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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly adhered to well-established legal principles in reaching its case-specific conclusion that Petitioner did not limit its liability in accordance with the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706.

RULE 29.6 STATEMENT

The parent corporations of Respondent ABB Inc. are ABB Holdings Inc. and ABB Ltd. There are no publicly held companies that hold 10% or more of the Respondent's stock.

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BRIEF IN OPPOSITION

Respondent ABB Inc. ("ABB") respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 721 F.3d 135, and reproduced in the Appendix to the Petition (Pet. App.) at 1a-32a. 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.

The district court's unpublished consent judgment is reproduced in the Appendix to this Brief in Opposition (BIO App.) at 1a-6a. The district court's unpublished order on remand setting trial dates is reproduced at BIO App. 7a-10a. The district court's unpublished order staying trial in this matter pending a decision on the petition is reproduced at BIO App. 11a-12a.

STATUTES AND REGULATIONS

In addition to the provisions of the Carmack Amendment set out at page 1 of the petition, *see* Pet. App. 74a-82a, relevant provisions of the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 11101, are reproduced at BIO App. 13-14a. Relevant provisions of regulations promulgated by the Surface Transportation Board, found in 49 C.F.R. § 1300.2, are reproduced at BIO App. 15a.

INTRODUCTION

The petition for certiorari in this case is based on a claimed split in the circuits that does not exist, and on an incorrect characterization of the holding of the Fourth Circuit below. Moreover, the petition is procedurally barred by the very consent judgment the Petitioner agreed to in the trial court.

Petitioner CSX Transportation, Inc. ("CSX") presents a question that is conjured up from a mischaracterization of the decision below: it asks this Court to review whether the Carmack Amendment imposes a heightened specificity requirement on a shipping contract which would preclude enforcement of an "agreed-upon" limitation of a carrier's liability set forth in an "incorporated" tariff.

This is a misstatement of both the record before the Fourth Circuit and its holding. A core dispute in this case was whether the limitation of liability was, in fact, "agreed-upon," and whether the price list in question was, in fact, "incorporated" in the shipping contract at issue. CSX's petition assumes, incorrectly, that both were the case and that the Fourth Circuit imposed a heightened standard of "specificity" on top of this supposed agreement between ABB and CSX. This is inaccurate.

Under the specific facts of this case—where CSX failed to provide ABB with rates or a copy of its privately-held price list upon ABB's request, ABB was not familiar with the CSX price list and had not shipped under it, and ABB did not include a

reference to the CSX price list or any limitation of liability in the shipping document at issue—the Fourth Circuit correctly held the price list in question was *not* incorporated by reference into the shipping contract. Pet. App. 13a-15a, 18a. Therefore the limitation of liability was *not* agreed-upon by the parties. *Id.* at 13a. As such, it was not enforceable under the Carmack Amendment. *Id.*

Thus, the petition presents a question that was not before the Fourth Circuit (whether a certain level of "specificity" is required in an already agreed upon limitation of liability) and cannot be the basis for a grant of certiorari.

Moreover, CSX is plainly wrong on whether a split exists among the circuits. There is no split among the circuits with respect to the interpretation and application of the law. There are only different outcomes due to different factual circumstances.

The decision below is a mainstream recitation and application of Carmack Amendment case law. The decision is also consistent with this Court's decisions addressing the Carmack Amendment. In reality, CSX's major complaint regarding the decision is that, on the facts before it, the Fourth Circuit reached a decision with which CSX does not agree. Claims of a circuit split and inconsistency with the Carmack Amendment are pure hyperbole designed to gain review of a fact-based decision when none is warranted.

It is also important to note the Fourth Circuit's decision was interlocutory. This matter is currently

on remand for trial on the issues of CSX's liability as well as damages. If CSX prevails and the jury finds it is not liable at all, or the jury awards damages of $25,000 or less, then the issue of whether CSX effectively limited its liability to $25,000 will be rendered moot.

Furthermore, in the consent judgment agreed to by the parties and entered by the trial court, CSX expressly agreed the matter would go to trial if the Fourth Circuit reversed and remanded the case. CSX did not preserve any right to petition this Court for review, and neither did ABB. Thus, CSX has waived review at this time and should not now be permitted to seek review by this Court in contravention to the terms of its agreement in the consent judgment.

For these independent reasons, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Sections I and II of the Fourth Circuit's majority opinion, which were the subject of Judge Agee's concurrence, provide the background of this case. Pet. App. 2a-11a, 20a. ABB refers the Court to that opinion and adds the following:

A. Statutory and Regulatory Background.

The Fourth Circuit's opinion correctly sets out the relevant statutory and regulatory scheme. *Id.* at 2a-7a. Central to the decision is the Carmack Amendment's restrictions on a rail carrier's ability to

limit liability by contract and the very narrow exception to the default rule of "full liability," permitting a rail carrier to limit its liability only by written agreement.[1] *See* 49 U.S.C. § 11706(a), (c). Subsection (c) of the statute sets out that narrow 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).

---

[1] The statute also permits a carrier to limit its liability "to a value established by written declaration of the shipper." 49 U.S.C. § 11706(c). As the Fourth Circuit observed, however, this alternative exception to full liability was not raised by the particular facts of this case. Pet. App. 12a n.14.

The Fourth Circuit's opinion also explains the statutory and regulatory history,[2] including the purpose and effect of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803. The ICCTA abolished the rate-filing, or public "tariff," requirement for rail carriers. Pet. App. 3a.

In lieu of filed tariffs, the ICCTA imposed a new obligation on rail carriers to provide their rates and service terms to shippers upon request. *Id.* at 4a n.1; *see* H.R. Rep. No. 104-422, at 183 (1995) (Conf. Rep.); 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—

---

[2] This appeal involves rail carriers, which are subject to the provisions of 49 U.S.C. § 11706. Motor carriers are subject to a separate provision of the Carmack Amendment, codified at 49 U.S.C. § 14706. There are similarities between the two with respect to the constraints on limiting a carrier's liability. Pet. App. 6a n.5. However, in other ways there are significant differences between these provisions and their legislative history. *See* H.R. Rep. No. 104-422, at 195-96, 222-23 (1995) (Conf. Rep.); *compare* 49 U.S.C. § 11706, *with* § 14706. In light of those differences, it is not clear that remarks regarding the intent of revisions to § 14706 apply equally to revisions to § 11706. *See* Pet. 7-8. Nonetheless, the legislative history of the revisions to § 14706 may provide some insights.

> (1) in writing and forwarded to the requesting person promptly after receipt of the request; or
>
> (2) promptly made available in electronic form.

49 U.S.C. § 11101(b).

The ICCTA also required that the Surface Transportation Board (the "Board") establish regulations to implement the new obligation imposed on rail carriers to provide "immediate disclosure and dissemination of rates and service terms." § 11101(f). The regulations promulgated by the Board provide, among other things:

> (a) A rail carrier must disclose to any person, upon formal request, the specific rate(s) requested (or the basis for calculating the specific rate(s)), as well as all charges and service terms that may be applicable to transportation covered by the rate(s). . . .
>
> (b) The information provided by a rail carrier under this section must be provided immediately. (It is expected that the response will be sent within hours, or at least by the next business day, in most situations.) . . . .
>
> (c) A rail carrier may, at its option, require that all requests submitted under this section be in written or electronic form, although the carrier may permit oral requests.

49 C.F.R. § 1300.2.

Thus, with the ICCTA's abolition of rate-filing, Congress did not abandon regulation of rail carriers' obligation to make rates and service terms available to shippers. Rather, a rail carrier is now required to provide its rates and service terms to a shipper upon the shipper's request, and it must do so *immediately*. *See* 49 U.S.C. § 11101(b); 49 C.F.R § 1300.2.

Post-deregulation, courts have found that if a bill of lading contains only general terms but does not identify a particular privately-held rate authority, and the rail carrier does not provide its rates or service terms to the shipper, the carrier has not satisfied the requirements to limit its liability under the Carmack Amendment unless there is other evidence showing that the shipper knew the terms of the applicable rate authority. *See Temple Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029, 1030-31 (7th Cir. 2000).

B. Factual and Procedural Background.

The Fourth Circuit's explanation of the factual and procedural background of this case is thorough and is incorporated here. *See* Pet. App. 1a-2a, 7a-11a.

The singular issue before the Fourth Circuit on appeal was whether ABB and CSX entered into a written agreement to limit CSX's liability in accordance with the Carmack Amendment. *Id.* at 12a n.14. Specifically, the question was whether ABB's bill of lading ("BOL") to ship its transformer, worth in excess of $1,000,000, had somehow incorporated by reference a $25,000 limitation of

liability contained in a separate "Price List 4605" issued by CSX three months earlier which ABB had never seen and under which ABB had never shipped cargo. *Id.* at 8a-11a, 18a.

The BOL at issue is a partially completed copy of ABB's standardized form containing generic, pre-printed language and spaces for specific information about a particular shipment, including a space for the "product value" as well as a space for identification of the governing "rate authority." *Id.* at 8a-9a. ABB's traffic manager, Brian Brueggeman, completed and signed the BOL. *Id.* at 10a.

Brueggeman listed the "product value" of "$1,384,000" for the transformer on the BOL. *Id.* at 8a. Importantly, the BOL did not include a reference to any CSX price list whatsoever much less a specific reference to Price List 4605. *Id.* at 9a, 13a-14a. This is in marked contrast to the other bills of lading in the record between ABB and various railroads, including CSX, that did have direct references to the railroad's price list or code. *Id.* at 18a.

It is undisputed that neither Brueggeman nor his predecessor was familiar with or even aware of the existence of Price List 4605 prior to the shipment at issue. *Id.* at 10a, 21a. Brueggeman's predecessor had always obtained rate information by contacting CSX directly. *Id.* at 10a, 18a.

Despite the fact that CSX suggests Brueggeman did not do so, Pet. 9-10, n.3, it is also undisputed that while preparing the shipment, he affirmatively

sought rate information on multiple occasions from the CSX website as well as by contacting CSX directly by telephone to request it. Pet. App. 11a, n.12, n.13, 21a. In each case, CSX failed to provide the requested rate information. *Id.* at 11a, 21a.

When CSX's representatives failed to provide rate information to Brueggeman upon his request (and as required by statute), Brueggeman was unable to complete the space on the BOL for the applicable "rate authority." *Id.* at 11a. Instead, he simply listed the full dollar value of the transformer being shipped. By listing the full product value, Brueggeman believed he was purchasing full liability coverage and was not agreeing to any limit of liability, and he would not learn the price of the shipment until CSX eventually sent him an invoice. *Id.* at 9a n.9, 11a.

The district court—based on the erroneous belief that Brueggeman never had asked CSX for rate information— ruled that CSX's undisclosed Price List 4605 was somehow incorporated into the BOL. *Id.* at 70a-71a. The district court's analysis ended there, and did not determine whether ABB had established a prima facie case of liability against CSX. *Id.* at 8a, 72a. It awarded summary judgment to CSX only on its defense that it had limited its liability, and set the matter for trial on the issues of causation and damages. *Id.* at 8a, 72a.

The district court did not certify its interlocutory order for immediate appeal. Rather, to avoid an expensive trial over $25,000 (the cap on ABB's

damages after the district court's summary judgment order), ABB and CSX entered into a consent judgment expressly reserving ABB's right to appeal the district court's resolution of the liability limit issue to the Fourth Circuit. *Id.* at 2a, 8a; *see* BIO App. 1a-6a. This is the only provision in the consent judgment dealing with the issue of allowed appeals.

Specifically, the terms of the consent judgment, signed and consented to by both ABB and CSX, stated that:

> 1. The Court has jurisdiction over the parties to this Consent Judgment and the subject matter of this action. The parties and the Court agree that ABB expressly reserves the right to appeal the March 22, 2012 Order, and to the extent necessary to perfect that appeal this Consent Judgment as well.
>
> 2. If ABB's appeal is dismissed or CSX prevails in an appeal of the limitation of liability issue and the Fourth Circuit Court of Appeals affirms the Court's March 22, 2012 Order, CSX shall pay to ABB the amount of $12,500 as a full and final resolution of this matter.
>
> 3. If the Fourth Circuit Court of Appeals returns the case to this Court for a trial, CSX will have the right to present evidence of any of its previously raised defenses on liability and damages and the amount that may be

> awarded to ABB at trial, if anything, will be reduced by the amount of $12,500.

See Pet. App. 2a, 8a; BIO App. 4a-5a.

Thus, under the express terms of the consent judgment entered in this matter, ABB reserved the right to appeal the liability limitation issue to the Fourth Circuit, but neither party reserved a further right of appeal to this Court. Depending on the Fourth Circuit's decision, the case would either go to trial or it would terminate.

Pursuant to the consent judgment, ABB timely appealed to the Fourth Circuit, and it prevailed. The Fourth Circuit reversed the district court on the limitation of liability issue. It vacated that portion of the district court's judgment fixing the liability limitation and remanded the case for further proceedings consistent with its opinion. Pet. App. 20a.

CSX petitioned for rehearing and rehearing en banc. *Id.* at 73a. The Fourth Circuit denied the petition without requesting a response. *Id.* at 73a.

This matter is now on remand. On July 31, 2013, the district court entered an order setting the matter for trial on the issues of causation and damages. BIO App. 7a-10a. In accordance with the consent judgment, CSX reserved the right to present any of its defenses on liability and damages at trial.

Not satisfied with the outcome for which it bargained in the consent judgment, CSX improperly petitioned this Court for a writ of certiorari despite

the fact that neither ABB nor CSX reserved the right to petition this Court for review of the Fourth Circuit's decision. If CSX were to prevail at trial, the limitation of liability issue it raises in the petition would be irrelevant and this Court's decision on the limitation of liability issue effectively mooted.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because this case does not satisfy the Court's criteria for certiorari review. The judgment below is interlocutory and CSX waived appellate review. In addition, the Fourth Circuit's decision is correct and does not conflict with any decision of this Court or any court of appeals. Further review is not warranted.

I. CSX Waived Review by This Court in the Consent Judgment.

CSX's petition omits a full explanation of the procedural posture of the case. In particular, CSX fails to explain that after the district court entered its order holding CSX had limited its liability to $25,000, the parties entered into a consent judgment reserving ABB's right to appeal on the liability limit issue. *See* Pet. App. 2a, 8a; BIO App. 1a-6a. The consent judgment provided that if the Fourth Circuit reversed and returned the case for trial, CSX reserved only the right to present its defenses on liability and damages at trial. *See* BIO App. 4a-5a. Neither CSX nor ABB reserved a right to appeal the Fourth Circuit's interlocutory decision.

After the conclusion of ABB's appeal, the Fourth Circuit vacated that portion of the district court's order limiting CSX's liability and remanded the matter for further proceedings. Pet. App. 20a. Subsequently, on July 31, 2013, the district court entered an order setting the matter for trial on the issues of causation and damages to determine whether CSX would be held liable at all and, if so, the amount of damages to be awarded to ABB. BIO App. 7a-10a. The district court has currently stayed trial of this matter pending a decision by the Court on the petition. *Id.* at 11a-12a.

The interlocutory nature of the Fourth Circuit's ruling weighs against present review by this Court, which "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari); *see* Eugene Gressman et al., *Supreme Court Practice* § 4.18, 280-81 (9th ed. 2007) (citing cases). Denial of CSX's petition, in accordance with this Court's practice, is required here.

First, there has been no final judgment, and the Fourth Circuit's ruling has no immediate consequences for CSX. The matter of whether CSX is liable at all must still be determined at trial. If CSX prevails on the issue of causation or if the jury awards $25,000 or less in damages, then the matter of whether CSX effectively limited its liability to $25,000 will be rendered moot. The lack of finality of the judgment below is itself sufficient reason to deny

the petition. Gressman, *supra*, § 4.18, at 280 (citing cases).

Second, by entering into the consent judgment in the district court, CSX waived appellate review of the issues raised in its petition. This is because a party's agreement to a consent judgment waives that party's appeal from issues addressed in the consent judgment unless the right to appeal is expressly reserved. *See Swift & Co. v. United States*, 276 U.S. 311, 324 (1928); *Pacific R.R. v. Ketchum*, 101 U.S. 289, 295 (1879); *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 682-83 (7th Cir. 2001). Parties to a consent judgment are bound by the terms of that judgment. *Hohenberg Bros. Co. v. United States*, 301 F.3d 1299, 1304 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 1068 (2003) ("Courts interpret a consent judgment according to general principles of contract law.").

Here, ABB and CSX entered into a consent judgment that specified a defined process for addressing the district court's decision on the limitation of liability issue. The consent judgment expressly reserved ABB's right to appeal to the Fourth Circuit and laid out how it would be handled. The parties agreed that if the Fourth Circuit affirmed the district court's decision upholding the limit of liability, the case would effectively be over and ABB would receive a small sum of money. The parties further agreed that if the Fourth Circuit reversed, the case would be remanded for trial with a small adjustment to the maximum amount of ABB's recovery. However, neither party specifically

and expressly reserved the right to petition this Court for a writ of certiorari if they were dissatisfied with the Fourth Circuit's decision.

In its petition, CSX fails to address the consent judgment at all, and fails to show it preserved the right to seek review of the alleged error it now asks this Court to redress. This is because it did not do so.

CSX indisputably could have but did not negotiate to preserve a right to appeal the Fourth Circuit's ruling to this Court. CSX opted to gamble on the Fourth Circuit's ruling.

The case law is clear. Having consented to return of the case for trial upon entry of the Fourth Circuit's judgment remanding the matter without specifically preserving the right to seek a petition for writ of certiorari, CSX waived review of the Fourth Circuit's decision. *See Assoc. of Comty. Orgs. for Reform Now v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996); *Dorse v. Armstrong World Indus.*, 798 F.2d 1372, 1375 (11th Cir. 1986); *Cohen v. Va. Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986).

ABB of course understands that this conclusion effectively ends CSX's ability to have the Fourth Circuit's decision ruled on by this Court. However, that is a necessary consequence of both parties deciding not to preserve the right to a petition for writ of certiorari in the consent judgment. Just as CSX has no right to do so, if the Fourth Circuit had ruled against ABB, ABB would similarly have no

means of having this Court review the Fourth Circuit's decision on the limitation of liability.

Given the waiver of review by CSX, this Court should decline the petition.

II. The Decision Below Is Correct And Does Not Conflict With Decisions Of This Court Or Other Circuits.

The petition claims a circuit split with respect to the question presented. This claim is, frankly, manufactured.

The Fourth Circuit applied the same tests for whether parties had agreed to a limit of liability under the Carmack Amendment as every other recent reported decision ABB has reviewed. CSX's claimed circuit split arising from the alleged new "specificity" rule crafted by the Fourth Circuit in the decision below is illusory. In each of the decisions CSX contends conflict with the Fourth Circuit's decision here, the analysis shows those courts would have reached the same decision as the Fourth Circuit on these facts, and vice versa. Last, the petition fails to present a conflict with any decision of this Court.

The Carmack Amendment principles the Fourth Circuit used in reviewing a rail carrier's attempt to limit its liability under the Carmack Amendment are well established. *See* Pet. App. 4a-6a. Under the statute itself, limitation of a rail carrier's liability is a very narrow exception to the default rule of full

liability for the "actual loss or injury to the property" caused by the rail carrier. 49 U.S.C. § 11706(a), (c).

The Fourth Circuit's decision aligns with and follows this Court's observation that the language of the Carmack Amendment "constrains carriers' ability to limit liability by contract." *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2441 (2010); *see* Pet. App. 4a-6a, 12a-13a, 19a. The statute expressly renders void any "limitation of liability . . . in a receipt, bill of lading, contract, or rule" that does not satisfy the statute's requirements. 49 U.S.C. § 11706(c); *see also Royal & Sun Alliance Ins., PLC v. Int'l Mgmt. Servs. Co.*, 703 F.3d 604, 607 (2d Cir. 2013) (recognizing the Carmack Amendment displaces traditional contract principles "insofar as it specifically provides"); *Rohner Gehrig Co. v. Tri-State Motor Transit*, 950 F.2d 1079, 1083 (5th Cir. 1992) (en banc) (observing the strictures of the Carmack Amendment took the interpretation of the provisions of a bill of lading "out of the realm of common law contractual interpretation and subject[ed] it to federal statutory and regulatory interpretation").

A. The Fourth Circuit's Decision Is Consistent with Decisions of Other Circuits Addressing Limitation of Liability Under the Carmack Amendment.

Contrary to the claims in the petition, there is no circuit-split between the Second and Eleventh Circuits on the one hand, and the Fourth Circuit on

the other. CSX and its amici base their arguments on what they contend is a heightened "specificity" requirement in the Fourth Circuit's ruling, but this heightened standard is CSX's creation, not the Fourth Circuit's.

The decision below is instead a simple, straightforward, and correct application of the well-established rule that if a rail carrier wishes to limit its liability, the carrier must obtain the shipper's written agreement in accordance with the Carmack Amendment. The decision created no such heightened "specificity" requirement, and does not conflict with any other circuit's case law on this subject.

In this case, the Fourth Circuit addressed the enforceability of a limitation of liability provision contained in a separate document solely within CSX's possession, CSX Price List 4605, rather than in the BOL governing the shipment at issue. Pet. App. 8a-10a. While the BOL contained generic and outmoded references to "lawfully filed tariffs" and "classifications" that were linguistic remnants of the rate-filing era and of no effect after abolition of the ICC, it did not contain any language stating the carrier's liability would be limited. *Id.* at 8a-10a, 12a, 13a-14a.

Moreover, the BOL did not identify or refer to Price List 4605 as the rate authority providing the terms of transportation for this particular shipment. *Id.* at 9a-11a, 13a-14a. ABB's traffic manager, Brian Brueggeman, listed the "product value" of the

transformer being shipped as "$1,384,000" on the BOL, but he did not fill in the space for a "rate authority" on the BOL as he was unable to obtain it from CSX. *Id.* at 8a-9a, 11a. Neither Brueggeman nor his predecessor was familiar with Price List 4605, and ABB had not shipped under Price List 4605. *Id.* at 10a, 18a, 21a.

Brueggeman sought rate information from CSX by telephone as well as by searching the CSX website, but CSX did not provide him with rates or a rate authority despite his requests. *Id.* at 11a, 21a. Brueggeman, in the absence of any information from CSX to the contrary, thought he was purchasing full liability coverage by listing the full product value on the BOL and had no idea CSX would later seek to impose a $25,000 limit of liability on the shipment. *Id.* at 9a n.9.

Under this specific set of facts, the Fourth Circuit concluded that the limitation of liability provision in Price List 4605 was not incorporated by reference into the BOL, and in the absence of any other limitation on the face of the BOL, the parties did not enter into a written agreement to limit CSX's liability in accordance with the Carmack Amendment. *Id.* at 13a-14a, 16a-17a. The court held the generic language referring to "tariffs" and "classifications" was not sufficient to incorporate Price List 4605 under the specific circumstances of this case, where Price List 4605 was not filed for public inspection, ABB was not familiar with and had not previously shipped under the price list, and ABB had requested pricing information but CSX

failed to provide it upon request in derogation of its statutory and regulatory obligations. *Id.* at 14a; *see* 49 U.S.C. § 11101(b); 49 C.F.R. § 1300.2.

Thus, what the Fourth Circuit was searching for here was not heightened "specificity," but rather record evidence of a basic agreement by ABB to CSX's proposed limitation of liability that was not contained in the BOL at all. This is not an extension or expansion of the Carmack Amendment's requirements. It is simply an enforcement of them. The carrier must obtain an agreement to the limit of liability after giving the shipper a fair opportunity to decide between higher rates and more carrier liability, or lower rates and less carrier liability.

The Fourth Circuit applied well-settled law to the record evidence before it. This decision is no outlier and rests on the solid basis that in some factual situations, like the one presented here, failure to include the specified rate information in *any* of the shipping documentation will be fatal to the carrier's claim that an agreement on the limitation of liability was reached.

CSX is patently wrong that the Fourth Circuit's decision creates a circuit split. CSX is creating tension between decisions that does not exist in order to justify Supreme Court review.

In fact, the Fourth Circuit's decision is consistent with the Second and Eleventh Circuit decisions with which CSX claims a conflict, and which are similarly based on the specific facts before those courts. *See Werner Enters., Inc. v. Westwind Mar. Int'l, Inc.*, 554

F.3d 1319, 1328 (11th Cir. 2009); *Siren, Inc. v. Estes Express Lines*, 249 F.3d 1268, 1268-70 (11th Cir. 2001); *Mech. Tech. Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087-89 (2d Cir.1985).

In *Werner*, the Eleventh Circuit upheld a limitation of liability provision because the contract between the carrier and the shipper specifically notified the shipper that third party carriers might limit their liability in the absence of the shipper's instructions otherwise, and the shipper did not indicate the full value of the goods or request full liability coverage. *Werner*, 554 F.3d at 1322-23, 1327 n.8. The third party contract at issue in that case did contain a limitation of liability clause and specifically incorporated a separate tariff that provided means for obtaining full "Carmack Liability." *Id.* at 1322-23. The express inclusion of a limitation of liability clause, as well as an actual opportunity to choose between different rates and levels of carrier liability, each highlights how different the facts in *Werner* were from those presented here—even though both courts used exactly the same Carmack Amendment test to evaluate whether the limitation of liability was enforceable.

Under those facts, where the shipper had notice that a downstream third party contract might specifically limit the carrier's liability and the shipper had a clear fair opportunity to select between rates with full and limited liability, the court held the liability limitation complied with the

requirements of the Carmack Amendment and was enforceable against the shipper. *Id.* at 1328.

The facts of this case are entirely different. Here, the BOL did not include any language notifying ABB of any limitation of liability that might apply, and ABB did list the full product value on the BOL. Pet. App. 8a-9a, 13a-14a. The law applied in the decision below is entirely consistent with the law applied in *Werner*—only the fact-based conclusion that was reached by each court differs. Faced with the facts of *Werner*, the Fourth Circuit would almost assuredly rule in favor of the carrier and enforce the limitation of liability due to the specific language in the BOL that any agreement with a third party that limited liability would be enforceable. Given that both courts applied the same test, and given that when presented with similar facts it is almost certain they would reach similar results, these decisions create no circuit split.

The decision in *Siren* is similarly consistent with the Fourth Circuit's decision here. In *Siren*, the shipper prepared the bill of lading, and twice on that document included a specific notation that the shipment would move under "Class 85." *Siren*, 249 F.3d at 1269. That term was universally understood in the trucking industry as limiting liability to a certain amount per pound of cargo, although the shipper claimed it had no actual knowledge of that limitation. *Id.* at 1269.

Regardless of the shipper's actual knowledge (or lack thereof), because the shipper specifically noted

"Class 85" on its bill of lading, the Eleventh Circuit held the carrier had a right to rely on the limitation of liability aspect of the "Class 85" term included in the bill of lading. *Id.* at 1270. Consequently, the court held the bill of lading incorporating the "industry-specific terminology" which included a limitation of liability was sufficient to comply with the Carmack Amendment. *Id.* at 1272.

In contrast to the bill of lading in *Siren*, in this case, the BOL did not include any specific terms or classifications. Pet. App. 13a-16a. The Fourth Circuit even observed that its conclusion would be different if the facts were similar to those in *Siren* and the BOL had included a similar specific notation to Price List 4605. *Id.* at 15a. Thus, this case would have been decided identically to *Siren* if (like in *Siren*) the BOL had included a reference to Price List 4605, and *Siren* would likely have been resolved identically to this case if the reference to "Class 85" had been left off the bill of lading at issue in that case.

Indeed, the factual differences in *Siren* and this case—all while applying the exact same test as a matter of law—highlight that CSX is complaining of an error of its own making. If CSX had included a reference to Price List 4605 on the shipping information, or simply responded to Brueggeman's requests for price information, any lack of clarity over what the parties had agreed to could have been resolved.

Finally, the Second Circuit's decision in *Mechanical Technology* arose during the ICC governed rate-filing era, where shippers were charged with knowledge of tariffs and rates on file with the ICC. The carrier in that case maintained a filed and published tariff with the ICC that listed various rates and levels of liability, and that provided a specific released rate of $5 per pound if the shipper failed to state a higher rate. *Mech. Tech.*, 776 F.2d at 1086. For the shipment at issue, the shipper did indeed fail to state a higher released value on the bill of lading, which contained a notice that it was received "subject to the classifications and tariffs in effect on the date of receipt by the carrier." *Id.*

The Second Circuit noted, "on the specific facts of this case," that the filed tariff provisions were incorporated into the bill of lading and therefore the bill of lading limited the carrier's liability. *Id.* at 1087-88. Because the carrier maintained a filed tariff, the court presumed the shipper's failure to complete the bill of lading was "deliberate[] with full knowledge of the consequences under the applicable tariff." *Id.* at 1089.

This case, however, did not arise during the filed-rate era. As the Fourth Circuit noted, prior to deregulation, courts reasonably held shippers to constructive knowledge of a published tariff based on a generic reference to a tariff in a bill of lading. Pet. App. 14a. Today, however, shippers cannot be presumed to have notice of a carrier's privately held price list. Here, ABB was unfamiliar with the price

list, CSX failed to provide the price list upon ABB's request, and ABB stated the full product value on the BOL intending to purchase full liability coverage. Because of these important factual distinctions, the outcome of the decision below is not contrary to *Mechanical Technology*.

There is also consistency across circuits with respect to the application of the four-part test utilized by the Fourth Circuit to determine if a rail carrier limited its liability consistent with the strictures of the Carmack Amendment. *See* Pet. 16-17 (citing cases); Pet. App. 6a-7a (citing cases); *see also Werner*, 554 F.3d at 1326. The Fourth Circuit's decision is based on that well-settled case law, and no intervention by this Court is required to resolve a circuit split or inconsistent decisions across the circuits.

As the petition acknowledges, *see* Pet. 16-18, courts have consistently held that for a liability limitation to be enforceable as a written agreement under the Carmack Amendment, a carrier must: (1) provide the shipper, upon request, a copy of the tariff or rate schedule; (2) give 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. Pet. App. 6a-7a; *OneBeacon Ins. Co. v. Haas Indus.*, 634 F.3d 1092, 1099-1100 (9th Cir. 2011).

In this case, ABB affirmatively sought rate information from CSX when Brueggeman requested rates and a rate authority from CSX for the shipment, but CSX failed to provide the requested rate schedule despite its statutory and regulatory obligation to do so. Pet. App. 11a, n.13, 14a; *see* 49 U.S.C. § 11101(b); 49 C.F.R. § 1300.2. The Fourth Circuit also noted the BOL on its face did not contain any language limiting CSX's liability, and it did not state a rate authority or otherwise indicate any identifiable classification, price list, or any other indication of limited liability. Pet. App. 13a-14a. The court rejected the argument that Price List 4605 was incorporated into the BOL under the unique facts in this particular case. *Id.* at 14a.

Although the decision below did not specify which parts of the four-part test were not satisfied, the outcome shows CSX did not satisfy any of them. It failed to provide a copy of its price list upon ABB's request; it failed to give ABB a reasonable opportunity to choose a different liability limit; it failed to obtain ABB's agreement to a liability limit; and the BOL did not reflect any agreement.

The petition does not address or even acknowledge CSX's failure to provide ABB a copy of its price list upon request. Nor does it demonstrate any real, rather than manufactured, disagreement among the circuits. None of the cited cases involve a post-deregulation attempt by a carrier to enforce a limitation of liability clause in a separate privately-held price list despite that carrier's failure (or

refusal) to provide a copy of that price list to the shipper upon request.

B. The Fourth Circuit's Decision Follows This Court's Precedent.

The Fourth Circuit's decision is also entirely consistent with this Court's decisions addressing the Carmack Amendment. In the seminal opinion in *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913), the Court observed the Carmack Amendment's restrictions were not violated by "a contract, fairly entered into, and where there is no deceit practiced on the shipper." *Id.* at 511. The Court reiterated the general rule that a contract that is "fair, open, just and reasonable" may limit a carrier's liability "to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk." *Id.* at 509-10.

Whether any given bill of lading or other agreement complies with the Carmack Amendment is of necessity a fact-specific determination. For example, in *Adams Express*, the Court held the shipper was bound by the liability limitation because the carrier's published rate schedules filed with the ICC offered varying rates based on valuations, the bill of lading at issue contained a specific limiting clause stating the carrier's liability was limited to $50 if no greater value was stated on the bill of lading, the bill of lading also stated in bold type that the carrier's charge was based on value which must

be declared by the shipper, and no greater value was declared by the shipper. *Id.* at 508-09, 512.

In *Adams Express*, arising in the ICC governed rate-filing era, the shipper was presumed to have knowledge of the terms of the carrier's rate schedules because the schedules were published with the ICC. *Id.* at 508-09. The petition similarly cites other rate-filing era decisions of this Court to suggest that the Fourth Circuit's opinion is some sort of outlier from these decisions. *See* Pet. 19-21.[3] This is plainly incorrect in light of the recent alterations to the statutory and regulatory requirements.[4]

The ICCTA abolished the rate-filing requirement and instead imposed an obligation on carriers to provide rate schedules to shippers upon request. *See* 49 U.S.C. § 11101. As a result, shippers may no longer be imputed with the same notice of the terms of a carrier's tariff or rate schedules. The decision

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[3] *See also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Louisville & Nashville R.R. v. Cent. Iron & Coal Co.*, 265 U.S. 59 (1924); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915); *Kan. City S. Ry. v. Carl*, 227 U.S. 639 (1913).

[4] The Court's post-deregulation decisions relating to carrier liability did not apply the Carmack Amendment. *See Kawasaki*, 130 S. Ct. at 2449 (holding the shipment was not governed by the Carmack Amendment); *Norfolk S. Ry. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 18-19 (2004) (reviewing matter arising under Carriage of Goods by Sea Act). Nothing in those decisions is contrary to the Fourth Circuit's decision in this case.

below rightly declined to charge ABB with notice of the terms of a separate CSX rate schedule that was not identified on the BOL at issue, and that was neither published nor provided to ABB, despite ABB's request for rates and the rate authority applicable to the shipment at issue. *See* Pet. App. 14a-17a.

In this case, the Fourth Circuit's decision is aligned with the decisions of this Court in considering the specific facts of the case and determining whether the shipper should be charged with knowledge of the carrier's rate schedule or terms. Under the facts of this case, the Fourth Circuit found it could not. That factual determination is consistent with this Court's decisions addressing the Carmack Amendment.

CSX's argument provides no basis for granting review. The petition fails to show any disagreement or split among the circuits, and fares no better in its attempt to show a departure from this Court's case law addressing the Carmack Amendment. These failings also defeat CSX and its amici's claims regarding the potential for "uncertainties" or lack of uniformity among the circuits with respect to whether a carrier has satisfied the requirements of the Carmack Amendment to limit its liability. *See* Pet. 21-25.

In fact no uncertainty exists with respect to the requirements of the Carmack Amendment and a carrier's obligation to provide its rates and service terms to a shipper upon request. The Fourth Circuit

applied well-settled law and used the same test in reaching its conclusions as that employed by the courts with which CSX claims there is a conflict.

However, determining how those requirements are met, or not met, in any given case is a unique, fact-specific inquiry, as it was in the decision below. Here, CSX failed in its statutory and regulatory obligation to provide its rates and rate authority to ABB upon request. ABB was not aware of CSX's Price List 4605 and did not include any notation on the BOL identifying that price list or any limitation of liability. Under the specific facts of this case, the Fourth Circuit concluded CSX did not satisfy the requirements of the Carmack Amendment to limits its liability. Such a fact-bound conclusion does not create a circuit split, and does not warrant this Court's review.

CONCLUSION

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

Respectfully submitted,

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December 12, 2013

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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

APPENDIX

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APPENDIX A

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

No. 5:08-CV-25-F

ABB, INC.,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

May 7, 2012.

CONSENT JUDGMENT
(Fed. R. Civ. P. 58)

JAMES C. FOX, Senior District Judge.

THIS CAUSE came on to be heard, pursuant to Rule 58 of the Rules of Civil Procedure and the consent of the parties, for the entry of this Consent Judgment.

A. Plaintiff ABB Inc. ("ABB") filed this lawsuit contending that it arranged to have Defendant CSX Transportation, Inc. ("CSX") ship a transformer from its St. Louis facility to a customer in Pittsburgh, Pennsylvania. ABB contends that its transformer was damaged during transit, that CSX was the

receiving and delivering rail carrier for the transformer, and that ABB is entitled to recover from CSX all of its losses associated with the damaged transformer in the amount of over $550,000.

B. CSX admits to the jurisdiction of the Court over it and over the subject matter of this action. CSX denies that it is responsible for any damage to the transformer, denies that it would be liable for any of ABB's losses, and contends that a limitation of liability provision applied to the shipment of the transformer that would limit any liability on CSX's part to a maximum of $25,000.

C. On November 1, 2010, the parties filed cross-motions for summary judgment on CSX's limitation of liability affirmative defense. CSX also moved for summary judgment on the issues of causation, liability and damages.

D. On March 22, 2012, the Court denied ABB's motion and granted CSX's motion for summary judgment as to its limitation of liability defense, holding a $25,000 limitation of liability applied to the shipment of the transformer. On April 5, 2012, the Court denied CSX's motion for summary judgment as to the remaining issues.

E. ABB views the Court's order of March 22, 2012, on the applicability of the limitation of liability as effectively dispositive. This is because even if ABB prevails at trial on liability and damages, ABB's potential recovery at trial is reduced to an amount far less than the likely cost of trying the case. CSX

agrees that the expense of trying this case in its present posture would likely exceed the amount remaining in controversy.

F. The economic inefficiency of trying the case in its present posture is bolstered by the fact that if the matter is tried now, the issue of the limitation of liability will not be before the District Court. It is possible, though, that on appeal from any final judgment, the Fourth Circuit Court of Appeals could determine that there is a factual issue related to the limitation of liability that requires a trial. In that case, if the Fourth Circuit remanded the matter for further proceedings on the limitation of liability, the parties and the Court would be faced with a second trial at a later date.

G. The parties have conferred regarding ABB's intent to appeal the March 22, 2012 Order. As explained above, both parties believe that a trial at this stage does not make economic sense, or further the interests of judicial efficiency. At the same time, both parties recognize and understand the need for the Court to conclude long-standing matters such as this one and remove them from the docket.

H. Thus, the parties have stipulated and agreed to entry of this Consent Judgment that fully and finally disposes of all claims asserted and that could have been asserted in this action.

I. However, the parties and the Court specifically agree that this Consent Judgment is without prejudice to ABB's right to appeal, and expressly reserves ABB's right to appeal, the Court's

March 22, 2012 Order granting CSX's motion for summary judgment on CSX's limitation of liability defense.

J. The parties further stipulate and agree that nothing in this Consent Judgment shall be deemed an admission on the part of CSX of any wrongdoing, fault, or liability. CSX reserves its right to present any of its previously raised defenses on liability and damages in the event ABB prevails in an appeal of the Court's March 22, 2012 order and the matter is returned to this Court for trial.

NOW THEREFORE, it is ORDERED, ADJUDGED, and DECREED that:

1. The Court has jurisdiction over the parties to this Consent Judgment and the subject matter of this action. The parties and the Court agree that ABB expressly reserves the right to appeal the March 22, 2012 Order, and to the extent necessary to perfect that appeal this Consent Judgment as well.

2. If ABB's appeal is dismissed or CSX prevails in an appeal of the limitation of liability issue and the Fourth Circuit Court of Appeals affirms the Court's March 22, 2012 Order, CSX shall pay to ABB the amount of $12,500 as a full and final resolution of this matter.

3. If the Fourth Circuit Court of Appeals returns the case to this Court for a trial, CSX will have the right to present evidence of any of its previously raised defenses on liability and damages and the

amount that may be awarded to ABB at trial, if anything, will be reduced by the amount of $12,500.

4. By this Consent Judgment, the Court makes no findings of liability, as alleged in the Complaint or otherwise, on the part of CSX.

5. Each party shall bear its own costs and attorneys' fees.

6. This Consent Judgment constitutes a final judgment in this action.

Signed this 7th day of May, 2012.

s/James C. Fox
United States District Judge

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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.

July 31, 2013.

ORDER

JAMES C. FOX, Senior District Judge.

This matter is before the court *sua sponte*.

Plaintiff ABB, Inc., ("ABB") filed this action against Defendant CSX Transportation, Inc. ("CSX"), seeking money damages for alleged in-transit damage and loss to a large, expensive electrical transformer that CSX shipped by rail in 2006. In an Order [DE-l05] filed on March 22, 2012, the court allowed, in part, the Motion for Summary Judgment [DE-48] filed by CSX and determined that CSX's liability for damages, if any, was limited to

$25,000.00.[1] Subsequently, the court issued another Order [DE-l06] which denied the remainder of CSX's Motion for Summary Judgment. The court set the matter for trial on the issues of causation and damages. The Pretrial Order [DE-112] was filed April 30, 2012. Subsequently, the parties entered into a Consent Judgment [DE-114], reserving Plaintiff ABB, Inc.'s right to appeal this court's ruling on the liability limit issue. ABB promptly filed its appeal.

On appeal, the Fourth Circuit Court of Appeals concluded "that the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706, subject CSX to the full liability for the shipment, and the parties did not modify CSX's level of liability by written agreement as permitted by the statute" and vacated the portion of this court's judgment limiting liability on the part of CSX to $25,000. June 7, 2013, Opinion p. 3 [DE-118]. The Mandate [DE-123] was issued on July 16, 2013.

Accordingly, it appears to the court that on remand, the issues of causation and damages remain for trial. Therefore, the Clerk of Court is DIRECTED to set this matter for trial on the term of court commencing **January 27, 2014**.[2] Additionally, the

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[1] The court also denied Plaintiff's Motion for Partial Summary Judgment [DE-75] on the limitation of liability issue.

[2] A regular term of court is scheduled to commence on January 27, 2014. The court has no way to predict, this far in advance, the nature or length of the criminal docket for that term. The court advises the parties that criminal cases

Clerk of Court is DIRECTED to schedule and notice a pretrial hearing before the undersigned on **January 22, 2014, at 1:30 p.m.** or as soon thereafter as the court may reach it. At the pretrial hearing, the court will rule on the parties' pretrial order, any objection to exhibits, any motions in limine, and any *Daubert* motions. At the hearing, each party should be prepared to present each exhibit to which an objection has been made, and be prepared to argue such objections. The court also will discuss its preliminary draft of jury instructions for the trial. In anticipation of this hearing, the parties are ORDERED to do the following **on or before January 6, 2014**:

1. Each party shall file its proposed jury instructions, any motions in limine and any *Daubert* motions.

2. Each party shall submit to chambers, the deposition transcript, reports and curriculum vitae of each opinion[3] witness that party intends to call at trial, whether as a live witness, or by written or video deposition. No witness whose materials are

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require adherence to statutory as well as Constitutional speedy trial requirements, and for that reason, criminal trials always preempt civil trials. The parties also should be aware that the volatile nature of criminal cases sometimes necessitates last-minute continuances of criminal trials, and often results in unexpected eleventh-hour guilty pleas. For these reasons, it is unlikely that the trial in this matter will actually commence on January 27, 2014.

[3] The parties are advised that this court refers to "expert" witnesses as "opinion" witnesses.

not presented to the court as herein directed will be permitted to testify at trial in person or through deposition.

3. The parties shall jointly submit to chambers the depositions of any witness whose testimony at trial will be presented via deposition, with the objections of ABB underlined in green, and the objections of CSX underlined in red.

SO ORDERED.

This the 31st day of July, 2013.

s/James C. Fox
James C. Fox
Senior United States District Judge

APPENDIX C

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

No. 5:08-CV-25-F

ABB, INC.,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

October 30, 2013.

ORDER

JAMES C. FOX, Senior District Judge.

This matter is before the court on the parties' joint Motion to Stay [DE-125]. Therein, the parties inform the court that Defendant CSX Transportation, Inc., has filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, petitioning the United States Supreme Court to review the judgment of the Fourth Circuit with respect to the enforceability of the liability limitation clause at issue in this case.

Having considered the parties' motion, the court finds that the interests of justice, efficiency, and judicial economy will be promoted by granting the

requested stay, and outweigh any competing interests. Accordingly, for good cause shown, the parties' Joint Motion to Stay [DE-125] is ALLOWED. The Clerk of Court is DIRECTED to remove this matter from the court's pretrial and trial calendars. Once a decision on the Petition is rendered, the parties shall file a notice with this court informing it of the same.

SO ORDERED.

This the 30th day of October, 2013.

s/James C. Fox
James C. Fox
Senior United States District Judge

APPENDIX D

FEDERAL STATUTES AND REGULATIONS

49 U.S.C. § 11101. Common carrier transportation, service, and rates

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.

(b) 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.

(c) A rail carrier may not increase any common carrier rates or change any common carrier service terms unless 20 days have expired after written or electronic notice is provided to any person who, within the previous 12 months—

(1) has requested such rates or terms under subsection (b); or

(2) has made arrangements with the carrier for a shipment that would be subject to such increased rates or changed terms.

(d) With respect to transportation of agricultural products, in addition to the requirements of subsections (a), (b), and (c), a rail carrier shall publish, make available, and retain for public inspection its common carrier rates, schedules of rates, and other service terms, and any proposed and actual changes to such rates and service terms. For purposes of this subsection, agricultural products shall include grain as defined in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and all products thereof, and fertilizer.

(e) A rail carrier shall provide transportation or service in accordance with the rates and service terms, and any changes thereto, as published or otherwise made available under subsection (b), (c), or (d).

(f) The Board shall, by regulation, establish rules to implement this section. The regulations shall provide for immediate disclosure and dissemination of rates and service terms, including classifications, rules, and practices, and their effective dates. Final regulations shall be adopted by the Board not later than 180 days after January 1, 1996.

49 C.F.R. § 1300.2. Disclosure requirement for existing rates.

(a) A rail carrier must disclose to any person, upon formal request, the specific rate(s) requested (or the basis for calculating the specific rate(s)), as well as all charges and service terms that may be applicable to transportation covered by the rate(s). For purposes of § 1300.4(a)(1) of this part, a formal request under this part is one that clearly notifies the railroad that the requester seeks not only immediate information but also notification of any future increases in the rate(s) involved or changes in pertinent service terms.

(b) The information provided by a rail carrier under this section must be provided immediately. (It is expected that the response will be sent within hours, or at least by the next business day, in most situations.) Such information may be provided either in written or electronic form as agreed to by the parties. If the parties cannot agree, such information is to be provided in electronic (non-passive) form where both parties have the requisite capabilities; otherwise, it is to be provided in writing.

(c) A rail carrier may, at its option, require that all requests submitted under this section be in written or electronic form, although the carrier may permit oral requests.