No. 13-

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ABB INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HYMAN HILLENBRAND
HILLENBRAND, O'BRIEN & SOLOMON, LLP
8751 West Broward Boulevard, Suite 106
Fort Lauderdale, FL 33324
(954) 652-0100

CARTER G. PHILLIPS*
QUIN M. SORENSON
CLAYTON G. NORTHOUSE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

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* Counsel of Record

QUESTION PRESENTED

Whether the Carmack Amendment, 49 U.S.C. §§ 11706, 14706, imposes a heightened "specificity" requirement on the parties to a shipping contract, precluding enforcement of an agreed-upon limitation on the carrier's liability set forth in an incorporated tariff if the contract itself does not explicitly describe the limitation or the tariff.

PARTIES TO THE PROCEEDINGS

Petitioner herein is CSX Transportation, Inc., which was defendant-appellee below.

Respondent herein is ABB Inc., which was plaintiff-appellant below.

RULE 29.6 STATEMENT

CSX Corporation is the parent company of petitioner herein. No other publicly held corporation has a 10% or greater ownership interest in petitioner herein.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CSX Transportation, Inc., hereby petitions for a writ of certiorari to review the judgment of the court of appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 721 F.3d 135, and reproduced at Petition Appendix (Pet. App.) 1a-32a. The unpublished order of the court of appeals denying rehearing en banc is reproduced at Pet. App. 73a. The opinion of the United States District Court for the Eastern District of North Carolina is reported at 862 F. Supp. 2d 467, and reproduced at Pet. App. 33a-72a.

JURISDICTION

The court of appeals entered judgment on June 7, 2013, and denied a timely petition for rehearing en banc by order dated July 8, 2013. Pet. App. 1a, 73a. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Relevant provisions of the Carmack Amendment, 49 U.S.C. §§ 11706, 14706, are reproduced at Pet. App. 74a-82a.

INTRODUCTION

The Carmack Amendment expressly authorizes interstate rail and motor carriers to limit their liability for freight damaged during transit "by a written agreement between the [shipper and the] carrier." 49 U.S.C. §§ 11706(c)(3)(A), 14706(c)(1)(A). This provi-

sion by its terms allows the parties to a shipping contract to bargain for and adopt limitations on the carrier's liability, and it imposes no extra-contractual statutory restrictions on the rights of the carrier to enforce these limitations in a subsequent federal civil action. *Id.* So long as the limitation is enforceable under traditional principles of contract interpretation, and the contract otherwise complies with the Carmack Amendment, the limitation must be judicially enforced. See, *e.g.*, *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 509-10 (1913); *OneBeacon Ins. Co.* v. *Haas Indus., Inc.*, 634 F.3d 1092, 1099-100 (9th Cir. 2011).

The enforceability of liability limits under the Carmack Amendment has, nevertheless, divided the circuits. The Second and Eleventh Circuits hold, in accordance with the plain meaning of the statute and traditional principles of contract interpretation, that liability limits set forth in a tariff and incorporated by general reference in a shipping agreement are fully enforceable against a shipper in any subsequent litigation. *Werner Enters. Inc.* v. *Westwind Mar. Int'l, Inc.*, 554 F.3d 1319, 1328 (11th Cir. 2009); *Mech. Tech., Inc.* v. *Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1088-89 (2d Cir. 1985); see also *Siren, Inc.* v. *Estes Express Lines*, 249 F.3d 1268 (11th Cir. 2001). The Fourth Circuit, by contrast, held in the decision below that the statute imposes a heightened "specificity" requirement, not found in the statutory language or supported by traditional principles of contract law, barring enforcement of liability limits against a shipper unless the limit or incorporated tariff is described with particularity in the contract itself. Pet. App. 13a-15a. As Judge Agee noted in his dissenting opinion, the contrary rule adopted by the panel means that liability limitations that would be fully enforcea-

ble in other jurisdictions, like the one at issue in this case, will not be recognized in the Fourth Circuit. *Id.* at 24a-26a.

This divide will have profound consequences for the shipping industry. No longer can rail and motor carriers rely on liability limitations negotiated with shippers in good faith and for value—even if those limits would be recognized as valid in the jurisdiction in which the contract was executed—if there is any possibility that a future lawsuit might be brought by the shipper within the Fourth Circuit. That possibility will almost invariably exist, given the number of major rail lines and motor carrier routes that pass through the jurisdiction and the generous venue provisions of the Carmack Amendment. See 49 U.S.C. §§ 11706(d), 14706(d). The result, in effect, is a mass modification of the terms of shipping contracts connected in any way to the Fourth Circuit, rendering liability limits in those contracts inherently suspect (if not necessarily invalid) and producing an immediate and unanticipated increase in liability exposure for carriers nationwide. And, for carriers and shippers in all jurisdictions, the decision below will invite a spate of litigation, as parties and courts struggle to define whether and when any provision of a shipping contract—not merely liability limitation clauses—are "sufficiently specific" to satisfy the Fourth Circuit's new standard. Pet. App. 12a.

STATEMENT OF THE CASE

This case concerns the enforceability of a liability limitation clause incorporated into a shipping contract between the shipper, ABB Inc., and the carrier, CSX Transportation, Inc. Pet. App. 1a-2a. That clause expressly limited CSX's liability for freight damaged during shipment to $25,000. *Id.* Neverthe-

less, and notwithstanding that this clause would have been fully enforceable in other circuits under traditional principles of contract law, the panel majority held that the clause was unenforceable because, in its view, the Carmack Amendment imposes a heightened "specificity" requirement, applicable only to shipping contracts, mandating that any liability limitation or governing tariff be described with particularity within the contract itself and not merely incorporated by general reference. *Id.* at 13a-15a, 24a-26a. The dispositive question here is, therefore, whether the Carmack Amendment should indeed be interpreted to impose such a novel, extra-contractual and extra-statutory heightened specificity requirement.

A. Statutory and Regulatory Background.

The Carmack Amendment, first enacted in 1906, was intended from its inception to standardize and simplify interstate shipping arrangements. *Adams Express*, 226 U.S. at 505-12; see also *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 119-20, 127 (1990). Prior to that time, the interpretation of interstate shipping contracts was governed exclusively by state law; as a result, given the "uncertainties and diversities of rulings" by courts under those varying legal regimes, "it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know ... what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another." *Adams Express*, 226 U.S. at 505-06. Moreover, because freight was commonly transferred among several different carriers during transit, shippers were frequently unable to determine or prove that any one carrier was individually liable for damage discovered only at the time of delivery. *Id.* at 506; see also *Ka-*

wasaki Kisen Kaisha LTD v. *Regal-Beloit Corp.*, 130 S. Ct. 2433, 2441 (2010).

1. The Carmack Amendment was intended to address these issues by establishing a uniform, federally regulated structure for interstate shipping. It required all rail and motor carriers to issue to the shipper a document outlining the terms of the shipping agreement—known as a "bill of lading"—before transporting the freight. 49 U.S.C. §§ 11706(a), 14706(a).[1] It also mandated that, henceforth, the carrier that issued the bill of lading would (with certain exceptions) be held strictly liable for any damage to the freight that occurs before final delivery, without any need for the shipper to offer individual proof of negligence. *Id.* (carrier is liable "for the actual loss or injury to the property"); see also *Kawasaki*, 130 S. Ct. at 2441; *Sec'y of Agric.* v. *United States*, 350 U.S. 162, 173 (1956) (Frankfurter, J., concurring). The statute thus effectively nationalized interstate shipping, displacing a large swath of state law. *Adams Express*, 226 U.S. at 505-12.

Congress did not, however, supplant this field in its entirety. It included in the Carmack Amendment an express exemption allowing shippers and carriers to bargain for and adopt clauses limiting the carriers' liability "to a value established by written … declaration of the shipper or by [a] written agreement between the [shipper and the] carrier." 49 U.S.C. §§ 11706(c)(3)(A), 14706(c)(1)(A). Under this provision, so long as a liability limitation clause would otherwise be enforceable under traditional contract law, it would remain enforceable under the Carmack

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[1] The Carmack Amendment originally applied only to rail carriers but was extended to motor carriers in 1934. Motor Carrier Act of 1934, ch. 498, 49 Stat. 543.

Amendment. See, *e.g.*, *Norfolk S. Ry.* v. *James N. Kirby Pty Ltd.*, 543 U.S. 14, 30-35 (2004); *Adams Express*, 226 U.S. at 509-10.

This exception followed well-established practice in the interstate shipping industry. Long before the Carmack Amendment, carriers and shippers had routinely negotiated and adopted limitations on the maximum liability for damaged freight. *Adams Express*, 226 U.S. at 509-10; see also *Hart* v. *Pa. R.R.*, 112 U.S. 331 (1884). These limitations benefitted not only the carriers, which could then better quantify their risks, but also the shippers, which could and normally did obtain reduced shipping rates in exchange. *Adams Express*, 226 U.S. at 505-10. Allowing this practice to continue, Congress recognized, would thus serve the interests of both shippers and carriers, as well as advance the ultimate goal of facilitating and standardizing interstate shipping arrangements. *Id.*; see also, *e.g.*, *Se. Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28, 29 (1936) (per curiam).

2. For much of the 20th Century, it was common for carriers to set forth the terms governing a particular shipment—including any limitation on the carrier's liability—in a "tariff," "classification," or other similar freight schedule published by the carrier. *Maislin*, 497 U.S. at 119-27 (citing *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94 (1915)). That document would then be incorporated by reference in the shipping contract, and the carrier was required by statute to file it with the Interstate Commerce Commission (ICC). See 49 U.S.C. § 10762 (1992). Because documents filed with the ICC were available to shippers upon request, courts (including this Court) held that shippers should be deemed to have constructive knowledge of their terms, and thus would be bound by those terms—including a liability

limitation—notwithstanding any claim by the shipper of lack of notice or knowledge. *E.g.*, *Maislin*, 497 U.S. at 119-20, 127.

This situation changed in the 1990s, when Congress initiated deregulation in the shipping industry. Amendments to the statute in 1994 drastically limited the ICC's role in regulating interstate shipments and, in particular, eliminated the requirement that tariffs or classifications be filed with the Commission. The Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, tit. II, 108 Stat. 1673, 1683. Soon thereafter, shippers began to claim regularly that they were no longer bound by the terms of tariffs or classifications incorporated by reference in a bill of lading, including liability limitations, because those documents were not publicly available and thus the shippers could not be deemed to have constructive knowledge of their terms. H.R. Rep. No. 104-422 (1995) (Conf. Rep.). Although nothing in the legislative record suggested that Congress anticipated this result, or intended in any way to modify or limit the enforceability of liability limitation clauses in shipping contracts, some courts sided with shippers and held that these clauses were now unenforceable. *Id.*

Congress responded with striking swiftness. One year after the repeal of the tariff filing requirement, it recognized that "[a]n unintended and unconsidered consequence [of the repeal was that] … carriers lost this particular avenue as a way of limiting liability," *id.* at 223, and to remedy the problem it enacted a new provision requiring that carriers make available to the public, "on request," the terms of any tariff, classification, or similar schedule governing interstate freight shipments, ICC Termination Act of 1995, Pub. L. No. 104-88, §§ 102, 103, 109 Stat. 803, 830, 908 (codified at 49 U.S.C. §§ 11101(a),

14706(c)(1)(B)). Under this system, the governing tariff or classification would once again be available to shippers, with the only change being that the document would now be maintained not by the ICC (which was formally terminated under the same amendment) but by the carriers themselves. See 49 U.S.C. § 11101(b). This requirement was, the conference report stated, "intended to return to the pre-[repeal] situation where *shippers* were responsible for determining the conditions imposed on the transportation of a shipment," and where "the carrier was under no obligation to specifically notify the shipper of the conditions or terms of the tariff." H.R. Rep. No. 104-422, at 223 (emphasis added).

With this express congressional imprimatur, carriers and shippers continued to follow the practice, as they had for the last century, of relying upon tariffs, classifications, and schedules to set forth the terms governing a particular interstate shipment. *E.g.*, *Kirby*, 543 U.S. at 18-21; *OneBeacon*, 634 F.3d at 1099-100. So long as the bill of lading stated that those terms would be incorporated, and the document was available to the shipper upon request, courts once again consistently held—as they had prior to 1994—that the terms were fully enforceable against the shipper. *E.g.*, *OneBeacon*, 634 F.3d at 1099-100.

B. Factual and Procedural Background.

The parties here, ABB and CSX, followed this same practice in their shipping arrangements, including the one that gave rise to this case.

1. ABB regularly shipped electrical equipment and other freight via CSX, and had developed a form shipping contract for use in these transactions (as well as those with other carriers). Pet. App. 7a-11a. That form contract contained a clause expressly in-

corporating the governing "classification or tariff" published by CSX. *Id.* at 9a. It confirmed that "all the terms and conditions … set forth in [said] classification or tariff … are hereby agreed to by the shipper," and further "certifie[d]" that "[the s]hipper … is familiar with all the terms and conditions … set forth in [said] classification or tariff." *Id.* (emphasis omitted).

There is no dispute that both ABB and CSX understood that the phrase "classification or tariff," as used in the contract, referred to the applicable price schedule published by CSX, which in this case was identified as "Price List 4605." Pet. App. 9a-10a, 66a.[2] This schedule, publicly available on CSX's website or upon request, stated (among other terms) that "[c]arriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment." *Id.* at 10a; see *id.* at 11a, 21a. It also explicitly offers the shipper the opportunity to request "[f]ull liability coverage," by "calling your sales representative for a specific quote." *Id.* at 10a, 21a.

For the shipment at issue here—an electrical transformer valued at approximately $1.3 million, to be transported from St. Louis to Pittsburgh—ABB utilized its form shipping contract. Pet. App. 7a-11a, 20a-22a. The contract included the incorporation clause quoted above, with the reference to the governing "classification or tariff" published by CSX—*i.e.*,

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[2] The panel noted that, although the requirement that carriers file formal "tariffs" with the ICC was repealed in the 1990s, carriers and shippers throughout the shipping industry continue to use that term "out of habit" when describing the freight schedule governing a particular shipment. Pet. App. 3a-4a; *see also id.* at 23a n.4 (Agee, J., dissenting) ("[P]ost-deregulation, a 'tariff' and 'schedule of rates' are equivalent terms in the contemporary trade.").

Price List 4605. *Id.* ABB modified the form contract to note the dates, location, and destination of the shipment, as well as the total value of the freight, but did not otherwise alter it to include any different language regarding CSX's maximum liability or any notation requesting that CSX accept full liability for the shipment, as ABB had done in certain prior transactions with CSX. *Id.* at 18a, 26a, 48a. The contract, as drafted by ABB, was delivered to CSX, which accepted it without change. *Id.* at 7a-11a, 20a-22a.[3]

The freight was transported by CSX in accordance with the shipping contract, issued as the bill of lading on March 24, 2006. Pet. App. 53a-60a. After delivery, the transformer was allegedly found to be damaged, for unknown causes. *Id.*

2. ABB brought this action against CSX in the U.S. District Court for the Eastern District of North Carolina on January 22, 2008, alleging that CSX should be liable for the full amount of damages to the freight, estimated by ABB at $550,000. Pet. App. 1a-2a. The district court held, on summary judgment,

[3] The ABB manager who prepared the contract, Brian Brueggeman, later acknowledged that he had been aware the contract incorporated the terms of the CSX price schedule, and understood the schedule was available for review. Pet. App. 8a-12a, 21a n.3, 26a n.7, 52a-60a. Nevertheless, he never requested the schedule from the appropriate contact at CSX, and—after purportedly attempting to retrieve it through the CSX website without success—decided to deliver the proposed contract to CSX without reviewing those terms and without speaking to a representative at CSX. *Id.*; *see also id.* at 12a ("The record reflects that Brueggeman did not exercise due diligence in performing a key aspect of his job, namely, negotiating and obtaining rate and liability information for the shipment of very expensive equipment."); *id.* at 26a n.7 ("The likely reason ABB did not pursue full liability coverage was the incompetence or negligence, or both, of Brueggeman, its agent.").

that the liability limit set forth in Price List 4605 was incorporated by reference into the bill of lading, and thus, consistent with those terms and the Carmack Amendment, CSX could not be held liable for damages in excess of $25,000. *Id.* at 70a-71a. The court rejected ABB's argument that the references in the bill of lading to "classification" and "tariff" were ambiguous, citing uncontradicted evidence that both ABB and CSX understood those terms to include price schedules of precisely this sort, in accordance with traditional industry practice. *Id.* It noted that other courts, including the Eleventh Circuit, had reached the same conclusion addressing "indistinguishable" factual circumstances, involving a sophisticated shipper that prepared its own shipping contract and then attempted to avoid an incorporated liability limit based on lack of notice. *Id.* at 61a-62a (citing *Siren*, 249 F.3d 1268).

ABB appealed. A divided court of appeals reversed. Pet. App. 20a. The majority acknowledged that the bill of lading could indeed be read as incorporating the liability limit of Price List 4605, and that the limit would be valid under traditional principles of contract interpretation. See *id.* at 12a, 18a-20a. They nevertheless concluded that the Carmack Amendment precluded its enforcement. *Id.* at 12a. The principal purpose of the statute, they reasoned, was to "protect[ ] shippers from attempts by carriers to avoid liability for damage to cargo," *id.* at 6a, and thus a liability limitation should be enforceable against a shipper only if it is set forth in the contract itself or in a tariff that the contract describes with "specificity"—such that there is no doubt the shipper was actually aware of the terms, *id.* at 12a-13a. "The general contract principle that ambiguous contracts be construed against the drafter," the majority opin-

ion concluded, "is inapplicable in the face of statutory language that unambiguously imposes the risk of error on one particular party, the carrier, to the exclusion of the other party, the shipper." *Id.* at 19a.

Judge Agee dissented. The bill of lading at issue, he noted, expressly incorporated the "terms and conditions … set forth in the classification or tariff which governs the transportation of this shipment," and the uncontradicted evidence presented to the district court established that the relevant "classification or tariff" for these purposes was Price List 4605. Pet. App. 21a-22a. ABB was thus bound by the liability limit set forth in Price List 4605, under the plain terms of the shipping contract and consistent with the provision of the Carmack Amendment authorizing liability limits "by a written agreement between the shipper and the carrier." *Id.* at 32a. Citing the same contrary precedent as the district court, and likewise characterizing it as "indistinguishable" from this case, *id.* at 24a-25a, Judge Agee concluded that there was no statutory basis to refuse enforcement of that limit. This conclusion was "further supported," he said, "by the fact that ABB drafted the [shipping contract] in this case," and should not be able to "rely on its own negligence in [failing to request or review the incorporated tariff] to avoid the resulting consequences of its contractual covenants." *Id.* at 26a-27a.

REASONS FOR GRANTING THE PETITION

This case plainly warrants review. The decision below, holding that the Carmack Amendment imposes a heightened specificity requirement for liability limitation clauses in shipping contracts, divides the circuits and calls into question a long line of precedent from this Court and others. *Infra* Part I. That deci-

sion will, moreover, produce immediate negative consequences for rail and motor carriers across the country, and ultimately risks disrupting the interstate shipping system on which the Nation's economy depends. *Infra* Part II.

I. THE DECISION BELOW CREATES A SPLIT AMONG THE CIRCUITS AND CONFLICTS WITH OPINIONS OF THIS AND OTHER COURTS REGARDING INTERPRETATION OF THE CARMACK AMENDMENT.

The panel's decision creates a clear split among the circuits on whether the Carmack Amendment imposes a heightened specificity requirement on the parties to a shipping contract. *Infra* pp. 13-16. It also conflicts with a number of opinions from both this Court and others addressing the statute's requirements. *Infra* pp. 17-21. Those conflicts amply justify this Court's review.

1. Two courts of appeals, the Second and Eleventh Circuits, have expressly rejected the heightened specificity requirement adopted by the panel, holding instead that liability limits incorporated into a contract through general reference to a governing "tariff" are enforceable against the shipper. *Werner*, 554 F.3d at 1327-28; *Siren*, 249 F.3d at 1273-74; *Mech. Tech.*, 776 F.2d at 1087-88.[4] To read the Carmack Amendment as precluding enforcement of liability limits that would otherwise be valid under traditional principles of contract law would, they explain, be in-

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[4] *See also Mech. Tech.*, 776 F.2d at 1089-90 (Winter, J., concurring in the result) (describing the panel's holding as rejecting "a rule that when a bill of lading does not specify either a reduced rate or released value, and the shipper has no actual knowledge of the terms of the tariff, limitations of liability contained in the tariff are not effective").

consistent with the statutory language expressly authorizing enforcement of liability limitations adopted "by a written agreement between the shipper and the carrier." *E.g.*, *Siren*, 249 F.3d at 1270-74. It would also be inconsistent with Congress's intent to standardize and simplify shipping arrangements across the country, because it would deny shippers and carriers the right to structure their business relationships in light of accepted industry practice and terminology that is "universally understood throughout the [interstate shipping] industry." *E.g.*, *id.* There is no reason to excuse a shipper from a liability limitation to which it agreed, and which it had an opportunity to review, merely because that limit was not described with particularity in the shipping contract itself. *Id.*; accord *Werner*, 554 F.3d at 1328; *Mech. Tech.*, 776 F.2d at 1087-88.

"This is even more true," these courts have reasoned, "when the [shipper itself] drafted the contract." *Siren*, 249 F.3d at 1273-74. It must be presumed in these circumstances, under traditional principles of contract law, that the shipper understood that the "carrier's tariff was incorporated by reference" and that it "should have known what terms were included within the tariff." *Id.* Deeming it neither "proper [n]or necessary to protect shippers from themselves," these courts have consistently held that liability limitations in a tariff or freight schedule incorporated by general reference in a shipping contract, especially one drafted by the shipper, is enforceable under the Carmack Amendment "irrespective of whether the shipper had actual knowledge of the limiting aspect of those terms." *Id.* at 1271-74; accord *Werner*, 554 F.3d at 1328; *Mech. Tech.*, 776 F.2d at 1087-88.

These opinions squarely conflict with both the holding and reasoning of the Fourth Circuit's decision. That decision holds that a liability limitation incorporated into a shipping contract through a "generic reference" to a governing tariff is unenforceable against the shipper, even when the shipper drafted the contract, because in the panel's view the Carmack Amendment requires that the contract either set forth the limitation itself or describe the tariff with "sufficient[ ] specific[ity]," that the shipper can be found to have knowledge of its terms. Pet. App. 12-13a. The panel justified this requirement not on the language of the statute—which, as noted, expressly authorizes the incorporation of liability limitations in shipping contracts—but on its assumption that the principal purpose of the Carmack Amendment was to "protect[ ] shippers from attempts by carriers to avoid liability for damage to cargo." *Id.* at 6a. That purpose would be best served, the panel decided, by excusing a shipper from any liability limitation that is not described with particularity in the shipping contract, even one drafted by the shipper. *Id.* at 12a-13a.

The panel acknowledged that its holding was contrary to the opinions discussed above, from the Second and Eleventh Circuits, but argued that those opinions were "distinguishable" in part because the shipping contracts in those cases more clearly described the applicable liability limitation. Pet. App. 14a-17a & n.16. Not so. Those contracts used language that was no more "specific" than that in the contract here—*i.e.*, a general reference to "tariff" or "classification"—and in each case the court found that same language sufficient to incorporate the terms of the governing freight schedule. *Werner*, 554 F.3d at 1328; *Mech. Tech.*, 776 F.2d at 1087-88; see also *Si-*

ren, 249 F.3d at 1273-74.[5] Whatever additional description the contracts in those cases may have contained, and whatever other differences may exist between this case and those, they played no role in the courts' analyses. See *Werner*, 554 F.3d at 1328; *Mech. Tech.*, 776 F.2d at 1087-88. To the contrary, the material facts on which those courts relied—a shipping contract, drafted by the shipper, that expressly incorporates the terms of a governing "tariff" or other liability limitation—are in all respects "indistinguishable" from the facts presented here, as Judge Agee recognized in his dissenting opinion. Pet. App. 24a-25a.[6]

The split between the Fourth Circuit and the Second and Eleventh Circuits is thus square and deep. This divide should be resolved by this Court.

2. The panel's opinion is also inconsistent with a host of other circuit court decisions addressing the validity of liability limits under the Carmack

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[5] In one of these cases, the shipping contract did not even use the term "tariff," but instead mentioned only a designation ("Class 85") that was used *within* the governing tariff to denote a liability limitation. *Siren*, 249 F.3d at 1273-74. Nevertheless, in light of evidence that the parties would have understood this designation as a reference to the liability limit, the Eleventh Circuit held the limit enforceable. *Id.*

[6] Indeed, language used by the Eleventh Circuit in support of its holding could apply without change to this case: "[H]ere we do not have a devious carrier hoping to slip a quick one over on an unsuspecting shipper. Rather it is the shipper's own agent who prepared the short form bill of lading on its own preprinted standardized contract form. If the shipper's agent thereby incorporated an industry-wide, indisputably legal, and federally sanctioned [liability] limitation[ ], the shipper cannot now be heard to complain about it." *Siren*, 249 F.3d at 1272 (quoting *Swift Textiles, Inc.* v. *Watkins Motor Lines, Inc.*, 799 F.2d 697, 703 (11th Cir. 1986)).

Amendment. Those decisions have consistently held that a liability limitation set forth in a separate tariff or schedule is enforceable under the Amendment if four elements are satisfied: (i) the tariff or schedule is "made ... available [to shippers] upon request"; (ii) the shipper had a "reasonable opportunity" to negotiate for a different liability limit; (iii) the carrier obtained the "shipper's agreement as to the [selected] liability limit"; and (iv) the carrier issues a "bill of lading prior to moving the shipment that reflects any such agreement." *OneBeacon*, 634 F.3d at 1099-100; see also, *e.g.*, *Rohner Gehrig Co.* v. *Tri-State Motor Transit*, 950 F.2d 1079 (5th Cir. 1992) (en banc); *Hughes* v. *United Van Lines, Inc.*, 829 F.2d 1407 (7th Cir. 1987). In none of these cases, or any other, has a court suggested that the shipping contract must, in addition to these elements, also describe the liability limitation or incorporated tariff with heightened "specificity," as mandated by the panel decision below. Pet. App. 12a-13a.

The panel majority nevertheless suggested that this requirement is consistent with these opinions, insofar as it serves to ensure that the shipper actually will review the liability limitation, in satisfaction of the "reasonable opportunity" element. Pet. App. 13a. This reflects a fundamental misconception of the statutory prerequisites applied by other circuits. Those decisions do not demand that the carrier ensure that the shipper actually reads or understands the liability limitation clause, but require only that the carrier provide the shipper with an "opportunity" for review that is "reasonable" under the circumstances. *E.g.*, *OneBeacon*, 634 F.3d at 1099-100; see also *Hughes Aircraft Co.* v. *N. Am. Van Lines, Inc.*, 970 F.2d 609, 612-13 (9th Cir. 1992). That opportunity is provided, they recognize, when the shipping con-

tract expressly states that the terms of a governing tariff or freight schedule are incorporated, and the carrier makes that document available to the shipper upon request. *Hughes*, 970 F.2d at 612-13. The burden then falls on the shipper to take advantage of that opportunity and request the tariff, if it wishes to review the terms. *Id.* Regardless of whether the shipper does so, however, the carrier has fulfilled its obligation and may assume, if the shipper executes the contract, that the shipper has knowledge of—and has agreed to be bound by—any liability limitation included in that document. *Id.*[7]

This result was clearly what Congress intended, as demonstrated by the 1995 amendments to the statute. Those amendments, passed in response to court decisions suggesting that shippers could not be bound by liability limits in tariffs because they were no longer publicly filed with the ICC, imposed upon carriers a duty to make tariffs and other freight schedules available to shippers and the public "on request." 49 U.S.C. § 11101(b); see also H.R. Rep. No. 104-422. The express purpose of this requirement was to ensure that shippers would have an opportunity to review those terms and, thereby, "return to ... the ... situation where *shippers* were responsible for determining the conditions imposed on the transportation of a shipment" and "the carrier was under no obligation to specifically notify the shipper of the conditions or terms of the tariff." H.R. Rep. No. 104-422, at 223.

[7] It is, of course, hornbook law that a party who signs an agreement after a reasonable opportunity to review its terms is bound by those terms notwithstanding any *post hoc* claim of ambiguity or lack of knowledge, especially where, as here, the same experienced and sophisticated party drafted the agreement now being challenged. See, *e.g.*, *Mech. Tech.*, 776 F.2d at 1087-88.

The heightened specificity standard adopted by the panel thus imposes on carriers the very obligation—"to specifically notify the shipper of the conditions or terms of the tariff"—that Congress intended to eliminate. *Id.* The demonstrable conflict between the panel's decision and the statute, as interpreted by other circuits (and understood by Congress), further supports review.

3. In addition to these inter-circuit conflicts, the panel's opinion breaks from a long line of this Court's decisions addressing the Carmack Amendment. For more than a century, this Court has consistently held that shippers "are charged with notice" of the terms set forth in a tariff governing a shipment and that they—no less than carriers—"must abide by [those terms]" once the bill of lading issues. *Maxwell*, 237 U.S. at 97.[8] While this rule is "undeniably strict," and may in some circumstances work to the detriment of a shipper, it must be enforced in all cases because "it embodies the policy which has been adopted by Congress." *Id.*

The seminal opinion in *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913), is illustrative of this approach. The Court held there that a shipper is bound by the declared value of the freight as stated in the bill of lading, and cannot thereafter recover a greater amount if the shipment is damaged during transport, even if the shipper can show definitively that the actual damages exceed the declared value. *Id.* at 510-12. In language equally applicable here, the Court explained that "it would be unjust and unreasonable, and would be repugnant to the soundest

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[8] *See also Maislin*, 497 U.S. at 127; *Louisville & Nashville R.R.* v. *Cent. Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *Kan. City S. Ry.* v. *Carl*, 227 U.S. 639, 653 (1913).

principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." *Id.* at 510-11 (quoting *Hart*, 112 U.S. at 340). Relying on the same reasoning, subsequent cases have reiterated that under the Carmack Amendment a shipper is bound by the terms set forth in the bill of lading and applicable tariff, and cannot avoid those obligations through claims of "ignorance" or "inequity." *Maislin*, 497 U.S. at 127, 131-32; *Maxwell*, 237 U.S. at 97; see *Adams Express*, 226 U.S. at 511-12.

These principles compel a result in this case contrary to that reached by the Fourth Circuit. The bill of lading at issue expressly incorporated the terms of the governing "tariff or classification"—the applicable CSX price schedule—which unambiguously limited CSX's liability to $25,000. Pet. App. 7a-11a, 20a-22a. ABB indisputably could have but did not negotiate for a higher limit or seek full coverage (as it did in prior bills of lading with CSX and other carriers), perhaps because CSX would have demanded a higher shipping rate in response. *Id.*[9] Having obtained the benefit of a lower shipping rate, ABB cannot now avoid the obligation that accompanied it. To hold otherwise, as the Fourth Circuit did, is to allow ABB "to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss," in contravention of *Adams Express* and a host of other decisions of this

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[9] To secure the lower shipping rates associated with limited liability coverage, while still protecting their investment, shippers of high-value freight (like ABB) may and often do obtain insurance through a third-party insurer—which is typically more cost-effective than paying a full liability freight rate. *See* Pet App. 47a.

Court. 226 U.S. at 510-11; see also, *e.g.*, *Maislin*, 497 U.S. at 127.

Nothing in the statute, or any of the subsequent amendments, warrants such a departure from this Court's decisions, or reflects a fundamental shift in congressional purpose in favor of affording maximum protection to shippers at the expense of carriers. Cf. Pet. App. 6a, 19a (characterizing that purpose as "[to] protect[ ] shippers from attempts by carriers to avoid liability for damage to cargo" and "impose[ ] the risk of error on one particular party, the carrier, to the exclusion of the other party, the shipper"). Quite the contrary, as discussed above, Congress explicitly signaled in the most recent statutory amendments its expectation that carriers would *not* be obliged "to specifically notify" shippers of the terms of an incorporated tariff; so long as the tariff or schedule is available upon request, the shipper is deemed to have knowledge of its terms. H.R. Rep. No. 104-422, at 223; cf., *e.g.*, *Kirby*, 543 U.S. at 24 (it is not the role of the courts to superimpose additional requirements on top of the plain meaning of a statute and basic principles of contract law). To address this conflict between the decision below and this Court's precedent, and also to resolve the divide among the circuits on these issues, review should be granted.

II. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL NATIONAL IMPORTANCE CONCERNING THE INTERSTATE SHIPPING SYSTEM.

Intervention by this Court is especially warranted given the importance of this case to the interstate shipping system. That system transports over $1.3 trillion worth of freight each year, serving each and every industry and commercial sector, and constitutes the backbone of the U.S. economy. See Fed.

Highway Admin., U.S. Dep't Transp., *Freight Facts and Figures 2011*, at 10 tbl.2-2 (2011). To function, it relies on the certainty and stability provided by uniform application of the Carmack Amendment. See, *e.g.*, *Maislin*, 497 U.S. at 127. This was, indeed, the paramount purpose of the statute. In order to avoid the "uncertainties and diversities of rulings" that previously plagued interstate shipping, and ensure that shippers and carriers could structure their agreements with knowledge and confidence as to how they would be interpreted and enforced, Congress enacted the Carmack Amendment to establish a "uniform rule" for shipping arrangements that would be consistently applied in courts throughout the Nation. *Adams Express*, 226 U.S. at 505-06.

That uniformity, largely achieved over the last century, is subverted by the decision below. Under the heightened specificity standard adopted by the Fourth Circuit, liability limitations in shipping contracts that would be fully enforceable in other jurisdictions—including under the law of the jurisdiction in which the contract was drafted and executed—will now be unenforceable in that circuit. See Pet. App. 24a-26a. Without knowing where future litigation may occur, neither carriers nor shippers will be able to predict with any certainty whether or how an incorporated liability limitation will be applied. This is precisely the situation the Carmack Amendment was intended to prevent: where "it [is] practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know ... what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another." *Adams Express*, 226 U.S. at 505-06. In short, the decision below re-introduces the very "un-

certainties and diversities of rulings" the statute was enacted to end. *Id.*

These uncertainties will be particularly acute, and most damaging, for carriers currently operating under shipping contracts with incorporated liability limitation clauses. Such clauses provide substantial benefits for carriers, as they allow for better management of risk and planning of future operations and investments, and they are often negotiated by carriers in exchange for substantial reductions in shipping charges or other concessions to shippers. See, *e.g.*, *Maislin*, 497 U.S. at 127; *Adams Express*, 226 U.S. at 509-10; *OneBeacon*, 634 F.3d at 1099-100. Now, however, under the Fourth Circuit's standard, these carriers will routinely be denied the benefit of their bargain, notwithstanding the parties' settled contractual expectations that agreed-upon incorporated liability limitations would be fully enforceable. Pet. App. 12a-14a, 19a. The result, in effect, is a mass modification of shipping contracts and an immediate, exponential increase in carriers' liability exposure. In this case alone, by virtue of the Fourth Circuit's decision, CSX's potential exposure under its shipping contract with ABB jumped from $25,000 to more than $1 million—a nearly 50-fold increase. See *id.* at 1a-2a.

The sums rise significantly when one considers the volume of interstate shipping that passes through the Fourth Circuit on a regular basis. All of the major railways and highways between the major ports and cities of the northeast and the south pass through that circuit, and likewise much of the traffic between the east and west coasts touches its jurisdiction at some point. See Bureau of Transp. Statistics, U.S. Dep't of Transp., *Transportation Statistics Annual Report 2012*, at 33-48 (2013). Given the generous

venue provisions of the Carmack Amendment, this means that a carrier handling such a shipment may potentially be subject to suit in the Fourth Circuit. See 49 U.S.C. §§ 11706(d), 14706(d) (permitting claims to be brought, *inter alia*, in any "State through which the defendant carrier operates"). These carriers can therefore no longer rely on the enforceability of liability limitations incorporated into their shipping agreements, even if those limits would assuredly be enforceable in the jurisdiction in which carrier is based or where the contract was executed (as in the Second and Eleventh Circuits).

Indeed, because the Fourth Circuit's standard could allow a shipper to recover awards many multiples greater than that available elsewhere, it seems certain that shippers will bring their claims in that jurisdiction whenever the shipment is connected in any way with it (as will very often be the case). The Fourth Circuit will become a haven and hub for litigation under the Carmack Amendment.

The panel decision, in addition to centralizing these cases in the Fourth Circuit, will also incentivize further Carmack Amendment litigation. The heightened specificity standard was applied in this case to invalidate a liability limitation clause, but nothing will stop shippers from arguing in future cases that it should be applied to invalidate other terms in a tariff or freight schedule incorporated by reference in a shipping contract. See Pet. App. 31a-32 & n.10. Indeed, shippers will have every incentive to do so, given that those terms most often serve to protect the carrier's interest. See, *e.g.*, *Kirby*, 543 U.S. at 18-21. The end result will be that tariffs—which have been used in the shipping industry for more than a century to define the terms of shipping arrangements (and indeed were congressionally mandated through the

1990s), *supra* pp. 4-8—may no longer be relied upon by carriers, pressuring them to transition to a new means of doing business. The ensuing costs, associated with both increased litigation and the modification of long-standing business practices, will be enormous, and will eventually be borne by consumers.

All of this can and should be avoided. The Court should grant certiorari to review the decision of the Fourth Circuit, resolve the conflicts among the Circuits over the interpretation of the Carmack Amendment, and provide much-needed clarification for shippers and carriers across the country.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HYMAN HILLENBRAND
HILLENBRAND, O'BRIEN & SOLOMON, LLP
8751 West Broward Boulevard, Suite 106
Fort Lauderdale, FL 33324
(954) 652-0100

CARTER G. PHILLIPS*
QUIN M. SORENSON
CLAYTON G. NORTHOUSE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

October 7, 2013

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 12-1674

ABB INC.,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

TRANSPORTATION AND LOGISTICS COUNCIL, INC.,
Amicus Supporting Appellant.

Argued: March 21, 2013
Decided: June 7, 2013

Before AGEE, KEENAN, and FLOYD, Circuit Judges

Opinion

Vacated in part and remanded by published opinion. Judge KEENAN wrote the opinion, in which Judge FLOYD joined. Judge AGEE wrote a separate opinion concurring in part and dissenting in part.

BARBARA MILANO KEENAN, Circuit Judge:

In March 2006, rail carrier CSX Transportation, Inc. (CSX) transported an electrical transformer worth about $1.3 million from shipper ABB Inc.'s plant in St. Louis, Missouri to a customer in Pitts-

burgh, Pennsylvania (the March 2006 shipment). ABB Inc. (ABB) later filed a complaint in the district court alleging that the transformer was damaged in transit, and that CSX was liable for over $550,000, the full amount of the damage. CSX denied full liability, and alternatively contended that even if the court found CSX liable for the cargo damage, the parties had agreed in the bill of lading to limit CSX's liability to a maximum of $25,000.

The district court held that the parties had limited CSX's potential liability in the bill of lading to $25,000. The parties thereafter entered into a consent judgment, reserving ABB's right to appeal the district court's resolution of the liability limit issue. Upon our review, we conclude that the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706, subjected CSX to full liability for the shipment, and that the parties did not modify CSX's level of liability by written agreement as permitted in that statute. We therefore vacate the portion of the district court's judgment limiting any liability on the part of CSX to $25,000.

I.

We begin with a discussion of the complex regulatory scheme governing interstate freight shipments, and the historical context in which the shipment in this case occurred. We also address the role of the Carmack Amendment, which restricts carriers' ability to limit their liability for cargo damage.

A.

In 1887, Congress enacted the Interstate Commerce Act (ICA), 24 Stat. 379, to regulate the transportation industry. *Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 183 (3d Cir.2006).

The Interstate Commerce Commission (ICC) initially was designated to administer this regulatory regime, but was replaced in 1995 by the Surface Transportation Board. *Id*. at 183, 186; ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803, 932-34. Among other things, the ICC "regulated the railroad industry by requiring rates to be 'reasonable and just' and prohibited certain railroad practices, such as rate discrimination [and] price fixing," and eventually expanded to include the regulation of motor vehicle transportation. *Emerson*, 451 F.3d at 183.

Until 1995, carriers were required to file their rates, or "tariffs," publicly with the ICC. *Tempel Steel Corp. v. Landstar Inway, Inc*., 211 F.3d 1029, 1030 (7th Cir.2000); *Comsource Indep. Foodserv. Cos. v. Union Pac. R.R*., 102 F.3d 438, 442 (9th Cir.1996). Under this scheme, "the filed rate govern[ed] the legal relationship between shipper and carrier," and the carrier could not deviate from the published tariff. *Maislin Indus., U.S. v. Primary Steel*, 497 U.S. 116, 119-20, 126, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). For these reasons, shippers and carriers generally were charged with notice of the terms that were required to be included in the carrier's published tariffs. *See id*. at 127, 110 S.Ct. 2759 (citing *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915)).

In 1995, in an effort to ease regulatory burdens on the transportation industry, Congress abolished the requirement that tariffs be filed as public documents. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803; *Tempel Steel Corp*., 211 F.3d at 1030. The term "tariff," even when still used by shippers and carriers "out of habit," is now merely a contractual

term with "no effect apart from [its] status as [a] contract[ ]."[1] *Tempel Steel Corp.*, 211 F.3d at 1030.

B.

The Carmack Amendment, 49 U.S.C. § 11706,[2] originally enacted in 1906 as an amendment to the ICA, "creates a national scheme of carrier liability for goods damaged or lost during interstate shipment under a valid bill of lading."[3] *5K Logistics, Inc. v. Daily Express, Inc.*, 659 F.3d 331, 335 (4th Cir.2011) (citation and internal quotation marks omitted). The statute requires that a rail carrier issue a bill of lading for property it transports, and that a carrier is liable to the "person entitled to recover" under the bill of lading "for the actual loss or injury to the prop-

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[1] At the time of the 1995 deregulation, Congress imposed on rail carriers a new obligation to make their rates available to shippers, in lieu of the public-filing requirement. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 830 (codified at 49 U.S.C. § 11101). Section 11101(b) provides:

> A rail carrier shall also provide to any person, on request, the carrier's rates and other service terms. The response by a rail carrier to a request for the carrier's rates and other service terms shall be—
>
> (1) in writing and forwarded to the requesting person promptly after receipt of the request; or
>
> (2) promptly made available in electronic form.

[2] This appeal involves rail carriers, which are subject to the provisions of 49 U.S.C. § 11706. Today, motor carriers are also subject to a separate provision of the Carmack Amendment, codified at 49 U.S.C. § 14706.

[3] A bill of lading "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." *Norfolk S. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 18-19, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004).

erty" caused by a carrier.[4] 49 U.S.C. § 11706(a). The Carmack Amendment specifies that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier." *Id*.

Subsection (c) of the statute provides only a limited exception to full carrier liability:

> (1) *A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection*. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void. . . .
>
> (3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which—
>
> > (A) *the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier*. . . .

49 U.S.C. § 11706(c) (emphasis added). In other words, the Carmack Amendment "constrains carriers' ability to limit liability by contract," *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp*., — U.S. —, 130 S.Ct. 2433, 2441, 177 L.Ed.2d 424 (2010), by requiring that a rail

[4] To establish a prima facie case of carrier liability under the Carmack Amendment, a shipper must show (1) delivery of the goods to the carrier in good condition; (2) the cargo's arrival in damaged condition; and (3) the amount of damages. *Oak Hall Cap & Gown Co. v. Old Dominion Freight Line, Inc*., 899 F.2d 291, 294 (4th Cir.1990).

carrier remains fully liable for damage caused to its freight unless the shipper has agreed otherwise in writing. 49 U.S.C. § 11706(a), (c); *see also Emerson*, 451 F.3d at 186 ("[A] carrier's ability to limit [its] liability is a carefully defined exception to the Carmack Amendment's general objective of imposing full liability for the loss of shipped goods.") (quoting *Carmana Designs Ltd. v. N. Am. Van Lines, Inc*., 943 F.2d 316, 319 (3d Cir.1991)) (internal quotation marks omitted).[5] The Carmack Amendment thus protects shippers from attempts by carriers to avoid liability for damage to cargo under the carriers' control, and "relieve[s] cargo owners of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." *Kawasaki*, 130 S.Ct. at 2441 (citation omitted).

To determine whether a carrier has limited its liability consistent with the strictures of the Carmack Amendment, courts have applied a four-part test, under which carriers must: (1) provide the shipper, upon request, a copy of its rate schedule;[6] (2) "give

[5] In this opinion, we reference cases involving the transportation of goods by motor vehicles under Section 14706, as well as cases involving rail carriers under Section 11706. As relevant here, pursuant to Section 14706, motor carriers are by default liable for "the actual loss or injury to the property caused" by the carrier, but the carrier's liability may be limited "to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 14706(a)(1), (c)(1)(A).

[6] Before deregulation, the first part of this test required that the carrier have maintained a tariff with the ICC. *OneBeacon Ins. Co. v. Haas Indus*., 634 F.3d 1092, 1099 (9th Cir.2011)

the shipper a reasonable opportunity to choose between two or more levels of liability; (3) obtain the shipper's agreement as to his choice of carrier liability limit; and (4) issue a bill of lading prior to moving the shipment that reflects any such agreement." *OneBeacon Ins. Co. v. Haas Indus.*, 634 F.3d 1092, 1099-1100 (9th Cir.2011); *see also Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 137 (4th Cir.1967) (explaining the requirement of "reasonable notice" to choose between levels of liability). The Carmack Amendment's exception allowing for limited liability is "a very narrow exception to the general rule" imposing full liability on the carrier. *Toledo Ticket Co. v. Roadway Express*, 133 F.3d 439, 442 (6th Cir.1998) (citing Carmack Amendment for motor carriers, as previously codified at 49 U.S.C. § 10730). Courts "will [ ] carefully scrutinize[ ]" any alleged limitation of liability "to assure that the shipper was given a meaningful choice and exercised it as evidenced by a writing." *Acro Automation Sys. v. Iscont Shipping*, 706 F.Supp. 413, 416 (D.Md.1989).

II.

In its complaint filed against CSX, ABB alleged that CSX was liable for the "actual loss or injury arising from the damage to the [t]ransformer" under the Carmack Amendment. ABB also asserted state law claims for negligence and breach of contract.

CSX did not admit liability, but raised as an affirmative defense that any liability on its part was limited to a maximum of $25,000.[7] CSX argued that

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(citing *Hughes Aircraft Co. v. N. Am. Van Lines*, 970 F.2d 609, 611-12 (9th Cir.1992)).

[7] CSX also argued in the district court that the parties had entered into a private shipping contract governed by 49 U.S.C.

the bill of lading (BOL) executed by ABB had incorporated by reference a $25,000 liability limitation contained in a separate price list used by CSX.

The district court did not consider the issue whether ABB had established a prima facie case of liability against CSX but, on submissions by the parties, proceeded to consider the liability limitation issue. The court awarded summary judgment to CSX based on its defense that it had limited its liability. The court also reasoned that the Carmack Amendment did not apply to the shipment because the shipper, rather than the carrier, had drafted the BOL. Pursuant to the consent judgment entered into by the parties, ABB timely appealed from the district court's determination regarding CSX's limitation of liability.[8]

Before beginning our analysis of the Carmack Amendment, we describe the two documents central to our resolution of this appeal. First, the BOL governing the March 2006 shipment is a partially completed copy of ABB's standardized bill of lading. The BOL included general information about the shipment, such as the date of transport, pick-up and destination locations, and scheduled transportation route. In the space on the form labeled "product value," ABB's traffic manager, Brian Brueggeman, entered "$1,384,000." Although the box labeled "prepaid" (compared with "collect") was marked, the BOL did not include a price for the shipment or indicate the level of liability assumed by CSX for lost or

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§ 10709, but assumed for purposes of summary judgment that the shipment was subject to the Carmack Amendment.

[8] The district court also dismissed ABB's state law claims, which decision is not at issue in this appeal.

damaged cargo.[9] The space labeled "rate authority" was left blank, as was the box that included the following pre-printed language:

> NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
>
> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding $——.[10]

The BOL also included certification language, which provided in part:

> It is mutually agreed . . . that every service to be performed hereunder shall be subject to all the terms and conditions the Uniform Domestic Straight Bill of Lading set forth . . . in Uniform Freight Classification in effect on the date hereof, if this is a rail or a rail-water shipment . . .
>
> Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the *classification or tariff which governs the transportation of this shipment*, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

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[9] In his deposition testimony, Brueggeman stated that he thought that ABB would receive full liability coverage by declaring the value of the transformer in the body of the BOL, although he did not include a notation to this effect in the document.

[10] ABB employees were unable to edit or enter any information into this "declared value box" due to a feature of the computer program.

(emphasis added).[11] The BOL was signed by Brueggeman.

The second document at issue in this appeal is CSX Price List 4605, which was "issued" by CSX on November 18, 2005 and became "effective" on December 14, 2005. This twelve-page document sets forth numerous rules applicable to CSX's transportation of machinery, such as, for example, procedures related to billing and to the loading and unloading of cargo. Relevant to this appeal is the section of Price List 4605 entitled "price restrictions." This section lists eighteen provisions, including the following:

> Carriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment. Full liability coverage is only available by calling your sales representative for a specific quote.

CSX's corporate representative, Joseph McCauley, testified in his deposition that Price List 4605 does not provide varying rates associated with different levels of liability, and that in order to receive coverage for full liability under the list, a shipper must negotiate a rate directly with the carrier.

Neither Brueggeman nor his predecessor in ABB's traffic manager position, Craig Steffey, was aware of the existence of Price List 4605 prior to the March 2006 shipment. During his tenure, Steffey had obtained rate information from CSX by contacting the carrier directly and obtaining a quote specific to the intended shipment.

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[11] In addition to the reference to a "tariff" in the certification, the following language appeared at the top of the BOL: "RECEIVED Subject to the Classifications and *Lawfully filed tariffs* in effect on the date of the issue of this Bill of Lading" (emphasis added).

With respect to the March 2006 shipment at issue in this appeal, Brueggeman sought rate information on multiple occasions without success from CSX personnel and from the CSX website,[12] and thus was unable to complete the space designated on the BOL for the "rate authority."[13] Brueggeman explained that because he had been unable to obtain the rate authority in advance, he would only learn the price of the shipment when he eventually received an invoice from CSX.

III.

ABB argues that the district court erred in failing to apply the Carmack Amendment to ABB's shipment. According to ABB, because the parties did not agree in writing to limit the carrier's liability, CSX is liable under the plain language of the Carmack Amendment for the full value of the cargo damage.

In response, CSX argues that ABB, as the drafter of the BOL, is not entitled to the protection of the Carmack Amendment and that, regardless, the BOL incorporated by reference the limitation of liability

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[12] Although McCauley claimed that Price List 4605 was available on the CSX website, Brueggeman testified that he could not recall ever seeing a price list, despite "look[ing] all over the website." In any event, it is undisputed that shippers could not request a full liability quote from CSX through the website.

[13] At oral argument and in portions of its briefing, CSX appears to contest that Brueggeman attempted to obtain rate information for the shipment. Yet elsewhere in its briefing, CSX acknowledges that Brueggeman consulted the CSX website and made inquiries to certain CSX personnel. Despite CSX's allusions to the contrary, the record clearly indicates that Brueggeman affirmatively sought rate information from CSX, to no avail.

included in Price List 4605.[14] We disagree with CSX's arguments.

We nevertheless observe at the outset that ABB's problem in this case is partly of its own making. The record reflects that Brueggeman did not exercise due diligence in performing a key aspect of his job, namely, negotiating and obtaining rate and liability information for the shipment of very expensive equipment.[15] We also recognize that ABB could have prevented many of the problems that occurred in this case not only by properly negotiating the shipping rate, but also by revising its standardized bill of lading to exclude outdated references to "tariffs" and "classifications" that were part of the pre-1995 regulatory scheme.

Despite ABB's failures, however, the Carmack Amendment imposed the burden of securing limited liability on the carrier, CSX, not on the shipper, ABB. 49 U.S.C. § 11706; *Acro Automation Sys*., 706 F.Supp. at 416. The plain language of the statute provides that in the absence of a clear, written agreement by the shipper, the carrier is subject to full liability for actual losses. *See* 49 U.S.C. § 11706(a), (c).

To overcome this default posture of full liability imposed by the Carmack Amendment, the carrier and the shipper must have a written agreement that is sufficiently specific to manifest that the shipper in

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[14] Based on the facts of this case, we are not confronted with a possible "written declaration of the shipper" as an exception to the imposition of full liability under the Carmack Amendment. 49 U.S.C. § 11706(c)(3)(A). Accordingly, we address only the "written agreement" exception. *Id*.

[15] We note that CSX's conduct also was culpable, given CSX's lack of accessibility to shippers over an extended period of time.

fact agreed to a limitation of liability. "[A] carrier cannot limit liability by implication. There must be an absolute, deliberate and well-informed choice by the shipper." *Acro Automation Sys.*, 706 F.Supp. at 416 (citation omitted). Without a rule requiring at least some specificity in a written agreement, the shipper would not have "a reasonable opportunity to choose between two or more levels of liability," *OneBeacon Ins. Co.*, 634 F.3d at 1099, but instead would be automatically and unwittingly subject to the carrier's unilateral choice of a rate authority. *Cf. N.Y., New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 135-36, 73 S.Ct. 986, 97 L.Ed. 1500 (1953) ("Binding [the shipper] by a limitation which [the shipper] had no reasonable opportunity to discover would effectively deprive [the shipper] of the requisite choice; such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts.").

We disagree with the district court's conclusion that, as a general matter, the Carmack Amendment does not apply when the shipper drafts the bill of lading. The text of the Carmack Amendment imposes full liability on carriers, without regard to which party prepared the bill of lading. The statute provides that a carrier's failure to issue a bill of lading "does not affect the liability of a rail carrier." 49 U.S.C. § 11706(a).

In this case, the parties did not reach a written agreement to limit CSX's liability and, accordingly, the Carmack Amendment operated to impose full liability on CSX. On its face, the BOL governing the March 2006 shipment was silent regarding the extent of CSX's liability. The space on the BOL labeled "rate authority," where a notation regarding rate and

liability normally would be listed, was left blank. Moreover, the BOL did not contain any references to an identifiable classification, a rate authority code, a price list, or any other indication that the carrier assumed only limited liability.

CSX contends, nonetheless, that Price List 4605 is incorporated by reference into the BOL through standardized language appearing on the BOL, indicating that the shipper agreed to the terms and conditions in "the classification or tariff which governs the transportation of this shipment." In CSX's view, this standardized language is adequate to meet the "written agreement" exception for avoiding full liability under the Carmack Amendment.

We cannot endorse CSX's position urging limited liability under these circumstances, because the language in the BOL does not specifically reference Price List 4605. Under CSX's proposed rule, shippers would be charged with notice of a private price list created by the carrier, even when the list was not filed for public inspection, the shipper had not previously shipped cargo pursuant to that list, and the shipper had sought the pricing information unsuccessfully from the carrier before drafting the BOL. Under such a theory, the shipper's "knowledge" of the list could be proved solely by use of the generic and outdated word "tariff" being employed as standard language in a bill of lading.

Prior to deregulation, courts reasonably held shippers to constructive knowledge of a published tariff based on a generic reference to the tariff in a bill of lading. *See Mech. Tech. Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087-89 (2d Cir.1985). Today, however, carriers are not required to file such public tariffs. *Tempel Steel Corp.*, 211 F.3d at 1030. To

permit a carrier to assume that a shipper is familiar with a carrier's price list, without any manifestation of that familiarity in the bill of lading or in an external agreement limiting the carrier's liability, would be contrary to the Carmack Amendment's command that a carrier may only limit liability pursuant to an express, written agreement with the shipper. 49 U.S.C. § 11706(c).

Extended to its logical extreme, CSX's proposed rule would encourage absurd results. One such example would be a situation in which the bill of lading references a general "tariff," but does not specify a particular rate authority or other code indicating the applicable rate and liability level. In the absence of publicly filed tariffs, or a citation to a specific rate authority or code, a carrier could change unilaterally its level of liability, unbeknownst to the shipper, by altering its price list a day before the shipment takes place.

Additionally, we observe that a decision in favor of CSX would be required if Price List 4605 had been referenced specifically in the BOL, even if ABB had not actually been aware of the limitation of liability contained in that price list. In such a circumstance, the shipper reasonably would be charged with notice of the meaning of a precise, currently applicable term that the shipper included in the BOL.

The Eleventh Circuit's decision in *Siren, Inc. v. Estes Express Lines*, 249 F.3d 1268 (11th Cir.2001), on which the district court and CSX have relied, is distinguishable on this basis. In *Siren*, the shipper prepared the bill of lading and noted twice that the shipment would move under "Class 85," a term understood in the trucking industry as limiting liability to a certain amount per pound of cargo,

although the shipper maintained it had no actual knowledge that this class designation provided such a limitation of liability. 249 F.3d at 1269, 1272. Nevertheless, the shipper was aware that it had received a significant discount from the carrier's full liability rate for the shipment in question, and that the rate it received was based on the "Class 85" designation. *Id*. The Eleventh Circuit concluded that, because "[the shipper] drafted the bill of lading, [the shipper] chose to use the term 'Class 85', [the shipper] did not rebut [the carrier's] assertion at trial that 'Class 85' included a limiting aspect, [the shipper] knew 'Class 85' determined the freight rate charged, and [the shipper] knew that it received a 62% discount from [the] full freight rate," the shipper could not avoid the limitation of liability it had included in the contract, because it was not "proper or necessary to protect shippers from themselves." *Id*. at 1271, 1273.

We agree with the Eleventh Circuit's determination that, by including a specific class designation in the bill of lading, the shipper was bound to the terms and conditions associated with that class designation. *Cf. Hughes Aircraft Co. v. N. Am. Van Lines, Inc*., 970 F.2d 609, 612 (9th Cir.1992) (holding that a shipper had "reasonable notice and an opportunity to make a deliberate, thoughtful choice in selecting" a limit of liability when the shipper drafted the bill of lading and negotiated its terms). In the present case, however, the BOL is entirely silent regarding any current rate, classification, or other specific authority governing the shipment. There also is no evidence that the parties had a written agreement establishing a limit of liability separate from the BOL. Therefore, as discussed above, we decline to conclude that a shipper should be held to notice of a privately held price

list based only on generic and ambiguous language referencing a "tariff" or "classification."[16]

Our conclusion that the parties did not agree to a liability limitation is not altered by CSX's reliance on its past course of dealing with ABB. The Carmack Amendment's requirement of a written agreement undermines CSX's argument that the parties' alleged course of dealing can serve as a substitute for a written limitation of liability for a particular shipment. *See Mooney v. Farrell Lines, Inc.*, 616 F.2d 619, 626 (2d Cir.1980) (declining to limit a carrier's liability by evidence of the parties' course of dealing, when the liability limit was not included in the bill of lading); *cf. Camar Corp. v. Preston Trucking Co.*, 18 F.Supp.2d 112, 115 (D.Mass.1998) (rejecting argument that the shipper's sophistication and the parties' course of dealing evidenced an "absolute, deliberate and well-

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[16] We disagree with the dissent's contention that the facts of this case are "indistinguishable" from the facts in *Werner Enters. v. Westwind Mar. Int'l, Inc.*, 554 F.3d 1319 (11th Cir.2009). *Post* at — – —. In *Werner*, the invoice for the shipment expressly notified the shipper of the potential for a limitation of liability. The invoice provided:

> Third parties to whom the goods are entrusted may limit liability for loss or damage; the Company will request excess valuation coverage only upon specific written instructions from the Customer, which must agree to pay any charges therefore; in the absence of written instructions or the refusal of the third party to agree to a higher declared value, at Company's discretion, the goods may be tendered to the third party, subject to the terms of the third party's limitations of liability and/or terms and conditions of service.

554 F.3d at 1322. In the present case, however, the BOL did not contain any such limiting language. In light of this material distinction, we conclude that *Werner* is inapposite.

informed choice by the shipper" to limit the carrier's liability, in the absence of a bill of lading or other written agreement).

Moreover, the present record lacks any evidence that ABB previously had shipped under the terms of Price List 4605, or otherwise was familiar with that list. Of the seventy-three total bills of lading predating March 2006 in the record, none references Price List 4605. Indeed, Price List 4605 was issued in November 2005 and became effective in December 2005, only three months before the shipment at issue in this case, and there is no evidence that ABB shipped any cargo pursuant to that list in the interim three-month period.

Of the nine ABB-CSX bills of lading included in the record, several different rate authority codes were used, and the record contains no evidence regarding the limits of liability associated with those codes.[17] Steffey, Brueggeman's predecessor in the traffic manager position, testified that he entered these rate authorities on the bills of lading after being instructed to do so by CSX representatives with whom he had negotiated rates for particular shipments, not because he was generally familiar with CSX price lists. Counsel for CSX also conceded at oral argument that CSX's price lists are regularly changing, further undermining the contention that ABB should have been familiar with Price List 4605 at the time of the shipment.[18]

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[17] On one of the ABB-CSX bills of lading, Steffey included the notation "FULL LIABILITY REQUIRED!!!," at the direction of a CSX marketing representative.

[18] The dissent broadly asserts that ABB has admitted that in its past dealings with CSX, it "always had to expressly request

We appreciate the common sense observation that a shipper drafting an imprecise bill of lading should not stand to benefit from its own lack of precision, as well as the district court's reflection that such a shipper need not be protected from itself. Nevertheless, we are bound by the express language of the Carmack Amendment, which puts the burden on the carrier to demonstrate that the parties had a written agreement to limit the carrier's liability, irrespective whether the shipper drafted the bill of lading. *See* 49 U.S.C. § 11706(a), (c). The general contract principle that ambiguous contracts be construed against the drafter, *see, e.g.*, *Wheeler v. Dynamic Eng'g*, 62 F.3d 634, 638 (4th Cir.1995), is inapplicable in the face of statutory language that unambiguously imposes the risk of error on one particular party, the carrier, to the exclusion of the other party, the shipper.[19]

Finally, we note that important practical considerations support the conclusion we reach today. Shippers by necessity entrust rail carriers with the safekeeping of expensive cargo and, under the Carmack Amendment, are entitled to presume that carriers will be held fully responsible for damage incurred during transit unless otherwise agreed. Our ruling

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full liability coverage in order to receive it." *Post* at —. We do not discuss the evidence underlying this broad assertion, because any alleged course of dealing prior to CSX's implementation of Price List 4605 does not bear on the question whether the parties had memorialized in writing an agreement that the March 2006 shipment would proceed under Price List 4605.

[19] For the same reason, we disagree with the dissent's reliance on the state law principle that a unilateral mistake does not justify rescission of a contract under the circumstances of this case. *Post* at — (citing *Kassebaum v. Kassebaum*, 42 S.W.3d 685, 693 (Mo.Ct.App.2001)).

encourages parties to employ precise bills of lading, which reflect fully and specifically the parties' choice of liability terms, and to memorialize these terms in writing as Congress intended by passage of the Carmack Amendment. *See* 49 U.S.C. § 11706.

IV.

In sum, we conclude that the district court erred in awarding summary judgment in favor of CSX on its claimed liability limitation of $25,000. We therefore vacate the portion of the district court's judgment fixing that liability limitation and remand the case for further proceedings consistent with this opinion.

VACATED IN PART AND REMANDED.

AGEE, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion except as to those parts of Sections III and IV that conclude that the district court improperly granted CSX's[1] motion for partial summary judgment. In my view, both the record and circuit precedent support the grant of partial summary judgment in favor of CSX. Accordingly, I respectfully dissent as to the above-noted parts of the majority opinion.

I

As a preliminary matter, the BOL in the transaction at issue was drafted by ABB, the shipper, on its own standardized form. The BOL clearly stated,

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[1] For brevity and clarity, I adopt the same conventions as in the majority opinion. For example, I refer to the defendant as "CSX," the plaintiff as "ABB," and the Bill of Lading as "BOL."

> Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

J.A. 121.

CSX's effective rate schedule at the time of the shipment, Price List 4605, clearly stated, "Carriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment. Full liability coverage is only available by calling your sales representative for a specific quote." J.A. 117.

Although ABB employees testified that they were not aware of Price List 4605 prior to drafting the BOL, CSX employees testified that Price List 4605 was published on the CSX company website and was available upon request from any of its sales representatives. ABB does not dispute that Price List 4605 was available on CSX's company website. ABB merely asserts that its employees attempted to contact CSX to obtain a price quote, but had no success in receiving rate information by telephone.[2] Despite its

[2] The majority opinion states that Brueggeman, ABB's employee, attempted to retrieve the price list from CSX's website without success. Majority Op. — & n. 13. Yet contrary to the majority opinion's recitation, Brueggeman testified only that "I looked all over the website and tried to find a lot of different things and I do not ever remember seeing a price list that they made available on the website for me to go and look at." J.A. 236. Brueggeman did not testify that the CSX website did not contain Price List 4605. The record contains no evidence contradicting CSX's claim that Price List 4605 was published and available on its website.

inability to receive price information from CSX, ABB still chose to ship a $1.384 million transformer using CSX as the carrier.

II

A

The majority holds that "the parties did not reach a written agreement to limit CSX's liability and, accordingly, the Carmack Amendment operated to impose full liability on CSX." Majority Op. ——.[3] On this point, we disagree. The record shows that the parties made such a written agreement and that the agreement complies with the requirements of the Carmack Amendment and limits CSX's liability.

The Carmack Amendment allows a commercial rail carrier to limit its liability with the shipper's written consent.

> A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which—
>
> > (A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or

[3] The majority holds that the district court erred in concluding that the Carmack Amendment does not apply when the shipper has drafted the bill of lading. On this point, I agree with the majority opinion; however, for the reasons stated herein, I would hold that ABB does not prevail under the Carmack Amendment.

(B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

49 U.S.C. § 11706(c)(3).

Courts determine whether such written consent is effective under the Carmack Amendment by considering whether the carrier (1) provided a tariff to the shipper upon the shipper's request,[4] (2) "gave the shipper a reasonable opportunity to choose between two or more levels of liability" (at least one of which was full liability coverage), (3) "obtain[ed the] shipper's agreement as to his choice of carrier liability," and (4) "issue[d] a bill of lading prior to moving the

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[4] Prior to deregulation, courts held that a written agreement limiting liability was valid only if the carrier "maintain[ed] a tariff in compliance with the requirements of the Interstate Commerce Commission." *Hughes Aircraft Co. v. N. Am. Van Lines, Inc.*, 970 F.2d 609, 611 (9th Cir.1992). However, Congress eliminated the requirement that carriers file tariffs with the government in 1994. *OneBeacon*, 634 F.3d at 1099. Courts responded by holding that a carrier must provide its tariff to the shipper upon the shipper's request. *Id*. at 1100.

ABB argues that Price List 4605 is not a "tariff" because the term "tariff" refers only to tariffs lawfully filed with the ICC prior to deregulation, rendering that term essentially meaningless in the deregulation era. Yet even after deregulation, rate schedules and price lists, such as Price List 4605, are still commonly referred to as tariffs. *See, e.g.*, *Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834, 841 (11th Cir.2003). As discussed more fully below, post-deregulation, a "tariff" and "schedule of rates" are equivalent terms in the contemporary trade.

shipment." *See OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1099-1100 (9th Cir.2011).[5]

Two of the above requirements are easily disposed of. As to the first requirement, ABB does not dispute that CSX never, in fact, received a request for its rates or tariff from ABB. While ABB asserts that it made several telephone calls to CSX that went unreturned, ABB presented no evidence that it ever made actual contact with an authorized CSX agent to request CSX's rate information. Nor does ABB present any evidence to rebut CSX's testimony that its rate information was available on its website. And courts have concluded that the fourth requirement, that a carrier issue a bill of lading prior to shipment, is also satisfied when the shipper prepares the bill of lading. *See, e.g.*, *Siren, Inc. v. Estes Express Lines*, 249 F.3d 1268, 1273 (11th Cir.2001). Thus, at issue in this case is only whether ABB had a reasonable opportunity to choose between two or more levels of liability and whether ABB agreed in writing to limited liability on the part of CSX.

The record reflects that CSX provided ABB with a reasonable opportunity to choose between different levels of liability coverage. The facts of this case seem indistinguishable from those in *Werner Enterprises v.*

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[5] The Eleventh Circuit has provided that a carrier and shipper may effectively agree to a limitation on liability in compliance with the Carmack Amendment if, for example, "a) the carrier prepares a bill of lading which incorporates the carrier's tariff by reference, b) that tariff contains an applicable limitation of liability provision and c) the shipper agrees to and signs the bill of lading," or if "the shipper . . . prepare[s] a similar bill of lading that the parties agree to and sign." *Siren, Inc. v. Estes Express Lines*, 249 F.3d 1268, 1270 (11th Cir.2001) (emphasis omitted).

Westwind Maritime International, Inc.[6] In *Werner*, the Eleventh Circuit considered whether a shipper was given a reasonable opportunity to elect full liability coverage when the shipping document incorporated by reference the carrier's tariff, which contained a $200,000 limitation on liability. 554 F.3d 1319, 1328 (11th Cir.2009). Notably, the tariff at issue in *Werner* instructed a shipper to specifically notify the carrier when it wanted full liability coverage. *Id*. As in the case at bar, the shipper in *Werner* never expressly requested full liability coverage from the carrier. *Id*. at 1323. The shipper in *Werner* argued that it did not have a meaningful opportunity to request full liability coverage because the carrier's default coverage was limited. *Id*. at 1327. Faced with this argument, the Eleventh Circuit held that the carrier properly limited its liability within the requirements of the Carmack Amendment because it provided the shipper with the right to request full liability coverage. *Id*.

ABB makes the same argument rejected by the Eleventh Circuit in *Werner*—that CSX's default policy of limited liability deprived it of a reasonable opportunity to choose full liability coverage. Yet like the carrier in *Werner*, CSX merely reserved "the right to approve the request [for full liability coverage] and

[6] The majority opinion distinguishes *Werner* on the basis that the contract between the shipper and the carrier suggested that certain third-party carriers could limit their liability by default and that full liability coverage was available only upon a specific written request. While the BOL in this case did not contain such a requirement on its face, it did incorporate this requirement by reference to CSX's "tariff which governs the transportation of this shipment." Moreover, even disregarding ABB's incorporation of CSX's tariff by reference, ABB admits that it was familiar with CSX's default policy of limited liability.

charge a correspondingly higher rate." *Id*. CSX's effective tariff, Price List 4605, incorporated by reference in the BOL, provided shippers with the right to elect full liability coverage.

Although ABB argues that it was not aware of Price List 4605, it is undisputed that CSX's policy requiring its shippers to affirmatively request full liability coverage was not new to Price List 4605 and was not a change in policy from prior dealings between CSX and ABB. In fact, ABB admits that in its past dealings with CSX as well as other carriers, it always had to expressly request full liability coverage in order to receive it and that it was aware that rail carriers limited their liability to amounts as low as $25,000 prior to the shipment at issue. It is therefore easy to conclude that, as in *Werner*, CSX provided ABB with a reasonable opportunity to elect full liability coverage, an opportunity ABB chose not to avail itself of for reasons known only to ABB.[7]

This conclusion is further supported by the fact that ABB drafted the BOL in this case. ABB argues at length that various problems with ABB's own BOL deprived it of a reasonable opportunity to choose full liability coverage. Among other things, ABB argues that its form bill of lading would not allow the employee filling it out to enter a value in the "declared value" box of the form. ABB's entire line of argument, however, completely ignores the fact that ABB created the bill of lading form and tendered it as

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[7] The likely reason ABB did not pursue full liability coverage was the incompetence or negligence, or both, of Brueggeman, its agent. Nonetheless, the salient point for Carmack Amendment purposes is that ABB had the option to pursue full liability coverage and chose to ship its transformer without doing so.

a contract to CSX. While a carrier may not require a shipper to use a form that deprives the shipper of a reasonable opportunity to request full liability coverage, any defects in a form created by a shipper are "no more than a unilateral mistake" that cannot later be used against a carrier. *Sassy Doll*, 331 F.3d at 842; *see Werner*, 554 F.3d at 1328 (stating that, while rejecting a similar claim, the court was "particularly persuaded by the fact that the shipper drafted the bill of lading."); *Norton v. Jim Phillips Horse Transp., Inc.*, 901 F.2d 821, 830 (10th Cir.1989) ("Carriers should not be held to a standard that would impose liability on them due to a unilateral mistake by an experienced shipper."); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1418-19 (7th Cir.1987) ("[O]nce the shipper was aware that the document signed was a contract for transporting his goods, absent fraud or bad faith, the shipper cannot reform the bill of lading without the consent of the carrier on the grounds that they were unilaterally mistaken about the terms of the contract."). ABB cannot rely on its own negligence in introducing its own defective document into the commercial marketplace to avoid the resulting consequences of its contractual covenants. Nothing in the Carmack Amendment requires the carrier to hold the shipper harmless for the shipper's negligence, particularly where the carrier has every reason to take the shipper at its word.

Moreover, ABB agreed in writing to CSX's limitation on liability. On its face, the BOL unambiguously incorporated CSX's effective tariff, which was Price List 4605, and therefore functioned to limit CSX's liability in accordance with the Carmack Amendment. Specifically, ABB certified that it was "familiar with all the terms and conditions . . . set forth in the

classification or tariff which governs the transportation of this shipment" and that it agreed to be bound by those terms and conditions. J.A. 121. The majority opinion treats this unambiguous, binding contract language as inoperative, however, because (1) the reference to the "tariff which governs the transportation of this shipment" is generic boilerplate language and (2) the BOL does not specifically mention Price List 4605.

ABB concedes that the BOL is a valid, binding contract between the parties. The Court must therefore read that contract consistently with the applicable contract law of the state in which the contract was formed. *See CTI/DC, Inc. v. Selective Ins. Co. of Am.*, 392 F.3d 114, 118 (4th Cir.2004). Because ABB asserts that the contract was formed in Missouri and CSX does not argue otherwise on appeal, we apply Missouri law.

Under Missouri law, the parol evidence rule bars courts from considering whether a party to a contract may have "intended anything other than what was written" in the contract document. *See Celtic Corp. v. Tinnea*, 254 S.W.3d 137, 143 (Mo.Ct.App.2008). One party's unilateral mistake cannot serve as the basis of rescission under Missouri law unless the mistake related to a material fact and the other party to the contract knew or should have known of the mistake. *See Kassebaum v. Kassebaum*, 42 S.W.3d 685, 693 (Mo.Ct.App.2001).

ABB argues that the contract language is unenforceable as written because the term "tariff" refers only to tariffs lawfully filed with the ICC prior to deregulation, rendering that term essentially meaningless in the ensuing 20 years of the deregulation era. Yet even after deregulation, rate schedules and

price lists, such as Price List 4605, are still commonly, if not uniformly, referred to as tariffs. *See, e.g.*, *Werner*, 554 F.3d at 1328 (referring to the carrier's post-deregulation shipping document as a "tariff"); *Sassy Doll*, 331 F.3d at 841 (holding that, in the deregulation era, "a carrier is now required to provide a shipper with the carrier's tariff if the shipper requests it, instead of the shipper filing its tariff with the now-defunct ICC"). Moreover, Price List 4605 clearly falls within the plain meaning of the term "tariff," which is defined as "a listing or scale of rates or charges for a business or a public utility."[8] Webster's Third New International Dictionary 2341 (2002). Thus, the BOL plainly and unambiguously stated on its face that ABB was familiar with the terms and conditions of CSX's effective tariff, which was Price List 4605, and that ABB agreed to be bound by those terms. Consequently, ABB's argument that it intended the reference to "tariffs" in its own document to carry no meaning is foreclosed by basic principles of Missouri contract law. *See Celtic Corp.*, 254 S.W.3d at 143.

ABB concedes in its opening brief, "There is nothing ambiguous about the form language in the BOL." Appellant's Brief 47. Nonetheless, ABB argues that the court should not bind it to its unambiguous contract provision because ABB did not have actual knowledge of CSX's effective tariff and because the

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[8] Price List 4605 also falls within the plain meaning of the term "classification," which is defined as "a publication containing for the purpose of tariff assessment a list of articles, the classes to which they are assigned, and the rules and regulations governing the application of class rates." *Webster's* at 417. ABB presents no argument that Price List 4605 is not a classification.

provision at issue was outdated boilerplate language[9]—i.e., because ABB made a unilateral mistake in its drafting of the BOL, albeit one it has perpetuated on a routine basis for two decades. Yet ABB presents no evidence and makes no argument CSX knew or should have known of ABB's "mistake." Rather, ABB admits that it never had two-way communication with CSX and simply faxed the completed BOL to CSX and relied on CSX as its carrier for the shipment of the transformer. Upon CSX's receiving the completed BOL that unambiguously stated on its face that ABB was aware of and accepted the terms of its effective tariff, CSX had no reason to believe that ABB, an experienced shipper, did not mean exactly what it stated in plain language on its own form. Thus, in the absence of any evidence of bad faith on the part of CSX, Missouri law prohibits ABB from avoiding the provision of its own BOL that it now finds unfavorable. *See Kassebaum*, 42 S.W.3d at 693.

The majority rejects the plain language interpretation of the BOL, arguing that under such an interpretation, "the shipper's 'knowledge' of the [effective price] list could be proved solely by use of the generic and outdated word 'tariff' being employed as standard language in a bill of lading." Majority Op. —. Having already demonstrated that the term "tariff" remains in common usage in the shipping industry, *see Sassy Doll*, 331 F.3d at 841, I also note that ABB

[9] ABB emphasizes that the contract language at issue is boilerplate language. Yet neither ABB nor the majority opinion cite to any authority suggesting that boilerplate contract terms are somehow less binding than other contract terms, particularly when the party seeking rescission of those terms is the party that drafted them.

did not simply make a general, passing reference to a "tariff" in the BOL. Instead, ABB certified, in binding contract language, that it was familiar with the terms of CSX's tariff. That ABB now argues it did not actually have the knowledge it then claimed it had is simply no basis upon which to render meaningless the unambiguous, binding terms of its contract with CSX. ABB's unilateral failure to draft its own contract with specificity should not allow it to later abandon terms that it, in hindsight, no longer finds favorable. As the Eleventh Circuit stated in *Sassy Doll*, the Court's sympathy should "not go out to the drafter of a bill of lading who blames another party for the results that flow from defects in that document." 331 F.3d at 843; *see also Werner*, 554 F.3d at 1328 (holding that courts should be "reluctant to protect a sophisticated shipper from itself when it drafts a shipping document").

Ultimately, it is undisputed that ABB is "an experienced shipper[,] was not forced to employ [CSX]," and used its own BOL contract. *Mech. Tech. Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1088 (2d Cir.1985). It is therefore appropriate to bind ABB to its own choices, even if ABB now argues it made those choices by its own unilateral mistake. *See Norton*, 901 F.2d at 830 ("Carriers should not be held to a standard that would impose liability on them due to a unilateral mistake by an experienced shipper."); *see also Siren*, 249 F.3d at 1272 (refusing to reform a shipping contract subject to the Carmack Amendment when the shipper made a unilateral mistake). As expressly contemplated in *Siren*, ABB "agree[d] in writing to a limitation of liability" by "prepar[ing] a bill of lading which incorporate[d] [CSX's] tariff by reference," and CSX's tariff "contain[ed] an applicable

limitation of liability provision." *Siren*, 249 F.3d at 1270.[10] As the Eleventh Circuit noted in *Werner*, "the [Carmack Amendment] requires nothing more than a valid written contract between the parties establishing a reasonable value for the purpose of limiting the liability of the carrier." 554 F.3d at 1328 (quoting *Siren*, 249 F.3d at 1271.)

III

For all the foregoing reasons, I conclude that the BOL, incorporating Price List 4605 and its limitation on liability, fully complies with the Carmack Amendment as a "written agreement between the shipper and the carrier." 49 U.S.C. § 11706(c)(3). I would therefore hold that the district court properly applied the Carmack Amendment exception for written agreements of limited liability and, thus, properly granted partial summary judgment to CSX. Accordingly, I respectfully dissent from the portion of Section III of the majority opinion regarding the majority's interpretation of the BOL and from Section IV of the majority opinion. I would affirm the district court's order granting CSX's motion for partial summary judgment.

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[10] The majority opinion rejects these cases, each of which apply the doctrine of unilateral mistake in the Carmack Amendment context, by stating, without citation to any authority, that the Carmack Amendment overrides standard principles of contract interpretation by "unambiguously impos[ing] the risk of error on one particular party, the carrier, to the exclusion of the other party, the shipper." Majority Op. —.

APPENDIX B

United States District Court,
E.D. North Carolina,
Western Division

No. 5:08-CV-25-F

ABB, INC.,
Plaintiff,
v.
CSX TRANSPORTATION, INC.,
Defendant.

March 22, 2012.

ORDER

JAMES C. FOX, Senior District Judge.

Plaintiff, ABB, Inc. ("ABB"), filed this action against defendant, CSX Transportation, Inc. ("CSXT"), to recover monetary damages for alleged in-transit damage and loss to a large, expensive electrical transformer that CSXT shipped by rail in 2006, between ABB's manufacturing facility in St. Louis, Missouri, and ABB's customer's facility in Pennsylvania. ABB seeks to recover "the value of the actual loss or injury arising from damage to the transformer" pursuant to the Carmack Amendment, 49 U.S.C. § 11706 ("Carmack"), to the former Interstate Commerce Act; or, alternatively to recover all damages under Missouri common law for (i) breach of contract, or (ii) negligence. *See* Complaint [DE-1], p. 6. Pending before

the court are CSXT's Motion for Summary Judgment as to ABB's substantive claims [DE-48.1], and as to its limitation of liability defense [DE-48.2]; and ABB's Cross-Motion for Partial Summary Judgment [DE-75] on the issue of CSXT's alleged limitation of liability.

I. Legal Standard

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and the law entitles it to judgment. Fed.R.Civ.P. 56(c). Disputes about material facts are "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (*en banc*). In reviewing the evidence "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

II. Applicable Law

The underlying factual predicate for this lawsuit is best appreciated within the framework of the governing law. Thus, a preliminary description of the legal context in which this dispute arises best precedes a recitation of the facts.

Carmack creates "a national scheme of carrier liability for goods damaged or lost during interstate shipment under a valid bill of lading." *5K Logistics, Inc. v. Daily Express, Inc.,* 659 F.3d 331, 335 (4th Cir.2011) (citation omitted); *see also York v. Day Transfer Co.,* 525 F.Supp.2d 289, 297 (D.R.I.2007) ("The princip[al] purpose of the Carmack Amendment was to achieve national uniformity in the liability assigned to carriers.") (citation and internal quotation marks omitted). Rail carriers, governed by the Carmack provision in 49 U.S.C. § 11706, are a subset of the carriers covered by Title 49.[1] Under Carmack, a rail carrier of property in interstate commerce that damages or loses a shipment generally is liable "for the actual loss or injury to the property caused by" the carrier. 49 U.S.C. § 11706(a). Nevertheless, a carrier may limit its liability "to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." *Id.* § 11706(c)(3)(A).

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[1] Motor carriers (the trucking industry) have their own Carmack provision in 49 U.S.C. § 14706(a)(1). The Carmack provisions for motor carriers are substantively identical in pertinent part to those governing liability for rail carriers. *See, e.g., KITO Group, Ltd. v. RF Int'l, Ltd.*, No. 3:09CV1371 (JBA), 2010 WL 2712138, slip. op. at *2 (D. Conn. July 6, 2010). Accordingly, cases construing the relevant notice and limitation provisions may be interchangeable, or nearly so. *See id.* at n. 3.

Here, ABB contends that CSXT is fully liable under § 11706(a) for all actual damages and losses incurred during CSXT's shipment of the transformer pursuant to the bill of lading for that shipment, in a sum up to the "value" ABB placed on the transformer. CSXT denies the applicability of Carmack to the instant matter, but for purposes of the summary judgment motions, contends that it limited its liability to $25,000 for loss or damages to this shipment under Carmack's § 11706(c). That is, even if ABB could prove that CSXT is liable for damages to the shipment under Carmack,[2] CSXT contends that such liability may not exceed $25,000, regardless of the value of the transformer or the losses ABB may have incurred from damage thereto in transit. As CSXT filed the first motion for summary judgment, the court first will examine its limitation of liability affirmative defense. *See, e.g., Siemens Power Transmission & Distrib., Inc. v. Norfolk Southern Ry. Co.,* No. 6:02-CV-1024-Orl-22KRS, 2006 WL 5110365 (M.D.Fla. March 24, 2006). In so doing, the court does not express any finding or opinion whether ABB can make a *prima facie* case under § 11706(a).

[2] To establish a prima facie case for damage to goods arising from the interstate transportation of goods by a rail carrier, a shipper must show (1) delivery of the goods in good condition, (2) receipt by the consignee of damaged goods, and (3) the amount of damages. *See Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir.2003); *see also Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964). If a prima facie case is established, the carrier may offer evidence that it limited its liability. *See Schoenmann Produce Co. v. Burlington Northern and Santa Fe Ry. Co.*, 420 F.Supp.2d 757, 762 (S.D.Tex.2006) (internal citations omitted).

A. *Lexicon*

As the terms are used herein, "shipper" refers to ABB. CSXT is both the "receiving carrier" and the "delivering carrier," pursuant to § 11706(a), Complaint [DE-1] ¶ 3. Duquesene Electric, ABB's customer who purchased the transformer, is the "consignee."

A "bill of lading" is a contract that records that a carrier has received goods from the shipping party, states the terms of carriage, and is evidence of a contract for carriage. *See Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 18-19, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). A bill of lading also is a receipt for goods to be transported, and usually contains the description, quantity and condition of the goods, their classification and, traditionally, reference to the carrier's filed "tariff." Although the carrier "issues" the bill of lading, it is not unusual for the shipper to prepare the document in the first instance, as ABB did here, using its own form. The bill of lading form used in this case is a non-negotiable, "straight bill of lading," and was both created and completed by ABB. It is referred to herein as "the BOL."

B. *The Carmack Amendment & Full Carrier Liability*

The Carmack Amendment, enacted as part of the former Interstate Commerce Act ("ICA"), refers collectively to federal statutory provisions governing freight carriers' liability for interstate shipments. These provisions "have at one time or another since 1906 resided in different sections of Title 49 of the United States Code." *North Am. Van Lines, Inc. v. Pinkerton Sec. Sys., Inc.,* 89 F.3d 452, 454 (7th

Cir.1996).[3] The Carmack provision applicable to rail carriers under § 11706(a)(1) codifies the common law rule that a carrier generally is liable for the actual loss or injury to the property.[4] That is, § 11706(a) requires the carrier to bear full liability for the goods it transports, and essentially renders the carrier an insurer of safe delivery under the terms of the bill of

[3] The particulars of Carmack's enactment, the industry's reaction thereto, subsequent amendments and various revisions, exceptions, and re-codifications thereof are intriguing and complex. *See, e.g., Babcock & Wilcox Co. v. Kansas City Southern Ry. Co.*, 557 F.3d 134 (3d Cir.2009) (highlighting the development and differences among what have become known as "common carrier pricing arrangements" or "published rates" (formerly called "tariffs") governed by 49 U.S.C. § 11706 (Carmack); "rail transportation contracts," (or "private contracts") governed by 49 U.S.C. § 10709 (the Staggers Rail Act of 1980, or "Staggers"); and "exemptions" pursuant to 49 U.S.C. § 10502). Since deregulation in the mid-1990's, interstate carriers' pricing arrangements are overseen by the Surface Transportation Board ("STB") which replaced the Interstate Commerce Commission upon enactment of the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995), *as amended*, Pub. L. No. 104-287, 110 Stat. 3390 (Oct. 11, 1996), codified at 49 U.S.C. § 11101, *et seq.* ("ICCTA"). Staggers private contracts and exempt contracts are not subject to the STB.

[4] In pertinent part, Carmack's subsection (a) codifying the common law "full liability" rule provides:

> (a) A rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property . . . are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—
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> (1) the receiving rail carrier;
>
> (2) the delivering rail carrier.

lading. *See, e.g., Rankin v. Allstate Ins. Co.,* 336 F.3d 8, 9 (1st Cir.2003). The phrase, "Carmack Liability" is used herein to describe § 11706(a) full, and effectively strict, carrier liability. However, as the facts of this case and many like it demonstrate, in practice, most commercial rail shipments occur under the § 11706(c) exception to the traditional full liability rule by which carriers offer much lower shipping rates in exchange for a much lower and predetermined limitation of their liability.

C. *The Exception is the Rule*

In order to temper high shipping rates charged by carriers commensurate with full Carmack Liability, Congress provided specifically for negotiation and agreement between the parties to a rail shipping arrangement. Subsection § 11706(c)(1) provides an exception to the statutory "default" of subsection (a) by permitting a rail carrier to limit its exposure to liability for damages by agreement with the shipper.[5] *See Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*

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[5] Title 49 U.S.C. § 11706(c) provides in pertinent part,

> (c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.
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> * * * * *
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> (3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which—
>
> (A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier. . . .

— U.S. —, 130 S.Ct. 2433, 2441, 177 L.Ed.2d 424 (2010) (explaining that under § 11706(c), Carmack "constrains carriers' ability to limit liability by contract").

Even though formal tariffs have been abolished in most instances, many rail carriers, including CSXT in this instance, continue to maintain tariff-like rate schedules based on the classification of goods to be shipped. Rate publications, price lists, or off-the-rack rate schedules, still commonly referred to as "tariffs," may be in brochure form and/or available online, are time-sensitive, and must be disclosed by the carrier upon request by a shipper or prospective shipper. Where, as here, a commercial shipper needs a rate quote for shipping a commodity such as an electrical transformer by rail, the shipper consults the selected carrier's current published circular or rates brochure or, if a printed rate schedule is not available, locates the published rate information online or directly contacts a representative of the carrier via telephonic or electronic means. *See* 49 U.S.C. § 11101(b); 49 C.F.R. §§ 1300.2 & 1300.3.

Ordinarily, the price lists or off-the-rack rates cover *limited* carrier liability. That is, the standard published rates are relatively low and carry a commensurately low limitation of liability. In order to comply with Carmack, however, the carrier must afford shippers the option of choosing a higher rate in order to obtain full Carmack Liability.[6] *See, e.g., Hughes Aircraft Co. v. North Amer. Van Lines, Inc.,* 970 F.2d 609 (9th Cir.1992); *Hansa Meyer Transp. GmbH &*

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[6] This requirement to satisfy the exception to Carmack's full liability rule functionally is the same for motor carriers. *See* 49 U.S.C. § 13710(a)(1); 14706(c)(1)(A) & (B).

Co., KG v. Norfolk Southern Ry. Co., No. 8:06-CV-924, 2008 WL 2168760 (D.S.C. May 20, 2008). Federal regulations promulgated by the STB concerning availability of so-called published rates for rail carriers subject to 49 U.S.C. § 11101(b), (c), (d) and (f), are found in 49 C.F.R. §§ 1300.1 *et seq.*

In this case, CSXT contends that its "published rates" for rail shipment of electrical transformers in March 2006, were contained in its Price List CSXT 4605 for the classification, "Machinery," effective December 14, 2005.[7] *See* McCauley Depo. [DE-52], Exh. 17. It is therein that CSXT purports to give sufficient notice of its $25,000 limitation of liability for shipments under those published rates. At page 10 under the heading, "Price Restrictions," the 4605 publication states, "Carriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment. Full liability coverage is only available by calling your sales representative for a specific quote." That is, CSXT contends its publication, Price List CSXT 4605 Containing Prices on Machinery" (hereinafter "Price List 4605") in effect on March 24, 2006, contains the published rates that applied to ABB's transformer shipment and notice of the commensurate $25,000 limitation of liability thereunder. The publication explicitly provides that, unless the shipper calls its CSXT sales representative and obtains a specific

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[7] Price List 4605 specifies on p. 12 that the Column Heading 5 price applies to items contained in "MACHINERY 2 of the Commodity List Section" for items shipped in "Flatcars" up to a "maximum weight of 199,999 lbs." The BOL here lists the transformer's weight as "166,822," and in the Product Value box, states "STCC # 36-129-11," which the court perceives to be the Standard Transportation Commodity Code Number description of the transformer. *See* Price List 4605, p. 5.

shipping rate quote for full liability coverage, rail shipment by CSXT of an electrical transformer would be pursuant to Price List 4605's published rates and corresponding $25,000 maximum carrier liability for loss or damages. Whether its position is correct must be determined by careful application of governing statutes and regulations, as well as the evidence of record concerning the transactions giving rise to this lawsuit.

D. *The Bill of Lading: Notice of and Agreement to Limitation*

The issue whether or not the carrier of a land shipment of goods lost or damaged in transit effectively has limited its liability as required by the subsection (c) exception to Carmack Liability has generated no small amount of litigation. The undersigned has located more motor carrier cases than rail cases addressing the question, but the rationale for both modes is the same. For a number of years, courts employed what is known as the "four-point test" developed prior to repeal of the tariff system in the mid-1990's.[8] *See Hughes,* 970 F.2d at 611-12; *Anton v. Greyhound Van Lines,* 591 F.2d 103, 105-06 (1st Cir.1978). After deregulation in the mid-1990's, when carriers were relieved of maintaining formal tariffs in most cases, the four-point test was tweaked to require that a carrier seeking to limit its liability (1) give the

[8] The original four-point test required that, in order to limit its liability, a carrier must (a) maintain a tariff within prescribed guidelines of the ICC; (b) obtain the shipper's agreement as to his choice of liability; (c) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (d) issue a receipt or bill of lading prior to moving the shipment. *Carmana Designs Ltd. v. North Am. Van Lines, Inc.*, 943 F.2d 316, 319 (3d Cir.1991).

shipper a reasonable opportunity to choose between two or more levels of liability (one of which is full liability), *see OneBeacon Ins. Co. v. Haas Indus., Inc.,* 634 F.3d 1092, 1099-1100 (9th Cir.2011); *Emerson Elec. Supply Co. v. Estes Express Lines Corp.,* 451 F.3d 179, 187 (3d Cir.2006); (2) obtain the shipper's agreement as to his choice of liability; and (3) issue a bill of lading prior to moving the shipment that reflects the agreement. *See id.* (citing *Acro Automation Sys., Inc. v. Iscont Shipping Ltd.,* 706 F.Supp. 413, 415 (D.Md.1989)).[9]

E. *When Carmack "Protection" is Unnecessary*

While there is some suggestion of a general retreat from use of the four-point test in Carmack litigation, *see* WESLEY S. CHUSED, THE EVOLUTION OF

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[9] Some courts have applied the following factors to determine whether a shipper had been provided "reasonable notice of the liability limitation and the opportunity to obtain information necessary to making a deliberate and well-informed choice:"

1. Whether the provision providing the limitation was specifically brought to the shipper's attention;
2. The shipper's sophistication;
3. The shipper's abundant experience;
4. The shipper's extensive prior dealings with the carrier;
5. Whether the shipper drafted the shipping contract;
6. Whether the shipper directly negotiated the terms of the shipping contract; and
7. Whether the provision providing the limitation was specifically produced in the bill of lading.

Comsource Indep. Foodservice Cos., Inc. v. Union Pacific RR Co., 102 F.3d 438, 444 (9th Cir.1996) (cited with approval in *Hansa Meyer*, 2008 WL 2168760, slip op. at *10). *See also Aida Dayton Tech. Corp. v. Trism Specialized Carriers, Inc.*, 178 F.Supp.2d 505, 507 (D.Md.2001).

MOTOR CARRIER LIABILITY UNDER THE CARMACK AMENDMENT INTO THE 21ST CENTURY," 36 Transp. L.J. 177, 200 (2009) (hereinafter "Chused"), there is no need for the test *at all* in a case like this in which the shipper, rather than the carrier, not only filled in the blanks of a standard form bill of lading but also drafted that form and used it for years. The very purpose of Carmack and the associated regulations were "to protect shippers from carriers who would take advantage of their own superior knowledge and leverage when dealing with unwary shippers." *Siren, Inc. v. Estes Express Lines,* 249 F.3d 1268, 1271 (11th Cir.2001). It is not "proper or necessary to protect shippers from themselves." *Id.*

III. Factual Predicate

Both parties contend that the evidence of record demonstrates a lack of any genuine issue of material fact. The deposition transcripts and other documentary evidence submitted in support of the parties' cross-motions for summary judgment reveal the following facts that are material to a determination whether CSXT effectively limited its liability to $25,000 as to the subject shipment.

A. *Parties' Course of Dealing*

The evidence that reveals the environment, history and context of this dispute best is discovered in the depositions of the parties' veteran employees—ABB's Craig S. Steffey and CSXT's Joseph McCauley. Both fairly recently retired from their respective positions; Steffey had been ABB's traffic manager for decades, and McCauley had served as CSXT's senior manager of freight claims for 24 years. *See* McCauley Depo. [DE-52], p. 9. Both were familiar with the manner in which ABB and CSXT had been arranging rail

shipments of electrical transformers for years, both before and after the deregulation of the mid-1990's. *Neither Steffey nor McCauley purports to have first-hand knowledge of the events that gave rise to preparation of the bill of lading at issue in this litigation.*

1. *ABB's Craig Steffey*

Steffey began working for Westinghouse in about 1972, and continued with the company in transportation logistics as traffic manager after it was bought out by ABB in 1990. *See* Steffey Depo. [DE-55], p. 9. He accepted ABB's offer for early retirement in 2003, but continued to perform his duties until 2005 on a contract basis. *See id.,* p. 10. Steffey still was working with ABB in a different part of the building during the time when the events occurred giving rise to this litigation. *See id.,* p. 13.

During his long tenure with Westinghouse and then ABB, Steffey dealt with the major railroad lines in the United States, including CSXT, Norfolk Southern, Burlington Northern, Santa Fe, Union Pacific and Canadian National in arranging the transportation of large electrical transformers of high value. *See* Steffey Depo. [DE-55], p. 13. No longer strictly regulated by federal law after repeal of the ICA, rates and liability levels were negotiated between the contracting parties, but still were subject to the ICCTA, including the Carmack Amendment and federal regulations promulgated thereunder. The shipping rate—expressed in units of weight—depended in part on the extent to which the shipper required the carrier to assume liability for loss or damage. The lower the shipping rate, the lower the carrier's liability.

To arrange for a shipment, Steffey contacted a marketing representative of the chosen rail company to request a "rate something less than tariff . . . [which] is usually a railroad publication . . . that basically states their rates that they want to charge, and terms and conditions and things like that." *Id.,* p. 14. Steffey never saw "a full tariff . . . book form," and never asked for a full tariff from any railroad. *Id.,* p. 15. He explained,

> when we began requesting rates or [a] rate quote, we had pretty good communication with the marketing folks and they would send us the two- or three, four-page . . . quote; they would fax it to us, and that would have the basic terms and conditions in that quote. And so we never really got to the full tariff, you know, rate and full tariff document.
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> Early on . . . in the early 90's . . ., we didn't have much of an issue with the railroad accepting full liability. I mean they just did it as a matter of fact, matter of course. They would give you a rate and the full liability was par of it. . . . Gradually, late 90's, we began to see the railroads . . . attempting to walk away from full liability, and be . . . trying to limit their liability It generally started with a reduction from full liability to . . . like, [$]500,000, and then I believe the Norfolk Southern came in with [$]100,000 limit of liability, and then gradually, it worked itself down to I think where it is, what they like to see the limit be now is like [$]25,000.

Id., pp. 16-17.

If ABB wanted to arrange a shipment for which the railroad would bear a risk of liability greater than $25,000, Steffey contacted the carrier's marketing representative who was readily available to indicate that ABB wanted the carrier to assume a particular level of liability, "and they would come up with a charge or a premium." *Id.,* p. 17. Initially, when the premium still was "reasonable," ABB would accept it and opt for full liability. *Id.* In that instance, the carrier told him "that we had to have the full liability spelled out on the bill of lading, and we had to have the value of it on the bill of lading And this was all by the marketing railroad person." *Id.* Steffey explained that he "put [the value of the product] on the bills of lading that I participated in, [ ] as long as I had the price from the railroad for the full liability coverage." *Id.,* p. 18.

Over time, full liability rates increased to the point that the shipper often did not choose to purchase the full liability coverage; rather, ABB would request a lower shipping rate with correspondingly lower liability coverage and would insure the difference, if the "insurance risk management" team recommended it. *See id.,* p. 18. Also as time passed and electronic communication improved, the railroad marketing representatives became less and less visible, and it became more difficult for ABB to identify and make contact with the right person. *See id.,* pp. 20, 35-36. It was Steffey's practice to make contact by telephone to discuss rates and liability and to determine a price. *See id.* In 2005 and 2006, Steffey recalls that the railroads "were cutting their marketing people back . . . and making them cover more territory which means they have less and less time to, you know, devote to any given customer." *Id.,* p. 37. Difficulty notwithstanding, "we got it done," *Id.,* at pp. 37, 80.

During his deposition, Steffey was shown a series of 73 ABB bills of lading, most of which he had prepared. *See* Exs. 31-1 to 31-73, to McCauley Depo. [DE-52]. Some of the bills of lading bore the instruction "!!! FULL LIABILITY REQUIRED !!!" and some did not. Generally, Steffey just called the marketing representative "and he gave us the dollars, or the rate per hundred weight for the charges," *e.g., id.,* p. 29. Although each bill of lading was unique, the deposition testimony and exhibits demonstrate, *generally,* if a shipment was "FOB destination" (meaning that ABB bore the risk of loss) and/or if the consignee had requested full liability, Steffey entered the instruction, "!!! FULL LIABILITY REQUIRED !!!" on the face of the bill of lading, as well as the weight, a rate code he had obtained from the carrier's marketing representative, and ABB's assertion of the product's value.[10] If the shipment was "FOB seller," or "collect," or if the consignee had arranged the transportation directly with the carrier, Steffey generally selected a lower level of carrier liability and thereby obtained a lower shipping rate. Again, as the carrier's level of liability increased according to the shipper's instruction, so did the shipping rate. *See, e.g.,* McCauley Depo. [DE-52], pp. 12-13.

Steffey's description of the parties' course of dealing is well-illustrated by the collection of 73 bills of lading used as exhibits during the depositions, and it comports generally with the governing statutory and regulatory scheme under Carmack. Steffey always

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[10] Steffey testified that it had been his practice for twenty years to always indicate ABB's valuation of the shipment on the bills of lading so that the carrier's personnel handling the load would be aware it contained a very expensive item, and not just a load of grain or coal.

was eventually able to contact a CSXT representative and express whether ABB elected to ship at a low rate under a limitation of liability or to pay a higher shipping rate to ensure Ml carrier liability. In the latter event, Steffey noted conspicuously on the face of the BOL, "FULL LIABILITY REQUIRED."

2. *CSXT's Joseph McCauley*

McCauley, a 40-year veteran of CSXT's claims department, was deposed by ABB's counsel on April 14, 2010. *See* McCauley Depo. [DE-52].[11] Although his job as senior manager of freight claims did not entail day-to-day communication with shippers in arranging shipments, he provided assistance to the marketing personnel in putting together limitations of liability and suggested language for use in claim liability contract language. *See id.,* p. 10. He was, however, familiar with the process of communication between the CSXT marketing representatives and shippers seeking to engage CSXT's services. His description of the shipping process during the relevant time is consistent with Steffey's.

> Well, normally the customer will furnish a request to the railroad telling them that they want to ship a particular item or freight, and they will indicate what they would like to do, whether they want to move it at full liability, limited liability or a partial limited liability. . . . After that is agreed, if it's in our price listings they can pick a price out of there, but normally most of our price listings cover limited liability. If they want a full common carrier liability, that has to be negotiated.

Id., p. 11.

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[11] McCauley is CSXT's designated corporate representative under FED.R.CIV.P. 30(b)(6), *see* McCauley Depo. [DE-52].

When asked how CSXT would respond if a shipper made a request "with [just] a value of the product," McCauley responded, "They wouldn't. [CSXT] would just handle it as a normal shipment. If they're moving it under the tariff and it calls for limited liability and you don't request full liability, they would handle it as a limited-liability shipment." *Id.,* p. 12. It was his understanding that the "tariffs" contain provisions for both full and limited liability rates. *Id.*

> Q. Okay. So if a shipper submitted a request saying, "I've got a million-five transformer," the CSX would just assume it was going to be shipped—barring any other information, it was going to be shipped with a lower limited liability?
>
> A. Absolutely, because almost every tariff that I have ever reviewed moves on limited liability, and it says, "If you want full liability, you must contact us to acquire a rate."

Id., p. 13.

McCauley was shown Exhibit 18, which is the BOL governing the 2006 shipment of ABB's transformer at issue here, *see id.,* pp. 13-14, and was questioned about his understanding of the terms. He explained that the shipping rates would have been contained in Price List 4605 that covers shipping of "Machinery." *See id.,* pp. 14, 17-18 & Exh. 17. CSXT's Price List 4605 is Exhibit 18 to McCauley's deposition.

> Q. Okay. Can you show me in here where it would say that if ABB or another shipper wanted a higher limited liability, they need to contact CSX?
>
> A. Yes. On Page 9, it starts with the paragraph that says, "Price Restrictions." The actual notation would be on Page 10 . . . which will say

> "Carriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment. Full liability coverage is only available by calling your sales representative for a specific quote."

Id. In order to find Price List 4605, a shipper could retrieve it online or "contact his sales representative, who could give him the price list." *Id.* Later, however, McCauley testified, "I don't believe you can get a quote on-line for [full] liability for a transformer if it's a fluctuating scale. They would *only put on-line the limited liability*. Then they would negotiate depending on the terms and conditions that . . . both sides want to set down." *Id.,* p. 26 (emphasis added). The "tariff itself," the Price List 4605, available online, alerts a shipper to contact a sales representative if the shipper wanted a higher limited liability; McCauley explained, "[y]ou would have to read the tariff." *Id.,* p. 27.

McCauley did not think CSXT would have been confused by the BOL's lack of any notation for "Rate Authority," because it has "received so many bill of ladings [sic] from ABB over the years." *Id.,* p. 22. He was unaware of any instance when ABB and CSXT operated under a shipping arrangement other than Price List 4605 without including a specific "full liability required" request on the bill of lading. *Id.,* p. 23.

> Q. I guess my question is: From this sheet [Exh. 18, the BOL], how would you know that ABB was agreeing to your limitation on liability?
>
> A. By the fact that they did not ask for full common carrier liability.

Id.

Summarizing a shipper's options for moving an electrical transformer with CSXT, McCauley explained, "4605 is the tariff the customer can move under. He can also request a price quote. He can also move them under contracts." *Id.,* p. 32. Asked if it was his understanding that "the default is that there's a limit of liability unless the shipper asks for something else," McCauley responded, "if that's how it's listed in the tariff, yes." *Id.,* p. 33. McCauley's explanation of the parties' lengthy rail shipping relationship and practice, and interpretation of terms contained in ABB's BOL generally was consistent with Steffey's.

B. *Brian Brueggeman and the BOL*

On March 24, 2006, ABB's traffic manager was Brian Brueggeman ("Brueggeman").[12] "Brueggeman came in as a new hire in . . . the summer of 2005," and Steffey trained him to take the reins as ABB's traffic manager, but "[n]ot nearly as long as I wanted to. . . . It was approximately [for] five or six months." Steffey Depo. [DE-55], pp. 10, 11-12. Thereafter, Steffey continued to work with ABB on a different floor in a different part of the building, but was "around and available" between 2005 and 2008, to help had Brueggeman asked. *Id.,* p. 13.

Prior to employment with ABB to replace Steffey as traffic manager, Brueggeman had worked as a transportation analyst for a coal-producing company, with several trucking companies, and with Trane as its transportation analyst for 15 years. *See* Brueggeman Depo. [DE-50], p. 8. Brueggeman testified that he had started work as traffic manager for ABB in July 2005.

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[12] Brueggeman is ABB's designated corporate representative under FED.R.CIV.P. 30(b)(6).

> I was the traffic manager here for this facility managing all the inbound and outbound carrier selection and routing, freight, bill, processing payment, negotiations, also any claims activity that were associated with our shipments. And then a year and a half ago, I went to work as the logistics manager for North America for the region for all—representing and working for all of the five divisions in ABB throughout the U.S., Canada and Mexico.

Id.

In 2006, when the events occurred that are the subject of this lawsuit, Brueggeman was for ABB the "one that would be most knowledgeable in terms of which carriers to use to route freight, how to route it, what mode was the right mode to use, making sure that the bill of lading was filled out properly and that the freight bills were received and processed and approved in a timely fashion so they could be paid." *Id.,* pp. 9-10. By March 2006, when he prepared the Bill of lading at issue here, "on the average, we shipped maybe three to four transformers a month, and out of those three to four transformers a month, maybe one a month might have been [transported by] CSX." *Id.,* pp. 22-23.

Brueggeman used ABB's computer program to prepare a standard ABB form bill of lading on or about March 24, 2006, for rail shipment of an ABB electrical transformer the company had built on order for Duquesene Electric. The transformer was to be shipped by CSXT from ABB's facility in St. Louis, Missouri, to Duquesene's facility in Pennsylvania. The BOL he prepared is designated "MLL 9659." *See* McCauley Depo. [DE-52], Exh. 18, p. 2. It bears ABB's logo and identifies ABB as the "shipper." *Id.* The

"consignee" is Duquesene Light Co. *See id.* Nothing on the face of the BOL indicates that CSXT is the carrier, but the fax cover page indicates that the BOL was faxed to the "Billing Center" at CSX Transportation on March 24, 2006, *see id.,* p. 1, and that fact is not disputed.

According to the BOL, the load is "prepaid" and consists of an ABB Electric Transformer weighing 166,822 pounds. The BOL lists the Clearance Value file number [13] for the load as "C0508-H-026," and states the identification number of the impact recorder(s) [14] affixed thereto. The shipment is designated, "FOB destination," which means that the shipper, ABB, bears the risk of loss. *See* Steffey Depo. [DE-55], pp. 22-24. The box on the BOL form for "rate authority" is blank. Brueggeman explained that he "was not provided with information from the railroad that says[,] here's the rate authority." Brueggeman Depo. [DE-59], p. 19.[15]

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[13] The "clearance value" refers to the dimensions of the projected load based on measurements taken by "the clearance bureau," and other information provided from ABB's engineers. Brueggeman explained, "I requested a clearance file, it be open [sic] and generated, with the dimensions of the transformer typically six months prior to its shipping so that the railroad can look to make sure my transformer is not going to hit any signals or knock [out] any bridges. They open a specific case for file and assign a unique number to—every time I request one of those." Brueggeman Depo. [DE-59], p. 18.

[14] Grossly oversimplified, an impact recorder detects latitudinal and/or longitudinal shifts in the load by G-force and by date/time during the transport. This load was equipped with one or more impact recorders.

[15] Brueggeman responded that he had asked someone "on several occasions" about rate authority. "Q. Who did you ask? A. The clearance bureau, the people that do the rail clearance for

The BOL box labeled "RAILROAD NOTE" contains the following preprinted notations:

!!!THIS IS A HIGH VALUE CLEARANCE LOAD !!!

!!! DO NOT FLAT SWITCH WITHOUT MOTIVE POWER ATTACHED !!!

!!! DO NOT HUMP UNDER ANY CIRCUMSTANCES !!!

Brueggeman's name appears below the preprinted BOL certification that "the above named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation, according to the applicable regulations of the Department of Transportation." There is no evidence to suggest that Brueggeman was under a time constraint when he prepared the BOL. In fact, Brueggeman recalled during his deposition that "our delivery date to the customer was not in jeopardy of being violated." Brueggeman Depo. [DE-59], p. 76.

ABB's computerized, preprinted BOL also contains the following preprinted boilerplate notices:

> The property described below, in apparent good order, except as noted (contents and condition of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another center on the route

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me. Q. Do they typically give you the rate authority? A. You know, sometimes I've seen them do that, sometimes they haven't." Brueggeman Depo. [DE-59], P. 19.

> to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereinunder *shall be subject to all the terms and conditions the Uniform Domestic Straight Bill of Lading set forth (1) in Uniform Freight Classification in effect on the date hereof if this is a rail or a rail-water shipment,* or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.
>
> *Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading,* including those on the back thereof, *set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.*

(Emphasis added). Mid-page on the BOL form is a box, hereinafter referred to as the "Declared Value" box, containing the statement:

> NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
>
> The agreed declared value of the property is hereby specifically stated by the shipper to be not exceeding $.

There is a blank space following the $ sign on this BOL. Brueggeman testified that he attempted to insert the price of the transformer into the box, but ABB's computerized form would not permit him to

type in that blank. *See* Brueggeman Depo. [DE-59], p. 15. He explained the locked Declared Value box was "one of the great mysteries of life," and there was "nobody that knows the answer to who filled this or who generated this form or created it." *Id.* p. 16.[16] Because he could not type in the locked box, Brueggeman inserted the transformer's price,

[16] The Declared Value box may be a vestige of regulation-era Carmack practice by which, as consideration for a fixed shipping rate, the shipper stipulated to a specific value of the load. Under Carmack, a carrier could not limit its liability, but if a shipper agreed in advance to a stipulated value, he later was estopped to demand damages in excess of that sum if loss or damage were to occur. *Cf. The Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494, 55 S.Ct. 483, 79 L.Ed. 1016 (1935) (Harter Act admiralty case pre-dating COGSA, in which Court recognized, "[t]wo so-called valuation clauses have been in frequent use. One is a true limitation agreement. . . . The other is a true valuation clause."). Perhaps, ABB's computer program had been designed to prevent entries from being inserted into the Declared Value box on the BOL form to avoid unintended application of the "true limitation agreement" principle by estoppel, as the benefit of that method of ascertaining damages inures only to the carrier and not to a shipper. *See id.*, p. 497, 55 S.Ct. 483. *See also George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278, 35 S.Ct. 351, 59 L.Ed. 576 (1915) (Early Carmack case answering negatively the "question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to $50, which is the sun [sic] named in the filed tariffs as the amount of recovery in the absence of a declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled in case of loss to recover the full value of the property.").

Regardless of ABB's rationale for blocking its agents' access to the Declared Value box on its form BOL, any risk resulting from Brueggeman's omitting entry of a figure therein is attributable to ABB as Brueggeman's employer and author of the form, not to CSXT.

$1,384,000, into a box lower down in the BOL labeled "Product Value."

At his deposition in May 2010, Brueggeman was shown the same series of the 73 old ABB form bills of lading that had been prepared, mostly by Steffey, before Brueggeman assumed the traffic manager position. As to none of those 73 bills of lading did Brueggeman know where the code for "Rate Authority" had come from or what shipping rate it represented, and he had no idea why some of the bills of lading bore the notation, "!!! FULL LIABILITY REQUIRED !!!", while others did not. *See, e.g., id.,* pp. 38, 56-57.

> Q. Were you aware that CSX has a tariff in the form of a rate price list on their website for machinery that contains a default limitation of liability of $25,000?
>
> A. In 2006, no, sir.
>
> Q. You had never heard of that?
>
> A. No, sir.

Id., p. 24. He had never talked to a marketing representative from CSXT. *See id.* pp. 24-25. He had looked all over CSXT's "website and tried to find a lot of different things [but he did] not ever remember seeing a price list that they made available on the website for me to go and look at." *Id.,* p. 25. Although he admitted that it was part of his job to know what a shipment price would be, he stated that "[w]ith the CSX Railroad and with the UP Railroad and with the Norfolk Railroad and the BNS Railroad, I didn't know [the shipment price] until the invoice showed up." *See id.,* pp. 25-26.

Brueggeman stated that he never discussed with Steffey how to get the prices and tariffs from the railroads, *see id.* pp. 28-29, does not know that a CSX "Q" number references a rate authority, *id.* p. 30, and never had occasion to ship an item when the customer had negotiated a rate with the railroad and provided a contract number, *see id.* pp. 32-33. He had never seen the CSXT Price List 4605, Exh. 17 to McCauley's Depo. [DE-52]. See Brueggeman Depo., p. 65. He does know that a "quote" is a request for a price in terms and conditions for movement of a shipment but is not sure how to obtain one, *see id.,* p. 53, and never saw a CSXT Price List or phone number, *see id.* When Brueggeman trained the current transportation manager, he never instructed her to write on the bill of lading that full liability was required because "my assumption, when I declared the value, that's what the coverage was going to be." *Id.,* p. 55. When asked who told him that writing the product value on the bill of lading was equivalent to declaring a value, he responded, "Probably Mr. Steffey." *Id.*

In short, Brueggeman testified that he knew he was supposed to place the product's value on the face of the BOL but ABB's computer form would not permit him to enter it in the box designated for "agreed or declared value" "when the rate is dependent on value." *See id.,* pp. 15-16. Therefore, he inserted the price of the transformer, $1,384,000, in a different part of the BOL labeled, "Product Value." *See id.,* p. 15. He did not insert a request for full liability on the BOL, which does not contain any indication of a shipping rate, quote, or a code for "Rate Authority," although the shipment's weight is designated as 166,822 pounds. *See* BOL, Exh. 18, p. 2, to Steffey Depo. [DE-59],

Brueggeman is adamant that, by typing in the price of the transformer on a line titled, "Product Value," he was requesting and receiving full liability coverage for that sum from the carrier. *See id.,* pp. 16-17, 38.

> In my experience with dealing with all four of those major class-one railroads, I have always submitted and declared the value of the transformer, which is our sale price to our customer on that bill of lading. It is my understanding [the railroads] cover the full value of the shipment.

Id. p. 24. ABB relies on Brueggeman's testimony and the BOL, Exh. 18 to McCauley's Depo. [DE-59], for its position that CSXT bore the entire risk of any and all damage to or loss incurred by the transformer during the rail shipment at issue.

C. *A "Train Wreck"*

Once the railcar carrying the transformer reached Duquesene's facility in Pennsylvania, it appeared that the load had sustained some sort of damage. The transformer itself was fully encased in a steel tank that had been welded onto the railcar bed and otherwise packaged and secured for the trip before leaving ABB's facility. *See* W. Ball Depo. [DE-53], p. 35. The cause and extent of damage, if any, to the transformer itself therefore was not readily apparent, and at ABB's request, CSXT shipped the load back to St. Louis at no charge. The parties and their opinion witnesses disagree when and how the alleged damage might have occurred.

ABB sought to recover from CSXT "actual damages" and losses it incurred as a result of the transformer's alleged damages and the costs of installing a replacement for Duquesene while repairs were made. ABB contends that initially, the parties were focused

on causation, but that CSXT later asserted that the BOL as prepared by ABB provided for a low shipping rate for ABB and a commensurate $25,000 limitation of liability by CSXT in lieu of full Carmack Liability.

IV. ANALYSIS

Whether and to what extent a carrier has effectively managed to limit its liability for damage to cargo or freight it transports under a bill of lading is a question once described as "the fiercest battleground in Carmack Amendment litigation." CHUSED, 36 TRANSP. L.J. at 200, The starting point for analyzing this set of facts lies, not in the language of the Carmack Amendment itself, but in the reason it exists and the purposes it is intended to serve. Two purposes most frequently have been cited for the Carmack Amendment, first enacted in 1906. One purpose was "'to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods,'" *Union Pac. RR Co. v. Greentree Transp. Trucking Co.,* 293 F.3d 120, 124 (3d Cir.2002) (quoting *Reider v. Thompson,* 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950)). The second oft-cited purpose was "'to protect shippers from carriers who would take advantage of their own superior knowledge and leverage when dealing with unwary shippers.'" *F.M. Machine Co. v. R & L Carriers, Inc.,* No. 5:08CV2358, 2009 WL 1759577 (N.D.Ohio June 15, 2009) (quoting *Siren,* 249 F.3d at 1271).

On the salient facts and applicable legal rationale, the court finds this case virtually indistinguishable from *Siren.* Siren, the shipper, had created and completed its own bill of lading form. On that form, Siren's agent indicated that the shipment was to move under "Class 85," but its agent who filled out the

preprinted bill of lading had no idea what "Class 85" signified, and certainly did not know that Class 85 was a code "well understood throughout the trucking industry" to mean, infer *alia,* that the carrier's liability was limited to $11.87 per pound. *Siren,* 249 F.3d at 1268. The Eleventh Circuit panel cited the four-point test, but found no reason to apply it because "[t]his Court does not deem it proper or necessary to protect shippers from themselves." *Id.* p. 1271. The pivot point was the fact that the bill of lading at issue was a form created and drafted by the shipper, rather than the carrier. The shipper "[h]aving had the opportunity on its own form to secure greater protection. . . 'cannot complain about the consequences of leaving the applicable spaces blank. . . .'" *Id.,* citing *Mech. Tech., Inc. v. Ryder Truck Lines, Inc.,* 776 F.2d 1085, 1087 (2d Cir.1985) (internal citation omitted).[17]

Here, as in Siren, the shipper drafted and completed the BOL containing the terms and conditions of the shipment, which expressly included:

> that every service to be performed hereinunder *shall be subject to all the terms and conditions the Uniform Domestic Straight Bill of Lading set*

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[17] The Eleventh Circuit panel rejected the parties' focus on the absence in the bill of lading of incorporation by reference of the carrier's tariff terms. "Obviously, if Siren did incorporate the Estes tariff into the bill of lading, then Estes would prevail because the limitation of liability is found within that tariff." *Siren*, 249 F.3d at 1270. Here, unlike *Siren*, ABB effectively *did* incorporate CSXT's "tariff" and classification into ABB's own form BOL, and that "tariff" contained a limitation of liability and notice of both the choice and means of obtaining a rate quote for full Carmack Liability. *Siren* correctly applied the unremarkable legal maxim that the drafter of a contract "'is ordinarily charged with knowledge of its terms and meaning.'" *Id*., p. 1272 (quoting *Hughes*, 970 F.2d at 612).

> *forth . . . in Uniform Freight Classification in effect on the date hereof, if this is a rail or a rail-water shipment . . .*
>
> Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Brueggeman testified at his deposition that there were no terms and conditions on the back of the BOL at issue here, but that he was familiar with the Uniform Domestic Straight Bill of Lading, of which there are "a couple different versions," and would need "to look at the book and reread it" to know the version referred to in the above-quoted excerpt from the BOL. *See* Brueggeman Depo. [DE-59], pp. 13-14.

In fact, the "Uniform Bill of Lading set forth in . . . [the] Uniform Freight Classification in effect of the date hereof" ceased to exist in the mid-1990's when the ICC and formal filed tariffs were abolished by the ICCTA. *See, e.g., Tempel Steel Corp. v. Landstar Inway, Inc.,* 211 F.3d 1029, 1030 (7th Cir.2000), In *Tempel,* the Seventh Circuit Court of Appeals was faced with similar verbiage, albeit on different facts, when a motor carrier sought to disclaim liability for the loss of cargo shipped from Ohio to Mexico. There, the bill of lading governing the shipment was prepared by the *carrier* and provided that the cargo was received, "subject to the . . . tariffs in effect" on the date of issue. As it turned out, the carrier had kept the referenced "tariff" in its own files and had not filed it with the government. Keeping in mind that the *bill of*

lading had been prepared by the carrier in *Tempel,* the appellate panel's comments on the effect of deregulation and abolition of tariffs nevertheless are relevant and worth repeating here:

> We doubt that this was a "tariff in effect" in 1997. Until 1995 tariffs had legal effect; the filed-rate doctrine made it impossible for shippers and carriers to contract around them. . . . The ICC Termination Act . . . abolished the tariff filing requirement and the filed-rate doctrine, and it canceled the legal effectiveness of most extant tariffs. . . . Today carriers adopt standard contractual terms, which some call "tariffs" out of habit, but which have no effect apart from their status as contracts. [The carrier's] bill of lading probably should have been revised to say that it incorporates "standard terms" rather than "tariffs in effect"; had it done this, [the carrier] could have avoided [the shipper's] argument that no tariff is "in effect" today and that [the carrier's] therefore should be ignored. But it is clear what the bill of lading was getting at so we read its language as incorporating off-the-rack terms.

Id. at p. 1030. Suggesting that "[the carrier] should have written a better set of terms," the *Tempel* court pointed out that, "[a]ping language from the Cretaceous period, [the carrier's bill of lading] recites that it governs" only tariffs referring to a referenced ICC number, notwithstanding that the ICC and its numbers had been abolished. *Id.*

Similarly, the "Uniform Freight Classification" incorporated by ABB into its BOL no longer exists, but as in *Tempel,* it is clear what the BOL was getting at, and the language properly is read as incorporating the carrier's "off-the-rack terms" and conditions. ABB has

offered no evidence to rebut CSXT's evidence, through McCauley's testimony, that the then-current Price List 4605 was, and for some time had been, the applicable off-the-rack "tariff" (as that word incorrectly but commonly still is used) for rail shipment of machinery. *See also, e.g., Valerus Compression Svs. L.P. v. Lone Star Transport., LLC,* No. 10-C-517, 2011 WL 3566865, slip op. at *1, *4 (E.D.Wis. Aug. 15, 2011) (shipper-prepared bill of lading stated the shipment was "'subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading'" and contained the shipper's certification that it was "'familiar with all the bill of lading terms and conditions in the governing classification'" that were agreed to and accepted by the shipper).[18]

V. SUMMARY

Unrebutted testimony produced by CSXT through McCauley establishes that the "classification or tariff which govern[ed] the transportation of this shipment" was the Price List 4605 publication in effect on March 24, 2006, that contained CSXT's published rates for rail transport of "Machinery," the classification covering electrical transformers. That publication and classification contained a $25,000 limitation of liability and notice of what the shipper must do in order to request full liability.

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[18] The *Valerus* court queried, "If [the shipper] was not referencing and incorporating [the carrier's] classifications and tariffs, whose was it incorporating?" Noting further that bills of lading are contracts between the parties, the court observed that contract principles apply, including that "ambiguities are construed against the drafter." *Id*., p. *4 (citations omitted). "[T]he only reasonable construction of the bill of lading is that it referenced and incorporated the classifications and tariffs of the carrier. . . ." *Id.*

ABB both drafted and completed the BOL that was issued for the rail shipment at issue in this litigation. *See Sassy Doll v. Watkins Motor Lines, Inc.,* 331 F.3d 834, 839 (11th Cir.2003) (explaining that "a shipper 'prepares' or 'drafts' the bill of lading for purposes of this rule when the shipper actually creates the bill of lading, not when it merely fills in the blanks on one the carrier has created") (quoting *Siren,* 249 F.3d at 1271-72). The BOL was ABB's own form bearing ABB's own logo and generated by ABB's own computer program. That standard ABB form, which Brueggeman (mostly) completed and executed on behalf of ABB, expressly states that the shipment "shall be subject to all the terms and conditions the Uniform Domestic Straight Bill of Lading set forth (1) in Uniform Freight Classification in effect on the date hereof. . . ." *See also* Brueggeman Depo., pp. 12-13. On the face of the BOL, Brueggeman on behalf of ABB "certifie[d] that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns." *See also id.,* pp. 13-14. That Brueggeman did not contact a CSXT representative to request a rate quote or specify a level of liability coverage different from what was contained in Price List 4605 or declare on the BOL that "full liability is required," is consistent with ABB's certification of familiarity, agreement and acceptance of CSXT's then-current published "tariffs" and classifications.

The undersigned is familiar with the unpublished opinion in *Siemens Power Transmission & Distr. Inc. v. Norfolk Southern Ry. Co.,* No. 6:02-CV-1024-Orl-22KRS, 2006 WL 5110365 (M.D.Fla. Mar. 24, 2006),

upon which ABB relies. In *Siemens,* a manufacturer/shipper's agent arranged with Norfolk Southern to ship an electrical transformer by rail from Norfolk to Titusville, Fla., during which transport the impact recorders allegedly registered severe g-loads on the equipment. *Id.,* p. *1. On remand from the Eleventh Circuit Court of Appeals,[19] District Judge Anne C. Conway concluded that Siemens was entitled to partial summary judgment as against Norfolk Southern on the railway's affirmative defense that its liability was limited to $100,000. The facts of that case and the court's treatment of them are materially distinguishable from the instant case.

First, in *Siemens,* the plaintiff/manufacturer, Siemens, hired an agent, Tranco, to make the shipping arrangements with Norfolk Southern. *See id.* Tranco's agent actually contacted by mail a Norfolk Southern representative with whom he was well-acquainted, and identified the cargo as a transformer, provided departure and destination locations, and furnished the transformer's weight and dimensions. *See id.* The letter did not mention the transformer's value. *See id.* A few days later, Norfolk Southern's agent telephoned Tranco's agent and provided a per hundred-weight price quote. Tranco's agent specifically recalled there having been *no* discussion of limitation of liability and that he believed the rate quoted was for full carrier liability; Norfolk Southern's agent did not remember whether liability limits were discussed during this conversation, although it was his practice to discuss limitation of liability when he provided rate quotes.

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[19] *Siemens Power Transmission & Distrib., Inc. v. Norfolk Southern Ry. Co.*, 420 F.3d 1243 (11th Cir.2005) (remanding upon finding shipper's notice of claim satisfied Carmack regulations).

See id. In the instant case, there was no communication *at all,* written or verbal, between the parties before Brueggeman submitted the BOL.

When the transformer was ready to ship several months later, Tranco prepared and issued a straight bill of lading, as usual. Unlike the instant case, Tranco *did* insert "$2.5 million"[20] into the space on the form bill of lading that bore the same language as that contained in ABB's BOL locked "declared value" box. *See id.,* p. *2. Tranco sent this bill of lading to Norfolk Southern, and the transformer began moving in mid-January. A couple of weeks later, Norfolk Southern "published" the rate quote for this shipment by generating a "price authority" document identified as "NSRQ 58414," with the effective date of February 3, 2000. This price authority document is the only document associated with the rail portion of the shipment that contained express limitation of liability language, but it was not signed by anyone.

In ruling that Norfolk Southern's purported limitation of liability was unenforceable, Judge Conway did not mention whether Tranco's bill of lading contained language incorporating any rate schedule or commodity classification, and likewise did not focus on the fact that the sophisticated shipper had prepared the bill of lading. Rather, the *Siemens* court found that no issue of genuine issue of material fact existed because (i) the bill of lading contained a specific statement by the shipper of the transformer's value (albeit inflated) in the space provided therefor; (ii) there was no written agreement between the parties to limit Norfolk Southern's liability; (iii) the bill of lading was the only

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[20] The court noted this figure appeared to be an overstatement of the transformer's value.

document signed by Tranco, and it did not contain a limitation of liability; (iv) there was no evidence that Siemens accepted the terms of the "price authority," as that document was not signed and did not rise to the level of a contract; (v) the bill of lading was not issued prior to movement of the transformer; and (vi) Norfolk Southern's agent's reliance on his "general practice" due to his inability to recall the specific transaction did not create a genuine issue of material fact in light of Tranco's agent's specific memory of there having been *no* discussion of limitation of liability. *See id.,* pp. *2-*4. "Finally, the declaration of value set forth in the bill of lading satisfies § 11706(c)(3)(A); it was effective to limit the Railroad's liability to $2.5 million. Even if it was not, again, the parties never entered into a written agreement limiting liability, leaving Siemens free to pursue the full measure of its damages." *Id.,* p. *4. In contrast, here, it is factually and legally significant that the shipper itself drafted and completed the BOL; that the "declared value" box on ABB's BOL form is blank; and that ABB's BOL specifically incorporated the terms and conditions of the shipper's then-current classifications and "tariffs." The court finds *Siemens* to be inapposite.

* * * *

Neither before nor after deregulation has Carmack's protective function been necessitated or properly invoked where, as here, the shipper has drafted the bill of lading. *See Mech. Tech.,* 776 F.2d at 1087 ("Having had the opportunity on its own form to secure greater protection, [the shipper] 'cannot complain about the consequences of leaving the applicable spaces blank. . . .'"). A thorough analysis of the controlling statutes, their common law roots, legislative history and regulations, and the cases that have

interpreted them, convinces the court that this commercial document, *drafted and prepared as it was by the shipper,* does not implicate Carmack's fundamental ameliorative function.

> But here we do not have a devious carrier hoping to slip a quick one over on an unsuspecting shipper. Rather, it is the shipper's own agent who prepared the short form bill of lading on its own preprinted standardized contract form. If the shipper's agent thereby incorporated an industry-wide, indisputably legal, and federally sanctioned [provision], the shipper cannot now be heard to complain about it.

Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697, 703 (11th Cir.1986); *see also EFS Nat'l Bank v. Averitt Express, Inc.,* 164 F.Supp.2d 994 (W.D.Tenn.2001); *Schweitzer Aircraft Corp. v. Landstar Ranger, Inc.,* 114 F.Supp.2d 199 (W.D.N.Y.2000) ("This is not a case of an unsophisticated shipper, Schweitzer was not shipping lug nuts.") (internal citation omitted).

VI. CONCLUSION

It is CSXT's position that Price List 4605's page 10 Price Restrictions satisfied its statutory and regulatory burdens of publishing and noticing shipping rates and establishing a low limitation of its liability thereunder, together with direction how a shipper may obtain a full liability rate quote. The court concludes that ABB has not demonstrated that it can refute CSXT's competent evidence, presented through depositions and affidavits, that:

- ABB both drafted and prepared the BOL at issue in this case;

- Price List 4605, effective December 14, 2005, was the published rate schedule (commonly still referred to as a "tariff") for Machinery, including the electrical transformer, in effect on the date the BOL was prepared and faxed to CSXT;
- Price List 4605 contained a limitation of liability of $25,000, together with notice that the shipper must contact the carrier's representative to obtain full liability coverage upon a specific quote;
- ABB did not contact CSXT's representative or otherwise request full liability coverage;
- ABB's BOL incorporated by reference the terms and conditions of the carrier's then-effective "tariff" or classification; and
- ABB certified that it was familiar with all the terms and conditions of the BOL "set forth in the classification or tariff" governing the shipment, which terms and conditions incorporated by reference the "Uniform Domestic Straight Bill of Lading set forth . . . in Uniform Freight Classification in effect on the date hereof." Bill of Lading, Exh. 17 to McCauley Depo. [DE-52].

In light of the parties' long course of dealing as outlined by their veteran employees, the express terms of the BOL drafted by ABB, the court perceives no *genuine* issue of *material* fact to have been generated by Brueggeman's sworn deposition testimony, and finds no merit in ABB's arguments that are based on Brueggeman's alleged ignorance of the existence or contents of Price List 4605 and his demonstrated misperception of the purpose and import of ABB's BOL

terms, ABB relied on its form BOL and Brueggeman's interpretation thereof at its peril; the letter of the law, supported by a common sense notion of fair play, requires that it bear the risk of so doing.

CSXT's Motion for Summary Judgment [DE-48.2] is ALLOWED as to its affirmative defense of limitation of liability and its contention that ABB's state claims are preempted by the Carmack Amendment. ABB's alternative state law claims hereby are DISMISSED.

The court still is analyzing CSXT's Motion for Summary Judgment [DE-48.1] as to causation and damages pursuant to Carmack, and an order on that motion will issue as soon as possible. Regardless of the outcome, however, CSXT's liability for damages, if any, is limited to $25,000.

ABB's Cross-Motion for Partial Summary Judgment [DE-75] is DENIED.

Trial on the issues of causation and damages is set for this court's *May 14, 2012*, term of court. The Clerk of Court is directed to continue management of this matter.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed July 8, 2013]

No. 12-1674
(5:08-cv-00025-F)

ABB INC.,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

TRANSPORTATION AND LOGISTICS COUNCIL, INC.,
Amicus Supporting Appellant.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Keenan and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

FEDERAL STATUTES

49 U.S.C.A. § 11706. Liability of rail carriers under receipts and bills of lading

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

(b) The rail carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the rail carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the

property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.

(2) A rail carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on trains carrying passengers.

(3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which—

(A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or

(B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

(d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.

(2)(A) A civil action under this section may only be brought—

(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(B) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection—

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

49 U.S.C.A. § 14706. Liability of carriers under receipts and bills of lading

(a) General liability.—

(1) Motor carriers and freight forwarders.—A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) Freight forwarder.—A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the

freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) Apportionment.—The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c) Special rules.—

(1) Motor carriers.—

(A) Shipper waiver.—Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) Carrier notification.—If the motor carrier is not required to file its tariff with the Board, it shall

provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

(C) Prohibition against collective establishment.—No discussion, consideration, or approval as to rules to limit liability under this subsection may be undertaken by carriers acting under an agreement approved pursuant to section 13703.

(2) Water carriers.—If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(d) Civil actions.—

(1) Against delivering carrier.—A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.

(2) Against carrier responsible for loss.—A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(3) Jurisdiction of courts.—A civil action under this section may be brought in a United States district court or in a State court.

(4) Judicial district defined.—In this section, "judicial district" means—

(A) in the case of a United States district court, a judicial district of the United States; and

(B) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) Minimum period for filing claims.—

(1) In general.—A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

(2) Special rules.—For the purposes of this subsection—

(A) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(B) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(f) Limiting liability of household goods carriers to declared value.—

(1) In general.—A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

(2) Full value protection obligation.—Unless the carrier receives a waiver in writing under paragraph (3), a carrier's maximum liability for household goods that are lost, damaged, destroyed, or otherwise not delivered to the final destination is an amount equal to the replacement value of such goods, subject to a maximum amount equal to the declared value of the shipment and to rules issued by the Surface Transportation Board and applicable tariffs.

(3) Application of rates.—The released rates established by the Board under paragraph (1) (commonly known as "released rates") shall not apply to the transportation of household goods by a carrier unless the liability of the carrier for the full value of such household goods under paragraph (2) is waived, in writing, by the shipper.

(g) Modifications and reforms.—

(1) Study.—The Secretary shall conduct a study to determine whether any modifications or reforms should be made to the loss and damage provisions of this section, including those related to limitation of liability by carriers.

(2) Factors to consider.—In conducting the study, the Secretary, at a minimum, shall consider—

(A) the efficient delivery of transportation services;

(B) international and intermodal harmony;

(C) the public interest; and

(D) the interest of carriers and shippers.

(3) Report.—Not later than 12 months after January 1, 1996, the Secretary shall submit to Congress a report on the results of the study, together with any recommendations of the Secretary (including legislative recommendations) for implementing modifications or reforms identified by the Secretary as being appropriate.