No. 13-452

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,
v.
ABB INC.,
Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE* AMERICAN TRUCKING ASSOCIATIONS, INC.[1]

Amicus Curiae American Trucking Associations, Inc. ("ATA") is the national association of the trucking industry. ATA's direct membership includes approximately 2,000 trucking companies and, in

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than ATA, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. Both parties received notice of ATA's intention to file this *amicus curiae* brief at least ten days prior to this brief's due date. Both parties have given their blanket consent to the filing of *amicus curiae* briefs in letters that have been lodged with the Clerk of this Court.

conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including on numerous occasions before this Court.

The national trucking industry is an essential pillar of the American economy and lifestyle. Every day, motor carriers transport millions of interstate shipments throughout the United States to businesses and consumers. In order to provide this vital service at a reasonable cost, motor carriers must have certainty and predictability with respect to, among other things, the liability that arises on those rare occasions when freight is lost or damaged.

This predictability is particularly critical to the motor carrier industry. While a rail carrier transports large volumes of freight continuously along a largely permanent rail line occupied only by other trains and related equipment, a motor carrier transports its assorted customers' freight in a variety of contexts (truckload, less-than-truckload, intermodal, etc.) across a multitude of dynamic environments (highways, city streets, rural roads, etc.) and coming into close contact with a host of other vehicles, persons, and infrastructure. The incalculable factors involved in motor carrier transportation means that such carriage inherently involves a greater number of occasions for possible freight loss or damage. Indeed, a review of the Petition for a Writ of Certiorari filed by petitioner in this case reveals that the seminal authorities upon which this dispute turns primarily involve motor carrier transportation rather than rail transportation. *See, e.g., Werner Enters. Inc.* v. *Westwind Mar. Int'l, Inc.*, 554 F.3d 1319 (11th Cir. 2009); *Siren, Inc.* v. *Estes Express Lines*, 249 F.3d 1268 (11th Cir. 2001); *Mech. Tech., Inc.* v. *Ryder Truck Lines, Inc.*, 776 F.2d 1085 (2d Cir. 1985).

As explained in greater detail below, the Fourth Circuit's decision has now potentially invalidated countless limitations of liability (thereby creating vast new liability exposure for trucking companies) and casts uncertainty on long-established operational practices as well as on more recently established practices that take advantage of electronic communications. For these reasons, ATA and its members have a direct and immediate interest in the Court's decision in this case.

SUMMARY OF ARGUMENT

In its holding, a divided panel of the United States Court of Appeals for the Fourth Circuit refused to enforce a plain and unambiguous limitation of liability for freight loss and damage claims on the basis that the tariff containing that limitation of liability was incorporated generally, rather than specifically, in the bill of lading governing the shipment. ATA agrees with all of petitioners' arguments in support of reversing the Fourth Circuit's judgment. However, ATA submits this amicus brief in order to emphasize the radical and disruptive effect that the panel's decision, if left standing, will have upon the trucking industry in particular and, by extension, the entire interstate shipping system. To begin with, the decision impairs Congress's goals in enacting the Carmack Amendment, and subjects the trucking industry to a vast and wholly unexpected new level of liability exposure for freight claims. In addition, the decision casts uncertainty on long-established operational practices designed to foster accuracy and efficiency in the transportation industry. As a result, and for all of the reasons urged by petitioner, this Court should issue a writ of certiorari to review the judgment of the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DESTABILIZES THE UNIFORM LIABILITY RULES CONGRESS ESTABLISHED FOR THE INTERSTATE TRUCKING INDUSTRY.

The magnitude of the liability exposure erroneously created by the decision below is breathtaking in scope and radically diverges from the statutory text, existing precedent, and robust legislative history. As petitioner already provides an excellent and comprehensive description of the statutory and regulatory background, ATA simply amplifies a few salient points regarding that important background.

A. Congress Intended The Carmack Amendment To Establish A Nationally Uniform Freight Claim Liability Regime.

The Carmack Amendment is part of a comprehensive and uniform legislative enactment. In 1887, the U.S. Congress enacted a national transportation policy in the original Interstate Commerce Act ("ICA"), 49 U.S.C. § 1, *et seq.*; Feb. 4, 1887, ch. 104, 24 Stat. 379, in response to the chaotic disparity which resulted from the application of varying state laws to interstate shipping transactions. By implementing the ICA, Congress intended federal rather than state law to regulate the field of interstate transportation of goods. *Id*. However, the ICA did not specifically define the rights and obligations of shippers or carriers. Consequently, inconsistent state laws continued to govern interstate transportation, and similar claims received widely divergent legal treatment depending on the forum. As a result, neither shippers nor carriers could reasonably predict their rights or obligations in any given situation. To eliminate the significant burden that this confusion placed on interstate commerce, Congress added the Carmack Amendment to the ICA in 1906.

The Carmack Amendment defines the parameters of carrier liability for loss and damage to goods transported under interstate bills of lading. While the Carmack Amendment originally only applied to rail transportation, the evolution of the commercial truck in the early part of the twentieth century naturally resulted in Congress extending the Carmack Amendment to motor carriers. Motor Carrier Act of 1934, ch. 498, 49 Stat. 543. The Carmack Amendment, as applied to motor carriers, is presently set forth in 49 U.S.C. § 14706 and states in relevant part:

> [A carrier issuing a bill of lading] 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 . . . .

49 U.S.C. § 14706(a). The Carmack Amendment represents a careful balancing of shipper and carrier interests. Under the Carmack Amendment, shippers

are relieved of the burden of meeting traditional tort requirements (*e.g.*, proving which of several potential carriers caused their loss, or whether the carrier's conduct actually or proximately caused the loss). In other words, the Carmack Amendment replaces tort principles with a type of strict carrier liability. *Missouri Pac. R.R. Co.* v. *Elmore & Stahl*, 377 U.S. 134, 138 (1964); see also *Reider* v. *Thompson*, 339 U.S. 113, 119 (1950) (noting that the Carmack Amendment relieves shippers of the burden of searching for the particular carrier at fault).

While carriers lost some defenses under the Carmack Amendment, they gained the certainty that accompanies application of a nationally uniform liability regime. In other words, rules regarding both proof of loss or damage and carrier liability are now universally applied, regardless of what states a shipment might pass through. *See Hughes* v. *United Van Lines, Inc*., 829 F.2d 1407, 1415 (7th Cir. 1987).

B. The Carmack Amendment Allows Shippers And Carriers To Negotiate Limitations On Liability For Freight Loss And Damage.

Even prior to the enactment of the Carmack Amendment, shippers and carriers regularly agreed to limit a carrier's liability for any lost or damaged freight. *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 510 (1913). The Carmack Amendment itself includes a statutory memorialization of the continued ability of shippers and motor carriers to bargain for clauses that limit a carrier's liability for freight loss and damage claims. 49 U.S.C. § 14706(c)(1)(A) provides in part:

> . . . a carrier providing transportation or service . . . may, subject to the provisions of

> this chapter . . . 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.

(emphasis added). The ability to enforce a limitation of liability under this statute is essential to the trucking industry and its shipper customers for a number of reasons.

First, a motor carrier's ability to rely upon limitations of liability means that the motor carrier is able to reduce the rates that it charges for its services. Not surprisingly, a motor carrier is willing to transport goods at a lower price if the motor carrier has confidence that its maximum exposure for freight loss or damage is limited to a specific amount. Among other things, a motor carrier that transports goods subject to a limitation of liability can reduce its own out-of-pocket expense (and therefore the cost that it charges to customers) by foregoing a certain level of cargo insurance. This inverse relationship between freight charges and limitations of liability benefits shippers as well, because the cost for a shipper to purchase insurance to cover its goods in transit is typically less than the amount that a motor carrier would have to charge that shipper in order to procure cargo insurance in an increased amount sufficient to provide for full value recovery. As a result, the shipper procures the best freight rate and the motor carrier avoids extraordinary, uninsured liability. Indeed, this Court has specifically recognized the inverse relationship between a carrier's limitation of liability and its transportation rates. *Norfolk Southern Railway Co.* v. *Kirby*, 543 U.S. 14, 19, 35 (2004).

In addition, a motor carrier's ability to limit liability for freight loss and damage means that the carrier is protected from the occasional high-value freight claim that completely destroys or severely erodes a motor carrier's profitability. Indeed, one high value, catastrophic freight claim (unprotected by a limitation of liability) can put a small trucking company entirely out of business.

As the petitioner has explained, Congress included a provision in the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Publ. L. No. 104-88, §§ 102, 103, 109 stat. 803, 830, 908, which ensured that shippers and carriers could still agree to limitations of liability contained in a carrier's tariff after the enactment of the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA"), Pub. L. No. 103-311, tit.II, 108 Stat. 1673, 1683. That provision, 49 U.S.C. 14706(c)(1)(B), provides that:

> 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.

(emphasis added). The legislative history of this provision confirms that the intent of Congress in amending the statute was to ensure that motor carriers could continue to limit liability in the same manner that they had always done so. The House of Representatives Conference Report No. 104-422 specifically notes:

> The intention of this conference agreement is to replicate, as closely as possible, the practical situation which occurred prior to the enactment of the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), which replaced the requirement that tariffs be filed with the ICC for individually determined rates. Prior to the enactment of TIRRA, carriers had the ability to limit liability as a part of the terms contained in the tariff. ***By signing a bill of lading which incorporated by reference the tariff, the shipper was deemed to have agreed to the tariff and its conditions and terms. However, the carrier was under no obligation to specifically notify the shipper of the conditions and terms of the tariff.*** It was the responsibility of the shipper to take an affirmative step to determine what was contained in the tariff—usually through the retaining of a tariff watching service. An unintended and unconsidered consequence of TIRRA was that, when the tariff filing requirement was repealed, carriers lost this particular avenue as a way of limiting liability. ***This provision is intended to return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment.***

H.R. Conf. Rep. No. 104-422, at 223 (1995), reprinted in 1996 U.S.C.C.A.N. 850, 908 (emphasis added). In other words, trucking companies and shippers were authorized to continue their longstanding practice of permitting a carrier to include a limitation of liability in a tariff and to incorporate that limitation of liability into a bill of lading by general reference. This legislative history demonstrates that, contrary to the Fourth Circuit's decision, the Carmack Amendment does not require a "citation to a specific rate authority or code." *ABB, Inc.* v. *CSX Transp., Inc*. 721 F.3d.135 at 143 (4th Cir. 2013).

C. The Fourth Circuit's Construction Of The Carmack Amendment Exposes Motor Carriers To Vast Potential Liability For Shipments That Have Already Occurred.

For the nearly twenty years since ICCTA was enacted, trucking companies and their customers have continued to incorporate limitations of liability for freight loss and damage claims into their transportation contracts with confidence that those limitations would be enforceable—and have priced their services accordingly. This changed when the Fourth Circuit issued its decision on June 7, 2013 and conjured up a new, extra-statutory "specificity" standard for limitations of liability under the Carmack Amendment. Now, according to the Fourth Circuit, these long-standard practices have had no binding effect, and a limitation of liability in a tariff or price list incorporated by reference into the bill of lading can be unilaterally repudiated by the shipper. Just as petitioner has observed that the Fourth Circuit's decision transformed a $25,000 exposure into a more than $1 million exposure (*i.e*., a nearly 50-fold increase), the decision exposes motor carriers to exponentially higher liability than that for which they had bargained.

As a result of this decision, any motor carrier that moves goods within the Fourth Circuit's jurisdiction now faces the prospect of litigating the enforceability of its liability limits if those limits were included in a tariff or price list incorporated into the bill of lading. The Carmack Amendment specifies a minimum, two-year statute of limitations commencing with a motor carrier's unequivocal denial of a freight claim. 49 U.S.C. § 14706(e)(1). Thus, the Fourth Circuit's decision opens the door to litigating countless freight claims that arose even several years ago if the shipper chooses to attack retroactively a limitation of liability. Those shipments were, of course, priced to take the liability limitations into account, resulting in an unjustifiable windfall for any shipper that successfully challenges a liability limitation under the Fourth Circuit's novel construction of the Carmack Amendment. Furthermore, because motor carriers make their cargo insurance decisions with liability limits in mind, the Fourth Circuit's decision leaves these motor carriers exposed to uninsured liability that both they and their customers reasonably believed had been clearly limited by contract. Even if a freight claim is too small to warrant litigation, shippers may aggregate these more modest claims and perform a belated set-off against freight charges. Motor carriers can do absolutely nothing at this point to mitigate this wholly unexpected new level of liability exposure associated with the billions of shipments performed in recent years.

The turmoil created by this decision is particularly acute in light of the fact that such a tremendous volume of truck traffic occurs throughout the states constituting the Fourth Circuit. For instance, as of 2011, a total of 7,138,000 trucks were registered in Maryland (1,683,000), North Carolina (2,743,000), South Carolina (1,726,000), Virginia (2,954,000), and West Virginia (732,000). AMERICAN TRUCKING TRENDS 2013 (American Trucking Associations, 2013). Of course, this figure does not include the millions of trucks domiciled in other jurisdictions that regularly cross into these states as well. The states constituting the Fourth Circuit serve as a vital conduit for truck transportation throughout the northeast and the south and serve as the origin or destination of a significant volume of truck transportation between the east and west coasts, including over 1,209,822 containers imported and exported from the Port of Virginia alone in 2012.[2]

In addition, the expansive venue provisions of the Carmack Amendment magnify the implications of the Fourth Circuit's decision. The Carmack Amendment guarantees shippers that they will have a particular choice of venue. 49 U.S.C. § 14706(d) establishes venue against a "delivering carrier" in "any State through which the defendant carrier operates." In addition, the statute establishes venue against a "carrier responsible for loss" in "the judicial district in which such loss or damage is alleged to have occurred." *Id*. As a result, sophisticated shippers who seek to invalidate a limitation of liability will now pursue such litigation in the Fourth Circuit in order to capitalize on this material divergence in the treatment of limitations of liability.

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[2] *See* Port of Virginia 2012 Key Performance Indicators, at http://portofvirginia.com/media/38503/2012_vpa_kpi.pdf.

In short, the erroneous decision below destabilizes the uniform liability rules that Congress enacted for the interstate trucking industry, subjecting motor carriers to enormous potential liability for shipments that have already occurred.

II. THE DECISION REQUIRES SHIPPERS AND CARRIERS TO REDESIGN BOTH LONG-STANDING AND INNOVATIVE CONTRACTING PRACTICES AT THE EXPENSE OF INDUSTRY EFFICIENCY.

Motor carriers routinely use tariffs to establish pricing and a wide variety of other terms and conditions, including limitations of liability, governing the carriage of goods. Motor carriers who use these tariffs rely upon the ability to incorporate them by general reference into a contract of carriage—whether a bill of lading or a transportation contract entered into pursuant to 49 U.S.C. § 14101(b)(1). The Fourth Circuit's atextual, heightened "specificity" requirement compels motor carriers and shippers to change operational practices that have developed—and continue to develop—to foster accuracy and efficiency in the transportation of goods.

A. Incorporation Through A Uniform Straight Bill of Lading.

Motor carriers and shippers frequently rely upon one version or another of a "Uniform Straight Bill of Lading" when agreeing to transport goods. As its name indicates, these bills of lading are virtually identical in many respects. One nearly universal feature is an acknowledgment on the face of the bill of lading incorporating a carrier's tariff by general reference, in language such as the following:

> RECEIVED, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the ***rate classifications and rules*** that have been established by the carrier and are available to the shipper, on request.

See, e.g., *EFS National Bank* v. *Averitt Express, Inc.*, 164 F.Supp.2d 994, 996 (W.D. Tenn. 2001) (emphasis added). Likewise, the following type of language typically also appears on the bill of lading:

> 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 hereunder shall be ***subject to all the terms and conditions of the Uniform Bill of Lading*** set forth in the National Motor Freight Classification. The shipper hereby ***certifies that he is familiar with all the terms and conditions of the said bill of lading,*** including those on the back hereof, and the said terms and conditions are hereby agreed to be the shipper and accepted for himself and his assigns.

Id. at 997 (emphasis added).[3] Motor carriers have long relied on language like this to ensure that their tariffs are properly incorporated into a contract of carriage.

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[3] The version of the Uniform Bill of Lading set forth in the National Motor Freight Classification ("NMFC") is primarily used for less-than-truckload transportation. (The NMFC is a set of standards, rules, and procedures adopted by many shippers and motor carriers in order to evaluate the "transportability" of

This reliance is increasingly important because shippers and third-party intermediaries—rather than motor carriers themselves—often prepare the bill of lading (as ABB did in this case). For instance, shippers frequently prepare bills of lading to ensure that an accurate description of the quantity and type of goods is listed. Motor carriers must have confidence that the standardized language mentioned above validly incorporates the carrier's tariff (and, in turn, the terms and conditions of carriage it contains). If incorporation by reference of the carrier's tariff is no longer effective, motor carriers and shippers will have to change consistent and well-established operational practices that have developed over recent decades and which currently accelerate rather than impede the free flow of commerce.

At present, shippers and third-party intermediaries commonly use efficient, automated processes to generate accurate bills of lading that incorporate the carriers' terms by reference. If the industry can no longer rely on those incorporations in the Fourth Circuit, these processes will doubtless be displaced in favor of carriers completing bills of lading manually, based on data provided by the shipper—resulting not only in an inefficient misallocation of resources but in an increased likelihood of errors. Alternatively, a shipper who insists upon preparing its own bills of lading would need to customize each bill of lading in order to incorporate with "specificity" a given motor carrier's terms. In other words, a shipper who does

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various types of freight and to provide predictable rules to shippers and carriers for packaging, claims disposition, and the like.) Substantially similar language (without specific reference to the National Motor Freight Classification) is used in a wide variety of truckload transportation as well.

business with fifty different motor carriers would need to have fifty different versions of a bill of lading available—and use the correct version with respect to each shipment—so that when a particular carrier accepts a shipment, the bill of lading will "specifically" reference that motor carrier's tariff in accordance with the Fourth Circuit's decision.

Until now, courts have consistently recognized the legitimacy of incorporating a tariff into a bill of lading by general reference. For instance, in *EFS National Bank*, *supra*, a carrier had in place a tariff, known as "Rules Tariff 100," that contained a limitation of liability. The carrier successfully enforced that limitation of liability because the tariff was incorporated into the carrier's bill of lading by virtue of the above-referenced acknowledgment language notwithstanding the fact that no specific reference was made to "Rules Tariff 100" in the bill of lading.[4] The court concluded that "the legislative history [of the Carmack Amendment] indicates that Congress intended to make it ***the shippers responsibility*** to ask for a copy" of the incorporated conditions, *id*. at 1001 (emphasis added), and held that general incorporation of the tariff in the bill of lading created an enforceable liability limitation. *Id*. at 1002.

The same was true in *Werner Enterprises, Inc.* v. *Westwind Maritime International, Inc*., 554 F.3d 1319 (11th Cir. 2009). In *Werner*, the carrier contract incorporated—by general reference—the motor carrier's tariff which, in turn, contained a limitation of liability. The Eleventh Circuit held that the motor carrier properly incorporated its tariff into the contract of

[4] The same type of language appears in the bill of lading that was prepared by ABB in this case.

carriage and rejected the shipper's assertion "that the shipping document itself must include the choice of rates,"—one reflecting full liability, the other reflecting limited liability—"in order for the shipper to have a reasonable opportunity to choose between them." *Id*. at 1327.

The outcome reached in cases like *EFS National Bank* and *Werner Enterprises*, *supra*, is also consistent with well-established precedent demonstrating that courts should not protect a sophisticated shipper from itself when the shipper drafts a bill of lading. See, *e.g*., *Am. Cyanamid Co.* v. *New Penn Motor Express, Inc*., 979 F.2d 310, 314 (3d Cir. 1992) (enforcing limitation of liability where shipper used its own "form of bill of lading"); *Hughes Aircraft Co.* v. *N. Am. Van Lines, Inc*., 970 F.2d 609, 612 (9th Cir. 1992) (enforcing limitation of liability where shipper "drafted the contract and directly negotiated its terms"); *Mech Tech. Inc.* v. *Ryder Truck Lines, Inc*., 776 F.2d 1085, 1086 (2d Cir. 1985) (enforcing a limitation of liability when the bill of lading was "one of [the shipper's] own forms"). Motor carriers have come to rely upon such precedent in executing their day-to-day operational practices.

Every day, shippers and motor carriers throughout the country prepare bills of lading having language akin to the language above—language that incorporates a motor carrier's tariff generally rather than by specific reference to a particular tariff. Shippers and motor carriers likely have in their possession hundreds of thousands, if not millions, of pre-printed bills of lading that will now be ineffective to protect their bargains in the Fourth Circuit. Designing and developing new bills of lading to meet the Fourth Circuit's heightened, extra-statutory "specificity" standard will consume significant time and money. Moreover, shippers would have an incentive to keep using more traditional bills of lading in the hope that—in the event of a damage or loss claim—they can repudiate an incorporated limitation on liability after taking advantage of the lower rates it enabled. Creating this perverse incentive, and thrusting such an operational change upon carriers and shippers, frustrates Congress' intent to foster uniform, efficient practices in the trucking industry.

B. Incorporation Through A "Pro Sticker."

In order to provide for those instances where a bill of lading might not on its face incorporate a carrier's tariff with the type of language referenced above, shippers and motor carriers often use what is commonly referred to as a "pro sticker" to incorporate the carrier's tariff into the bill of lading. A "pro sticker" is an adhesive label that a motor carrier's driver may affix to a bill of lading at the time of accepting a shipment.[5] A typical "pro sticker" contains simple language that alerts the shipper to the fact that the carrier may have a tariff in place. For instance, in *AIM Controls, LLC* v. *USF Reddaway, Inc*., 2008 U.S. Dist. LEXIS 93034 (S.D. Tex. 2008), the court affirmed the ability of a carrier to incorporate its tariff into a bill of lading through the use of a "pro sticker." In *AIM Controls*, the shipper had prepared a bill of lading that did not incorporate the carrier's tariff. However, the carrier affixed a "pro sticker" to the bill of lading that incorporated the carrier's tariff by reference. When a claim arose for damaged freight, the carrier asserted the limitation of liability contained in its incorporated tariff. The court held that the limitation was validly

[5] A "pro sticker" is so named because it uses a "progressive" numbering system for purposes of tracking shipments.

incorporated into the bill of lading by virtue of the "pro sticker":

> [The shipper] used its own bill of lading, which did not specify a tariff. Instead, it signed the tariff after [the carrier] affixed the sticker. ***Other circuits have held that, when a shipper uses its own bill of lading, it is bound by any terms it incorporates, even if it does not have actual knowledge of those terms. . . .***

Id. at 7 (internal citations omitted). In other words, no heightened "specificity" requirement was imposed by the court in order to incorporate a tariff through a "pro sticker." In light of the Fourth Circuit's decision, motor carriers will now need to collect and destroy all existing "pro stickers" that incorporate tariff terms, create new "pro stickers" that may or may not be sufficiently specific to meet the Fourth Circuit's malleable, extra-statutory standard, and distribute and implement these new "pro stickers" to a decentralized workforce of drivers spread throughout the entire United States. The Fourth Circuit's decision fails to recognize the real-world consequences that follow from displacing well-established precedent that has informed the development of operational practices over many years.

C. Incorporation Through A Website.

Many carriers also make their terms and conditions of carriage (whether or not actually described as a "tariff") available on their respective websites.[6] These

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[6] *See*, *e.g*., Tariff 100 for YRC Worldwide Inc. at https://my.yrc.com/dynamic/national/servlet?CONTROLLER=com.rdwy.ec.rexcommon.proxy.http.controller.PublicProxyController

carriers alert their customers to the terms and conditions posted on their websites in a variety of ways—by referring to the company website in a carrier-generated bill of lading, by referring to the website on a "pro sticker," by referencing the website on a rate confirmation, or by communicating the existence of the website to its customers in e-mails, correspondence, and the like. The Fourth Circuit's decision means that a similar incorporation of a tariff provided on a website is likewise subject to attack. In other words, the Fourth Circuit's decision operates to stifle efficiency and transparency on the part of motor carriers and shippers who desire to take advantage of efficient, accessible technology to communicate with each other regarding applicable terms and conditions of carriage.

&redir=/tfd616; Tariff 211 for C.R. England, Inc. at https://www.crengland.com/etools/rate_quote/rate_quote_tariff.jsp.

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of certiorari, this Court should grant the writ.

Respectfully Submitted,

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