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

BRIEF OF *AMICUS CURIAE* TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION IN SUPPORT OF PETITIONER NORFOLK SOUTHERN RAILWAY COMPANY

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QUESTIONS PRESENTED

1. Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers that actually transport the owner's goods.

2. Whether the phrase "person (including any independent contractor) whose services have been used in order to perform the contract" in a freight forwarder's multimodal bill of lading covers truckers that actually transport the goods to their inland destination, regardless of whether the trucker is in privity with the freight forwarder.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 the Transportation Loss Prevention and Security Association states that it is a non-profit corporation incorporated in New Jersey. Its shares are not traded.

STATEMENT OF CONSENT

The parties have consented to the filing of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES

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BRIEF OF *AMICUS CURIAE*[1] TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION IN SUPPORT OF PETITIONER NORFOLK SOUTHERN RAILWAY COMPANY

RELEVANT FEDERAL STATUTES

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 14706.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Transportation Loss Prevention and Security Association "TLPSA" is a non-profit corporation incorporated in the State of New Jersey. It is comprised of over sixty-five member organizations which are involved in the trans-

[1] No other person or organization made a monetary contribution to the preparation of this brief

portation of freight by truck within the United States. Members include trucking companies, large and small, some with revenues upwards of $2.5 billion. Its mission as stated in its bylaws is to:

> (1) provide continuing professional education to cargo claims professionals and their insurers, cargo security professionals, and law enforcement; (2) facilitate practical and effective communications between carrier and insurance personnel and law enforcement; (3) engage in legal and legislative advocacy on behalf of the membership.

A majority of its members transport freight to and from domestic locales as a component of continuous through movements in international transportation. As such, they frequently transport freight subject to ocean bills of lading which include Himalaya clauses as well as clauses Paramount. Consequently they are similarly situated to Norfolk Southern Railway Company ("Norfolk Southern"). In fact, it is merely an accident of circumstance that a railroad rather than a trucker was retained to carry the freight in this controversy. Had the freight been bound for a town not served by a rail line, it would have been trucked. In addition, Norfolk Southern was only dispatched to deliver the freight to its rail ramp in Huntsville, Alabama. The ultimate destination was Athens, Alabama, thirty miles west, to which the freight would have eventually been short hauled by a trucker.

Constituents of TLPSA include small trucking companies, which, unlike Petitioner Norfolk Southern do not have the financial wherewithal to absorb a $1.5 million judgment. Claims of such magnitude would force numerous truckers out of business. It is the considered opinion of TLPSA not only that the Eleventh Circuit decision is in error, but that if it remains intact it will have a chilling effect upon the willingness of trucking companies to accept import and export freight, in contravention of established public policy.

SUMMARY OF ARGUMENT

Any decision affecting the effectiveness of limitations of liability in an ocean carrier's bill of lading insofar as it affects the liability of railroads will necessarily have a similar impact upon the liability exposure of the trucking industry; an industry which constitutes a more significant component of the national economic infrastructure than do railroads.

The ultimate outcome of the 11th Circuit's decisions will be to discourage truckers both large and small from accepting imported freight. Any such outcome is counter to and destructive of well settled public policy ensconced in the Interstate Commerce Act, 49 U.S.C. 101, *et seq*. Specifically, if the decision below is affirmed it will: (1) chill entrepreneurship by impeding the viability of small trucking companies; (2) subject this vital component of the infrastructure to catastrophic liability exposure; and (3) discourage the use of transportation intermediaries, essential to the deregulated transportation environment.

ARGUMENT

I. PUBLIC POLICY ENCOURAGES THE PROLIFERATION OF SMALL, PRIVATELY OWNED TRUCKING COMPANIES

In 1935 Congress adopted the Motor Carrier Act which placed the motor carrier industry under the heavy hand of the erstwhile Interstate Commerce Commission ("ICC" or "the Commission"). Market entry was restricted, rates were subject to regulatory review and competitor protest, and routes were confined to those expressed within the carrier's operating authority issued by the Commission.

Prodded by the government as well as the general public, the Commission began to unshackle the transportation industry in the 1970's. In 1980 Congress adopted a new Motor Carrier Act mandating further deregulation.

During the period between 1980 and 1995, Congress enacted a series of laws which completely overhauled the regulatory scheme. These enactments were designed to achieve various goals including: (1) to deregulate the trucking industry and subject it to market-driven forces; (2) to further integrate the national transportation network by eliminating state government regulation of motor carriers; and (3) to encourage entrepreneurship by making it easy for individual truckers to own their own independent companies. This last goal represented a deliberate policy decision not only to spur entrepreneurship for its own sake, but also to encourage the proliferation of minority-owned businesses, which could avail themselves of federally-mandated set-aside programs.[2]

Passage of the Motor Carrier Act of 1980 resulted in a boom of small operators entering the field. Between 1980 and 1995, the number of federally-licensed motor carriers swelled from 14,000 to over 55,000. (1994 U.S. Code and Administrative News, p. 804; 104 Congr., 1st Sess. 1995.)

II. PUBLIC POLICY HAS ALWAYS FAVORED A RISK ALLOCATION REGIME WHICH MAKES CARRIERS STRICTLY LIABLE FOR COMMONPLACE LOSSES, BUT SHIFTS THE BURDEN FOR EXTRAORDINARY LOSSES TO SHIPPERS' INSURERS.

At common law, a carrier was strictly liable for the full actual value of cargo damaged in its care. This principal was codified by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §14706 (previously 49 U.S.C. 11707 and 49 U.S.C. 20(a).) However, a longstanding exception to the full value rule has been found in what is

[2] *See* Thoms, William E.: "Rollin' On . . . To A Free Market. Motor Carrier Regulation 1935-1980." 13 Transportation Law Journal 43, 72, 76, 84 (1983).

alternatively known as the declared value, or released rates doctrine. As this Court stated long ago:

> There is no justice in allowing a shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a lesser sum than that claimed after loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier.

Hart v. Pennsylvania Railway Co., 112 U.S. 331, 340 (1884).

The Carmack Amendment to the Interstate Commerce Act, as modified by the Cummins Amendment of 1916, specifically provided that carriers could offer a menu of published discount rates provided that the shipper was willing to accept a limited liquidated cap on the carrier's liability. The inherent equities of this arrangement have long been lauded by this Court:

> The underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed. The broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their uniform application.

Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29; 57 S.Ct. 73; 81 L.Ed. 20 (1936). *Accord*: *Missouri, K&T.R. Co. v. Harriman Brothers*, 227 U.S. 657 (1913).

In 1919, the Interstate Commerce Commission prescribed the Uniform Domestic Bill of Lading which featured a block requiring shippers to declare the value of their freight when the rate paid was based in part on the freight's value. *In Re: Bills of Lading*, 52 I.C.C. 671 (1919).

In 1977 the I.C.C. promulgated Released Rates Order No. MC 894, 353 I.C.C. 661 (1977), which endorsed the practice of carriers establishing by tariff rule that a shipper's omission to declare the value of its freight automatically resulted in the freight being transported at the lowest rate along with the concomitantly lower limitation of liability. The petitioner in that proceeding was a major shipper, IBM, which was having trouble distributing high-value mainframe computers because carriers were reluctant to haul such expensive merchandise. That decision crystalized the overriding policy rationale supporting the limited liability regime. In order to protect motor carriers from catastrophic losses, and to allow shippers the flexibility to manage their risk as they see fit, the I.C.C. ordained a liability regime which shifted the burden for extraordinary losses to private insurers whose premium pool was far more widespread. Despite ample opportunities for legislative reexamination [3], limitations on carrier liability for extraordinary losses remain the rule. This is consistent with other modes of transportation in which limitations of liability are ubiquitous.

The liability of ocean carriers is limited by statute to $500 per shipping unit. Carriage of Goods by Sea Act, 46 U.S.C. §1304(5). Limitations of liability in the volume transportation contracts of railroads are routinely upheld. *Cooperative Shippers, Inc. v. Atchison, Topeka & Santa Fe Railway Company*, 840 F.2d 447 (7th Cir. 1988). The liability of international air carriers is limited by treaty to the sum of $9.07 per pound. 49 U.S.C. §40105.

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[3] Motor Carrier Act of 1980, Pub.Law. 96-296 94 Stat. 793; Trucking Industry Regulatory Reform Act of 1994 Pub. Law. 103-311, 108 Stat. 1683 (1994); Interstate Commerce Commission Termination Act of 1995, Pub.Law. 104-88, 109 Stat. 903 (1995).

III. PUBLIC POLICY ENCOURAGES THE PRESENCE OF TRANSPORTATION INTERMEDIARIES

In the new deregulated environment matching freight with a carrier suitably situated to haul it is a much more haphazard and frenetic enterprise. Among the sidebar consequences of this sea change is the massive proliferation of transportation intermediaries who run the gamut from brokers who mix and match shippers with carriers, sometimes with the benefit of little more than a personal computer and a telephone, to third party logistics providers which operate as outsourced traffic departments for large companies.

The I.C.C. recognized and accommodated this shift in the marketplace by promulgating *Ex Parte* No. MC-96 Entry Control of Brokers 126 MCC 476 (1977), which loosened entry restrictions on brokers.

Over the course of the past decade countless intermediaries have entered the marketplace. The Transportation Intermediaries Association, for instance, was nonexistent until 1996, and now boasts over eight hundred active members. In 1980, Congress repealed the prohibition against motor carriers holding dual authority as both carriers and brokers. It is now not only common for freight to be brokered, it is downright common for freight to be rebrokered from entity to entity until a suitable empty truck can be found in the vicinity of the freight heading in the same direction in which the freight is bound.

IV. THESE PUBLIC POLICY GOALS WILL BE SEVERELY UNDERMINED IF THE LOWER COURT'S RULING IS AFFIRMED

Small truckers, who comprise an ever larger segment of the trucking market are required by law only to carry cargo insurance of $10,000 per occurrence. 49 C.F.R. 387.303(c).

This is consistent with the economic reality that ninety percent (90%) of all freight that moves is worth less than $10 a pound. U.S. Department of Transportation Cargo Liability Study, August 1998, p.26.

These small truckers have been advised by this Court since *Kansas City Southern Railway v. Carl*, 227 U.S. 639 (1912), that they can avail themselves of whatever limitation of liability has been agreed to by an earlier, upstream carrier. They have also been advised by this Court since *Great Northern Railway v. O'Connor*, 232 U.S. 508 (1914), that whatever limitation of liability is negotiated by an intermediary is binding on the shipper. The Eleventh Circuit has deviated from these lines of precedent which form the legal pillar upon which carriers have always relied.

Asking truckers to accept any type of cargo without availing themselves of the limitations of liability in place for the prior carrier would essentially ask them to purchase a pig in a poke. The freight on board could be anything from abacuses to zippers, and without the prior limitations on liability truckers would have to carry over $1,500,000 in insurance coverage to protect themselves against catastrophic losses like that here. No small transportation company has that kind of coverage, in no small measure because they are mindful of, and rely upon, the ocean carriers' $500 per package limitation of liability. If this Court affirms the decision below, local draymen, regional carriers, and other small truckers integral in completing the last leg of most import transportation would simply refuse to carry freight, and inbound commerce would grind to a halt.

It is also neither plausible nor possible to expect shippers and carriers to negotiate freight rates and insurance coverage every time someone needs a truck, especially when the cargo originates overseas and arrangements are made by a third party. The nature of freight distribution depends heavily on the flexibility provided by the vast range of carriers and types of service. Just-in-time shipping and expedited distribution services require the interchangeability of equipment and companies to meet whatever the current need may be. Expecting the parties to stop all shipping operations every time a substitute carrier is used, or every time there is a change in a distribution plan, runs counter to the transportation policy and will have a devastating effect on the supply chain.

The National Transportation Policy, first enacted in 1940 and now codified at 49 U.S.C. §13101(a)(2), seeks to encourage reasonable rates, efficiency, service to small towns, profitability, and further seeks to promote inter-modalism. The Eleventh Circuit's view will only promote higher freight rates and service shortages.

This policy will be completely undermined if the lower Court's decision is affirmed. The pool of transportation providers will be severely reduced, and the field will be limited only to large carriers with high risk reserves or small carriers cavalier enough to transport loads too valuable for them to assure against loss.

CONCLUSION

Amicus Curiae respectfully request that the decision of the 11th circuit be reversed.

Respectfully submitted,

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