

Holland & Knight

10 St. James Avenue | Boston, MA 02116 | T 617.523.2700 | F 617.523.6850
Holland & Knight LLP | www.hklaw.com

Chester D. Hooper
(617) 854-1472
chester.hooper@hklaw.com

October 17, 2013

Robert B. Parrish
President, The Maritime Law Association of the United States
c/o Moseley Prichard Parrish Knight & Jones
501 West Bay St
Jacksonville, FL 32202

Dear Bob:

I write to request the MLA to file a brief amicus curiae in support of a petition for certiorari from the Supreme Court to the Fourth Circuit in the two to one decision of *ABB Inc. v. CSX Transp., Inc.* No. 12-1674 (4th Cir. July 8, 2013). I think the issue is important enough for the Supreme Court to decide, but I realize that our membership would be divided on the issue. For that reason, I do not think we should file a brief on the merits and should state in our brief in support of a petition for certiorari that we shall not file a brief on the merits.

The case involved a rail shipment whose contract was evidenced by a bill of lading form drafted by the shipper rather than the carrier. The shipper's form bill of lading incorporated the railroad's tariff by reference, but the majority of the Fourth Circuit panel held that the Carmack Amendment prevented the court from construing the shipper's form against the drafter and imposed a heightened 'specificity' requirement upon the carrier. As a result, the majority of the court held the shipper's form language was not specific enough to constitute a written agreement to incorporate the lesser liability set forth in the CSX tariff. Judge Agee disagreed and wrote a well reasoned, I think, dissent.

The majority opinion seems to run counter to the reasoning in *Norfolk S. Ry. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004) that a Himalaya Clause in a bill of lading be interpreted as any other contract, without a need for specific language.

In both *Kirby* and *Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corp. et al.*, 130 S.Ct. 2433, 560 U.S. ___, 2010 AMC 1521 (2010) the Court realized the need for a practical, uniform interpretation of the various contracts used in multimodal carriage of goods. The majority of Fourth Circuit opinion did not recognize that need, but the dissenting judge did.

Robert B. Parish
October 17, 2013
Page 2

I shall be at the Puerto Rico meeting, arriving during the evening of Tuesday, October 29th.

Thank you for your consideration.

Sincerely yours,



Chester D. Hooper

CDH/nev

Cc: Jeffrey Young
Legal Department
ABB Inc.
940 Main Campus Drive, Suite 200
Raleigh, NC 27606
(919) 856-2514
jeff.young@us.abb.com

Dauna L. Bartley
Sessoms & Rogers, P.A.
1822 East Highway 54, Suite 200
Durham, NC 27713
(919) 688-1000
dlbartley@sessomslaw.com

Enclosures:

Appendices, which include the lower court decisions
The Petition for certiorari filed by CSX

Response to Required Form for Brief Amicus Curiae Request

1. Case in which review is sought: *CSX Transportation, Inc. v. ABB, Inc.*, No. 13-452 (U.S.).
2. We do not represent a party in this case, but we have and do represent CSX in other non-related matters. We also represent multimodal ocean carriers who should have an interest in issues related to those presented by this case.
3. Date of the Order/Judgment that review is sought: July 8, 2013
 - (a) CSX Transportation, Inc. (“CSX”) seeks review of the final judgment of the U.S. Court of Appeals for the Fourth Circuit in *ABB, Inc. v. CSX Transportation, Inc.*, 721 F.3d 135 (4th Cir. 2013).
 - (c) The amicus participation of the Association is only requested for the petition stage.
4. CSX seeks review in the U.S. Supreme Court and filed the petition for certiorari on October 7, 2013.
5. The Association’s amicus curiae brief in support of the petition for certiorari would be due November 12, 2013.
6. The question presented by the CSX’s petition is “whether the Carmack Amendment ... 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 incorporate tariff if the contract itself does not explicitly describe the limitation or the tariff.”
7. This case is of critical importance to the maritime industry. The Fourth Circuit’s decision creates significant uncertainty, for both carriers and shippers, regarding the enforceability of liability limitations and other contractual clauses set forth in a governing tariff and incorporated by reference in a shipping agreement that maritime shippers and carriers may themselves be bound by. In addition, the panel’s decision may contribute to and deepen an existing split among the circuits concerning the interpretation of analogous liability limitation provisions in the Carriage of Goods by Sea Act (“COGSA”), §4(5), Ch. 229, 49 Stat. 1207 (1936) *reprinted in* note following 46 U.S.C. §30701: whereas several circuits have held that a shipping contract may incorporate those limitations by general reference, *e.g., Henley Drilling Co. v. McGee*, 36 F.3d 143, 145 (1st Cir. 1994), the Ninth Circuit—echoing the Fourth Circuit’s analysis of the Carmack Amendment—requires in addition that the carrier must provide specific notice of those limits to the shipper, as a prerequisite to their enforcement in any subsequent litigation, *e.g., Starrag v. Maersk, Inc.*, 486 F.3d 607, 613 (9th Cir. 2006). The panel’s decision may also create a conflict with the reasoning of opinions such as *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010) and *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), both of which

emphasize the importance of allowing the parties to shipping arrangements to exercise the practical discretion to structure their transactions without unnecessary or superficial restrictions, including artificial "specificity" requirements. 543 U.S. at 31.

8. The outcome of this case would affect a number of the Association's by-laws 702.3 factors. First, as described above, the Fourth Circuit's decision adversely affects the uniformity of enforcement of limitations on liability. The Fourth Circuit's decision has caused a circuit split with the Eleventh and Second Circuits regarding the enforceability of limitations on liability and will deepen the existing split among the circuits concerning the interpretation of analogous liability limitation provisions in COSGA, 46 U.S.C. App. § 1304(5). This could cause serious damage to the uniform application of maritime law to the maritime shipping industry. Second, the outcome of this case could adversely affect traditional practice under COSGA and the Carmack Amendment by refusing to recognize carrier limitations on liability unless such limitations are described with the requisite "specificity" that the Fourth Circuit demands. Finally, the outcome of this case likely would affect the interpretation of the COSGA package or customary freight unit limitation.
9. (a) Name and address of opposing counsel:

Jeffrey Young
Legal Department
ABB Inc.
940 Main Campus Drive
Suite 200
Raleigh, NC 27606
(919) 856-2514
jeff.young@us.abb.com

Dauna L. Bartley
Sessoms & Rogers, P.A.
1822 East Highway 54, Suite 200
Durham, NC 27713
(919) 688-1000
dlbartley@sessomslaw.com

- (b) CSX's attorney has requested blanket consent for filing amicus briefs from attorneys representing ABB. ABB's attorney is considering the request.

10. Requested materials are enclosed.

Date:

Oct. 17, 2013

Signature:

Chetan P. Hoop