No. 02-1028

# In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

*v.*

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER**


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## QUESTION PRESENTED

Whether a foreign cargo owner who shipped goods to an inland destination in the United States using a shipping intermediary is bound by liability limitations in the intermediary's bill of lading, or in the bill of lading that a subcontracting ocean carrier issued to the intermediary, when suing a railroad that subcontracted to deliver the goods to their destination.

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## INTEREST OF THE UNITED STATES

This case involves the interpretation and application of limitation-of-liability provisions contained in two contracts for the transportation of goods. Performance of each contract involved both sea and rail carriage. The Federal Maritime Commission exercises regulatory authority over the maritime shipping industry, and the Surface Transportation Board performs similar regulatory functions with respect to railroad commerce. The Department of Transportation is responsible for establishing the Nation's overall transportation policy and for coordinating the administration of federal programs involving both maritime and rail transportation. This Court's disposition of the question presented implicates the responsibilities of each of those federal agencies. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

## STATEMENT

1. A bill of lading is a contractual document recording that a carrier has received certain goods from a shipper and "govern[ing] the relationship of the parties before delivery

of the goods." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 60 (3d ed. 2001). Since the 19th Century, it has been "prevalent practice for [maritime] common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534-535 (1995). To promote uniform shipping practice and law among nations, the Hague Rules of 1921 were adopted with minor modifications by international convention in 1924. See International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931; 2 Schoenbaum, *supra*, at 75. In 1936, Congress implemented the Hague Rules by enacting the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (46 U.S.C. App. 1300 *et seq.*). See generally *Vimar Seguros*, 515 U.S. at 536-537; Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-144 (2d ed. 1975).[1]

COGSA governs "[e]very bill of lading * * * for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. App. 1300. The Act grants shippers certain rights against common carriers and establishes carriers' minimum liability for cargo damage or loss. See 46 U.S.C. App. 1302-1304. Of particular relevance

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[1] Some countries, including the United States, still apply the Hague Rules. Other nations (including most of this country's trading partners) apply the Hague-Visby Rules, which entered into force in 1977 and impose higher liability limits than the Hague Rules. Still other countries are parties to the Hamburg Convention, which entered into force in 1992 and imposes liability limits higher than the Hague-Visby limits. Because of the serious commercial problems caused by that lack of uniformity, the United Nations Commission on International Trade Law is currently developing a new, comprehensive convention governing carriage of goods by sea, which is intended to replace all existing rules. See note 11, *infra*. The United States is an active participant in the process of negotiating that convention.

here, COGSA establishes a default rule limiting carrier liability "for any loss or damage to or in connection with the transportation of goods" to no more than $500 per package, "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 46 U.S.C. App. 1304(5). COGSA permits the carrier and shipper to agree to a higher liability cap, but not a lower one. 46 U.S.C. App. 1304(5). In practice, maritime bills of lading typically incorporate COGSA's $500-per-package liability limitation with respect to the carriage of goods by sea. Shippers pay a reduced transport rate that reflects the carriers' reduced risk and obtain private insurance for the excess value of their goods. See Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000).[2]

2. A cargo owner seeking to arrange for sea carriage of goods will often contract, not with the actual operator of a vessel, but with a shipping intermediary, who arranges for transportation and may also combine the goods of various shippers into larger loads bound for the same location. The role of shipping intermediaries has taken on increased importance with the advent of the so-called "container revolution." Modern container transport involves "large, reusable metal receptacles [containers], ranging in length from 20 to 40 feet * * * which can be moved on and off an ocean vessel unopened." *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490, 494 (1980). The standardized dimensions of

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[2] A shipper has the right to declare a higher value for its goods and thereby obtain a higher liability limit, but it must in return pay an additional ad valorem freight charge. As one commentator explains,

> virtually no sensible shipper would declare a higher value—no matter how clearly the opportunity to do so is presented—because the ad valorem freight charge that would be triggered by a declaration is almost invariably higher than the premium that a cargo underwriter would charge for insuring the same shipment. Furthermore, cargo insurance covers a wider range of risks and cargo insurers pay claims more quickly.

Sturley, *supra*, 31 J. Mar. L. & Comm. at 244.

containers allow ships to carry more cargo and to be loaded and unloaded in far less time than before. See *id.* at 494-496. The Maritime Administration of the Department of Transportation advises that in Fiscal Year 2002, approximately 28% (by weight) of international waterborne cargo in the United States was containerized. By combining the goods of different owners for transport to a common location, intermediaries enable cargo owners to share in the efficiencies of containerization even if their shipments to particular destinations are infrequent, or too small to fill a container. See *International Longshoremen's Ass'n*, 447 U.S. at 495-496 & n.8; 2 Schoenbaum, *supra*, at 30.

Congress recognized the important role of shipping intermediaries in the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.* (Shipping Act), which requires licensing of certain intermediaries and establishes regulatory oversight of their activities by the Federal Maritime Commission (FMC). See 46 U.S.C. App. 1702(17) and 1718. The Shipping Act creates the statutory classification of "ocean transportation intermediary," which includes both "ocean freight forwarder[s]" and "non-vessel-operating common carrier[s]" (NVOCCs). Ocean freight forwarders act as shippers' agents, arranging for shipments from the United States via common carrier "on behalf of shippers." 46 U.S.C. App. 1702(17)(A). FMC regulations provide that, if an ocean freight forwarder is identified in the bill of lading, its status as agent of the shipper must be indicated as well. 46 C.F.R. 515.42(a). In contrast, although NVOCCs operate and are regulated as common carriers, they do not own the vessels used for transport, and they are defined as shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B). Thus, under the Shipping Act, the crucial distinctions between NVOCCs and "ocean freight forwarders" are that the former but not the latter issue bills of lading in their own names, are treated as common carriers, and "assume[] responsibility for the transportation from the port or point of receipt to the port or point of destination," 46 U.S.C. App. 1702(6)(A)—meaning that an NVOCC can be held liable to the shipper if the goods are lost or damaged in transit, even if the NVOCC has exercised due care in the selection of a vessel operator.

The Shipping Act's distinction between "ocean freight forwarders" and NVOCCs corresponds to a long-recognized distinction in the railroad industry "between two very different kinds of 'forwarders.'" *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 484 (1949). As the Court in *Acme Fast Freight* explained, "[t]he term ['forwarder'] was originally applied to persons who arrange for the transportation by common carrier of the shipper's goods," and whose "duties, as agent of the shipper, went no farther than procuring transportation by carrier and handling the details of shipment." *Ibid.* Subsequently, "a different type of forwarding service was offered," in which the forwarder "held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee." *Ibid.* From an early date, the two types of forwarders were subject to "differing standards of liability." *Ibid.* "When goods handled by an agent-forwarder were lost or damaged, it was liable to the shipper only for its own negligence, including negligence in selecting a carrier." *Id.* at 484-485. The second type of forwarder, by contrast, "was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault," on the ground that "[i]ts undertaking was to deliver the shipment safely at the destination." *Id.* at 485.

3. The requirements and prohibitions contained in COGSA apply of their own force only "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. App. 1301(e). COGSA makes clear, however, that the Act does not preclude the carrier and shipper from agreeing to limits on the carrier's liability for any loss or damage that may occur "prior to the

loading on and subsequent to the discharge from the ship on which the goods are carried by sea." 46 U.S.C. App. 1307. Consistent with that provision, the International Federation of Freight Forwarders Associations (FIATA) has developed a standard bill of lading, known as the FIATA Multimodal Transport Bill of Lading (FBL), that is principally designed for "multimodal" transportation agreements—*i.e.*, agreements involving the carriage of goods using two or more modes of transportation. See Pet. App. 54a-60a (standard conditions governing FBL).

The FBL defines the rights and responsibilities of the "Freight Forwarder"—a term that is defined, for purposes of the FBL, as "the Multimodal Transport Operator [MTO] who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a. Under Clause 2.2 of the FBL, the Freight Forwarder is responsible for the acts and omissions of servants, agents, or other persons whose services are used to perform the contract. *Id.* at 55a. Because an FBL Freight Forwarder "assumes liability for the performance of the multimodal transport contract as a carrier," *id.* at 54a, the FBL applies only to the second category of transportation intermediary described by this Court in *Acme Fast Freight*, 336 U.S. at 484-485. See p. 5, *supra*.[3]

Clause 8 of the FBL limits the maximum liability of the Freight Forwarder under various circumstances. Clause 8.6(a) provides that, if "an applicable international convention or mandatory national law" establishes a specific limit of liability for the particular stage of the transportation on

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[3] Under the Shipping Act, by contrast, the term "ocean freight forwarder," see 46 U.S.C. App. 1702(17)(A), refers only to the *first* type of transportation intermediary described in *Acme Fast Freight*—*i.e.*, an intermediary who arranges for transportation on behalf of shippers but does not undertake a contractual commitment to deliver the goods to their destination. The Court in *Acme Fast Freight* used the term "forwarder" to refer to *both* types of intermediaries. See 336 U.S. at 484-485.

which the goods were lost or damaged, that limit will govern the Freight Forwarder's liability. Pet. App. 58a. Clause 8.6(b) states that, unless the shipper has declared the value of the goods and has paid the ad valorem rate, the Freight Forwarder's liability for damage or loss occurring at sea is limited to $500 per package if COGSA is applicable. *Ibid.*; see *id.* at 57a (Clause 7.3); 46 U.S.C. App. 1300 (COGSA applies to "carriage of goods by sea to or from ports of the United States, in foreign trade.").

Clause 8.3 of the FBL contains a fallback limitation of liability. Pet. App. 57a. It provides that the "Freight Forwarder shall in no event" be liable for more than the greater of 666.67 SDR per package or 2 SDR per kilogram of the lost or damaged goods, unless the shipper declares the value of the goods and pays the higher ad valorem freight rate. *Ibid.*[4] By its terms, Clause 8.3 applies when goods are known to have been lost or damaged on a leg of the transportation to which COGSA is inapplicable, and no "international convention or mandatory national law" (Clause 8.6(a); Pet. App. 58a) establishes an alternative limit.

Clause 10.1 of the FBL is a so-called "Himalaya Clause" (see Pet. App. 2a & n.1) that extends the intermediary's liability limitations to other parties. See *id.* at 5a. The FBL's Himalaya Clause provides that the conditions of transport stated in the FBL "apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any

[4] An SDR, or Special Drawing Right, is a unit of account created in 1969 by the International Monetary Fund (IMF). As of March 22, 2004, one SDR was valued at $1.48005 U.S., see <http://www.imf.org/external/np/tre/sdr/basket.htm>, and the value of 666.67 SDR was therefore slightly less than $1000 U.S. Since the liability limit established by Clause 8.3 is the *greater* of 666.67 SDR per package or 2 SDR per kilogram, see Pet. App. 57a, the liability limit for an unusually heavy package may be substantially greater than COGSA's $500 limit.

independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a.

4. a. Respondent James N. Kirby Pty Limited (Kirby) contracted with International Cargo Control Pty Ltd. (ICC) for "through" (*i.e.*, end-to-end) transportation of ten containers of machinery from Sydney, Australia, to Huntsville, Alabama. Pet. App. 2a, 3a, 27a; Br. in Opp. 4. ICC issued Kirby a bill of lading that designated Sydney as the place where ICC received the goods and as the port of loading; Savannah, Georgia, as the port of discharge from the ship; and Huntsville (a city more than 300 miles inland from Savannah) as the place of delivery. Pet. App. 66a. That bill of lading also incorporated the standard conditions set forth in the FBL. See *id.* at 67a. Kirby did not declare the goods' value or pay an additional ad valorem charge. *Id.* at 30a. To obtain additional protection against loss of or damage to its machinery, Kirby insured the cargo with the predecessor of respondent Allianz Australia Limited. See *id.* at 4a n.4; Br. in Opp. 5 n.4.

b. ICC subcontracted with an ocean shipping company known as Hamburg Sud for the transport of Kirby's machinery from Sydney to Huntsville. Pet. App. 3a-4a. Hamburg Sud issued ICC a bill of lading for the cargo. See *id.* at 68a; see also *id.* at 61a-64a (excerpts from Hamburg Sud bill). Clause 4 of the bill of lading committed Hamburg Sud to "provide transportation to/from sea terminal and [specified] inland points, which may well involve transport by rail." *Id.* at 61a. Clause 17 provided generally that "the Carrier's liability shall be limited to U.S. $500 lawful money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in [the] Bill of Lading, and extra freight paid if required." *Id.* at 64a. ICC did not declare the goods' value or pay an additional ad valorem charge. *Id.* at 31a.

The Hamburg Sud/ICC bill also included a Himalaya Clause that extended Hamburg Sud's contractual protections to other parties. Clause 5(a) stated that Hamburg Sud "shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it." Pet. App. 62a. Clause 5(b) stated that "all exemptions, limitations of, and exonerations from liability" provided under the Hamburg Sud/ICC bill of lading "shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers * * * and all independent contractors whatsoever." *Id.* at 63a.

c. Hamburg Sud's ship carried Kirby's machinery from Sydney to Savannah, where Columbus Line USA hired petitioner Norfolk Southern Railroad Company to carry the cargo by rail to Huntsville. Pet. App. 4a & n.3.[5] Petitioner "did not issue its own bill of lading to Columbus Line, but instead acted under the Hamburg Sud bill." *Id.* at 4a. Petitioner's train derailed between Savannah and Huntsville, allegedly causing $1.5 million dollars of damage to Kirby's machinery. *Ibid.* Kirby was reimbursed for the loss by its insurer/co-respondent. *Id.* at 4a n.4.

5. Respondents sued petitioner in the United States District Court for the Northern District of Georgia, alleging both tort and contract claims. Pet. App. 4a; see J.A. 33-36, 37-38 (Second Amended Complaint). Petitioner raised as a defense the $500-per-package liability limitation contained in the Hamburg Sud/ICC bill and argued that its liability, if any, is limited to a total of $5000. See Pet. App. 29a, 31a-32a.

The district court granted petitioner's motion for partial summary judgment. Pet. App. 27a-38a. The court held that

[5] The parties disagree as to the exact relationship between Hamburg Sud and Columbus Line USA. Pet. App. 4a n.3. Petitioner contends that Columbus Line USA is simply the name under which Hamburg Sud conducts business in the United States; respondents argue that Columbus Line USA is a separate corporate subsidiary of Hamburg Sud. *Ibid.*

respondents' claims against petitioner are subject to the liability limitation in the Hamburg Sud/ICC bill of lading, because that was the contract under which petitioner "contracted and performed." *Id.* at 37a. The court accordingly determined that petitioner's liability is limited to $500 for each of ten "packages" of machinery, or $5000. *Id.* at 38a. The court certified its decision for immediate appeal under 28 U.S.C. 1292(b). See Pet. App. 21a-26a.

6. The United States Court of Appeals for the Eleventh Circuit reversed. Pet. App. 1a-20a.

a. The court of appeals first held that petitioner's potential liability is unaffected by the provisions of the Hamburg Sud/ICC bill of lading. Pet. App. 6a-11a. The court expressed the view that, because Kirby was not a party to the Hamburg Sud/ICC bill (see *id.* at 6a), it could be bound by that bill's liability limitations "only if ICC was acting as Kirby's agent when it received Hamburg Sud's bill." *Id.* at 7a. The court of appeals examined the relevant documents and the course of dealing between the parties and concluded that ICC had not acted as Kirby's agent when it contracted with Hamburg Sud. *Id.* at 7a-10a.

b. The court of appeals also held that petitioner is not protected by the liability limits contained in the ICC/Kirby bill of lading. Pet. App. 11a-18a. The court construed the term "independent contractor" in the ICC/Kirby bill's Himalaya Clause as limited to parties that are in privity of contract with the carrier. *Id.* at 14a n.11; see *id.* at 12a-14a. The court also suggested that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier." *Id.* at 16a. Finally, the court observed that "[t]he FBL form was drafted based on a 'network' approach to carrier liability," which "envisions that each leg of a journey should be subject to the liability rules governing the mode of transport for that leg." *Id.* at 17a. The court of appeals inferred that "[b]ecause the FBL was drafted with this 'network' liability system in mind, its Himalaya clause was not designed to extend the liability regime for sea carriers—COGSA—to inland carriers, who instead would be covered by the different liability scheme applicable to rail carriers." *Ibid.*

c. Judge Siler dissented. Pet. App. 19a-20a. Judge Siler would have found petitioner to be "a beneficiary of the Himalaya Clause in the Kirby/ICC bill of lading" because Kirby knew when the contract was formed "that an inland carrier would have to be used, because of the destination being Huntsville, Alabama." *Id.* at 19a. Judge Siler also would have held that ICC, in contracting with Hamburg Sud, was acting as Kirby's "agent," and that Kirby was therefore bound by the liability limit contained in the ICC/Hamburg Sud bill of lading. *Id.* at 20a.

## SUMMARY OF ARGUMENT

I. Under the Himalaya Clause of the ICC/Kirby bill of lading, petitioner is entitled to the same limitations of liability that would apply in a suit against ICC. That reading follows from the plain language of the Himalaya Clause, which encompasses all persons "whose services have been used in order to perform the contract," and it is reinforced by other provisions of the bill of lading. The reasons given by the court of appeals for construing the Clause to exclude petitioner are unpersuasive. Nothing in the Clause's text suggests that its protections are limited to persons in privity with ICC. Because the form bill of lading on which the ICC/Kirby bill is based is specifically intended for use in *multimodal* transportation agreements, and explicity addresses the possibility that loss or damage will occur on a stage other than the sea leg of the transportation, the Himalaya Clause is naturally read to encompass inland carriers.

II. Respondents cannot recover damages from petitioner in excess of the $500-per-package liability limit set forth in the Hamburg Sud/ICC bill of lading. This Court's decision in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), indicates that, when a carrier accepts goods for transport from an intermediary and the goods are lost or damaged, the cargo owner's recovery from the carrier may not exceed the liability limit agreed to by the carrier and the intermediary. That rule ensures that the underlying carrier can base its rates on an accurate understanding of its potential liability without discriminating in its terms of carriage between shipper-owners and transportation intermediaries—a form of discrimination that federal law forbids. Because the imposition of additional tort liability would disrupt the administration of federal common-carrier regulation, it is preempted by federal law.

It is not necessary for this Court to determine whether ICC, in contracting with Hamburg Sud, acted as Kirby's "agent." 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. Furthermore, because ICC assumed the responsibilities of a common carrier, it was not the type of transportation intermediary that has historically been characterized as the shipper's "agent." In the field of common-carrier regulation, this Court and the courts of appeals have occasionally used the term "agent" more broadly to describe transportation entities whose services are essential to completion of the carriage. But reliance on preemption principles avoids the potential confusion that could result from inferring an "agency" relationship in the circumstances of this case.

## ARGUMENT

### I. PURSUANT TO THE HIMALAYA CLAUSE OF THE ICC/KIRBY BILL OF LADING, PETITIONER IS ENTITLED TO THE BENEFIT OF THE LIABILITY LIMITS SET FORTH IN CLAUSE 8 OF THAT BILL

#### A. Petitioner Is Encompassed Within The Plain Terms Of The ICC/Kirby Bill's Himalaya Clause

The Himalaya Clause of the ICC/Kirby bill of lading states that the conditions set forth in the contract "apply whenever claims relating to the performance of the contract * * * are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a (Clause 10.1). That Clause plainly encompasses underlying carriers like petitioner whose services were required in order to complete the transport contemplated by the bill of lading.

In *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), this Court considered the question whether the limitation-of-liability provisions of an ocean bill of lading, which stated that "the Carrier's liability, if any, shall be determined on the basis of $500 per package," affected the liability of a stevedoring company hired by the carrier. *Id.* at 302; see *id.* at 298-299. The Court held that the stevedoring company's liability to the cargo owners was unaffected by those contractual provisions. See *id.* at 302-308. Because the limitation-of-liability provisions by their terms "deal[t] only with the 'Carrier's liability' to the shippers," the Court found "nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence." *Id.* at 302. The Court did not question the *ability* of contracting parties to establish binding limitations on the potential liability of agents, subcontractors, or other third parties whose services facilitate the performance of the contract. The Court held, however, that such provisions "must be strictly construed and limited to intended beneficiaries," and should not be interpreted to protect third-party beneficiaries "unless the clarity of the language used expresses such to be the understanding of the contracting parties." *Id.* at 305 (citation and internal quotation marks omitted).

The Court's decision in *Herd* makes clear that the provisions of Clause 8 of the ICC/Kirby bill of lading—which by its terms establishes a "Limitation of [the] Freight Forwarder's [*i.e.*, ICC's] Liability," Pet. App. 57a—do not *automatically* apply in suits against a third party such as petitioner. The Himalaya Clause (Clause 10.1) of the ICC/Kirby bill, however, provides the clear expression of intent to limit the liability of third parties that was lacking in *Herd*. Clause 10.1 makes the liability limits contained in Clause 8 broadly applicable to "any * * * person (including any independent contractor) whose services have been used in order to perform the contract." *Id.* at 59a. Because the ICC/Kirby bill of lading provides for carriage of goods from Sydney, Australia, to Huntsville, Alabama (*id.* at 65a), and because petitioner was engaged to transport the goods on the final leg of that trip, petitioner falls squarely within the literal coverage of the Himalaya Clause. *Herd*'s "clarity of * * * language" requirement (359 U.S. at 305) is therefore satisfied in this case.

### B. Other Provisions Of The ICC/Kirby Bill Of Lading Reinforce The Conclusion That The Himalaya Clause Was Intended To Encompass Petitioner

Clauses 2 and 6 of the ICC/Kirby bill of lading, which define the nature of ICC's contractual undertaking and the circumstances under which it may be held liable for loss of or damage to Kirby's goods, reinforce the conclusion that Clause 10.1 encompasses all carriers, including petitioner, who were ultimately engaged to transport those goods during any part of the journey from Sydney to Huntsville. Clause 2.2 of the bill provides that ICC "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, *or any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own." Pet. App. 55a (emphasis added). The italicized language in Clause 2.2 is not meaningfully different from the disputed phrase in Clause 10.1—*i.e.*, "person (including any independent contractor) whose services have been used in order to perform the contract." *Id.* at 59a. Clause 6.2 of the FBL states that ICC "shall be liable for loss of or damage to the goods * * * unless [ICC] proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2 has caused or contributed to such loss [or] damage." *Id.* at 56a.

The FBL's drafters surely intended that inland secondary carriers such as petitioner would be treated as "person[s] of whose services [ICC] makes use for the performance of the contract" within the meaning of Clause 2.2. Pet. App. 55a. Clauses 2.2 and 6.2 are intended to effectuate ICC's contractual commitment "to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge * * * to the place of delivery." *Ibid.* (Clause 2.1(a)). If petitioner were found *not* to be one of the "person[s]" referred to in Clause 2.2, then proof that the damage to Kirby's goods occurred during the rail leg of the transportation would be sufficient to establish that "no fault or neglect of [ICC's] own, his servants or agents or any other person referred to in Clause 2.2 has caused or contributed to such * * * damage." *Id.* at 56a (Clause 6.2). Under that reading of the FBL, ICC would escape all liability to Kirby under Clause 6.2—a result clearly inconsistent with ICC's status as a common carrier and its contractual commitment to deliver the goods to their ultimate destination. To prevent that result, Clause 2.2's reference to "person[s] of whose services [ICC] makes use for the performance of the contract" must be construed to encompass petitioner. There is no basis for giving the nearly identical language in Clause 10.1 a more limited construction.

### C. The Court Of Appeals' Reasons For Construing The Himalaya Clause To Exclude Petitioner Are Unpersuasive

1. The court of appeals announced, as a rule of construction governing Himalaya Clauses generally, that terms such as "agent," "servant," or "independent contractor" should be read to apply only to persons who are in privity of contract with the primary carrier (here, ICC). Pet. App. 14a n.11. That interpretive rule has no basis in logic, and it produces a result that is demonstrably inconsistent with the text of the ICC/Kirby bill.

Certainly a Himalaya Clause *could* be drafted so that its protections would be limited to persons in contractual privity with the shipping intermediary or other carrier. Under any ordinary understanding of the contractual language actually contained in the ICC/Kirby bill, however, petitioner is unquestionably an "independent contractor" (not to mention a legal "person") "whose services have been used in order to perform the contract." Pet. App. 59a; see p. 14, *supra*. The *Herd* Court's holding that limitation-of-liability provisions "must be strictly construed and limited to intended beneficiaries," 359 U.S. at 305, provides no basis for the court of appeals' addition of a privity requirement that is not reasonably inferable from the text of the parties' agreement.

2. The court of appeals also suggested that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier." Pet. App. 16a. The court of appeals' interpretation of the ICC/Kirby bill's Himalaya Clause as excluding inland carriers has no basis in the text of Clause 10.1, and it is inconsistent with the purposes of the FIATA Multimodal Transport Bill of Lading (FBL) that Kirby and ICC chose to utilize.

The FBL is a form bill (see p. 6, *supra*) that, "as indicated by its very name, is intended for the case where the [transportation] contract would involve at least two different modes of transport." Jan Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 50 (1993). The contract between Kirby and ICC provided for the carriage of goods from Sydney to Huntsville and is therefore characteristic of the transportation arrangements for which the FBL was drafted. With respect to the obligations and liabilities of ICC itself, the FBL is clearly intended to apply to the inland as well as the sea leg of the transportation, in order to enforce ICC's contractual commitment "to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge * * * to the place of delivery." Pet. App. 55a (Clause 2.1(a)).

Various other FBL provisions refer in general terms to the "performance of the contract." See Pet. App. 54a (Definitions), 55a (Clause 2.2), 59a (Clause 9). There is no basis for presuming that such provisions cover only the maritime portion of the transportation. Rather, because the FBL as a whole is specifically designed to implement agreements for *multimodal* transportation, Clause 10.1's unqualified reference to persons "whose services have been used in order to perform the contract" (*id.* at 59a) is most naturally read to encompass inland as well as maritime carriers, absent express language *excluding* inland carriers from the Clause's protection.[6]

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[6] The court of appeals relied in part on the fact that "Himalaya clauses originally were aimed more at extending COGSA protections to additional parties who handle cargo in and around a port than at extending the reach of those protections inland." Pet. App. 16a. It is true that the earliest Himalaya Clauses, which were contained in contracts for port-to-port carriage of goods by sea, were intended to make contractual limitations of liability applicable to parties (*e.g.*, stevedores) whose services were ancillary to that carriage. A Himalaya Clause contained in such an agreement would have no application to inland carriers because inland carriage would

3. The court of appeals also observed that "[t]he FBL form was drafted based on a 'network' approach to carrier liability," under which "each leg of a journey should be subject to the liability rules governing the mode of transport for that leg." Pet. App. 17a. The court inferred that, "[b]ecause the FBL was drafted with this 'network' liability system in mind, its Himalaya clause was not designed to extend the liability regime for sea carriers—COGSA—to inland carriers." *Ibid.* That analysis reflects a misunderstanding of the relationship between the liability limits contained in Clause 8 of the FBL and the Himalaya Clause (Clause 10.1).

Clause 8 of the FBL defines the maximum liability of ICC to Kirby for loss of or damage to the relevant goods. Under the "network" approach reflected in the various subparts of Clause 8, that maximum liability may vary depending on the location where that loss or damage occurs. See pp. 6-7, *supra*. Thus, ICC's potential liability to Kirby for the damage resulting from the railroad derailment in this case is greater than if the same damage had occurred during the sea leg of the transportation. Compare Pet. App. 57a (Clause 8.3) with *id.* at 58a (Clause 8.6(b)); see note 4, *supra*.[7]

form no part of the underlying contract. That history, however, provides no basis for giving an artificially narrow construction to the phrase "person * * * whose services have been used in order to perform the contract" when that phrase appears in a bill of lading that *does* cover inland transportation.

[7] At the petition stage (U.S. Br. 16, 18), the government expressed its understanding that the ICC/Kirby bill of lading established a uniform $500-per-package liability limit applicable to all stages of the transportation. Further examination of the terms of that contract has revealed that this earlier understanding was mistaken. Because the damage to Kirby's goods is known to have occurred during the rail leg of the transportation, and because respondents have identified no "applicable international convention or mandatory national law" (Clause 8.6(a), Pet. App. 58a) that specifically limits liability for that damage, the liability of ICC (and thus, through the Himalaya Clause, of petitioner) is limited under Clause 8.3 to "666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher." *Id.* at 57a; see p. 7 & note 4, *supra*. Respondents' supplemental brief at the petition

The Himalaya Clause, by contrast, is not used to compute the dollar amount of any defendant's maximum liability. Its function instead is to identify a class of third parties who may invoke the liability limit that applies to ICC under Clause 8, *whatever that limit may be in a particular case*. To construe the Himalaya Clause in accordance with its plain language would not, as the court of appeals supposed (Pet. App. 17a), limit petitioner's potential liability in this case to the COGSA maximum of $500 per package. Rather, under the Himalaya Clause, petitioner is entitled to the *same* limitation on liability that would apply to claims against ICC for damage occurring *during the rail leg* of the transportation. Contrary to the court of appeals' reasoning, the decision of the FBL's drafters to adopt a "network" approach to liability *supports* the textually natural reading of the Himalaya Clause as encompassing inland carriers. The different subparts of Clause 8 make clear that the drafters anticipated, and specifically addressed, the possibility of loss or damage to goods during a non-maritime leg of the transportation.

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stage states (at 9) that the liability limit under Clause 8.3, computed on a per-kilogram basis, "is about $450,000 in this case."

Under the FBL's Himalaya Clause, "the *aggregate* liability of the Freight Forwarder and of [the] servants, agents or other persons [whose services have been used in order to perform the contract] shall not exceed the limits in clause 8." Pet. App. 59a (Clause 10.1) (emphasis added). Respondents filed suit in Australia against ICC based on the same accident that is at issue here (see Pet. C.A. Br. 4 n.4), but the record in this case does not reflect the outcome of that suit. If respondents recovered damages from ICC in that suit, the amount of that recovery would be subtracted from the limit computed under Clause 8.3 in order to determine the maximum amount of petitioner's potential liability.

## II. RESPONDENTS CANNOT RECOVER DAMAGES FROM PETITIONER IN EXCESS OF THE $500-PER-PACKAGE LIABILITY LIMIT CONTAINED IN THE HAMBURG SUD/ICC BILL OF LADING

### A. Under This Court's Decision In *Great Northern Railway* v. *O'Connor*, A Cargo Owner Ordinarily Cannot Recover Damages From An Underlying Carrier That Exceed The Liability Limits Agreed To By The Carrier And The Transportation Intermediary

This Court's decision in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), indicates that, when a carrier accepts goods for transport from an intermediary and the goods are lost or damaged, the cargo owner's recovery from the carrier may not exceed the liability limit agreed to by the carrier and the intermediary. The railroad in *Great Northern* had published tariffs for carload lots of $1.60 per cwt. (*i.e.*, 100 pounds) if the value of the goods was not stated, and $1.00 per cwt. if the value was declared not to exceed $10.00 per cwt. *Id.* at 509 (Statement of the Case). The plaintiff employed the Boyd Transfer Company to arrange for shipment of household goods, weighing 545 pounds and worth $598, from Minnesota to Oregon. *Id.* at 513 (opinion of the Court). Without express authority from the plaintiff, the transfer company shipped the goods by rail at the $1.00 per cwt. rate. *Ibid.* The goods were destroyed en route, and the Minnesota Supreme Court held that the plaintiff could recover the full value of the cargo from the railroad. *Ibid.*

This Court reversed. The Court held that, "[i]n the absence of something to indicate that the Transfer Company was guilty of false billing, the carrier was not required to make special inquiry, but could rely on the statement that the car was loaded with goods of the character and value stated." 232 U.S. at 514. In the Court's view, that principle followed logically from its prior holding in *ICC* v. *Delaware, Lackawanna & Western Railroad*, 220 U.S. 235 (1911), that railroad common carriers are "not concerned with the question of title, but must treat the Forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles." *Great Northern*, 232 U.S. at 514. The Court in *Great Northern* made clear that the railroad's liability would be limited to $10 per cwt.—the maximum value for which the $1.00 per cwt. carload rate was available—regardless of whether the plaintiff had authorized the transfer company to declare the value of the goods or to ship them at that reduced rate. The Court explained that "the carrier had the right to assume that the Transfer Company could agree upon the terms of the shipment," and it concluded that "[t]he carrier was not bound by [the plaintiff's] private instructions or limitation on the authority of the Transfer Company, whether it be treated as agent or Forwarder. If there was any undervaluation, wrongful classification or violation of her instructions, resulting in damage, the plaintiff has her remedy against that Company." *Id.* at 514-515.

The same principle applies here. Hamburg Sud "was not bound by [Kirby's] private instructions" or agreement with ICC, and Hamburg Sud "had the right to assume that [ICC] could agree upon" the limitation-of-liability provisions that would govern carriage of the goods by Hamburg Sud (and by others who, like petitioner, "acted under the Hamburg Sud bill," Pet. App. 4a).

### B. The Rule Announced By The Court Of Appeals Is Preempted Because It Would Disrupt Established Commercial Practices And Subvert Longstanding Principles Of Federal Common-Carrier Regulation

The court of appeals did not dispute that, if ICC had owned the relevant cargo, the Hamburg Sud/ICC bill of lading would have insulated Hamburg Sud and its subcontractors from liability in excess of the $500-per-package limit. Viewing the matter *ex ante*, the enforceability of such contractual provisions would have served ICC's interests as well, since it would have allowed ICC to obtain the lower carriage rate that is the usual *quid pro quo* for a contractual limit on potential liability. See p. 3 & note 2, *supra*. The court of appeals held, however, that the Hamburg Sud/ICC bill could not effectively limit the liability of Hamburg Sud and its subcontractors in this case because the shipper with whom Hamburg Sud dealt was a transportation intermediary rather than the owner of the goods.

It is well established that a state law damages remedy may be preempted if it "stands as an obstacle to the accomplishment and execution of" federal law. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (citation omitted). Imposition of liability on petitioner in excess of the $500-per-package limit set forth in the Hamburg Sud/ICC bill of lading is preempted under that standard.

1. Historically, a core feature of federal common-carrier regulation was a tariff regime under which the rate of carriage varied depending on the carrier's maximum exposure to damages liability.[8] Although the shipper could insist that the carrier assume potential liability for the full value of the goods, the carrier was entitled in return to impose a higher freight charge. The Court's decision in *Acme Fast Freight* refutes any suggestion that this essential tradeoff should be abandoned simply because the entity presenting the goods for shipment is a transportation intermediary. The Court in that case addressed the question "whether, granting that both forwarder and underlying carrier must issue bills of lading, the liability provisions of bills issued by the latter are

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[8] With respect to the transport of goods to and from the United States by sea, that tariff regime is currently embodied in the Shipping Act, 46 U.S.C. App. 1707, and regulations promulgated by the FMC, see 46 C.F.R. Pt. 520. With respect to rail carriage under common-carrier rates, that regime is embodied in the Interstate Commerce Act, as amended. See 49 U.S.C. 11706(a) and (c)(3)(A); *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28 (1936).

to be considered null and void when forwarder freight is being hauled." 336 U.S. at 480. The Court held that "the whole scheme of the [Freight Forwarder] Act, its language and history, negative that proposition." *Ibid.*

The maritime shipper's option to obtain a higher liability limit by paying a higher carriage rate has less practical significance now than it did in an earlier day, simply because that option is very rarely exercised. Rather, maritime shippers almost always accept a low liability limit and protect themselves against loss or damage by purchasing insurance. See note 2, *supra*. It remains the case, however, that, other things being equal, a carrier's rate will vary depending on the liability limit established by the contract. Indeed, it is precisely "because the ad valorem freight charge that would be triggered by a declaration [of value] is almost invariably higher than the premium that a cargo underwriter would charge for insuring the same shipment," Sturley, *supra*, 31 J. Mar. L. & Comm. at 244, that shippers typically prefer to purchase insurance rather than to negotiate a higher liability limit.

The rule announced by the court of appeals would substantially disrupt established commercial practices by preventing the underlying carrier from linking its rate to its potential liability. Although a carrier in Hamburg Sud's position should be aware when the shipper with whom it is dealing is a transportation intermediary rather than the owner of the cargo, it may not be privy to the details of the intermediary's own bill of lading, including the liability limit that applies under that bill and the scope of coverage of any Himalaya Clause. If the rule announced by the court of appeals in this case is upheld, an underlying carrier will therefore frequently lack any assurance that the liability limit contained in its own bill of lading is legally enforceable, and will have no clear understanding of what alternative limit might apply. The carrier may also be unaware of the actual value of the relevant goods, and thus of the dollar amount of the money judgment that "full" liability would entail. Those uncertainties would effectively preclude the carrier from setting rates based on its actual maximum exposure, and would thus subvert a central and longstanding feature of the federal regime.

2. To avoid those uncertainties, the carrier might attempt to adjust its contracting practices depending on whether a particular shipper is a transportation intermediary or the owner of the goods. For a carrier to differentiate among shippers on that basis, however, would itself be inconsistent with established legal and commercial norms. Nearly 100 years ago, this Court invalidated the practice of charging lower rates to shippers who deliver their own property than to shippers, such as freight forwarders, who consolidate goods belonging to various owners. See *Delaware, Lackawanna & W. R.R.*, 220 U.S. at 251-256. Noting that longstanding English law "forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others," *id.* at 254, the Court held that to distinguish between owners and non-owners would be "discriminatory" within the meaning of the Interstate Commerce Act, and "in conflict with the * * * elementary duty resting upon a carrier * * * [and] the rights of shippers," *id.* at 252. Accord *Acme Fast Freight*, 336 U.S. at 476.

Maritime carriers are subject to analogous nondiscrimination requirements under the Shipping Act of 1984 and its predecessor Shipping Act of 1916. See 46 U.S.C. App. 1709(b)(3) (prohibiting "unfair or unjustly discriminatory methods"); 46 U.S.C. App. 1709(b)(4)-(5) (prohibiting "any unfair or unjustly discriminatory practice"); 46 U.S.C. App. 1701(1) (establishing "a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce"); *United States Navigation Co.* v. *Cunard S.S.*, 284 U.S. 474, 480-481 (1932); *Waterfront Comm'n* v. *Elizabeth-Newark Shipping, Inc.*, 164 F.3d 177, 185 (3d Cir. 1998). The FMC has long taken the view that differentiation by an ocean carrier between NVOCCs and shipper-owners is a form of unreasonable discrimination that is prohibited by the Shipping Act. See, *e.g.*, 50 Fed. Reg. 38,896-38,897 (1985) (citing *Delaware, Lackawanna & W. R.R.*, *supra*); 50 Fed. Reg. 14,708-14,709 & n.5 (1985) (same).[9] Hamburg Sud is therefore precluded by federal law from differentiating in its rates of carriage between shipper-owners and NVOCCs. Indeed, since "discriminatory 'privileges' come in many guises, and are not limited to discounted rates," *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 224 (1998) (citing Interstate Commerce Act precedents), Hamburg Sud would likely violate the Shipping Act's nondiscrimination mandate if it entered into carriage agreements for two otherwise identical shipments, charged each shipper the same rate, but provided one shipper a more favorable (*i.e.*, higher) liability limit than the other. The practical effect of the court of appeals' decision in this case, however, is to mandate precisely that discriminatory result, because cargo owners who deal directly with Hamburg Sud are bound by the liability limit in Hamburg Sud's bill of lading, while cargo owners who ship through an intermediary are not, even if the transactions are otherwise identical and Hamburg Sud charges the same carriage rate in both instances.

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[9] With respect to carriage of goods by rail, the statutory ban on unreasonable discrimination remains in force, see 49 U.S.C. 10741(a), though it is subject to significant exceptions. The nondiscrimination requirement does not apply to rail traffic moving under Section 10709 rail transportation contracts. See 49 U.S.C. 10741(b)(1). Pursuant to 49 U.S.C. 10502, the Interstate Commerce Commission (the STB's predecessor agency) has exempted rail movement of containerized freight from most provisions of Subtitle IV of Title 49, including the nondiscrimination requirement of Section 10741(a). See 49 C.F.R. Pt. 1090; *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981). The nondiscrimination provisions of the Shipping Act, however, are not subject to comparable exceptions, and those provisions apply to multimodal bills of lading (like the Hamburg Sud bill) issued by maritime carriers.

In holding that the shipper in *Great Northern* could not recover damages in excess of the liability limit agreed to by the railroad and the transportation intermediary, the Court invoked the principle that common carriers "[a]re not concerned with the question of title, but must treat the Forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles." 232 U.S. at 514 (citing *Delaware, Lackawanna & W. R.R.*, *supra*). Although the precise doctrinal basis for the Court's decision in *Great Northern* is unclear, that ruling seems best understood as based on federal preemption of inconsistent state law. If a carrier in Hamburg Sud's position is unable to rely on the liability limit contained in its own bill of lading, it will frequently be forced either (a) to set rates of carriage without accurate information as to its actual damages exposure (contrary to the goals of the tariff regime), or (b) to avoid that uncertainty by differentiating between owners and non-owners in its own rates of carriage (in violation of the Shipping Act's nondiscrimination principle). In either event, the rule announced by the court of appeals would "stand[] as an obstacle to the accomplishment and execution of" federal law. *Geier*, 529 U.S. at 873.[10]

[10] Respondents cannot avoid the preemptive force of the federal scheme on the ground that, under the circumstances of this case, Kirby's own contract (the ICC/Kirby bill) provides a liability limit significantly greater than $500 per package for loss or damage to the goods during the rail leg of the transportation. See pp. 18-19 & n.7, *supra*. *Whenever* federal law is held to preempt state tort remedies, the effect is to foreclose the plaintiff from collecting damages to which it might otherwise be entitled. In any event, the core protection for which Kirby bargained was that ICC would accept the duties of a common carrier and would be liable (subject to the limits to which Kirby agreed under Clause 8 of the ICC/Kirby bill) for any loss of or damage to the goods. Under the Himalaya Clause of the ICC/Kirby bill, moreover, Kirby agreed that Clause 8 would define the maximum *aggregate* liability of ICC and all others whose services were used to perform the contract. See note 7, *supra*. Because respondents' right to recover that full amount from ICC remains intact, any restriction on their ability to proceed against petitioner as an *alter-*

### C. The Court of Appeals' Determination That ICC Did Not Act As Kirby's "Agent" Does Not Support Its Holding That Respondents Can Sue Petitioner For Damages In Excess Of The $500-Per-Package Limit Set Forth In The Hamburg Sud/ICC Bill

The court of appeals held that the Hamburg Sud/ICC bill's liability limit was inapplicable to respondents' suit against petitioner because ICC, in contracting with Hamburg Sud for the carriage of Kirby's goods, was not acting as Kirby's "agent." Pet. App. 6a-11a. Because preemption principles furnish an alternative basis for holding that respondents cannot recover damages from petitioner in excess of the Hamburg Sud/ICC bill's $500-per-package limit, there is no need to determine whether an "agency" relationship existed in this case. If the Court does address that issue, the considerations below would be relevant to the Court's analysis.

1. Under the common law, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1958). Issuance of the ICC/Kirby bill of lading did not create an "agency" relationship as so defined. Although ICC assumed a contractual responsibility to deliver Kirby's goods to Huntsville, that obligation is not naturally characterized as a "fiduciary" duty, and nothing in the ICC/Kirby bill suggests that ICC in its performance of the contract was "subject to [Kirby's] control." The ICC/Kirby bill did not place any constraint on ICC's selection of an underlying carrier or on its negotiation of appropriate terms of transportation, and it provided no mechanism by which Kirby could have overseen ICC's choices with respect to those matters.

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*native* source of recovery does not significantly disappoint respondents' contract-based expectations.

Nor did ICC function as the type of transportation intermediary that has historically been characterized as the shipper's "agent." As this Court explained in *Acme Fast Freight*, the law has long recognized two distinct types of forwarders: the first "arrange[s] for the transportation by common carrier of the shipper's goods" but assumes no contractual responsibility to deliver the goods to their destination, while the second does accept that responsibility and is "subjected to common carrier liability for loss or damage whether it or an underlying carrier ha[s] been at fault." 336 U.S. at 484-485; see p. 5, *supra*. The term "agent" is often used to describe the first type of forwarder and to distinguish it from the second. See, *e.g.*, *Acme Fast Freight*, 336 U.S. at 484; Ramberg, *supra*, at 14. In the instant case, ICC clearly acted as the *second* type of forwarder, since it "assume[d] liability for the performance of the multimodal transport contract as a carrier" and accepted legal responsibility for the acts or omissions of others whose services are used to perform the contract. Pet. App. 54a (definition of "Freight Forwarder"), *id.* at 55a (Clause 2.2); see Ramberg, *supra*, at 51 (forwarder's acceptance of responsibility for conduct of others described in Clause 2.2 of the FBL "is the main distinction between the freight forwarder as a carrier and a freight forwarder acting only as an agent").

2. In the sphere of common-carrier regulation, this Court has occasionally used the term "agent" to describe transportation entities whose services are essential to completion of the carriage, even where the elements of the *Restatement* definition (*i.e.*, a fiduciary relationship, and effective control by the principal) are absent, and even where the "agent" has assumed the duties of a carrier. Thus, in *Acme Fast Freight*, the Court stated that the rationale for permitting a shipper by freight forwarder to sue the underlying carrier is that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." 336 U.S. at 488 n.27. The Court has also explained that the effect of

the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. 11706), under which a common carrier that accepts goods for transportation to a destination in another State is liable to the shipper for any damage caused by a connecting carrier's acts or omissions, is to treat the connecting carrier as the initial carrier's "agent." See, *e.g.*, *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 206-207 (1911); *Northern Pac. Ry.* v. *Wall*, 241 U.S. 87, 92 (1916).

3. Similarly in the maritime context, courts of appeals have occasionally stated that "an NVOCC generally acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Kukje Hwajae Ins. Co.* v. *The M/V Hyundai Liberty*, 294 F.3d 1171, 1176 (9th Cir. 2002), petition for cert. pending *sub nom. Green Fire & Marine Ins. Co.* v. *M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002); accord *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 (2d Cir. 1984) ("With respect to the vessel and her owner, * * * the NVOCC is an agent of the shipper."). In using that term, however, the courts have not suggested that an NVOCC in its relation to the shipper falls within the *Restatement* definition; nor have they held that the NVOCC should be treated for *all* purposes as the shipper's "agent." We are aware of no case, for example, in which the underlying carrier has invoked that putative agency relationship as a sword rather than a shield —*i.e.*, as a basis for suing the cargo owner under the contract. NVOCCs instead have been treated as shippers' agents for the purpose of determining whether the contract between the intermediary and the underlying carrier can limit the *shipper's* right of action *against* that carrier. Rather than resting on the application of general agency principles, that characterization may reflect a policy judgment that, for this limited purpose, the NVOCC should be treated *as if* it were the shipper's agent, so that the shipper will be bound by restrictions on recovery to which the intermediary and the carrier have agreed. See *Insurance Co. of*

*N. Am.*, 732 F.2d at 304 (explaining that imposition of additional liability on the underlying carrier in a manner inconsistent with the terms of the carrier's bill of lading "would clearly conflict with the policies embodied in the tariff system" and "would also threaten the role of the bill of lading as an effective means for carriers to limit their liability").

That policy judgment is a sound one, since the approach adopted by those courts of appeals ensures that the underlying carrier can base its rates on an accurate understanding of its potential exposure to suit, without discriminating among shippers in a manner that federal law forbids. Judicial characterization of the NVOCC as the shipper's "agent," however, is a potential source of confusion: the NVOCC is *not* the shipper's "agent" as that term has traditionally been understood, and established legal and commercial relationships would be disrupted if it were treated as such for all purposes.[11] Those potential difficulties are avoided if the same policy concerns are considered as part of a preemption analysis rather than treated as grounds for inferring an "agency" relationship. See pp. 21-26, *supra*.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[11] For example, we are informed by the State Department that a legal rule treating an NVOCC as the shipper's "agent" for all purposes would substantially complicate the ongoing negotiation (see note 1, *supra*) of a comprehensive new carriage of goods convention at the United Nations Commission on International Trade Law. If the NVOCC were deemed for all purposes to be an agent of the shipper, many provisions of the draft text would need to be reevaluated, and compromises already reached might be upset. In addition, the FMC in its prior administration of the Shipping Act has rejected attempts by NVOCCs to describe themselves as "agents" in order to avoid the Act's requirements. See, *e.g.*, *Prudential Lines, Inc.* v. *Farrell Lines, Inc.*, 26 F.M.C. 497, 515-516, adopted without modification, 26 F.M.C. 496 (1984).

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