No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING,
MMI GENERAL INSURANCE LTD.
Respondents.

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

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently

[1] The parties have filed with the Court letters consenting to the filing of *amicus* briefs. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

appears before Congress, administrative agencies and the courts on behalf of the railroad industry. For AAR's member railroads that are active participants in international commerce, the significance of this case goes well beyond the $1.5 million in damages sought against petitioner.

As petitioner aptly put, the decision of the Eleventh Circuit "upsets settled expectations and business practices." Pet. at 20. This observation rings particularly true for railroads that handle large volumes of freight arriving from overseas, accounting for a significant share of their business. This business is conducted in accordance with established commercial practices designed to assure that goods move reliably, services are paid for, and the terms of the carriage are well understood. Under the Eleventh Circuit's decision, these settled practices will no longer protect railroads participating in international commerce from unpredictable liability. The decision below thus strikes a blow against uniformity and certainty in an area where predictability of liability risk is critical, and will lead to inefficiency as railroads and other participants in intermodal international transportation are forced to accommodate an unworkable legal rule. AAR files this brief to emphasize to the Court the significance of the impact of this "upsetting" on the railroad industry and the urgency of the need for this Court to clarify the legal rules under which international commerce takes place.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

The decision below regarding the applicability and interpretation of bills of lading utilized in international commerce will have a significant impact on railroads. Railroads actively participate in international commerce, moving substantial amounts of cargo arriving from overseas by ocean carrier, primarily in containers, to final destination points in the United States. As a practical matter, railroads rarely do business directly with the overseas shippers of the cargo. Rather, they enter into arrangements with U.S. based freight forwarders or with ocean carriers, often agreeing to ship large volumes of freight tendered by these parties. Like other carriers, railroads establish contractual liability limitations, often those established by the Carriage of Goods by Sea Act, which they typically require to be passed back to downstream parties.

The COGSA liability provisions, which were set forth in two bills of lading interpreted by the court below, establish a regime by which an ocean carrier's liability for damage to the lading is limited. These limits, which may be contractually extended to other carriers, allow carriers to offer low rates to shippers, who in turn obtain insurance to cover any excess risk. The court below interpreted the bills of lading, which clearly were meant to extend COGSA limitations, as not benefitting petitioner railroad, even though petitioner was an anticipated and indispensable party to the transportation required by the shipper. This ruling, which creates a windfall for the shipper's insurer, is based on notions of agency and privity which do not comport with commercial realities and are in conflict with decisions of other courts of appeals. If it is allowed to stand, railroads will need to alter their practices in ways that are neither efficient nor practical, with the consequence of upsetting established commercial norms in international shipping.

ARGUMENT

I. RAILROADS PARTICIPATE IN A SIGNIFICANT AMOUNT OF INTERNATIONAL INTERMODAL BUSINESS WHICH IS CONDUCTED IN ACCORDANCE WITH WELL-ESTABLISHED AND EFFICIENT BUSINESS PRACTICES

The Eleventh Circuit has torpedoed the expectations of U.S. rail carriers in a decision that, though grappling with seemingly mundane questions–which bill of lading applied and to whom did it apply[2]–has significant ramifications for international commerce. Creating technical rules with no policy justification and elevating such technicalities over the clear intent of freely entered into contracts, the Eleventh Circuit has muddled an area that demands clarity and uniformity.

As is typical, the international transportation shipment giving rise to this case involved multiple parties. Here, respondent Kirby, the cargo owner who shipped the goods from Sydney, Australia, sued petitioner, the railroad responsible for the inland portion of the move to its final destination, Huntsville, Alabama, for damage to the cargo occurring during the inland move. Federal statute establishes limits on liability when a lading is damaged during transportation by ocean carrier. Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936), codified at 46 U.S.C. app. §§1300-1315. Absent declaration of a higher value for the cargo, liability is limited to $500 per package, 46 U.S.C. app. §1304(5), a limitation which, by contract, may be extended to other parties participating in the

[2] A bill of lading is a document evidencing receipt of goods for shipment issued by persons engaged in the business of transporting or forwarding goods, which contains, among other things, the contract for carriage of the goods. BLACK'S LAW DICTIONARY 168 (6th ed. 1990).

transportation. *Id.* at §1307. Liability limitations, and the scope of their applicability, are generally set forth in the bill of lading.[3]

In this case, two bills of lading issued in the course of the underlying transaction expressed an intent to extend COGSA's limitations on liability to all carriers performing the transportation contract. Yet, according to the court, petitioner may not avail itself of the benefits of either. Ensnaring petitioner in a variation of a classic "Catch 22," the court held that the bill of lading which protected petitioner did not bind Kirby, and that the bill of lading that bound Kirby did not protect petitioner. *Kirby v. Norfolk Southern Ry. Co.,* 300 F.3d 1300 (11th Cir. 2002). The court acknowledged that the Himalaya clause of the bill of lading issued by the ocean carrier to the freight forwarder hired by Kirby was meant to benefit the railroad, as it referenced "inland carriers" as among the parties against whom liability was limited. However, the court held that this bill of lading did not bind Kirby because the freight forwarder who contracted to ship Kirby's freight did not act as an agent. *Id.* at 1305-07. At the same time, the court also held that while the Himalaya clause of the bill of lading issued by the freight forwarded to Kirby did bind Kirby, its extension to "any independent contractor whose services have been used in order to perform the contract" did not benefit petitioner. Though, undisputably, petitioner did provide "services used to perform the contract" the court reasoned that petitioner was not covered by that phrase because it did not contract (was not in privity) with the carrier (freight forwarder). *Id.* at 1308-10. In addition to dealing a double blow to petitioner,

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[3] Contractual extensions of COGSA's liability limitations to cover parties participating in the shipment prior or subsequent to the ocean carriage are known as Himalaya clauses. *Generali v. D'Amico,* 766 F.2d 485, 487-88 (11th Cir. 1985).

the court below also struck a blow against the reliance interests of rail carriers and other parties engaged in international transportation.

A. Railroads are Significant Participants in International Commerce

Transportation is the life blood of commerce. "Intermodal" freight transportation–movements involving two or more modes of transportation–has been a growing force in world markets over the past few decades and plays a vital role in the global economy. *See generally,* GERHARDT MULLER, INTERMODAL FREIGHT TRANSPORTATION (3d ed. 1995). Intermodal transportation involving the interchange of freight shipped in containers or trailers has experienced explosive growth since the 1950s. DAVID J. DEBOER, PIGGYBACK AND CONTAINERS 159 (1992). Containers predominate in international moves, and millions of containers, accounting for billions of dollars in transportation revenue, are transported from overseas to the points in the United States each year.

Railroads began prominent use of containers in the 1920s, while containerization of ocean cargo became widespread in the late 1950s. MULLER at 12-13. During the 1960s, land and sea container transportation evolved from separate services to a combined, integrated service. *Id.* at 17. Marrying up of sea and land transport often is an effective way of shortening delivery time of international freight movements, as it permits avoidance of circuitous and lengthy ocean routes. So-called "bridge" service may involve ocean carriage from Asia to a U.S. west coast port, and from the east coast to Europe, linked by transcontinental land-based transportation. *Id.* at 104 Even where the final destination is a U.S. port and an all-water route is feasible, efficiency may call for the final leg of the move by land. *Id.* at 106-107. Finally, international moves to inland U.S. destinations must of necessity involve a land-based carrier.

Railroads are active participants in international trade and a vital link in the global economy, serving all the major ports ringing the U.S. coast line from Boston to Seattle-Tacoma. Connecting these ports to numerous inland locations, railroads play a key role in the movement of international freight, originating much export traffic, and serving as intermediary or destination carriers for large volumes of import traffic. Railroads derive approximately $3 billion in annual revenue moving import traffic in several million containers.

Intermodal traffic is a growing and highly competitive segment of the rail market. Although some export traffic moves in containers, commonly exported bulk products, such as coal and grain, move to port in open hopper cars. The size and weight of these shipments makes them particularly suited for rail transport. On the other hand, import shipments, which typically consist of high-value items such as consumer goods, electronics, household products and clothes, move primarily in containers that are loaded off of ships at port and onto flatcars designed to carry containers. Such shipments often are transported in dedicated fast trains. Before reaching final destination, such traffic may be interchanged with another railroad or mode (*e.g.*, truck).

The growth of intermodal traffic, both domestic and international, has spawned a number of associated industries. On the manufacturing side, companies worldwide produce the large volumes of containers needed to sustain international shipping. MULLER at 164-73. Cranes and other heavy equipment used for loading and unloading also are in continual demand. *Id.* at 147-56. On the service side, over the past few decades intermodalism has spurred the creation of many companies–like International Cargo Control Pty Ltd., (ICC), the freight forwarder in this case–devoted not to actually moving cargo, but to the support and facilitation of transportation in a variety of ways. Among other services these companies provide is the consolidation of many small shipments into large consignments for more economical shipping. *Id.* at 129.

B. Railroads and Other Participants in International Commerce Have Developed Efficient Business Practices Which Meet the Needs of All Parties

Because they require multiple modes of transportation as well as providers of associated services, international cargo shipments usually involve complex, multiparty transactions. However, despite their inherent complexities, these transactions have the straightforward goal of moving freight between two points. Shippers of cargo have an interest in making arrangements for a complete transaction, *i.e.*, shipment from origin to final destination, with all necessary transportation and associated services provided. With this aim in mind, the details of who is accomplishing each aspect of the service is of lesser importance. Shippers do not enter into individual relationships with numerous parties providing various aspects of the service, some of whom may be located on different continents. Nor would it be economically efficient if legal rules encouraged such arrangements.

Conversely, because import traffic (other than from Canada and Mexico), of necessity, must first travel on at least one other carrier before being interchanged to a North American railroad, the railroad is unlikely to have a direct relationship with the overseas shipper of the goods. Nor would it be practical to attempt to do so. Instead, a more efficient means of doing business has developed. Typically, railroads enter into arrangements with entities with U.S. contacts, such as domestically-based freight forwarders or similar parties, known more colloquially as "brokers" or "wholesalers." Under such arrangements, railroads may sell blocks of space on their trains in volumes to accommodate the cargo of numerous shippers. Alternatively, railroads enter into similar arrangements with steamship companies calling on U.S. ports, agreeing to transport cargo that is off-loaded from their ships without regard to the identity of the individual shipper or the content of individual containers.

Securing space on the railroads for cargo entering the U.S. allows business to be conducted efficiently, obviating the need for foreign shippers to locate and make arrangements with a land-based U.S. carrier for each shipment. The ability to consolidate freight of numerous shippers and arrange for through transportation to destination, utilizing multiple carriers, some of whom the foreign freight forwarder need not directly contact, is of benefit to shippers worldwide. In addition to relieving the shipper of the need to enter into numerous discrete arrangements, the ability to tender large volumes of freight enables the freight forwarder to obtain better rates than could individual shippers attempting to ship small volumesof cargo.

Regardless of the precise arrangement, it is the general practice that a party other than the foreign shipper will directly make the arrangement that will result in its goods being placed on a train for inland transport in the United States. It goes without saying that a single entity does not (and cannot) transport goods both by sea and land, and also provide all the loading and unloading services as needed. But the fact remains that these are all pieces of the unitary service sought by the shippers wishing to move cargo from a specific origin point to a specific destination point. The shipper knows full well that when it is contracting for through transportation, it is contracting for services which inevitable will be performed by several parties, some located in different countries and continents.

C. Acceptance of Liability Limitations Supplemented By Insurance is the Normal Practice For Shipping International Cargo

As in all commercial arrangements, carriers involved in international transportation seek to memorialize their expectations in contract documents. Railroads set forth their terms of carriage, including liability limitations, in circulars or similar documents which are available to the shipping public. Knowing full well that the ocean carrier or wholesaler with whom they directly contract is not the only party with an interest in the transaction, railroads typically require that their terms be passed back to downstream parties. Such an arrangement was evident in this case, as both the bill of lading issued by ICC and the bill of lading issued by the ocean carrier incorporated the COGSA liability limitations and, through Himalaya clauses, extended those limitations to the other parties to the transaction.

COGSA affords shippers of cargo by sea a choice: to declare a higher value for the goods and pay a higher freight rate, or accept the liability limitations set forth in the statute. 46 U.S.C. app. §1304(5). The former option is almost never exercised. Instead, the shipper, accepting the carriers' limited liability, will choose to insure the cargo for its full value. This regime makes commercial sense. The shipper, with whom the traffic originates, knows exactly what is being shipped and the shipment's value. The carriers, particularly a railroad situated a continent away that has arranged to accept numerous containers without individualized inquiry as to the specific nature of the goods contained therein or the identity of the particular shipper of the goods, generally are not in a position to ascertain the goods' value. Shipments remain in their containers, unopened until final destination is reached. Thus, the shipper is in the best position to determine whether to declare a high value or to insure, and at what level. Similarly, insurers who underwrite this insurance know they are insuring a risk for which other parties' liability is limited.

Shippers almost always find it far more cost effective to accept both the lower freight rate and associated limitation on liability, relying on insurance for protection against any outstanding risk. This was the course chosen in this case. See Petition at 28a ("In contracting, Kirby was given the opportunity to declare a value in excess of $500.00 and to obtain higher coverage for its cargo, paying an additional ad valorem rate charge for the shipment. Instead, Kirby separately insured its cargo with its co-plaintiff, MMI General Insurance, Ltd." *Kirby v. Norfolk Southern Ry. Co.*, No. 1:98RCV-2939-CAP (N.D. Ga., order of Oct. 11, 2000)). The fact that Kirby chose to insure the goods during transport, including the land portion (evidenced by the insurer's payment on the policy for damage occurring during the land portion), shows that it fully expected that the liability limitations to which it agreed in the ICC bill of lading were intended to extend to the land portion of the shipment. The practical effect of the Eleventh Circuit's decision is not to benefit the shipper who knowingly and freely, in its best judgment, has entered into these contractual limitations on damages, but instead to permit maritime insurers to reap a windfall by evading the contractual limitations on damages against which they insured the shippers and upon the basis of which they establish their premiums.

II. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE FAILURE TO RESOLVE THE CONFLICTS IT CREATES WILL UNDERMINE CARRIER EXPECTATIONS AND LEAD TO INEFFICIENT AND COUNTERPRODUCTIVE BUSINESS PRACTICES

The Eleventh Circuit's decision paid little heed to these well-established commercial practices. The court held that when contracting with the ocean carrier to move Kirby's goods, ICC did not act as Kirby's agent and therefore did not bind Kirby to the terms of the Himalaya clause in the ocean carrier's bill of lading, a contractual provision clearly meant to benefit petitioner. As petitioner points out, this contrasts with other courts that properly have recognized that shippers are to be held to the terms of the contracts through which freight forwarders arrange for transport of the shippers' goods with a carrier.[4] Staking out a different approach to this question, the Eleventh Circuit's decision raises doubt as to whether railroads can continue to rely on the terms of ocean carrier-issued bills of lading to limit railroad liability. This doubt is fueled by concern that the Eleventh Circuit's ruling will empower shippers to disavow any contractual obligations that, as a commercial practice, are entered into on the shipper's behalf by a freight forwarder whom the shipper authorizes to arrange transportation. *See Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty,* 294 F.3d 1171, 1176 (9th Cir. 2002), citing to Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification,* 75 Tul. L. Rev. 337, 395-96 (2000). If railroads cannot contract with

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[4] E.g., *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989); *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276 (2nd Cir. 1992). See Pet. at 14-18.

assurance to foreclose exposure to unforseen liability in excess of their contractual limitations, they may be compelled to require from the prior upstream party a defensive indemnity against liability in excess of the contractual limit. In turn, the other upstream parties involved in the ocean movement of the lading may take similar action. The creation of these linked indemnities will result in a cascade of parties being drawn into litigation if the shipper/insurer is able to bypass the freight forwarder's/ocean carrier's limitations of liability and proceed against the railroads or some other downstream party for excess recoveries.

More fundamentally, the Eleventh Circuit's decision will undo longstanding expectations of U.S. rail carriers and will require counterproductive alteration to a process that works efficiently and effectively to facilitate international commerce. The logical end of this ruling is that railroads would need to find a way to contract directly with parties with whom they would not ordinarily deal if they wished to assure they will benefit from the protection of liability limitations or other terms, a proposition of questionable feasibility and likely considerable expense. But this is precisely the reason that most courts have recognized that it is counterproductive to adhere to the fiction that the shipper is not bound by the terms of a bill of lading issued to the freight forwarder that has been engaged to arrange transportation for that shipper's goods. *Carman Tool & Abrasives, Inc. v. Evergreen Lines,* 871 F.2d 897 (9th Cir. 1989)("It would be next to impossible for a carrier to give actual notice of the liability limitations to everyone a court might later hold has a foreseeable economic interest in the goods. It could also substantially delay shipments . . ." *Id.* at 901)

Similarly, the distinction posited by the Eleventh Circuit between "relational" terms and "descriptive" terms when used in a Himalaya clause turns a blind eye to the business realities of this case and international commerce in general.

When a contract of carriage by its very nature calls for both ocean and land transportation, the shipper is well aware that, of necessity, the subcontractors involved will include a land-based carrier like a railroad. A contract that plainly extends liability limitations (or any terms) to other parties that will be performing the services contemplated by the parties–in this case, shipment of cargo from Australia to (inland) Alabama–must be enforced in accordance with its terms if established means of doing business are to be maintained.

Notwithstanding this Court's admonition that Himalaya clauses should be narrowly construed, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959), a distinction must be recognized between construing a clause narrowly by limiting it to the reasonable meaning of the words used and interpreting a clause contrary to the intent and expectations of the parties. There is no rational basis for reading the railroad out of the Himalaya clause through a privity requirement. The railroad was not a remote entity whose involvement was too far removed to be contemplated by the parties. Rather, the railroad was an essential party that was fully contemplated by the shipper, and without which the services could not have been completed. As Judge Siler, whose dissent properly recognized the commercial realities of multimodal international transportation, pointed out: "When the bill of lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama." 300 F.3d at 1312. Given this clear understanding, the Eleventh Circuit's privity requirement is properly seen as an artificial technicality that subverts the intent of the parties and undermines the effectiveness of the prevailing means by which carriers and shippers generally conduct their business.[5]

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[5] Years ago, courts abolished the requirement of privity in product liability cases, recognizing the reality that the ultimate consumer, whose use of and potential injury by a manufactured product, though entirely

The friction between the Eleventh Circuit's holdings and both commercial realities and other federal appellate decisions makes review of this case by this Court imperative. Kirby enter into the contract knowing full well the kinds of services that would be required to complete the transportation it contracted for, and chose to decline to declare a value for its goods and pay a higher freight rate, opting instead to insure the goods for their full value. These decisions were reflected in the bill of lading issued by the ocean carrier to Kirby's freight forwarder. However, as a result of the Eleventh Circuit's decision, it is now unclear whether the law requires shippers in these circumstances to be held to the bargains struck on their behalf by freight forwarders simply because the freight forwarder, though never intending to transport any goods, designated itself a "carrier." If that is indeed a proper reading of the law, this Court should clearly so state so that participants in international commerce can adjust their conduct accordingly. Similarly, this Court should resolve the question of proper interpretation of Himalaya clauses, since the Eleventh Circuit's privity requirement has deepened a split among federal courts of appeals. Pet. at 23-26.

The major U.S. freight railroads operate over extensive networks of between 20 and 35 thousand miles,[6] covering numerous federal circuits. The major eastern carriers, petitioner and CSX Transportation, whose networks cover territory where the circuits are geographically smaller, operate in most of the federal circuits. The major western roads, Burlington Northern Santa Fe and Union Pacific,

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foreseeable, in all likelihood will not have purchased the product directly from the manufacturer. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); WILLIAM L. PROSSER, LAW OF TORTS §96 at 641-43 (4th ed. 1971).

[6] Association of American Railroads, *Railroad Facts* 69-70, 74, 76 (2002 ed.).

operate from the west coast, ultimately crossing the Mississippi river, also covering numerous circuits. Thus, a single bill of lading may cover transportation over several jurisdictions. (For example, a shipment from South America to a southeastern port, picked up by rail to destination at Boston, would likely move through states located in the Eleventh, Fourth, Third, Second and First Circuits.) The splits among the federal courts of appeals created and exacerbated by the decision below, if unresolved, will mean that a contract may have different meanings depending on where an accident or event giving rise to a dispute occurs. This is untenable for railroads. Failure to clarify the important issues raised by this case will leave participants in international commerce to operate under a cloud of uncertainty when moving billions of dollars of cargo over oceans and continents.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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