No. 13-452

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

REPLY BRIEF

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

* Counsel of Record

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The Fourth Circuit held in this case that the Carmack Amendment, 49 U.S.C. §§ 11706(c)(3)(A), 14706(c)(1)(A), precludes enforcement of a contractual limitation on a carrier's liability if the limitation is not described with "specificity" in the shipping agreement. Pet. App. 13a-15a. This requirement appears nowhere in the statutory language but was manufactured by the panel based on its assumption that the "inten[t]" of the Amendment was to "impose[ ] the risk of error on one particular party, the carrier, to the exclusion of the other party, the shipper." *Id.* at 19a-20a. That holding squarely conflicts with decisions of other circuits, and if allowed to stand will create substantial confusion for carriers and shippers nationwide. Pet. 12-25.

Rather than defend the panel's holding, the respondent ABB Inc. (ABB) contrives vehicle problems that do not exist. ABB argues that CSX "waived" its right to file a petition for certiorari by agreeing to a consent judgment in the district court, Opp. 13-17, but that judgment was *in favor of CSX* and did not, either explicitly or implicitly, waive CSX's right to seek review of the subsequent, adverse decision of the Fourth Circuit. *Infra* pp. 9-10. ABB characterizes the judgment below as "interlocutory" and not "final," Opp. 14, even though that judgment resolved all claims in the case and all agree that the issue presented is potentially dispositive of the matter, which is why the district court agreed to stay proceedings until this Court acts on CSX's petition. *Infra* pp. 10-11. And, ABB insistently characterizes the panel's holding as "fact-specific" and unfit for review, Opp. 28-31, when the panel's opinion itself states that its holding was based on its interpretation of the

Carmack Amendment *as a matter of law*—to impose heightened "specificity" when limiting liability for loss in shipping agreements. *Infra* pp. 2-4.

Notwithstanding ABB's attempts to avoid it, this case clearly merits review. The "specificity" standard adopted by the Fourth Circuit is flatly inconsistent with the language of the Carmack Amendment, conflicts with opinions of other circuits and this Court, and if uncorrected will seriously disrupt the interstate shipping system, and the Nation's economy as a whole, in a manner directly contrary to Congress's intent in enacting the Carmack Amendment.

I. THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER THE CARMACK AMENDMENT IMPOSES A HEIGHTENED "SPECIFICITY" REQUIREMENT ON THE PARTIES TO A SHIPPING CONTRACT.

Throughout its brief ABB argues that the panel below did not actually adopt a "specificity" standard under the Carmack Amendment but instead based its decision on traditional principles of contract law in light of "the specific facts of the case." Opp. 30. This argument is belied by the panel's opinion.

That opinion, by its own terms, refused to enforce the liability limitation not based on any factual finding but because the shipping agreement failed *as a matter of law* to satisfy a "specificity" requirement of the Carmack Amendment. Pet. App. 12a. The panel makes this point no fewer than a dozen times over the course of its opinion, repeatedly characterizing the Carmack Amendment as "requiring … specificity" and the agreement at issue as "[in]sufficiently specific." *Id.* at 12a-20a ("specific," "particular," "clear"). Indeed, the opinion acknowledges at one point that, if this "specificity" requirement were *not* applied, the

liability limitation would be valid and enforceable against ABB under well-settled principles of state contract law. *Id.* at 19a. The panel held to the contrary only because, in its view, these principles were preempted and rendered "inapplicable" by the Carmack Amendment. *Id.*

At no point does the opinion suggest that the "specific facts of this case"—including the history and course of dealing between ABB and CSX—played a role in its conclusion that the liability limitation was unenforceable. Quite the opposite, the opinion states that evidence of the parties' "alleged course of dealing ... *does not bear* on th[at] question." Pet. App. 19a n.18 (emphasis added). In asserting otherwise, ABB mischaracterizes the panel opinion and the record in this case. ABB asserts, for example, that the ABB manager who prepared the shipping agreement, Brian Brueggeman, "sought rate information from CSX by telephone as well as by searching the CSX website … but CSX failed to provide it upon request in derogation of its statutory and regulatory obligations." Opp. 20-21. Nowhere in the opinion, however, does the panel find that CSX failed to provide *any* information requested by ABB, much less that CSX violated its "statutory and regulatory obligations." Rather, the opinion states at the outset that ABB's failure to obtain or review the governing price list was attributable to the failure of its own agent Mr. Brueggeman, who did not "exercise due diligence in … obtaining rate and liability information." Pet. App. 12a.[1]

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[1] The record likewise contains no evidence that CSX refused to provide the price schedule or rate information to ABB or violated any disclosure obligations. Mr. Brueggeman testified that he had reviewed the CSX website and attempted to contact CSX personnel, but he could not identify any particular CSX repre-

The panel, in short, did not rely in any way on the facts surrounding the parties' history, negotiations, or course of dealing in concluding that the liability limitation of the shipping agreement was unenforceable. Rather, it based that conclusion entirely on its holding, as a matter of law, that the Carmack Amendment requires such terms to be described with heightened "specificity." Pet App. 19a-20a. That legal issue is thus squarely presented for review and respondent's attempt to wish it away fails.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS AND RAISES ISSUES OF EXCEPTIONAL NATIONAL IMPORTANCE CONCERNING THE INTERSTATE SHIPPING SYSTEM.

The question presented, *viz.*, whether the Carmack Amendment imposes a heightened "specificity" requirement on the parties to a shipping agreement, has divided the circuits, implicates conflicts with this Court's precedent, and raises issues of exceptional importance to the interstate shipping system and the Nation's economy.

1. The panel's decision creates a square split with opinions of the Second and Eleventh Circuits. *Werner Enters. Inc.* v. *Westwind Mar. Int'l, Inc.*, 554 F.3d

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sentative with whom he spoke or say that the CSX website did not contain the price list—rather, he simply did not "remember seeing [it]." Pet. App. 21a n.2, 54a-55a, 58a, 67a. Indeed, Mr. Brueggeman's predecessor (who left his position shortly before these events) testified that he had on numerous occasions obtained such information upon request. *Id.* Similarly, the fact that Mr. Brueggeman noted the "product value" on the bill of lading, although emphasized by ABB, is simply irrelevant, as that notation did not by its terms constitute a request for a modified liability limit. *Id.*

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). Those opinions hold that liability limitations incorporated into a shipping agreement through a generic reference to a governing tariff, classification, or freight schedule are valid and enforceable against the shipper under the Carmack Amendment. *Werner*, 554 F.3d at 1328; *Siren*, 249 F.3d at 1273-74; *Mech. Tech.*, 776 F.2d at 1087-88. This is particularly true, those courts reason, where the shipper itself drafted the shipping agreement, meaning the shipper cannot reasonably claim that it lacked notice of the limit or a reasonable opportunity to request a different liability level. *Siren*, 249 F.3d at 1272; *Mech. Tech.*, 776 F.2d at 1088-89; see *Werner*, 554 F.3d at 1328. The panel below, by contrast, held that the Carmack Amendment precludes enforcement of an incorporated liability provision unless it is described with "specificity" in the shipping agreement, even when the shipper drafted the agreement. Pet. App. 12a-13a.

ABB nevertheless suggests that these opinions can all be viewed as consistent because, according to ABB, the shipping agreements before the Second and Eleventh Circuits described the applicable schedule or liability terms with "specificity," and thus would have satisfied the Fourth Circuit's test. Opp. 21-26. That is clearly not the case. The agreement in *Werner* stated only that it "*may be* ... subject to the terms of [a] third party's limitations of liability and/or terms and conditions of service," without describing what the terms are, where they might be found, or even which "third party" adopted them. 554 F.3d at 1322 (emphasis added). The agreement in *Siren* did not make *any* reference to an incorporated tariff or liability terms, but merely included the undefined notation

"Class 85." 249 F.3d at 1269. And the agreement in *Mechanical Technology* used exactly the same language as the shipping agreement in this case, referring generically to the governing "classification[ ]" or "tariff[ ]." 776 F.2d at 1086.

None of these agreements was more "specific" than the one in this case—indeed, those in *Werner* and *Siren* were, if anything, substantially less clear than those here. To be sure, as ABB notes, evidence introduced in those cases, relating to the parties' course of dealing and common industry usage, shed light on the meaning of the relevant references and allowed the courts to identify the specifically applicable schedule or liability terms. *E.g.*, *Siren*, 249 F.3d at 1274 ("Class 85" was "universally understood throughout the motor carrier industry" as limiting liability). But ABB ignores that this is precisely the type of evidence the Fourth Circuit said could *not* be considered under its "specificity" test: that standard can be satisfied, the panel held, only if the language of the shipping agreement itself is clear and unambiguous on its face. Pet. App. 19a n.18.

Had the Second and Eleventh Circuits applied the same "specificity" rule, they would have held that the relevant agreements were insufficiently "specific" and that the incorporated liability limits were invalid under the Carmack Amendment. See *Werner*, 554 F.3d at 1322; *Siren*, 249 F.3d at 1269; *Mech. Tech.*, 776 F.2d at 1086. That they instead found to the contrary—that the liability limitations at issue were valid and enforceable—confirms that they did not apply, and indeed rejected, the "specificity" standard that is the linchpin of the panel's decision below.

The panel decision is, moreover, inconsistent with a host of other circuit opinions addressing liability limits under the Carmack Amendment. Pet. 16-19.

Those opinions recognize that contractual terms limiting the carrier's liability are valid and enforceable so long as the terms are "available upon request" and the shipper had a "reasonable opportunity" to negotiate for a different liability limit. *Id.* (citing, *e.g.*, *OneBeacon Ins. Co.* v. *Haas Indus., Inc.*, 634 F.3d 1092, 1099-100 (9th Cir. 2011)). This standard was clearly satisfied in this case: the applicable CSX price schedule was available to ABB upon request (although ABB never obtained it as a result of the negligence of its agent Mr. Brueggeman) and ABB could have negotiated for a different limit by noting the request on the agreement (as it had in fact done in prior situations). Pet. App. 12a, 18a, 26a, 48a. The panel nevertheless refused to enforce the liability limitation in this case on grounds that CSX had failed to satisfy an atextual "specificity" requirement. *Id.* at 15a. The demonstrable conflict between this holding and the approach of other circuits further justifies this Court's review.

2. The panel's opinion also conflicts with settled precedent of this Court. Pet. 19-21. In cases stretching back 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—including a limitation on the carrier's liability—and are bound thereby so long as the tariff is available for review. *Id.* (quoting *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915)). These opinions compel enforcement of the liability limitation in this case.

ABB, notably, does not disagree. Instead, it makes the extraordinary claim that these opinions are no longer valid or binding precedent "in light of the recent alterations to the statutory and regulatory requirements." Opp. 29. Those amendments, from the

1990s, terminated the Interstate Commerce Commission and eliminated the statutory requirement that carriers must file their tariffs publicly with the Commission. Pet. 7-8. These changes, ABB argues, mean that "shippers may no longer be imputed with ... notice of the terms of a carrier's tariff or rate schedules." Opp. 29.

That argument, beyond reflecting a remarkable disregard for this Court's precedent, is inconsistent with the amendments on which it relies. The same amendments that terminated the Commission separately mandated that tariffs would still be publicly available to shippers, but would henceforth be maintained by carriers and produced "on request." 49 U.S.C. § 11101(b). The express purpose of this provision was "to return to the pre-[repeal] situation where *shippers* were responsible for determining the conditions imposed on the transportation of a shipment." H.R. Rep. No. 104-422, at 223 (1995) (emphasis added).

Thus, these amendments, far from superseding or vitiating the decisions of this Court holding that shippers "are charged with notice [of]" and bound by the terms of the governing tariff or schedule, affirm that those decisions remain valid. Pet. 17-21. In all events it is this Court's prerogative—not the Fourth Circuit's, and certainly not ABB's—to decide whether the Court's prior holdings remain good law.

3. Intervention by this Court is especially warranted given the undisputed importance of this case to the interstate shipping system. Pet. 21-25. The panel's decision will produce substantial uncertainty, as rail and motor carriers will no longer be able to 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 (as there almost invariably will be) that a future lawsuit might be brought by the shipper within the Fourth Circuit. *Id.* The costs associated with increased liability, increased litigation, and decreased efficiency will be significant, and will ripple through the economy, as the amicus briefs filed by the American Association of Railroads and American Trucking Associations confirm.

The only response ABB can offer is to re-assert its argument that the decision below was "fact-specific" and therefore should not apply in other cases. Opp. 31. But, as explained above, the decision embodies a *legal* interpretation of the Carmack Amendment that, even if not directly binding in other circuits, can and almost certainly will be cited and applied in any future cases implicating those provisions. *Supra* pp. 2-4. The only way to prevent the profoundly negative consequences associated with the panel's decision on the interstate shipping system—which even ABB does not dispute—is for this Court to intervene now and clarify for courts across the country the proper interpretation of the Carmack Amendment.

III. THIS CASE IS PROPERLY BEFORE THE COURT.

With no rejoinder to the ample grounds supporting certiorari, ABB attempts to avoid review by characterizing this case as outside the Court's reach. It argues that (i) CSX "waived" its right to petition for certiorari and (ii) the decision below is "interlocutory" and not "final." Opp. 14-16. These contentions are groundless.

CSX clearly did not "waive" its right to seek review in this Court by agreeing to the consent judgment in the district court. Entry of a consent judgment gen-

erally waives a party's right to challenge *that judgment*, but it does not and cannot without more waive a party's right to challenge *separate judgments*. *E.g.*, *Montez* v. *Hickenlooper*, 640 F.3d 1126, 1132 (10th Cir. 2011); see*, e.g.*, *United States* v. *ITT Cont'l Baking Co.*, 420 U.S. 223, 233 (1975); *United States* v. *Int'l Bhd. of Teamsters*, 905 F.2d 610, 615 (2d Cir. 1990). That includes a judgment of an appeals court in a subsequent appeal, particularly where (as here) that judgment is adverse to the district court's decision. While CSX consented to the judgment of the district court, it obviously did not consent to—indeed, it vigorously contested—the judgment of the Fourth Circuit, and it did not waive, either implicitly or explicitly, its right to seek review of that judgment.

CSX did not, as ABB states, "consent[ ] to return of the case for trial upon entry of the Fourth Circuit's judgment." Opp. 16. Rather, CSX reserved in the consent judgment its right to present evidence on its defenses "*[i]f* the Fourth Circuit Court of Appeals returns the case to this Court for a trial." *Id.* at 11-12 (emphasis added). This language cannot be read as a waiver of CSX's right to seek review of the Fourth Circuit's judgment, much less the requisite "clear and unequivocal waiver." *E.g.*, *Montez*, 640 F.3d at 1132.

Nor can the district court's judgment be deemed "interlocutory" or non-"final" in any sense that would warrant postponing review. Opp. 14. That judgment resolved *all* pending claims in this case and constituted a "full and *final* resolution of this matter." *Id.* at 11 (emphasis added). Moreover, throughout these proceedings, both parties acknowledged that, if the liability limitation were deemed enforceable against ABB, judgment should be entered on all claims, and "the case would effectively be over." *Id.* at 15. Indeed, trial proceedings in this case have been stayed

by the district court because—as both parties stated—if this Court reverses the Fourth Circuit's decision, and reinstates the district court's holding, it "would obviate the need for trial altogether." Mem. Supp. Joint Stay Mot. 3, No. 5:08-cv-25 (E.D.N.C. Oct. 29, 2013).

All of this simply confirms what this Court and others have recognized in past cases: the enforceability of a liability limitation, especially when potentially determinative of the claims, is appropriate for review on appeal and before this Court. See *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 22 (2004) (granting review to consider enforceability of liability limits under Carmack Amendment on interlocutory appellate review). Particularly given the demonstrable conflicts created by the Fourth Circuit's decision and exceptional importance of these issues to the interstate shipping system and the Nation's economy, there is no reason to postpone consideration of this case.

CONCLUSION

For the foregoing reasons and those stated in the petition, 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

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