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The Continuing Role of Carrier Tariffs in the Aftermath of *ABB, Inc., v. CSX Transportation, Inc.*

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More than thirty years have passed since economic deregulation of the motor and rail transportation industries began, yet carriers continue to face challenges stemming from the abolition of the tightly controlled regime in place prior to deregulation. Although deregulation has undoubtedly produced many benefits for carriers and shippers alike, an unintended practical consequence has been greater difficulty enforcing the terms of a carrier's tariff than under the Interstate Commerce Commission ("ICC") regime. Today, carriers are permitted to negotiate rates and shipping terms with customers based on the free market. With that freedom, however, come challenges as to how carriers can manage their relationships with customers in a highly competitive environment. The publication of a tariff that is incorporated into every carrier bill of lading and shipping agreement has customarily provided one solution. However, the United States Court of Appeals for the Fourth Circuit's recent decision in *ABB, Inc. v. CSX Transportation, Inc.*, ___ F.3d ___ 2013 WL 2451088 (4th Cir. June 7, 2013), raises significant questions about the continued viability of this practice.[1]

Prior to the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA") and the Interstate Commerce Commission Termination Act ("ICCTA"), 109 Stat. 803 (1995), carriers were required to file tariffs with the ICC that established rates and rules of carriage. With this requirement came the "filed-rate doctrine" and certainty as to the rates and rules applicable to interstate transportation of goods. Once a carrier's tariff was filed, it "had legal effect; the filed-rate doctrine made it impossible for shippers and carriers to contract around them." *Temple Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029, 1030 (7th Cir. 2000). Moreover, the filed-rate doctrine meant that "provisions in tariffs usually governed whether shippers had actual, constructive, or no notice. . . ." *Id.* at 1031; see also *Security Servs., Inc. v. Kmart Corp.*, 511 U.S. 431 (1994) (explaining that whether or not a shipper elects to read all of the carrier's applicable tariffs is "simply irrelevant").

The TIRRA and the ICCTA swept away the filed-rate doctrine.[2] No longer does a carrier's tariff, of its own force and regardless of a shipper's lack of knowledge, bind the carrier and shipper. But Congress has recognized the continuing importance and utility of carrier tariffs by expressly authorizing motor carriers to maintain tariffs:

> If the motor carrier is not required to file its tariff with the Board, it shall provide . . . to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

49 U.S.C. § 14706 (c)(1)(B). Similarly, rail carriers also "may establish rates for transportation of property under which . . . the liability of the rail carrier for such property is limited to a value" established by agreement or by a declaration of the shipper. 49 U.S.C. § 11706 (c)(3). Moreover, Congress made clear its intent that carriers benefit from these tariffs through their incorporation into shipping contracts:

> The intention of this conference agreement is to replicate, as closely as possible, the practical situation which occurred prior to the enactment of [TIRRA], which repealed 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

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the conditions or 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 [49 U.S.C. § 14706] is intended to return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment. . . .** In the TIRRA, the Congress eliminated most individual tariff filings (provided for under 10702) and substituted a regime (contained in section 13710) where carriers would maintain schedules of rates, classifications, rules and practices and make such schedules available to shippers upon request.

U.S. Code Congressional and Administrative News, 104th Congress – 1st Sess. 1995, Vol. 2 at p. 908 (emphasis added); see also, e.g., *Gulf Rice Ark., LLC v. Union Pac. R.R. Co.,* 376 F. Supp. 2d 715, 722 (S.D. Tex. 2005) (holding that even though the ICCTA abolished the requirement that rail carrier tariffs be filed with the ICC, a shipper is deemed to have constructive knowledge of the rail carrier's tariff if it is incorporated into the carrier's contract with the shipper. If a shipper is unaware of the carrier's rates, classifications, rules and practices "the shipper has the burden to request a copy of the carrier's tariff"); *EFS National Bank v. Averitt Express, Inc.,* 164 F.Supp.2d 994 (W.D. Tenn. 2001) (citing legislative history to uphold limitation of liability contained in bill of lading under § 14706).

By and large, the courts have given effect to Congress' intent and enforced tariffs that carriers maintain and make available to the shipper on request. Often these cases arise in the context of carrier's limitations on liability for freight damage. For example, in upholding and enforcing a limitation of the carrier's liability contained in its tariff, the court in *Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834 (11th Cir. 2003), held:

> Because the shipper is charged with notice of the carrier's tariff, a provision in a tariff which limits liability to a certain amount absent a declaration of value in the bill of lading constitutes a written agreement between the carrier and shipper limiting the carrier's liability to the value provided in the tariff.

Id. at 842. In *Siren, Inc. v. Estes Express Lines*, 249 F.3d 1268, 1274 (11th Cir. 2001), the court went further, noting that the tariff's rules will apply even where the shipper did not understand the terminology in the bill of lading by which those rules were adopted and given meaning:

> [W]hen a shipper drafts a bill of lading, incorporating language which is universally understood throughout the motor carrier industry to limit the liability of the carrier, said shipper will be bound by the terms of the contract, irrespective of whether the shipper had actual knowledge of the limiting aspect of those terms.

Id. at 1274. These cases followed Congress' directive in continuing to give effect to carriers' tariffs.

In contrast, the recent *ABB* decision departs from Carmack's statutory text and Congress's guidance by failing to follow the established post-deregulation precedent holding that a shipper is "responsible for determining the conditions imposed on the transportation of a shipment." U.S. Code Congressional and Administrative News, supra, p. 908. Instead the Fourth Circuit determined that, even though the shipper's *own bill of lading* incorporated the carrier's tariff – and stated that the shipper is "familiar with all the terms and conditions . . . set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper" – the liability terms appearing in the carrier's tariff were unenforceable because the bill of lading did not explicitly reference by name the specific price list where the limitation appeared. *Id.*

If other courts follow the logic articulated in *ABB*, carriers may face far greater uncertainty in managing their relationships with shippers. And it can be argued that the decision in *ABB* also fails to recognize the public policy concerns that motivated Congress to continue to allow carriers to maintain tariffs and to incorporate them into contracts.

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706 (applicable to motor carriers and freight forwarders), et seq., and 49 U.S.C. § 11706 (rail carriers) and its common law antecedents, recognize that carriers are effectively strictly liable for loss to cargo entrusted to their possession. See, e.g., *Rankin v Allstate Ins. Co.,* 336 F.3d 8 (1st Cir. 2003) (describing Carmack Amendment as "impos[ing] something close to strict liability upon originating and delivering carriers"); *Tokio Marine & Fire Ins. Co. Ltd. v Amato Motors, Inc.,* 996 F.2d 874, 876 n. 6 (7th Cir. 1993) (statute "incorporated common law principles relating to liability of interstate carriers," which was that carriers were liable for loss or damage to goods essentially without regard to fault). In exchange, carriers are permitted to lessen that liability and to control their exposure by establishing rules, terms, and conditions that govern their relationship with their customers. This includes offering released—i.e. lower—freight rates to their customers, in exchange for the shipper's agreement that the carrier's liability for loss or damage to the shipper's freight is limited, and by offering discounted rates in exchange for timely payment of freight bills. 49 C.F.R. § 377.203(f); see also, e.g., *Hill Construction Corp. v. American Airlines, Inc.*, 996 F.2d 1315, 1317 (1st Cir. 1993). Often the shipper will then protect itself by purchasing insurance from a third party to cover losses in excess of the agreed liability limitation. See, e.g., *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 19-20 (2004).

Assuming, as with the vast majority of shipments, that no cargo loss or damage occurs and that freight bills are timely paid, shippers benefit by paying lower shipping rates. The carrier, in turn, is protected from exposure to unusually high cargo losses and from the onerous costs of collecting often minimal freight bills where it has borne the risk of non-payment through the extension of credit. *Id.* Finally, the shipper is protected by having the option to select higher limitations on liability in exchange for paying higher rates. *Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Systems, Inc.*, 235 F.3d 53, 59-60 (2d Cir. 2000). Thus, there is thus a fair exchange between shipper and carrier.

As Congress has recognized, the carrier's tariff plays a crucial role in this fair exchange. Although, with deregulation, the carrier now has the options of either entering into a bilateral, negotiated contract with the shipper or of varying the terms contained in the bill of lading, see 49 U.S.C. §§ 10709, 14101(b)(1), 14706(c)(1)(A), and 11706(c) these options do not offer the same flexibility to a carrier that a tariff does. A tariff, for example, lets a carrier establish detailed, standardized, and publicly available pricing systems based on the type of freight being transported, the origin and destination, the particular type of services requested by the customer, and other factors. A tariff also gives a carrier the option of setting forth specific provisions governing the extension of credit to its customers and the payment of freight bills, provisions that are required by 49 C.F.R. Part 377 (applicable to motor carriers).[3] Of course, a tariff also allows a carrier to limit its liability for freight loss while also offering its customers the ability to protect themselves by increasing the carrier's liability exposure.

Detailing all of these provisions in a contract or a bill of lading—especially the carrier's complex provisions regarding pricing, which often consist of detailed rate schedules akin to what was seen in old rate tariffs filed with the ICC—is simply not feasible or commercially reasonable. Additionally, in today's shipping environment, where many bills of lading are drafted by shippers or third party logistics providers, the continued utility of the bill of lading as "the basic transportation contract," *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982), is questionable.

Now that bills of lading can be freely drafted, are not standardized, and are not automatically subject to a carrier's filed tariff, carriers have little or no control over, or advance knowledge of, what terms and conditions a shipper's bill of lading may purport to impose on them. A bill of lading presented by a shipper to a motor carrier's driver on the loading dock for review and signature is not the ideal medium for the carrier to negotiate or insert terms governing the shipment.

For these reasons, the tariff remains vital for carriers seeking to manage their relationships with customers in the post-deregulation world. Congress has acknowledged this and has legislated accordingly. Carriers should make use of the opportunities Congress has allowed by maintaining publicly available tariffs and by looking for ways—through carrier websites, contracts, bills of lading, rate confirmations, PRO stickers, etc.—to explicitly incorporate the tariff's terms and conditions into all shipping agreements.[4] Doing so will bring more certainty to carriers in today's competitive markets and specifically address the concerns articulated by the Fourth Circuit in *ABB*.

Endnotes

1. Summarized elsewhere in this issue.
2. The requirement to file tariffs survives for certain types of carriers, such as household goods carriers. 49 U.S.C. § 13702.
3. Although the regulations contained in 49 C.F.R. Part 377 have not been withdrawn, it is unclear whether they survive the ICCTA.
4. Courts have shown that they will enforce even new and creative mechanisms by which tariffs are incorporated as part of the shipper-carrier agreement, as long as the shipper at least constructively agrees to their terms. For example, in *Marso v. United Parcel Service, Inc.*, 715 S.E.2d 871 (N.C. App 2011), the carrier required the shipper to agree to the terms of a pop-up dialogue box on the carrier's computerized shipping system that provided:

   > By clicking on "print" and tendering your package for shipment, you agree to, for yourself and as agent for and on behalf of any other person having interest in this package, Terms of Service specified by UPS on any applicable waybill, tariff or service guide, including terms which may limit the liability of UPS. UPS Terms of Service and Tariff Information is viewable at www.ups.com or may be obtained from the counter attendant upon request.

   The Court would have allowed the incorporation of the limiting terms of the carrier's tariff via this dialogue box, but, unfortunately, the carrier's employee booked the shipment through the computer system instead of the shipper.