis added). The plurality's conclusion that Harndon was the agent of the bank, combined with Justice Woodbury's separate finding of the same relationship, *see New Jersey Steam*, 47 U.S. at 418, constituted a holding of this Court.

and [is] answerable only for misconduct or negligence." *Id.* at 382. Although it noted that the contract language limiting the carrier's liability is "general and broad, and might very well comprehend every description of risk incident to the shipment," the plurality concluded that "it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, *or want of ordinary care*, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." *Id.* at 383 (emphasis added).

The plurality emphasized that, even when the carrier seeks to exempt itself or limit its liability from losses, it "incurred the same degree of responsibility as that which attaches to a private person, . . . bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation." *Id.* That principle, the plurality reasoned, "should govern the construction of the agreement in question." *Id.* Although the carrier could limit its liability for incidents beyond its control (e.g., acts of God), therefore, it could *not* limit its liability for losses "occasioned by the *want of due care*, or by gross negligence." *Id.* at 384 (emphasis added).[15] Because the plurality found a "great want of care" by the carrier, "[w]e are of opinion, therefore, that the [carrier is] liable for the loss of the specie, notwithstanding the special agreement under which it was shipped." *Id.* at 385.[16]

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[15] Although a majority determined that *The Lexington* had been operated in a grossly negligent manner, the degree of negligence was unnecessary to the Court's holding invalidating the limitation clause because it had determined that mere negligence voided that provision. *See* 47 U.S. at 382 ("answerable only for misconduct or negligence"), 383 ("want of ordinary care" and "bound to use ordinary care"), 384 ("want of due care"). Kirby's complaint alleges negligence by NS. *See* JA 33-36.

[16] Justice Catron concurred on the ground that "[t]he case depends not on any contract, but on mere tort standing beyond the contract." 47 U.S. at 394. Justice Daniel opined that the case should have been a common-law breach of contract action brought *in personam* in New York. *Id.* at

b. NS thus exhibits complete indifference to the holding of *New Jersey Steam*, which cannot be squared with its assertion that a cargo owner is always bound by a carrier's limitation of liability even if the bill of lading is entered into with a forwarder. It then curiously asserts that this Court "never wavered from the *New Jersey Steam* rule" (Br. 24) when it decided *York v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865). But *York* no more supports the railroad's fabricated "rule" than *New Jersey Steam* did. *York* also involved the traditional forwarder role as the shipper's agent. *See* Abstract of Record at 4, No. 181 (Dec. Term 1864) ("Thomas Trout was a special agent of the plaintiff"); 70 U.S. at 107-08 (describing in prefatory material to Court's opinion that Trout & Son was working on a commission on account of York as owner of the goods). Indeed, the plaintiff cargo owner York argued that Trout had exceeded its authority as York's agent by agreeing to a contract containing a limitation of liability that York never authorized it to enter. *See* Plaintiff in Error Br. at 12-13, No. 181 (Dec. Term 1864). This Court's opinion explicitly recognized that, far from denying that Trout was York's agent, York's principal argument was that Trout *was* its agent and had exceeded its authority as agent by agreeing to the railroad's stipulation limiting the carrier's liability. 70 U.S. at 113. In holding that the agreements of York's agent, Trout, were imputable to York, the Court stressed that, although a carrier could contractually limit its liability for such incidents as natural perils, a limitation would be unenforceable as to "losses from *negligence* or misconduct." *Id.* (emphasis added). Thus, properly understood, *York* provides no support for NS's argument here: Kirby has never argued that ICC exceeded any agency authority, because ICC was never Kirby's agent. ICC contracted as Kirby's *carrier*, and was

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416. Thus, although he thought the cargo owner should prevail, he did not think jurisdiction had been properly established. *Id*. at 418. Justice Woodbury concurred separately, because "[t]he recovery, in cases like this, on the tort, counting on the duty of the carrier and its breach by the negligent loss of the property, is common, both in this country and abroad, in the courts of common law." *Id*. at 428.

therefore an independent contractor and not an agent. In any event, even if it applied here, the *York* rule would negate NS's attempt to limit its liability for negligence. *Id.*; *New Jersey Steam*, 47 U.S. at 383.[17]

c. NS never invoked *The Lexington* or *York* in the courts below, and argued instead that ICC had to be Kirby's agent because it could not be a carrier. *See* Pet. C.A. Br. 25-29 (relying on *Great Northern Railway v. O'Connor*, 232 U.S. 508 (1914)). Although NS has now abandoned that argument, it seeks to contort *O'Connor* into support for its wholly new contention that a carrier can be both a principal and an agent as to the same obligation. *O'Connor* supports no such theory. That case also involved a classic principal-agent relationship that is absent between Kirby and ICC. NS ignores the facts of that case and takes statements by this Court out of their proper legal context. As in *York*, the *O'Connor* cargo owner had procured the services of a forwarder as agent. The forwarder did not properly value the goods when contracting (on the owner's behalf) with the carrier. When the goods were damaged, the owner brought an action directly against the railroad for the full value of the goods, claiming that the forwarder had no authority to exceed the scope of its agency. *See* O'Connor Br. at 4, No. 996 (Oct. Term 1912) (stressing that the forwarder *was* her agent but that it "had no authority to release the value of the goods of defendant in error").

In rejecting O'Connor's argument, the Court considered the case on a trial record in which O'Connor had stipulated

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[17] NS also cites *Reid v. Fargo*, 241 U.S. 544 (1916), as supposed authority for binding a cargo owner to a carrier's bill of lading "even though the express company/forwarder had issued its own bill of lading" (NS Br. 25). But there is no indication in this Court's opinion, the briefs filed by the parties, or the court of appeals' opinion in that case that the forwarder *had* "issued its own bill of lading." Indeed, the Court's holding (241 U.S. at 551) assumed the correctness of the court of appeals' description of the express company as a "mere forwarder" (*id*. at 548). The Court held that the forwarder was liable to the cargo owner for exceeding its authority as an agent when it accepted a bill of lading limiting the carrier's liability to $100 for an automobile worth $3,900. *Id*. at 550-51.

that Boyd was her agent. *See id*. at 4-5. The Court stressed that the forwarder there was acting as O'Connor's agent and not as a carrier in its own right. *See* 232 U.S. at 515. The Court noted that O'Connor had an action against the forwarder for having exceeded its agency authority, *id*. at 514-15, but such an action would be distinct from the type of claim O'Connor would have had if the forwarder had been a carrier.[18] The Court further explained that the railroad's terms were tariffed by operation of statute and thus "open to inspection at every station," *id*. at 515, the implication being that O'Connor and her forwarder-agent were equally on notice of what the rates would be, *id*. Thus, the forwarder bound O'Connor to the terms of the rail rates under agency and filed tariff doctrine principles, neither of which applies here. ICC was not acting as Kirby's agent, and there is no indication that any of the contracts of carriage in this case (ICC's, Hamburg Süd's, or NS's) were tariffed. Certainly if Hamburg Süd had carried these goods under a tariff and such carriage supported its position, NS would have been obliged to raise that two courts ago when it first invoked *O'Connor* under the theory that ICC could only be Kirby's agent. But it has not done so.

d. NS's supposed coup de grace is *Chicago, Milwaukee, St. Paul & Pacific R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), but the holding of the case is completely irrelevant here. This Court held that the forwarder was a shipper in its relation to the rail carrier by operation of *statute* and therefore was limited in bringing a subrogation action within

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[18] The Court explained that it did not matter whether Boyd was "treated as agent or forwarder," but it used that unexplained phrase in the context of holding that the railroad was bound by what the "shipper" declared as the value of the goods as imposed by the Interstate Commerce Act ("ICA"). *See* 232 U.S. at 514. The Court explained further that, pursuant to the "tariff rate" in effect, forwarders and cargo owners alike were treated as "shippers" for classification purposes. Because the ICA and filed tariff doctrine are inapplicable, whether ICC had the power to bind Kirby to its agreement with Hamburg Süd is solely a question of applicable agency law.

the time allotted for shippers under § 413 of the Freight Forwarder Act of 1942, 49 U.S.C. § 1013 (1946), which provided that the provisions of the Carmack Amendment (49 U.S.C. § 20(11) and (12) (1946)) would apply to forwarders. *See* 336 U.S. at 487-89. Indeed, only two years before enactment of the Freight Forwarder Act, this Court affirmed a holding that Acme's business was not that of a carrier, so there is not even an apt analogy between Acme and ICC. *See Acme Fast Freight v. United States*, 30 F. Supp. 968 (S.D.N.Y.), *aff'd mem.*, 309 U.S. 638 (1940). The Court explicitly referenced that opinion in the *Acme* case invoked by NS. *See* 336 U.S. at 466.

But even if there were a valid comparison between ICC and the forwarder there, *Acme* stands for the unremarkable proposition that Congress has the power to deem a forwarder to be a shipper for purposes of establishing when the forwarder may bring a subrogation action against the rail carrier for damage to the goods. 336 U.S. at 487. The Court noted that forwarders historically had been denominated as "shippers" in relation to rail carriers, and Congress did not intend the 1942 Act to change that result. *Id.*[19] Importantly, *Acme* says nothing about the rights of a *cargo owner* or a vessel carrier. The Court self-consciously tied its analysis "to find [w]hat Congress intended" in its enactment of rail and freight forwarder statutes that have long since been repealed. *Id.*; *see infra* at n.24. Again, NS takes a few sentences out of context as supposed support for a "rule" that somehow would sustain its argument that the Hamburg Süd bill of lading limits Kirby's recovery in a suit against NS for negligence.[20]

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[19] There is nothing talismanic about a party being deemed a "shipper in relation to the actual carrier." NS Br. 22. That was Columbus Line's relationship to NS. *See* JA 107-09. Yet NS has expressly denied that Columbus Line was Kirby's legal agent. *See* JA 102. Being a "shipper in relation to a carrier" does not transform that entity into the cargo owner's agent with authority to bind the owner to another carrier's bill of lading. The two concepts are simply unrelated.

[20] NS (Br. 19, 30-31) and the government (Br. 28) misread footnote 27 as opining that in all circumstances a forwarder acts for an "undisclosed

e. Taken together, the cases on which NS bases its entire argument on Question 1 fail to support its premise. First, each involves the forwarder as the cargo owner's agent and not as its carrier. Under normal agency principles, the cargo owner would be bound to the bill of lading in those circumstances. *See supra* at 9-10. But that is not the nature of ICC's relationship with Kirby. Thus, whatever each of those cases says about binding the owner to a bill of lading arises in the context of normal agency law that, in this case, is crystal clear in negating an agency relationship between ICC and Kirby. Second, none of those cases involves a second carrier's bill of lading or an effort to bind a cargo owner to the terms of such a bill of lading when it is not a party to that contract.[21] Finally, none of those cases involved a contention that a sub-sub-subcontractor was a beneficiary to a bill of lading so that it could attain a virtually complete exoneration for its negligence. Thus, to describe these cases as announc-

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principal" – the shipper – in its subsequent dealings with carriers. *See* 336 U.S. at 487 n.27. That is not what the Court said. The Court invoked the undisclosed principal doctrine to debunk the error of the court of appeals, which had believed that a forwarder never had a subrogation claim against a rail carrier. The Court explained that, if the forwarder had to pay on a claim for damaged goods to a cargo owner, it had a right of action against the rail carrier in subrogation of the cargo owner's claim against the rail carrier. *See id*. It was well established even at the time of *Acme* that the undisclosed principal doctrine applied only if an agency relationship had already been established. *See supra* at n.14.

[21] NS (Br. 30-32) notes that consignees have been held bound to bills of lading in certain circumstances even though they are not formally parties to the contract. That rule does not aid NS here. The point of having a negotiable bill of lading is to enable the holder to transfer its rights to a subsequent holder. When the original shipper negotiates a bill of lading to a consignee, the consignee steps into the shipper's shoes and acquires the right to enforce the shipper's contract against the carrier. This is a longstanding common law rule that has since been codified. *See, e.g.*, 49 U.S.C. § 80105 (Federal Bill of Lading Act); U.C.C. § 7-502(a)(4) (2003). Under the subrogation doctrine, respondent MMI is bound by the ICC bill of lading in the same way as Kirby because MMI's rights are derivative from Kirby's. There is no such doctrine to bind Kirby to the Hamburg Süd bill of lading.

ing a "150 year[]" rule that benefits NS (NS Br. 1) is pure sophistry.

3. NS's "common law" rule cases preclude a carrier from limiting its liability for negligence

Both *New Jersey Steam* and *York* were careful to couch their endorsement of a carrier's right to limit its liability. A plethora of cases consistently has read those two decisions as confining the rule to allow contractual limitation of liability clauses only when the loss could not be attributed to a negligent act of the carrier – even when the cargo owner agreed to a stipulated value for the cargo. *See, e.g.*, *The Queen of the Pacific*, 180 U.S. 49, 56 (1901) (reading *York* as permitting limitation on carrier liability only if it did "not operat[e] to restrict his liability for negligence"); *Constable v. National S.S. Co.*, 154 U.S. 51, 62 (1894) (stating that *York* permitted liability of carrier to be limited by special contract except insofar as there is "any want of due care on his part"). Thus, to the extent there was any "federal common law" rule recognizing a carrier's right to impose a limitation of liability clause, it was limited to damage not caused by the carrier's negligence. That is certainly not the case here, where NS's negligence must be presumed at this stage and where the rail accident in any event was a classic case of *res ipsa loquitur*. *See Reid*, 241 U.S. at 549-50. NS thus derives no benefit from the reimportation of federal common law rules. Even if it could, it would be bizarre to allow NS to invoke a ridiculously low limitation of liability in another carrier's contract for *its* negligence, when its own Rail Circular expressly *accepts* liability for negligence with a relatively high limitation amount. *See supra* at 4-5.

4. Any rule conceived here by NS did not survive *Erie*

Even if those cases did announce something of a common law rule that survived the pervasive statutory and regulatory overlay that gave rise to the filed tariff doctrine, that rule did not survive the decision of this Court in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which announced that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the

state. . . . There is no federal general common law." *Id.* at 78. Because COGSA does not apply to this case – the loss having occurred outside the "tackle to tackle" period, *see* COGSA § 1(e), 46 U.S.C. app. § 1301(e) – there is no conceivable federal statute that "govern[s]" (*id.*) this diversity case. This Court has often reiterated the force of the *Erie* doctrine and has made clear that "federal common law" will be recognized only in "few and restricted" circumstances where a "federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citation omitted). *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (even where federal statute in "related" field exists, there must be proof that state standard would pose "significant conflict" with federal interest). Nor will this Court "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (collecting cases).[22] NS has simply failed to justify a special rule of federal common law under this Court's standards.[23]

In any event, the deregulation of the major transportation industries has radically altered the statutory matrix; vestigial

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[22] Any concern about any conceivable "conflict" between a state rule and a federal statutory tariffed rule is no longer present in light of the deregulation of the railroad industry. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (noting that uniformity is an insufficient justification to create federal common law even as to federal program – person seeking such rule must prove state law would "frustrate specific objectives of the federal programs").

[23] All of NS's cases but *Acme* were decided before *Erie*, and the Court's analysis in *Acme* is so patently a construction of the Freight Forwarder Act that NS cannot credibly maintain that that case announced a "federal common law" rule.

federal common law principles are of dubious validity.[24] The effect of such legislation "is to make much of the old law concerning the inviolability of tariffs inapplicable." 4 Sorkin § 20.00, at 20-10.[25] This Court has already negated the proposition that lingering federal common law exists for the deregulated airline industry. *See, e.g.*, *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (holding that Congress did not intend the Airline Deregulation Act "to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services"); *Morales v. TWA*, 504 U.S. 374, 378 (1992) (noting that ADA's deregulatory thrust was not to increase preemption of state claims but rather to create "maximum reliance on competitive market forces").[26] NS's failure to address this trend underscores how unpersuasive it is to reimport so-called "150-year-old rules" into a radically different regulatory environment that now operates predominantly on freedom-of-contract principles.[27]

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[24] *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (abolishing Interstate Commerce Commission and substantially deregulating rail industry); Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. L. No. 105-258, 112 Stat. 1902; Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. §§ 41713 *et seq.*; Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1337, 1466 (repealing Freight Forwarder Act).

[25] In like fashion, OSRA "eliminates the requirement for ocean common carriers to file tariffs with the [FMC]," 4 Sorkin § 20.02, at 20-15, with such rates now available electronically.

[26] The government itself, with the approval of the Solicitor General, has filed an *amicus* brief under the ADA urging the Fifth Circuit to recognize a state claim as not preempted under the ADA as "better reasoned and more consistent with the modern rule tightly circumscribing the judiciary's power to fashion a federal common law." U.S. *Amicus* Br., *Sam L. Majors Jewelers v. Airborne Freight Corp.*, No. 96-50146, 1997 WL 33560672, at *16 (5th Cir. filed Apr. 18, 1997). The government's assertion of preemption in this case cannot be squared with its anti-preemption position under the deregulatory regime of the ADA.

[27] There is no "special agency" rule in this context. NS Br. 36. In addition to *Acme*, which is inapposite, NS cites 14 Am. Jur. 2d *Carriers*

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What NS seeks, therefore, is breathtaking for its audacity and lack of grounding in statute or this Court's precedent: (1) freedom to enter into its own contracts of carriage with the subcontractor of an ocean carrier that evade limitations on its ability to discriminate in the making of its rates; (2) freedom to avoid the liability provisions applicable to common carriers through such "contract carriage"; and (3) a right to claim the benefits of common-carrier law to impose a federal common law rule that trumps Kirby's freedom of contract to make ICC an independent contractor rather than Kirby's agent. Through that, NS seeks to elude the terms of its own Rail Circular – which would more than compensate Kirby for its loss – so that it may benefit from a bill of lading (Hamburg Süd's) that nowhere else in the world would be held to be binding on Kirby.

C. The Government's Novel Preemption Theory Is Made Up Out Of Whole Cloth

The government offers a completely unsupported conception of "preemption" as a basis for precluding Kirby's "state law damages remedy." U.S. Br. 22. The government's argument is so extreme and ill-conceived that not even NS – which itself has concocted an entirely new argument since the ones it unsuccessfully pressed on the Eleventh Circuit – has made it. Having not been advanced by NS or made or passed on below, the argument is waived. *See, e.g.*, *Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (argument made by *amicus* not properly before the Court where not made by a party and not considered by court below); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) ("declin[ing] to consider this argument since it was not raised by either of the parties here or below").

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§ 558 (2000), *see* NS Br. 36, but the date of that publication is quite misleading insofar as the authorities cited in that source for the proposition that a cargo owner may be bound to a contract entered into by a deliverer of the goods are state cases from the early 1900s when forwarders routinely acted as agents for shippers and therefore had the authority under settled principal-agency law to bind shippers to contracts of carriage.

In any event, the government's theory rests on the weakest of legal foundations. Notwithstanding that this Court has decided a dozen or more preemption cases in the past decade, the only case the government cites (Br. 22) is *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). But the implied conflict preemption held to preempt a state law damages claim there rested on a statute authorizing a federal standard that the Department of Transportation had adopted. *See id.* at 875-76. This Court held that a state law claim for negligent failure to include an air bag as safety equipment impliedly conflicted with a promulgated federal agency standard that was formally amended numerous times and that "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 875.[28]

There is no similar federal regulation in this case. The government (Br. 22) seeks to obscure that fundamental omission in its argument by outlining a "tariff regime" for rail carriers – but that comprehensive mandatory "tariff regime" no longer exists. *See* ICC Termination Act, *supra*. "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

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[28] This Court's recent preemption cases have all been fought over whether Congress intended federal legislation to preempt state common law claims. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (no preemption of common law tort claim by Coast Guard letter that did not take a position on the issue; Federal Boat Safety Act did not contain express preemption); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (no preemption of common-law negligence claim by medical devices statute); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (no preemption of common-law negligence claim when no federal standard in place); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (no preemption of state common-law claims by federal cigarette labeling statute). None of the cases finding preemption presents a legislative or regulatory regime remotely analogous to the situation presented here, which rests fundamentally on contracts entered into by parties in Australia. *See, e.g., United States v. Locke*, 529 U.S. 89 (2000) (finding preemption from complex web of statutes, international treaties, and federal regulations for oil tankers on subject addressed by state environmental standards); *Geier, supra*.

The government further misunderstands the international multimodal transportation system when it then asserts that a free-floating federal "policy" enables a carrier to obtain a higher carriage rate in exchange for a higher liability limit. *See* U.S. Br. 23. The government's position is astounding now that the rail, air, and sea carriage regimes are predominantly deregulated: large shippers and non-vehicle owning carriers can contract (as NS asserts Columbus Line did with it) to reduce carriage rates and liability limits, thus enabling the free market to determine what carriers can charge for the carriage of an international multimodal shipment.

The government seeks to justify its request for judicial intrusion on the marketplace by objecting to the Eleventh Circuit's rule as "substantially disrupt[ing] established commercial practices by preventing the underlying carrier from linking its rate to its potential liability." *Id.* While noble-sounding in the abstract, that "policy" leads to the truly bizarre result that Columbus Line – which apparently did *not* announce a higher value for the cargo when it contracted with NS to carry Kirby's freight (*see* JA 107-09) – is not precluded from obtaining a remedy under NS's Rail Circular for up to $2.5 million (JA 102), but *Kirby* is limited to $5,000 under the Hamburg Süd bill of lading. The government favors that "solution" without demonstrating how Kirby's suit would conflict with a single federal statutory provision.

Finally, the government is flatly wrong to suggest that the Eleventh Circuit's position means that a cargo owner that deals with Hamburg Süd is bound by the liability limits in its bill of lading, but a cargo owner that deals with an intermediary that then ships through Hamburg Süd is not. By statute, COGSA applies of its own force for the ocean carriage to the United States, so the liability limits in Hamburg Süd's bill are irrelevant in determining the ocean carrier's actual liability if a loss occurs at sea and thus falls within COGSA's scope. The only relevance of the government's position therefore is when a bill of lading extends liability limitations to third parties outside the contract. Given *Herd*'s reluctance to extend liability limitations, and Congress's affirmative decision *not*

to extend COGSA benefits to other performing parties, there certainly is no basis for thinking that an ocean carrier's extensions to third parties should be preferred to an intermediary's that would be known to the party adversely affected by them, the shipper.

As this Court has concluded, when there is no "extant" federal action that "can create an inference of pre-emption in an unregulated segment of an otherwise regulated field, preemption, if it is intended, must be explicitly stated." *Puerto Rico*, 485 U.S. at 504.[29] Yet Congress has made no such explicit statement. "To adopt the imaginative" approach "set forth in the Solicitor General's *amicus* brief" would require this Court to conclude that "repeal of [carrier] regulation" left "behind a pre-emptive grin without a statutory cat." *Id.*

D. NS's Rule Produces Harmful Consequences

The new "American" rule – as NS and the government would have it – would have disastrous consequences for international maritime carriage rules. First, it would disrupt the uniformity now prevailing in all of the major maritime trading nations, which accept the Eleventh Circuit's position. *See* Int'l Professors *Amici* Br. Cargo owners worldwide should not be expected to master NS's "special agency" rule when contracting in their home country for a shipment to the United States, especially when that rule conflicts with principal-agency rules accepted everywhere else.

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[29] The government hides the Achilles' heel of its argument in a footnote (*see* Br. 25 n.9), where it acknowledges that a rail carrier is allowed by statute to engage in rate discrimination through contract carriage. In its invitation brief, the government stated that it had been informed by NS that Kirby's cargo was carried under such a contract. U.S. Inv. Br. 12. There can be no basis for holding *Kirby* to whatever side deal NS struck with Columbus Line USA Inc. – Kirby was not a party to such a contract and has no idea of its terms. Likewise, because the contract carriage removes any possibility of a "conflict" with the supposedly preemptive federal policy, there is no basis for preempting Kirby's suit. *See Geier*, 529 U.S. at 873 (conflict preemption must arise under the "circumstances" presented).

Second, by binding shippers to an "actual" carrier's bill of lading, NS's approach would subject cargo owners to two sets of shippers' obligations rather than just the one to which they agreed. This could include anything from freight rates and lien clauses to liability terms and forum selection clauses. If bound by a second carrier's bill, a cargo owner might be required to pay freight twice; or it might face two wildly divergent limitation provisions in the event of cargo damage; or it might be subject to suit in different countries.

Third, there is no limiting principle to NS's position. If a harsher Himalaya clause is upheld in this case on a "special agency" theory (NS Br. 36), presumably nothing would stop an intermediary from binding a cargo owner to a subcontracting carrier's contract terms that resolve a dispute under some completely different law, contain a completely different choice of forum clause, describe the cargo in a completely different way, value the cargo in a manner inconsistent with the original contract with the intermediary, confer special rights of delivery and acceptance on a consignee that penalize the consignor, or accept a time limitation on causes of action that snuffs out valuable remedial rights. Indeed, under NS's theory, the intermediary could make the cargo owner liable to a subsequent carrier in tort by its own failure to identify goods as especially hazardous and in need of special carriage conditions. That notion, however, would clash with this Court's recognition of "the common-law rule that a principal normally will not be liable for the tortious conduct of an independent contractor." *General Bldg.*, 458 U.S. at 396. In virtually the rest of the world, the cargo owner would have no cause of action against an intermediary-carrier for violating an "agency relationship" because none would have been created. *See* Int'l Professors *Amici* Br. 14-17. Subcontracting carriers would make themselves immune from suit and do so in faraway forums using different law, and cargo owners would functionally have no recourse against the true wrongdoer.

II. THE HIMALAYA CLAUSE IN THE ICC BILL OF LADING DOES NOT PROTECT PETITIONER

For the reasons just given, the ICC bill of lading is the only contract "binding on the person damaged." *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 303 (1959). But NS must still demonstrate that the ICC Himalaya clause exonerates it. *Id.* Applying well-established principles going back to *Herd*, the court below correctly held that the ICC Himalaya clause[30] does not protect NS for two independent reasons: NS is not ICC's "independent contractor," and, as an inland carrier, a greater degree of specificity is needed for the clause to embrace NS. Either holding is adequate to sustain the judgment below.[31] NS's arguments to the contrary go beyond the scope of its question presented, distort the basic contract construction principles that are routinely applied to strictly construe such clauses, ignore two uniform lines of circuit precedent that explain precisely why the Eleventh Circuit was correct, omit any analysis of the reasons why the phrase "other persons" is insufficient to meet *Herd*'s appropriately stringent standard, and misunderstand the parties' intent and reasonable expectations as to the scope of the ICC Himalaya clause.

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[30] The Eleventh Circuit did not rule whether the Hamburg Süd Himalaya clause would protect NS; it was unnecessary to reach the question. But that clause would not protect NS for the reasons that Kirby explained below. Kirby CA Br. 40-52. NS does not address the issue. If this Court were to reverse on the first question, that issue would be open on remand. Respondents have never conceded that the clause would protect NS. *Cf.* P&I Br. 4.

[31] Because the questions presented in the petition challenge only the first of the court's two independent reasons, and the second reason by itself is adequate to sustain the judgment below, this Court should in any event affirm on Question 2. NS's blatant attempt to introduce new issues that are not fairly included in the original questions presented comes too late. *See infra* at 37-38, 42.

A. Himalaya Clauses Must Be Strictly Construed And Limited To Their Intended Beneficiaries

In *Herd*, a negligent stevedore sought to limit its liability for the cargo damage that it had caused during vessel loading by claiming the benefit of the carrier's package limitation. Rejecting the claim, this Court held that neither COGSA nor the bill of lading protected anyone other than the carrier. 359 U.S. at 305. The *Herd* Court left open the possibility that a contractual provision might extend the carrier's limitation clauses to third parties performing the carrier's duties under the contract of carriage, but it narrowly limited this option:

> [C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."

Id. (quoting *Boston Metals Co. v. The S/S Winding Gulf*, 349 U.S. 122, 123-24 (1955) (Frankfurter, J., concurring)).

An entire body of jurisprudence has subsequently developed in the lower courts to apply *Herd*'s limiting principles to construe Himalaya clauses. Justice Kennedy, as a Ninth Circuit judge, stated the applicable principles that were already well-settled in 1985:

> Himalaya Clauses should be strictly construed and limited to intended beneficiaries. The intent to extend COGSA benefits to third parties must be clearly expressed. When a party seeking protection under a Himalaya Clause is not specifically mentioned therein, the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which COGSA benefits are extended under the terms of the clause.

Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus, 762 F.2d 1364, 1366-67 (CA9 1985) (citations omitted).

1. A limitation of liability clause is strictly construed against the party claiming its benefit

This Court has unequivocally stated in this precise context that "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries." *Herd*, 359 U.S. at 305. That well-established principle has deep roots in contract law. *See, e.g.*, 11 *Williston on Contracts* § 32:20, at 533 (4th ed. 1999) (courts "construe even the most clear and unambiguous exculpatory provisions strictly against the party seeking the benefit of the clause").

NS's contrary argument (Br. 42-43) is astonishing. It ignores the relevant authority and invokes the interpretive rule for federal criminal statutes as though that canon applies to contractual exculpatory clauses. *See* NS Br. 43 (quoting *Singer v. United States*, 323 U.S. 338, 341-42 (1945), replacing a reference to "criminal statutes" with "[words]"). NS claims a 150-year-old common law rule in support of its agency argument by reading the plurality's dicta in *New Jersey Steam* out of context, *see supra* at 16-18, but it ignores the true 150-year-old common law rule embodied in the Court's holding there – an application of the strict construction canon. The Court held that a broad bill of lading clause purporting to limit a carrier's liability for "fire, water, breakage, leakage, and all other accidents," 47 U.S. at 347, did not apply to negligence because the parties could not have intended that the carrier would seek to exempt itself from "the same degree of responsibility as that which attaches to a private person … to use ordinary care in the custody of the goods," *id.* at 383.

NS and the government fail to grasp the proper application of this Court's rule that clauses "purporting to grant immunity from, or limitation of, liability [such as a Himalaya clause] must be strictly construed." *Herd*, 359 U.S. at 305. Clauses in which a carrier *accepts* liability (such as Clause 2.2 of the FBL, in which the issuer accepts liability for the actions of "any other person of whose services [it] makes use for the performance of the contract," JA 86) are not subject to

a limiting interpretation. Indeed, these clauses must be read broadly, under the principle that a bill of lading is construed against the carrier. *See supra* at n.12. Language that fails to pass muster in an exculpatory clause context may be acceptable when the tables are turned. Contrary to the government's unsupported assertion (Br. 16), a strong basis exists for this distinction – to protect against a long history of carriers' overreaching.

2. An intent to extend COGSA benefits must be clearly expressed to include a well-defined class of readily identifiable persons

The clarity requirement follows logically from the strict construction rule and the requirement that clauses be limited to intended beneficiaries. A clause cannot be thus limited if the intended beneficiaries are unclear, poorly defined, or not readily identifiable. Those principles have long been widely accepted by the lower courts and relied upon by commercial parties.[32] Even the precise phrase "well-defined class of readily identifiable persons" appears frequently in the cases – including in the only two Himalaya clause decisions NS cites. *See Akiyama Corp. of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (CA9 1998) (citing *Vessel Gladiolus*, 762 F.2d at 1367); *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 743 (CA4 1993) (quoting *Generali v. D'Amico*, 766 F.2d 485, 490 (CA11 1985)). NS's suggestion (Br. 48) that *Herd* permits a Himalaya clause to express an intent to protect a third party only "in some way" ignores not only the *Herd* opinion as a whole but also more than 40 years of federal court jurisprudence.

These well-established general principles have long been applied to the concrete language of actual Himalaya clauses.

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[32] In the House of Lords' most recent Himalaya clause decision, Lord Hobhouse noted the "basic rule of construction of contracts of carriage" that a party seeking "to exclude or limit his liability or to rely on an exemption . . . must do so in clear words. Unclear words do not suffice. Any ambiguity or lack of clarity must be resolved against that party." *The Starsin*, [2003] UKHL 12, ¶ 144 (citation omitted).

The influential Second Circuit, for example, has convincingly explained that a broad phrase such as "any person whose services have been used in order to perform the contract" does not provide the necessary clarity of language. *See, e.g.*, *Rupp v. International Terminal Operating Co.*, 479 F.2d 674, 676 (CA2 1973) (rejecting clause covering "all persons rendering services in connection with performance of this contract"); *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476, 478 (CA2 1971) (same).[33] Mentioning "other persons" does not describe a "well-defined class of readily identifiable persons" but purports to extend coverage to those who have *not* been defined or identified at all.

Neither NS nor its *amici* make any effort to rebut the long-established rule of *Cabot* and *Rupp*. NS dismisses (Br. 45) the Eleventh Circuit's careful review of the ICC Himalaya clause and its conclusion (following *Cabot* and *Rupp*) that the overly broad language in the clause does not benefit NS without acknowledging or responding to the court's rationale. *See* Pet. App. 12a (citing *Rupp*).[34] Thus, under the uniform view of every circuit to have addressed the issue, the operative language of the Himalaya clause here covers "servant[s]," "agent[s]," and "independent contractor[s]" whose services have been used to perform the contract.

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[33] Other circuits have followed *Cabot* and *Rupp* approach. *See, e.g.*, *Vessel Gladiolus*, 762 F.2d at 1367; *La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56, 59-60 (CA4 1979); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 264-65 (CA3 1974).

[34] NS's citation of *Wemhoener Pressen* with a parenthetical quoting the broad language discussed in that opinion, *see* NS Br. 43, does not purport to respond to the Eleventh Circuit's analysis. In any event, it would be an inadequate response. The Fourth Circuit, relying on two references to subcontracting in the Himalaya clause before it, explained that the "clause defines third party beneficiaries as subcontractors who take part in performance of the carriage." 5 F.3d at 743. Because the defendant was a stevedore "acting as [the carrier's] agent," *id.*, and it was performing a "peculiarly maritime activity" (as opposed to inland carriage), *id.*, the Fourth Circuit held that it was entitled to the benefit of the package limitation as the carrier's agent. It did not question the long-established rule of *Cabot* and *Rupp*.

Not only does the phrase "other person . . . whose services have been used in order to perform the contract" lack the necessary clarity, NS is unable to rely on it for another reason. The interpretation of this language goes well beyond the questions presented in the petition. When NS sought this Court's review, it framed Question 2 in the context of a bill of lading clause covering "'independent contractors' used to perform the contract of transportation,"[35] and it asked only which "independent contractors" should be covered by those terms. *See* Pet. i.

NS has now completely rewritten Question 2 to ask how a much broader clause should be interpreted.[36] *See* NS Br. i. But this new question is not "fairly included" in the question that this Court agreed to decide. *See Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992); Sup. Ct. R. 24.1(a). This is not one of "the most exceptional cases" justifying this Court's "address[ing] the unpresented question." *Yee*, 503 U.S. at 535 (citation omitted). As was true of the additional question in *Yee*, "[t]he lower courts have not reached conflicting results," *id.* at 537, on the treatment of "other persons" clauses, *see supra* at 35-36 & n.32. Accordingly, NS's and its *amici*'s arguments based on the "other person" phrase,

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[35] Without any bow to its own double standard, NS describes the Eleventh Circuit's "turn[ing] its knife to the phrase 'any independent contractor'" and "silently excis[ing] the word 'any'" (NS Br. 45) after NS itself omitted "any" before "independent contractor" in its petition Question 2.

[36] NS has also transformed an issue about federal maritime law to one of contract interpretation. The change is palpable. The petition questions whether "the federal maritime law" supports the Eleventh Circuit's holding on the privity of contract aspect of the Himalaya clause question. NS's merits brief omits the reference to maritime law and poses the new question simply as a matter of contract interpretation. *Compare* Pet. i. *with* NS Br. i. NS's revision is rich in irony because the Opposition closed by noting that the real question raised in the case involved "an analysis of the Australian contracting parties' intent – not an issue of federal law." Opp. 30. Now that NS apparently agrees, the Court may wish to consider whether to dismiss the writ as improvidently granted.

NS Br. 43-46; U.S. Br. 13-16; P&I Br. 9-11, 14, are not only erroneous, they are not properly before the Court.

B. The ICC Himalaya Clause Does Not Protect ICC's Sub-sub-subcontractors

The court of appeals correctly held that the ICC Himalaya clause does not protect NS for two independent reasons, either of which sustains the judgment below on this issue. We address each in turn.

1. As a sub-sub-subcontractor, NS is not covered by the ICC Himalaya clause's plain language

The clause protects only ICC's independent contractors, not Columbus Line's independent contractors or ICC's sub-sub-subcontractors. The language in the ICC bill of lading must be interpreted in context. When the Himalaya clause speaks of a "servant," for example, it cannot be referring to all of the world's servants. (If it were, there would not be a "well-defined class of readily identifiable persons.") The term "servant" only makes sense describing an employment relationship and thus the existence of an employer. Similarly, "agent" implies a principal, and "independent contractor" another contracting party.[37] That language therefore must refer to *ICC's* servants, agents, and independent contractors. No other usage makes sense.

Clause 10.2 (JA 94) confirms this reading. The Himalaya clause covers only those parties for which ICC "act[s] . . . as agent or trustee." ICC would have no authority to act for parties with which it did not contract, and thus the Himalaya clause could not cover them.[38] In his authoritative treatise,

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[37] A "servant" is defined as "[a] person who is employed *by another* to do work under the control and direction of the employer," *Black's Law Dictionary* 1399 (8th ed. 2004) (emphasis added); "agent" as "[o]ne who is authorized to act for or in place *of another*," *id*. at 68 (emphasis added); and "contractor" as "one who contracts to do work or provide supplies *for another*," *id*. at 350 (emphasis added).

[38] Clause 2.2 (JA 86) does not defeat this reading. Language that is overly broad in the context of the Himalaya clause, and lacks the requisite clarity, *see supra* at 35-36, is entirely permissible in Clause 2.2, *see supra*

the chair of the FBL's drafting committee confirms this reading. *See* Ramberg at 68 (noting that the FBL Himalaya clause protects "the *Freight Forwarder's* servants, agents and other persons") (emphasis added).[39] Just last year, the House of Lords concurred with that analysis:

> Ordinarily understood the word "independent contractor" in the context of a head contract means a third party with whom a party to a contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party had undertaken to perform under the head contract, in other words, a subcontractor.

The Starsin, [2003] UKHL 12, ¶ 28 (Lord Bingham) (quoting trial court). At least in British English, the ICC Himalaya clause would cover "a subcontractor," but not a sub-sub-subcontractor. It would require a beneficiary to enter into a contract with "a party to [the head] contract," not with some third party. American English demands the same result, particularly in light of the strict construction canon.

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at 34. Arguments to the contrary misunderstand the proper application of the strict construction rule.

[39] In his *amicus* brief in this case, Prof. Ramberg also confirms that the FBL Himalaya clause was not intended to protect sub-subcontractors. *See* Ramberg Br. 5 n.6. The P&I Clubs criticize the court of appeals' "emphasis on the intent of the drafters of the FBL," arguing that it undermines the intent of the actual parties. P&I Br. 21. But the entire purpose of a standard form is to achieve uniform results wherever the form is used. *See generally, e.g.*, Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 NY.U. L. Rev. 429, 439-40 (2002). Indeed, NS implicitly advocated for the uniform interpretation of FBLs when it sought this Court's review in this case on the ground that "the FBL [is] the most widely used shipping document in international multimodal transport." Pet. 26; *see also* Pet. 2. By choosing to use a standard form, the parties expressed their intent to adopt the meaning given to that standard form by those who wrote and promulgated it. Prof. Ramberg's intent is unquestionably relevant.

2. The parties did not intend the ICC Himalaya clause to cover ICC's sub-sub-subcontractors

NS asserts its preferred view of the parties' supposed intent (Br. 43-46) without offering any evidence or reasoned analysis. Every available indication of the parties' intent, however, is contrary to NS's view. The plain language of the contract shows the intent to cover only ICC's independent contractors. *See supra* at 3. The person most likely to have formed a specific intent with regard to this specific language has confirmed his intent to cover only subcontractors. *See supra* at 39 & n.38. One party to the contract (Kirby) has consistently asserted its intent, both here and in the courts below. NS's intent is legally irrelevant, but at the time of the accident even NS did not intend to benefit from either Himalaya clause. *See* App., *infra*, 1a; JA 100, 102.

To the extent prior judicial decisions shaped the parties' intent, the weight of appellate authority accords with the Eleventh Circuit here (as NS has admitted, Pet. 25-26). At the time of the transaction, every reported appellate decision would have informed the parties that relational language in a Himalaya clause would protect only those third parties that had contracted with the issuer. Prior to *Akiyama* (which was decided almost 16 months after ICC issued its bill of lading), even the Ninth Circuit adhered to the rule that "[w]hether an entity is an intended beneficiary of a Himalaya Clause depends upon the contractual relation between the party seeking protection and the [carrier issuing the bill of lading containing the Himalaya Clause]." *Vessel Gladiolus*, 762 F.2d at 1367; *see Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450 (CA9 1993). The Second Circuit's rule was also well established by 1997. *See Mikinberg v. Baltic S.S. Co.*, 988 F.2d 327, 333 (CA2 1993); *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 521-22 (CA2 1975).

In *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), this Court declared that it would "not stretch the language when the party drafting . . . a form contract has not included a provision it easily might have." *Id.* at 183. That approach would quickly resolve this case, because NS cannot

carry its burden of ensuring that the necessary language is in the bill of lading.[40] The maritime commercial world has long recognized the need for greater specificity when seeking to extend Himalaya clause protection beyond an issuer's immediate subcontractors, and specific language to accomplish that goal has long been readily available. *See, e.g.*, *Himalaya Clause Subcommittee Report*, Maritime Law Ass'n doc. no. 652, at 7902, ¶4 & n.4 (David R. Owen ed., 1984) (recommending use of the language "direct and indirect servants, agents and independent contractors of the Carrier, as well as their respective servants, subagents or subcontractors" for parties seeking "to accomplish the goal of including subagents and subcontractors within the protection of COGSA," and warning "that typical Himalaya Clause language covering merely 'servants, agents and subcontractors' of the carrier will not extend the protections of COGSA to subcontractors of the carrier's independent contractors"); J.W. Richardson (ed.), *The Merchants Guide* 37 (Int'l ed. 1995) (reprinting P&O's standard bill of lading, which covers "any independent contractor employed by the Carrier in performance of the Carriage and any sub-sub-contractors thereof"). These widely available sources show language intended to protect parties not in privity with the issuer. Because "the party drafting [the FBL] form contract has not included a provision it easily might have," *Monrosa*, 359 U.S. at 183, NS's claimed expansive coverage presumably was not intended.

C. The ICC Himalaya Clause Does Not Protect Inland Carriers

The court of appeals also correctly held that the ICC Himalaya clause does not protect NS for a second, independent

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[40] The P&I Clubs' suggestion (Br. 11-12) that the burden should be on innocent cargo owners to ensure that marginal third parties are excluded from Himalaya clauses, rather than on negligent tortfeasors and their defenders to ensure that marginal third parties are included, would eviscerate *Herd*. After all, no contractual provision excluded the *Herd* stevedore from the benefit of the carrier's package limitation. The default rule is full liability the consequences of negligence. *See* 359 U.S. at 308.

reason that is also adequate to sustain the judgment below. The clause was intended to protect only maritime parties such as stevedores and terminal operators, not inland carriers.

1. Question 2 does not challenge this holding

NS has baldly rewritten Question 2 to mask the petition's failure to challenge the Eleventh Circuit's alternate holding that inland carriers are not embraced within the language of ICC's bill. *Cf.* NS Br. i *with* Pet. i. The new question is not "fairly included" within the question this Court granted certiorari to resolve. *See* Opp. 24-25; *Yee*, 503 U.S. at 535-38; Sup. Ct. R. 24.1(a). This is not an "exceptional case[]." *Yee*, 503 U.S. at 535 (citation omitted). Given the petition's failure to challenge the alternate holding denying protection under the ICC Himalaya clause for "inland carriers," there is a "heavy presumption" (*id.* at 537) against this Court's resolving NS's new Question 2, particularly given that the Eleventh Circuit's alternate holding still renders advisory any decision by this Court on the rewritten "privity" issue.

2. "Independent contractors" covers only maritime parties such as stevedores and terminal operators

NS concedes (Br. 47 n.16) that Himalaya clauses were invented to benefit stevedores. Even a cursory review of the jurisprudence demonstrates that the clause's benefits have been claimed mostly by stevedores and others that work in the port area. "[A]ll of [the Eleventh Circuit's] prior Himalaya clause cases" have involved "a stevedore or other provider of port services," Pet. App. 15a, and the same is true for most circuits. This lack of cases is both a cause and an effect of the industry's understanding that the typical Himalaya clause does not extend to protect inland carriers.

Many factors contribute to this situation. The typical purpose of a Himalaya clause is to extend a sea carrier's maritime-oriented defenses to its subcontractors. COGSA, by its own terms, applies only to the ocean voyage – from loading to discharge. *See* COGSA §1(e), 46 U.S.C. app. § 1301(e). Applying maritime defenses to inland carriers is often nonsensical. *See, e.g., Vistar, S.A. v. M/V Sea Land*

Express, 792 F.2d 469, 471-72 (CA5 1986) (rejecting a trucker's claim that it was entitled to the "error-in-navigation" defense of COGSA §4(2)(a), 46 U.S.C. app. § 1304(2)(a), when the truck hit a low bridge). Thus, most parties drafting Himalaya clauses do not intend them to extend to inland carriers. And, if they do intend broader coverage, they use specific language to indicate this intent. *See, e.g.*, JA 60 (¶ 1(g)), 63 (¶ 5(b)).

The usual solution to the problem of inland carriers' damaging cargo (and the one explicitly adopted in the FBL, *see* JA 92-93) is the "network" system that fixes the carrier's liability by "the particular legal regime applicable to the carrier on whose line the loss occurred." 3 Sorkin § 14.15[3][a], at 14-98. The FBL's drafters assumed that damages on a railroad would be covered by the liability regime applicable to railroads and saw no need to extend Himalaya clause protection to railroads. Moreover, as one of NS's most-cited authorities has observed, extending Himalaya clause protection to inland carriers under a network system "creates an inconsistency which may make the bill of lading ambiguous on this issue." *Id.* at 14-99. Avoiding that ambiguity is yet another reason why the FBL's drafters rationally chose not to include a broad Himalaya clause covering inland carriers.

The commercial parties' understanding that a typical Himalaya clause will not protect inland carriers is confirmed and reinforced by the fact that, in every reported decision on point, the courts of appeals have held that Himalaya clauses do not protect inland carriers. *See Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 725-26 (CA4 1990) (holding that trucker was not "independent contractor" because of "settled rule that limitations of liability are to be 'narrowly' construed"); *De Laval Turbine*, 502 F.2d at 269-70 (rejecting argument that "bailee" adequately expressed parties' intent to encompass inland carrier).

NS's response (Br. 48) – that these cases involved ocean bills of lading – is both deceptive and irrelevant. The *De Laval Turbine* contract included delivery at least a short distance inland, 502 F.2d at 261, which is why an inland carrier

was involved. And, in *Caterpillar Overseas*, the parties contractually agreed to the inland move. 900 F.2d at 717. The relevant point is that the inland carriers in *Caterpillar Overseas* and *De Laval Turbine* were doing the same thing that NS claims to have been doing here – performing obligations under the contract of carriage.

The reported decisions not only confirm the understanding that a typical Himalaya clause would not protect inland carriers, but also inform the parties' understanding that the ICC Himalaya clause would not protect a railroad. There is no need to "stretch the language when the party drafting . . . a form contract has not included a provision it easily might have." *Monrosa*, 359 U.S. at 183. The maritime commercial world has long recognized the need for greater specificity when seeking to extend Himalaya clause protection to inland carriers, and specific language to accomplish that goal has long been readily available. *See, e.g.*, Richardson at 37 (reprinting P&O's standard bill of lading, which covers "road and rail transport operators"); JA 63 (¶ 5(b)). Because "the party drafting [the FBL] form contract has not included a provision it easily might have," 359 U.S. at 183, it presumably did not intend the expansive coverage claimed by NS.

III. KIRBY'S SUIT COMPORTS WITH THE PARTIES' REASONABLE EXPECTATIONS

A. NS Would Expect To Be Responsible Under The "Network" Principle

Virtually the entire world – with the apparent exception of Venezuela – accepts the "network" principle, pursuant to which liability for an international multimodal shipment will generally be governed by the liability rules applicable for each "mode" of the journey. *See* International Academy of Comparative Law, *Multimodal Transport: Carrier Liability and Issues Related to the Bills of Lading* 42 (Kiantou-Pampouki ed. 1998) (noting that Venezuela was the only country to have adopted uniform liability system; in the "rest of the reporting countries, the network system applies"); id. at 249 (noting that United States "uses the network systems approach" such that "each mode of transportation has its own

carrier liability regime"). Thus, NS would have had no basis for thinking that a "unimodal" rule of liability would apply, giving it the benefits of the substantially lower sea carriage limited liability regime. No court in the United States has ever imposed such a rule.

NS's expectation that the network principle would govern is amplified by its own Rail Circular, which addresses "Intermodal" shipment of containers and pickups from seaports. Yet under the limitation of liability provision, the circular makes no mention of reliance on any ocean carrier's liability limits and in fact stresses that the circular is what governs the railroad's own liabilities. *See* R. 16.B.4(d).

B. NS Would Expect To Be Liable For Its Negligence

This case falls four-square within the rule announced in *New Jersey Steam*, *York*, and post-Carmack Amendment cases that a carrier may not contractually limit its losses arising from its own negligence. The cases upholding limitation of liability provisions all take care to allow such limitations for damage only when carrier negligence was not at issue (*e.g.*, acts of God). *See, e.g.*, *Boston & M.R.R. v. Piper*, 246 U.S. 439, 445 (1918) ("the carrier may not exonerate itself from losses negligently caused by it"); *York*, 70 U.S. at 113 (stipulation limiting loss does not apply to carrier's "losses from negligence or misconduct"). Yet NS's assertion of a liability limit of $5,000 – one-third of 1% of the total damages – is very nearly an assertion of complete exoneration, a principle long ago rejected as against public policy. *See, e.g.*, *Liverpool*, 129 U.S. at 441-42 ("an express stipulation by any common carrier . . . that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void"). NS's current assertion, moreover, is inconsistent with its own Rail Circular, under which NS accepted liability for its negligence. *See* R. 16.B.4(c).

NS's proposed regime would create substantial disincentives for carriers to take care to deliver goods in sound condition – and would lead paradoxically to precisely the *opposite* of the original common law rule of full liability that treated

the common carrier as an insurer of the goods. To make matters worse, ocean carriers could readily collude with inland carriers to provide contractual limitations of liability for especially low through carriage rates. The market system would work imperfectly in this respect, because cargo owners' insurers would bear all the risk of loss without the "actual" carrier having any incentive to take care of the goods. Insurers would have no recourse but to raise premiums, which in turn would make the costs of carriage to a consignor or consignee increasingly expensive. What has made the system work efficiently to date is the assurance that wrongdoers can be held accountable for their negligence, often by insurers exercising their subrogation rights. NS has no reasonable expectation of receiving a free pass for its negligence.

C. NS Would Expect To Defend A Tort Suit

Nor does NS have any basis for thinking that it could somehow be immune in this transaction against a tort suit for its own negligence. In keeping with its imaginative use of snippets of language in this Court's cases, NS invokes the seventh edition of an English treatise, *see* James S. Henderson, *Carver's Carriage by Sea* § 67, at 93 (7th ed. 1925), for the proposition that a cargo owner may not sue a negligent carrier if the owner "consented" to the carriage. *See* NS Br. 31. The thirteenth edition of that treatise, however, notes that "Judge Carver . . . fail[ed] to foresee the future importance of a cargo owner's right to sue in tort in respect of mishaps to his goods," and thus the seventh edition "sparsely discussed the matter" in the passage quoted by NS. *See* 1 Raoul P. Colinvaux, *Carver's Carriage by Sea* ¶ 121, at 122 (13th ed. 1982). In fact, the thirteenth edition canvasses English cases to establish that the seventh edition failed to anticipate developments in the law that clearly permit injured cargo owners to sue negligent carriers in tort, and it was simply wrong on the point invoked by NS as ostensibly representing the "law" in the mid-1920s: from the late nineteenth century, English law recognized that an injured cargo owner could sue a negligent carrier in tort even when the owner was not in privity of contract with the carrier.

The modern trend has firmly embedded that principle in the law: "Thus, it may now be generally stated that, although a shipowner is not in a contractual relationship with the owner of goods lost or damaged in transit, the [carrier] will be liable to their owner in tort if the loss or damage arose from lack of reasonable care of the goods by him or his servants." *Id.* ¶ 123, at 125. That fundamental principle has long been accepted by the House of Lords in England, *see Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 (applying *Donoghue v. Stevenson*, [1932] A.C. 562); the Supreme Court of Canada, *see Cominco v. Bilton*, [1973] Lloyd's Rep. 261, 272, 273; and in the major European maritime trading nations of Germany, France, and the Netherlands.[41] Thus, as with its main submission that the forwarder-carrier's bill of lading must be disregarded as a matter of law, NS's argument is based on antiquated notions of law that have long been superseded. *See also Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446 (permitting tort suit against carrier's independent contractor that caused damage in transit to owner's goods). In *Herd*, this Court recognized the same principle, upholding an injured cargo owner's right to sue a stevedore in tort for damage to goods, even though the cargo owner was not in privity of contract with the stevedore. 359 U.S. at 298.

D. NS Would Expect To Pay For The Entire Loss

NS's Rail Circular contemplates the railroad's liability for $250,000 per container, which would equal an amount in excess of the US$1.5 million value of the goods damaged in the

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[41] *See* Ralph De Wit, *Multimodal Transport* § 14.18, at 453 (1995) ("with the relatively recent development of the tort of negligence, any case in which a servant or an independent contractor of the carrier negligently damaged a cargo owner's goods immediately opened the pathway to a direct action in tort") (footnote omitted), § 14.23, at 456 (France solved the problem of tort against a third party not in privity by calling it a "contract" action), § 14.25, at 458 (in Netherlands, "the third party's act or omission [in damaging goods in transit] constitutes a tort"), § 14.37, at 470 (in Germany, "[t]here is nothing against a contracting party bringing an action in tort as against a third party who performed all or part of the other contracting party's duties").

derailment. In the aftermath of the accident, NS's personnel anticipated that its own circular would fix its liability. Shortly after the derailment, an NS official reported internally that a Kirby engineer was on the scene to assess damage from the derailment, that '[o]ur liability is limited by the NS Intermodal Rules Circular to $250,000 per container, and there is a possibility we may receive a claim exceeding our estimate of $820,000." App., *infra*, 1a; *see also* JA 100, 102. Then NS's lawyers began advancing various arguments – a different theory in the district court, Eleventh Circuit, and now this Court – to evade its own liability limits. The NS corporate officers' expectation comports with the settled rule of full liability for negligence. *See Herd*, 359 U.S. at 300, 308 (affirming judgment for full damages); *The Ansaldo San Giorgio I v. Rheinstrom Bros.*, 294 U.S. 494, 496 (1935) (carrier "cannot contract for relief from liability for his own negligence," and "measure of the shipper's recovery is normally the market value of the goods at destination, in like condition as they were when shipped").[42] Notwithstanding its representation here that NS expected to be protected under the Hamburg Süd bill of lading, therefore, its post-accident conduct reflected just the opposite – that NS would be bound by the liability limits of its Rail Circular.

E. Kirby Would Have Had No Way Of Knowing The Hamburg Süd Bill Would Apply

The parties' reasonable expectations would have been further informed by the virtual impossibility of Kirby's learning

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[42] NS's contention that its expectations were altered by the absence of any stipulated value for Kirby's cargo lacks merit. NS Br. 39. NS's $250,000 limit is its "standard" limit, to which all normal freight applies. *See* Rail Circular, R. 16.B.4(d). By contrast, NS's "Carmack Liability Provisions" expressly remove that $250,000 per container limit. *See id*., R. 16.C.3. Neither the terms and conditions for intermodal shipment nor the shipper's instructions in NS's circular impose any requirement to declare a freight value if the contents of the container are worth less than $250,000. *See id*., App. A. A shipper can seek a higher limit, but only through a signed writing by an authorized NS official. *See id*., R. 16.B.4(d).

the terms of a subsequent carrier's bill of lading issued to ICC. Certainly ICC had no fiduciary duty to share those terms with Kirby. NS's entire premise in developing its so-called "150-year rule" rests on the assumption that Hamburg Süd was the "actual carrier" of Kirby's cargo. NS Br. 22. NS further asserts that, because the vessel name *Queensland Star* was on the ICC bill of lading, Kirby had notice that the Hamburg Süd bill of lading would be issued as evidencing carriage by the "actual" carrier. *Id.* at 35. Both in theory and in fact, that premise is completely false.

Kirby could not have seen the vessel name *Queensland Star* on the ICC bill of lading until after that bill was issued. Because it was a "shipped on board" bill of lading, *see* JA 78, 79, it could not have been issued until the ship was ready to sail – two months after Kirby had completed its contract with ICC, *see supra* at 2, and too late for Kirby to object even if it had been aware of the ocean carrier's bill of lading terms.

Even if Kirby had learned of the *Queensland Star* in timely fashion, Kirby would have had no way of knowing that having its cargo loaded on that vessel would necessarily result in the issuance of a Hamburg Süd bill of lading. Blue Star's ownership of the vessel might have suggested that a Blue Star bill of lading would have been issued. Even if Hamburg Süd had owned the vessel, a Blue Star bill of lading might have been issued if Blue Star had chartered slots from Hamburg Süd (instead of the other way around). Indeed, it is also possible that a third carrier, such as Australia New Zealand Direct Line – which is also a party to sharing agreements with Blue Star and Hamburg Süd for the Australia to North America routes (*see supra* at n.3) – might have issued the bill of lading for carriage on a Blue Star or Hamburg Süd vessel. Kirby would not have had any practical basis for knowing whether the "actual carrier" – Blue Star, as it happens – or a slot charterer would issue the bill of lading. Each carrier in a slot charter arrangement typically uses its own bill of lading forms – so cargo aboard the *Queensland Star* would be carried under bills of lading from several different carriers, only one of which would be the "actual carrier." Because vessel

sharing arrangements are prevalent, NS's principal argument rests on a fallacy – regardless of which company owns the vessel. With 90% of container cargo in major trade routes being carried under sharing agreements, there is no practical means for the cargo owner to ascertain who is the "actual carrier." The real world simply does not operate in NS's "actual carrier" fantasyland. Companies contract as "carriers" by accepting responsibility and liability for carriage; they subcontract with other companies to do the carriage; in many instances they put cargo they promise to carry on the ships and vehicles of other carriers; and the cargo owner rarely has any idea who is handling the cargo or under what subcontracted terms. Only when a tortfeasor fails to handle the goods with due care – as NS did here – do the various subcontractual relationships come to light. Thus, there is no basis in logic, law, equity, or commercial practice to support an assumption that Kirby would have had any inkling that Hamburg Süd's bill of lading would be issued as evidence of a contract to carry Kirby's cargo, much less what the terms of that bill of lading would have been.

* * *

The plain truth here is that NS seeks from this Court a blanket protection from liability that is one-fifth of a penny on the dollar compared to its own rail circular expectations. It brazenly seeks that relief in the form of a one-size-fits-all federal common law rule that would cement in law an entire sector of the international transportation industry (intermediaries) regardless of the facts underlying their method of operation. And it seeks that rule notwithstanding its unwillingness to accept similar liability limitations when offered as part of legislative compromise solutions. *See* Opp. 29; Resp. Supp. Br. 7 n.9. This Court should not impose a rule that negates the rights of international parties to contractual freedom.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

J. S. SCOTT BUSBY
CHARLES ROBERT SHARP
BOVIS, KYLE & BURCH, LLC
53 Perimeter Center East
Third Floor
Atlanta, Georgia 30346
(770) 391-9100

Counsel for Respondents

May 28, 2004

APPENDIX

October 10, 1997
File: 34-Derailment

Mr. D. N. Zureich:

Reference earlier discussion today concerning derailment of Train 319 in Alabama and our lading estimate of $820,000.

I have since found out that Mr. David Crawley, Plant Manger, General Motors, Athens, Ala., is on the scene with our Supervisor (N. C. McBride). Mr. Crawley has with him an engineer from Kirby Engineering in Australia.

These gentlemen advise that the value of the lading in the four containers is approximately $3 million. These containers, along with 50 others were shipped from South America, and contain all the parts necessary to put together an assembly line to make aluminum power steering pumps for General Motors. The value of the entire shipment (54 containers) is $17 million.

Our liability is limited by the NS Intermodal Rules Circular to $250,000 per container, and there is a possibility we may receive a claim exceeding our estimate of $820,000.

As information, I have personally spoken with General Manager Manion and advised him of the above information.

P. M. Davis

CC: M. D. Manion – GM West
J. R. Miller – File WK 12394
G. P. Roach – Control Center