No. 18-1094

IN THE

Supreme Court of the United States

CANADIAN PACIFIC RAILWAY LIMITED, CANADIAN PACIFIC RAILWAY COMPANY, SOO LINE CORPORATION, AND SOO LINE RAILROAD COMPANY,

Petitioners,

v.

JOE R. WHATLEY, JR., SOLELY IN HIS CAPACITY AS THE WD TRUSTEE OF THE WD TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Carmack Amendment makes rail carriers liable to shippers for certain losses and prescribes a two-step process for handling such claims. 49 U.S.C. §11706(a). The shipper first files a notice of claim against the carrier; the statute requires a carrier to provide "a period of [no] less than 9 months for filing a claim against it under this section." *Id.* §11706(e). If the carrier denies the claim, it must provide "a period of [no] less than 2 years for bringing a civil action against it under this section." *Id.* That two-year window runs from "the date the carrier gives … written notice that the carrier has disallowed any part of the claim specified in the notice." *Id.*

The question presented is whether a shipper's letter to a carrier raising claims under Canadian law—and explicitly stating that it does *not* raise any claim under the Carmack Amendment—is nonetheless a notice of claim whose denial triggers the Carmack Amendment's two-year clock for filing a civil action, as long as the letter gives the carrier sufficient information to facilitate the investigation of the eventual Carmack claim.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Joe R. Whatley, Jr., solely in his capacity as the WD Trustee of the WD Trust hereby submits the following corporate disclosure statement:

Montreal Maine & Atlantic Railway Ltd. ("MMA") was wholly owned by non-debtor Montreal Maine & Atlantic Corporation ("MMA Corp."). The Trust for Cynthia K. McFarland indirectly owns 71.4% of MMA Corp.

Pursuant to the Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015 (as amended Oct. 8, 2015), which was confirmed by the U.S. Bankruptcy Court for the District of Maine, MMA Corp.'s equity interests in MMA were cancelled and extinguished on the plan's effective date, December 22, 2015. The residual assets of MMA's post-effective-date estate are being administered under the plan for the benefit of MMA's creditors. Thus, no entity owns more than 10% of MMA.

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INTRODUCTION

The Carmack Amendment is a federal statute that makes rail carriers liable to shippers for certain losses that occur during shipping. 49 U.S.C. §11706(a). The statute provides a two-step process for a shipper's claim. *Id.* §11706(e). First, the shipper must provide the carrier notice of its Carmack Amendment claim. *Id.* If the carrier denies that claim, the carrier must provide "a period of [no] less than 2 years for bringing a civil action against it under this section." *Id.* That two-year window runs from "the date the carrier gives …

written notice that the carrier has disallowed any part of the claim specified in the notice." *Id.*

In July 2013, a train carrying oil from North Dakota to New Brunswick, Canada derailed in Lac-Mégantic, Quebec, spilling millions of liters of crude oil, killing dozens of people, and causing substantial damage to the town and the surrounding area. The shipper of the oil sought to recover losses arising from the derailment from the carrier. Because the shipment originated in the U.S. but derailed in Canada, the shipper believed it had claims under both Canadian law and the Carmack Amendment. Accordingly, the shipper first noticed a claim under Canadian law to comply with Canada's shorter notice period. That notice stated that it raised only a claim under Canadian law and expressly stated that it did *not* raise any claim under the Carmack Amendment. The carrier disallowed the Canadian law claim, acknowledging in its disallowance that the notice did not raise any Carmack Amendment claim. Later, the shipper timely noticed a claim under the Carmack Amendment. The carrier also disallowed that claim, again acknowledging that the earlier notice had raised only a Canadian law claim.

Respondent, the assignee of the shipper's Carmack Amendment claim, brought suit under the Carmack Amendment less than two years after the carrier disallowed the shipper's Carmack Amendment claim. The carrier moved to dismiss, claiming for the first time that the two-year clock for filing suit under the Carmack Amendment began running after the carrier disallowed the Canadian law claim. The Eighth Circuit rejected that argument and held that, under the particular circumstances of this "unusual … multi-national case" (Pet. App. 11a), the shipper was entitled to raise its Canadian and U.S. claims in separate notices.

The petition asks the Court to review that entirely fact-bound—and correct—decision. But this case presents no question that is even remotely worthy of this Court's review. Petitioners argue that the Eighth Circuit announced a categorical rule that a notice of claim must expressly refer to the Carmack Amendment to be effective. That is untrue. The court of appeals announced no rule of general applicability at all, simply deciding that on the "unusual" facts of this case, a notice that expressly *denied* it was asserting a Carmack claim—an interpretation endorsed by petitioners at the time—did not in fact assert a Carmack claim for purposes of the statute's limitations period. That commonsense holding does not conflict in any way with this Court's decision in *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), or with other decisions petitioners cite stating that notices of claim should be construed "practically."

Nor does the decision below "deepen" any circuit split on whether *Blish* or Interstate Commerce Commission ("ICC") regulations provide the correct standard for determining whether a Carmack notice is effective. The Eighth Circuit did not address that question at all. And petitioners themselves say that this case would have come out the same way under either approach. Petitioners thus effectively concede that granting certiorari in this case would not permit the Court to pass on any disagreement among the circuits.

The petition for certiorari should be denied.

STATEMENT

1. The Carmack Amendment makes rail carriers liable to shippers for certain losses that occur in the course of shipping. 49 U.S.C. §11706. As this Court has

recognized, the Carmack Amendment was enacted primarily for the benefit of shippers. Its purpose is "to relieve cargo owners 'of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.'" *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U.S. 89, 98 (2010) (quoting *Reider* v. *Thompson*, 339 U.S. 113, 119 (1950)); *see also Missouri, Kan. & Tex. Ry. Co. of Tex.* v. *Ward*, 244 U.S. 383, 386 (1917) ("The purpose of the Carmack Amendment has been frequently considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to destination."). "To help achieve this goal, Carmack constrains carriers' ability to limit liability by contract." *Kawasaki*, 561 U.S. at 98 (citing 49 U.S.C. §11706(c)).

In addition to restricting carriers' power to limit their liability, the statute protects shippers' right to recover by guaranteeing shippers a minimum period for filing claims. A carrier must give a shipper a period of no less than "9 months for filing a claim against it under this section," and a period of no less than "2 years for bringing a civil action against it under this section." 49 U.S.C. §11706(e)(1). The statute specifies that the two-year minimum period begins to run on "the date the carrier gives [the shipper] written notice that the carrier has disallowed any part of the claim specified in the notice." *Id.*

2. In June 2013, World Fuel Services Corporation, World Fuel Services, Inc., and Western Petroleum Company (collectively, "WFE") executed a through bill of lading with petitioners (collectively, "Canadian Pacific") for shipment of crude oil from New Town, South

Dakota, to New Brunswick, Canada.[1] Canadian Pacific successfully transported the oil from North Dakota to Quebec, Canada, where it arranged to have the oil transported to New Brunswick via the railways of Montreal Maine & Atlantic Railway Ltd. ("MMA") and Montreal Maine & Atlantic Canada ("MMAC"). After receiving the oil from Canadian Pacific, MMAC commenced the second leg of the transport. That second leg would travel through Canada, back into the United States through Maine, and then back into Canada again to reach its final destination in New Brunswick.

Shortly before midnight on July 5, 2013, MMAC parked the train carrying the oil on its main track and left it unattended. Early in the morning of July 6, 2013, as a result of various system failures, the unattended train rolled towards the town of Lac-Mégantic, Quebec, gathering speed as the train careened downhill. As the train passed through the town at high speed, most of the tank cars carrying WFE's oil derailed. The oil ignited upon release, resulting in a series of major explosions and a large pool of oil that burned for several days. The derailment and resulting fires killed approximately

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[1] In the court of appeals, the parties disputed whether the bill of lading incorporated the terms of the Uniform Bill of Lading ("UBL"). As petitioners explain (at 6), the relevant provisions of the UBL adopt the statutory minimums guaranteed in the Carmack Amendment—namely, nine months to file a claim, and two years from the disallowance of any claim to file a civil action—as mandatory limitations periods. The Eighth Circuit assumed for purposes of its decision that that the bill of lading incorporated those terms (Pet. App. 8a), so respondent assumes the same thing for purposes of this brief in opposition. For all other purposes, respondent maintains its position that no such incorporation occurred by reference or by operation of law.

forty-seven people, injured hundreds more, and inflicted massive damage on the town center of Lac-Mégantic. The surrounding area also suffered significant contamination from the oil and resulting fires.

As a result of the derailment, on August 7, 2013, MMAC's parent, MMA, filed a voluntary Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Maine. On August 9, 2013, similar insolvency proceedings were initiated under Canadian law for MMAC.

3. On November 5, 2013, WFE sent a letter to Canadian Pacific (the "November 2013 Letter") asserting a claim under Canada's Railway Traffic Liability Regulations. Pet. App. 58a-67a. Those Canadian regulations require such a notice to be sent to a carrier "within four months after a reasonable period for delivery of the goods." *Id.* at 62a. The November 2013 Letter made clear that it asserted only claims under Canadian regulations. It specifically disavowed making any claim under "the laws of the United States of America, including the Carmack Amendment (49 U.S.C. §11706), which provides a period of not less than 9 months for filing a notice of claim against a rail carrier." *Id.* at 62a-63a. The November 2013 Letter also stated that the "Notifying Parties w[ould] submit a separate notice of claim in accordance with" the Carmack Amendment "at the appropriate time." *Id.* at 63a.

On November 27, 2013, Canadian Pacific responded to the November 2013 Letter by disallowing WFE's claims under Canadian law. *See* Pet. App. 71a-81a. That response acknowledged that the November 2013 Letter raised only claims under Canadian law and did not assert any claim under the Carmack Amendment. *Id.* at 73a. In fact, the primary basis Canadian Pacific

gave for disallowing the claims asserted in the November 2013 Letter was that, "[b]y invoking Canadian law," WFE "failed to submit a valid claim." *Id.* Any claim for damages, Canadian Pacific asserted, would have to be made under the Carmack Amendment, not Canadian law. *Id.* Later in the disallowance letter, Canadian Pacific again recognized that the November 2013 Letter did not assert a Carmack Amendment claim, saying that, "even if [WFE] *were* to submit a proper Carmack Amendment claim" in the future, liability for any such claim "could not exceed the value of the lading (crude oil)." *Id.* at 74a (emphasis added).

As promised in the November 2013 Letter, WFE sent a separate notice asserting a claim under the Carmack Amendment on April 4, 2014 (the "April 2014 Notice"). Pet. App. 82a-88a. That notice was submitted within nine months of the derailment, as required under the Carmack Amendment and the UBL. The April 2014 Notice stated that it was submitted "pursuant to [the Carmack Amendment]" and sought recovery for all of the damages arising out of the derailment, including any amounts that WFE might owe to injured parties or for environmental cleanup. *Id.* at 82a, 84a. The April 2014 Notice asked for a different amount of damages than had been requested in the November 2013 Letter, and noted that additional damages amounts had yet to be determined. *Compare id.* at 84a, *with id.* at 64a-67a.

On April 24, 2014, Canadian Pacific sent WFE a letter entitled "Disallowance of Carmack Amendment claims." Pet. App. 89a. In that letter, Canadian Pacific explained that it understood that in "November of 2013" WFE "submitted a claim under Canadian law," and that the April 2014 Notice "submitted a claim … under United States law—namely, the Carmack Amendment." *Id.* Canadian Pacific went on to disallow

any liability under the Carmack Amendment. *Id.* at 89a-93a.

4. WFE eventually settled all derailment-related claims against WFE for $110 million, part of a global settlement implemented by MMA's confirmed Chapter 11 plan. Under that plan, WFE's Carmack Amendment claims were assigned to respondent Joe R. Whatley, Jr., the trustee of a trust created under the plan to benefit the victims of the Lac-Mégantic derailment.

On April 12, 2016—less than two years after Canadian Pacific disallowed WFE's April 2014 Carmack Amendment Notice—Whatley filed this action as trustee of the assignee trust, asserting WFE's Carmack claims against Canadian Pacific.

Canadian Pacific moved for judgment on the pleadings or summary judgment on the ground that Whatley's suit was untimely. Canadian Pacific argued that WFE's November 2013 Letter was, in effect, a Carmack notice, and that Canadian Pacific's November 2013 disallowance of WFE's Canadian law claims thus started the two-year clock for WFE to file suit under the Carmack Amendment. The district court agreed and granted Canadian Pacific's motion, dismissing the case with prejudice and entering judgment in favor of Canadian Pacific.

On appeal, the Eighth Circuit unanimously reversed the district court's dismissal of Whatley's WFE Carmack claims. *See* Pet. App. 1a-13a.[2] The court noted that it was "clear that WFE timely filed its notice of claim by sending its Carmack Amendment notice on

[2] The Eighth Circuit's decision was not unanimous as to other claims that are not at issue in this petition. *See* Pet. App. 13a-17a.

April 4, 2014," which was "less than nine months" after the incident. Pet. App. 9a. Thus, the "essence" of the dispute between the parties "centers on the effect of the November 27, 2013, denial issued by [Canadian Pacific] for WFE's Canadian claims." *Id.*

The Eighth Circuit found that none of the cases Canadian Pacific cited in support of its position presented an issue analogous to the question in this case. Pet. App. 9a-10a. Rather, as the court explained, this case presents the "unusual situation where" the shipper first made a claim in November 2013 "pursuant to Canadian law" and "expressly denied that [it] was making its Carmack Amendment claim" at that time. *Id.* at 11a. On those unusual facts, the Eighth Circuit held that WFE's explicit disavowal of a Carmack claim in the November 2013 Letter was effective, and that the April 2014 Notice was the relevant Carmack notice, denial of which triggered Whatley's two-year window to file a civil claim.

The Eighth Circuit found support for that conclusion in the text of the Carmack Amendment. Pet. App. 11a. The statute provides that carriers must have two years from the denial of a claim brought "under this section" to file suit. 49 U.S.C. §11706(e). But the claim made in the November 2013 Letter was made under Canadian law and was "assuredly and explicitly not brought pursuant to 49 U.S.C. §11706." Pet. App. 11a-12a. The Eighth Circuit therefore reversed the district court's judgment and remanded for further litigation on the merits.

REASONS FOR DENYING THE PETITION

The petition presents a wholly fact-bound question that does not implicate any split of authority: whether,

when a shipper provides notice of a claim under Canadian law and expressly disavows making any Carmack Amendment claim, and the carrier acknowledges and agrees with that characterization, a court must nevertheless ignore the parties' expressed intent and treat that notice as a Carmack notice. The petition does not identify—and respondent is not aware of—any other case that addresses anything similar to that question.

This case does not conflict with *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), or with the other decisions petitioners cite addressing whether a shipper's communication regarding a claim provides enough information to the carrier to satisfy Carmack's notice requirement. The Eighth Circuit simply did not pass on that question. Petitioners' argument that the Eighth Circuit announced a categorical rule—that a Carmack notice must always expressly invoke the Carmack Amendment to be effective—is simply untrue.

Petitioners separately suggest that this case deepens a disagreement as to whether *Blish* or ICC regulations provide the applicable standard for assessing the sufficiency of a Carmack notice. But the Eighth Circuit's decision had nothing to do with that question either. Indeed, petitioners all but concede that the split they identify is not implicated here by admitting that this case would come out the same way under either standard the courts of appeals have articulated. The decision below is correct, and the question presented does not warrant this Court's review.

I. THIS CASE PRESENTS A FACT-BOUND QUESTION ON WHICH THERE IS NO DISAGREEMENT OF AUTHORITY

A. The Eighth Circuit Decided Only That, In The Particular Context Of This Case, A Notice That Explicitly Disavowed Making A Carmack Claim Was Not A Carmack Notice

As the Eighth Circuit recognized, this case presents a highly "unusual situation": Following an international shipping disaster, a shipper filed two separate notices of claim to comply with different requirements for timely noticing claims under Canadian and U.S. law. Pet. App. 11a. Because Canadian law provides for a shorter notice period than the Carmack Amendment, WFE first noticed a claim "pursuant to Canadian law" to comply with Canada's four-month notice requirement. *Id.* But WFE "expressly denied" in that notice "that [it] was making its Carmack Amendment claim" at that time. *Id.* Petitioners disallowed WFE's Canadian law claims, making clear that they understood that the November 2013 Letter raised only claims under Canadian law. *See id.* at 73a-74a. Only later—and within the minimum time guaranteed to shippers under the Carmack Amendment—did WFE notice its Carmack claim. *See id.* at 82a. Petitioners nonetheless contended in this litigation that the denial of the *Canadian law* claims started the clock for filing suit on the *Carmack Amendment* claims. The Eighth Circuit correctly rejected that position. In the context of this "unusually complicated multi-national case," the Eighth Circuit explained, "it would be unwise policy, and actually unfair," to "allow the carrier to start the two-year clock when the shipper had not yet broken the huddle." *Id.* at 11a.

That holding is entirely fact-bound. *First*, it turns on the particular language and sequencing of the communications between petitioners and WFE. The Eighth Circuit emphasized that the November 2013 Letter "expressly stated that it was not making a claim under the Carmack Amendment." Pet. App. 3a. The decision also highlighted that petitioners not only failed to question that disavowal, but actually confirmed in their November 2013 denial that "the Canadian claim was … not a claim pursuant to the Carmack Amendment." *Id.* Indeed, the principal reason petitioners gave for denying WFE's claims under Canadian law was that any claims for damages "are governed by United States law—namely, the Carmack Amendment," and that "[b]y invoking Canadian law," WFE "failed to submit a valid claim." *Id.* at 73a.

By contrast, WFE's April 2014 Notice clearly stated that it was making a claim under the Carmack Amendment. Pet. App. 82a ("This Notice of Claim is submitted … pursuant to 49 U.S.C. §11706[.]"). Petitioners responded to that notice on April 24, 2014 with a document titled "Disallowance of Carmack Amendment claims." *Id.* at 89a. And that disallowance again acknowledged that WFE had submitted both "a claim under Canadian law" in November 2013 and a separate "claim … under United States law—namely, the Carmack Amendment"—in April 2014. *Id.* The decision below held only that, in these particular and "unusual" circumstances, the court of appeals would give effect to the parties' clearly expressed contemporaneous intent by treating the April 2014 Notice and subsequent disallowance as the relevant documents for purposes of calculating WFE's two-year period to file a civil suit under the Carmack Amendment.

Second, the "dueling notices" dispute here could only arise in the very unusual context of a cross-border railroad disaster giving rise to potential claims under both U.S. and Canadian law. As noted, WFE filed two separate notices because Canadian law requires shippers to notice claims within four months of the date of delivery or, where delivery does not occur, a reasonable time for delivery—five months before the Carmack Amendment would require notice. *See* Pet. App. 62a (citing Railway Liability Regulations [Canada] (SOR/91-488)). In that context, treating the November 2013 Letter as noticing a Carmack claim would effectively allow Canadian law to cut short the minimum notice period guaranteed to shippers under U.S. law.

As petitioners themselves point out (at 23-24), the international character of this case distinguishes it from cases where the shipper purports to assert state-law claims or other federal claims rather than a Carmack claim. The Carmack Amendment preempts any state-law cause of action, providing the exclusive means to recover from a carrier under U.S. law. *See Adams Express Co.* v. *Croninger*, 226 U.S. 491, 505-506 (1913) (explaining that the Carmack Amendment covers "[a]lmost every detail" of the relationship between carriers and shippers, such that "there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it"). But the Carmack Amendment does not—and cannot—preempt the operation of Canadian law with respect to claims arising from an incident that occurred on Canadian soil. In short, both the parties' dispute and the decision below turned largely on the "unusually complicated multi-national" nature and the specific facts of this case. Pet. App. 11a.

Petitioners nevertheless repeatedly claim (at 15-23) that the Eighth Circuit's decision announces a broad rule of general applicability. It does not. Contrary to petitioners' contention, the decision below does not hold that a Carmack notice is effective *only* if it explicitly invokes the Carmack Amendment. *First*, as already explained, nothing in the decision below suggests that it is announcing any categorical rule at all. *See supra* 11-13. Rather, the court of appeals made clear that its holding was limited to the "unusual" circumstances of this case. Pet. App. 11a.

Second, even as to these specific facts, the court did not hold that the November 2013 Letter was ineffective as a Carmack notice because it failed explicitly to invoke the Carmack Amendment. Quite the opposite. The court made clear that it was the parties' affirmatively expressed intent—not their silence—that determined whether the November 2013 Letter raised a Carmack claim. Both parties explicitly stated that they understood that the November 2013 Letter raised *only* claims under Canadian law and did *not* raise any Carmack claim. *See* Pet. App. 3a, 11a. The court merely held that it would give effect to WFE's explicit disavowal of any Carmack Amendment claim in its November 2013 Letter, where petitioners' November 2013 and April 2014 responses not only did not contest that disavowal, but in fact relied on it. That fact-bound holding does not warrant this Court's review.

B. None Of The Cases Petitioners Cite Conflicts With The Decision Below

Petitioners claim (at 15-19) that the decision below is inconsistent with *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), and a number of court of appeals decisions applying *Blish*.

But neither *Blish* nor any of the other decisions petitioners identify considered the two-year limit for bringing a civil action under the Carmack Amendment at all, let alone the specific question presented in this case—whether a notice that expressly disavows making any Carmack Amendment claim must nevertheless be deemed to be a Carmack notice. Instead, each decision petitioners cite addresses a question that was never at issue here: whether the shipper submitted *any* effective notice of claim within the nine months the Carmack Amendment provides. Those decisions thus are not relevant to the question presented here.

Indeed, the only thing this case has in common with the cases petitioners cite is that in each case, as here, the shipper sought to escape liability by using the Carmack Amendment's notice requirement. And in each case, as here, the court ruled against the carrier, refusing to allow the carrier to use the notice requirement to shield itself from otherwise meritorious claims. In so holding, the cases petitioners cite recognize that the question when and whether notice has been given should be evaluated "practically," considering the entire course of communication between the shipper and carrier. Petitioners would turn those decisions on their head, transforming a line of cases that refuse to dismiss meritorious Carmack claims on hypertechnical grounds into a doctrine that would yield precisely that result in this case. This Court should reject that effort.

1. The decision below is consistent with this Court's decision in *Blish*

In *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U.S. 190 (1916), flour shipped by Blish Milling Company was damaged during shipping. Blish and the railroad company exchanged a series of

communications regarding the damaged shipment, ending with a final telegraph from Blish informing the railroad company that Blish would "make claim against [the] railroad for [the damaged flour] at invoice price." *Id.* at 193. Blish later sued to recover for damages to its flour shipment. In response, the railroad company sought to dismiss Blish's claim. The railroad argued, among other things, that Blish's action was barred because Blish had never provided a formal notice of claim, as required under the bill of lading between the parties. *See id.* at 196-197.

This Court disagreed with the railroad company, holding that Blish's final telegraph was an effective notice of claim and that no "more formal notice" was required. *Blish*, 241 U.S. at 198. The requirement that a shipper provide notice of its intent to bring a claim, this Court held, should be "construed in a practical way." *Id.* Considering the final telegram in the context of the broader exchange between the parties, the Court reasoned that because Blish had already identified the specific shipment in question in earlier communications, "this final telegraph[,] taken with the others[,] established beyond question the particular shipment to which the claim referred, and was in substance the making of a claim." *Id.* That was enough to satisfy the notice requirement.

Blish is doubly irrelevant here. First, there is no question in this case that WFE gave petitioners timely notice. Petitioners have never disputed that WFE provided adequate notice of its intent to bring a claim under the Carmack Amendment within nine months of the scheduled date of delivery. As petitioners admit elsewhere, WFE provided adequate notice under any potentially applicable standard. *See* Pet. 22. Thus, the

only question this Court considered in *Blish* is not at issue in this case.

Second, *Blish* says nothing about the question actually presented here. *Blish* does not address the question when the Carmack Amendment's two-year clock for bringing a civil action starts. Nor does *Blish* consider whether a notice that expressly disavows any intent to raise a Carmack Amendment claim must nevertheless be deemed a Carmack notice as long as it contains enough facts to allow the carrier to investigate the possible Carmack claim.

It is therefore no surprise that the decision below does "not even mention [*Blish*]" (Pet. 15), since *Blish* had no relevance to the question before the Eighth Circuit. *Id.* Indeed, petitioners themselves never cited *Blish* in their Eighth Circuit briefing, and the district court decision mentioned *Blish* only in passing. *See* Pet. App. 30a & n.48.

In any event, even if *Blish* were relevant, the decision below is entirely consistent with *Blish*'s admonition that courts should approach the notice requirement in a "practical way." 241 U.S. at 198. When a notice explicitly disavows a Carmack Amendment claim, and subsequent communications between the carrier and the shipper demonstrate that both parties understood that disavowal to be effective, it is eminently "practical" to give effect to that expressed intent. Indeed, it is petitioners' position that would run afoul of *Blish*. Petitioners argue that, regardless of what the parties intended or understood, the first communication from the shipper to the carrier that gives the carrier sufficient detail to understand and investigate the claim *must* be deemed the relevant Carmack notice for purposes of triggering the shipper's two-year window to file suit.

But it is not remotely "practical" to ignore the plainly expressed intention and understanding of both parties in favor of that kind of wooden rule. Nor can it be said that a notice that clearly says it makes no Carmack claim is "in substance the making of a [Carmack] claim." *Blish*, 241 U.S. at 198.

Blish also made clear that, in evaluating the Carmack amendment's notice requirement, a court should not look at individual communications in isolation. Instead, a court should look to the broader course of correspondence between the shipper and the carrier to ascertain whether notice was provided. The Eighth Circuit's decision clearly comports with that instruction. The exchange of notices and responses between WFE and petitioners establish that both sides understood that the November 2013 Letter did not assert a Carmack claim. Again, it is petitioners' position that conflicts with *Blish* by suggesting that the court of appeals should have ignored the course of correspondence between the shipper and the carrier, and instead focused only on the November 2013 Letter in isolation.

2. The decision below is consistent with other courts' application of *Blish*

Petitioners also claim (at 16-19) that the Eighth Circuit's decision is inconsistent with decisions from other courts of appeals that apply the "'practical' … inquiry adopted in *Blish*." But none of the decisions petitioners cite say anything about the question presented in this case—namely, how a court should treat a letter that asserts claims only under foreign law and expressly disavows making any Carmack claim.

Instead, in all the cases petitioners identify (as in *Blish*), the carrier attempted to escape liability under

the Carmack Amendment by claiming that the shipper had failed to provide adequate notice of its claim within nine months. *See Wisconsin Packing Co.* v. *Indiana Refrigerator Lines, Inc.*, 618 F.2d 441, 443 (7th Cir. 1980) ("[The carrier] moved for summary judgment, arguing that [the shipper] had failed to file a written claim for damage within nine months."); *American Synthetic Rubber Corp.* v. *Louisville & Nashville R.R. Co.*, 422 F.2d 462, 463 (6th Cir. 1970) (noting that the carrier "moved for summary judgment … on the ground that [the shipper] had not filed a claim in writing … within nine months"); *Loveless* v. *Universal Carloading & Distrib. Co.*, 225 F.2d 637, 639 (10th Cir. 1955) ("Universal denied the claim solely on the ground that" a notice of claim had not "been filed within 9 months of the delivery date[.]"). And, like *Blish*, every decision petitioners cite refused to allow the carrier to use the notice requirement to escape liability under the Carmack Amendment. *See Wisconsin Packing*, 618 F.2d at 448; *American Synthetic*, 422 F.2d at 468-469; *Loveless*, 225 F.2d at 641.

Far from suggesting that the decision below is out of step, the cases petitioners identify establish that courts consistently construe notices given under the Carmack Amendment so as not to foreclose potentially meritorious claims. As numerous circuits have recognized, the "purpose of the [Carmack Amendment's] written claim requirement is to insure that the carrier may promptly investigate claims, and '*not to permit the carrier to escape liability.*'" *S & H Hardware & Supply Co.* v. *Yellow Transp., Inc.*, 432 F.3d 550, 554 (3d Cir. 2005) (emphasis added) (quoting *Insurance Co. of N. Am.* v. *G.I. Trucking Co.*, 1 F.3d 903, 907 (9th Cir. 1993)). Indeed, the cases petitioners cite (at 16-19) make this precise point. *See Loveless*, 225 F.2d at 640

("[T]he carrier may not use the provisions of the bill of lading to shield itself from the liability imposed upon it by the statute … for its negligent destruction of the shipper's property. To hold otherwise would not be construing the bill of lading 'in a practical way.'"); *Wisconsin Packing*, 618 F.3d at 444 ("Congress adopted the Carmack Amendment to prevent carriers from insulating themselves from damage actions filed by shippers."). These cases thus only confirm that the Eighth Circuit correctly refused to allow a carrier to escape liability based on a hypertechnical reading of the Carmack Amendment's notice requirement.

C. The Supposed Circuit Split Petitioners Identify Is Not Implicated By The Decision Below And Is Irrelevant To This Case

Petitioners alternatively claim (at 19-23) that this case is worthy of certiorari because it "compounds" an existing circuit split regarding the appropriate standard for sufficiency of Carmack notices. But the supposed "split" petitioners identify has nothing to do with this case.

Petitioners point to a putative disagreement among circuits as to whether the sufficiency of a Carmack notice is governed by requirements set out in ICC regulations or by the looser "practical" test set out in *Blish*. *Compare Wisconsin Packing*, 618 F.2d at 444-445 (holding that *Blish*'s "practical" inquiry, rather than the ICC regulations, governs whether a Carmack notice is sufficient when the carrier contests the shipper's claim), *with Pathway Bellows Inc.* v. *Blanchette*, 630 F.2d 900, 904 (2d Cir. 1980) (holding that ICC regulations "provide the appropriate standard for assessing the sufficiency of all claims," whether or not the carrier

contests the claim). Petitioners' attempt to hitch this case to that disagreement is unavailing.

Tellingly, the decision below mentions neither *Blish* nor the relevant ICC regulations. And for good reason: As discussed above, there was never any dispute that WFE provided petitioners with a sufficiently detailed notice of its Carmack claims, and that it submitted such a notice within the nine months guaranteed by the Carmack Amendment. *See supra* 16-17. Petitioners are therefore wrong to argue that the decision below somehow creates "a *third* rule for evaluating Carmack notice sufficiency." Pet. 22. The decision below set forth no "rule" at all regarding the sufficiency of a Carmack notice. *See supra* 14. It held only that, on the particular facts of this case, the April 2014 Notice was the relevant notice for calculating WFE's time to file a civil suit under the Carmack Amendment.

Any difference between the requirements of the ICC regulations and *Blish* is therefore not implicated here. Indeed, petitioners acknowledge as much when they admit that this case would have come out the same way under either approach. Pet. 22. If this case would have the same result regardless of which side of the supposed split is correct, by definition it gives this Court no opportunity to pass on that split.

II. EVEN IF THIS CASE PRESENTED THE QUESTION PETITIONERS IDENTIFY, IT WOULD BE A POOR VEHICLE TO CONSIDER THAT QUESTION

Even if the decision below had held—as petitioners wrongly claim—that a Carmack notice must explicitly invoke the Carmack Amendment to be effective, this case would be a poor vehicle for addressing that question. As discussed above, WFE's November 2013 Letter did not merely fail to state that it was raising a

Carmack claim; it expressly stated that it was *not* raising such a claim, but only a claim under Canadian law. *See supra* 11. Accordingly, even if this Court granted certiorari and held that Carmack notices do not require an explicit invocation of the Carmack Amendment, the Eighth Circuit would almost certainly reach the same conclusion on remand based on the November 2013 Letter's explicit disavowal of any Carmack claim.

Petitioners' conduct in this case also makes it a poor vehicle to consider the question petitioners claim is presented. This is not a case in which a carrier treated an earlier communication as if it were a Carmack notice. Petitioners never stated that they understood the November 2013 Letter to be an effective Carmack notice. Nor did they ever suggest that they viewed their November 2013 disallowance as effectively disallowing claims under both Canadian law and the Carmack Amendment. Instead, petitioners repeatedly signaled that they understood that the April 2014 Notice was the operative notice, disallowance of which started the clock on WFE's two-year filing period. For example, petitioners explicitly stated that the November 2013 Letter raised only "a claim under Canadian law," Pet. App. 89a, and that the November 2013 Letter did not notice a Carmack claim, *id.* at 73a. Petitioners even titled their April 2014 disallowance "Disallowance of Carmack Amendment claims." *Id.* at 89a.

In these circumstances—where petitioners themselves repeatedly signaled to WFE that the April 2014 Notice was the relevant notice for purposes of calculating WFE's time to file a civil suit—allowing petitioner to escape liability would raise estoppel concerns. *Cf. Loveless*, 225 F.2d at 639 ("Loveless also pleads estoppel to assert non-compliance with [the notice requirement] having acted to his prejudice upon representations of

the local manager that he had two years within which to file a claim.").

III. THE DECISION BELOW IS CORRECT AND FURTHERS THE PURPOSES OF THE CARMACK AMENDMENT

Petitioners argue (at 23-31) that the decision below is incorrect, and that the Eighth Circuit's ruling is contrary to the objectives of the Carmack Amendment. Even if that were true, that kind of fact-bound error correction would not warrant this Court's review. But in any event, the decision below correctly held that the April 2014 Notice—not the November 2013 Letter—was the relevant notice for purposes of calculating WFE's two-year window to bring a civil suit. And it is petitioners' proposed rule, not the Eighth Circuit's, that would undermine the objectives of the Carmack Amendment.

A. The Decision Below Is Correct

The Eighth Circuit correctly held that the April 2014 Notice, not the November 2013 Letter, was WFE's Carmack notice for purposes of calculating WFE's time to file a civil action against petitioners. As discussed above, that decision gave effect to the parties' clearly articulated intent, including WFE's explicit statement in the November 2013 Letter that it was not asserting any Carmack claim at that time. *See supra* 11.

As the Eighth Circuit noted, that conclusion comports with the text of the Carmack Amendment. *See* Pet. App. 11a. Section 11706(e) provides that "[a] rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it *under this section* and a period of less than 2 years for bringing a civil action against it under this section.

The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of *the claim specified in the notice*." 49 U.S.C. §11706(e) (emphasis added). The statute refers to the disavowal of a notice that asserts a claim "under this section." Pet. App. 11a. And a notice that *expressly disavows* making any Carmack claim cannot reasonably be said to be making a claim "under this section."

In response to that common-sense understanding of the statutory text, petitioners first criticize the Eighth Circuit (at 28) for saying that Section 11706(e) "*defines* a Carmack Amendment claim as one being brought '*under this section*.'" Petitioners argue that the statute contains "no such definition" of a valid claim. But it is immaterial whether the statutory language at issue is a "definition." What matters is that the statute specifies that the time to file a civil action runs from the disallowance of a claim brought "under this section." The Eighth Circuit correctly concluded that a letter that states it is not making any claim "under this section" is not the kind of "notice" referred to in Section 11706(e).

Petitioners also suggest that the Eighth Circuit's decision is inconsistent with ICC regulations, which "separately define the elements of a sufficient notice." Pet. 28. But the ICC regulations petitioners identify set out only the "minimum" requirements for a Carmack notice. 49 C.F.R. §1005.2(b). They do not purport to provide an exhaustive list of all factors that can be considered in evaluating whether a notice is effective. And they certainly do not address how to treat a notice that asserts a claim only under foreign law and expressly disavows making any Carmack claim.

B. The Decision Below Furthers The Purposes Of The Carmack Amendment

Petitioners claim (at 23-28, 30-31) that the Eighth Circuit's holding undermines the objectives of the Carmack Amendment. Not so. The notice and suit limitations in Section 11706(e) protect shippers, not carriers: The statute prohibits a carrier from providing "by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section," and likewise prohibits a carrier from providing "a period of less than 2 years for bringing a civil action against it under this section." The purpose of that provision is to guarantee shippers a minimum amount of time to bring a Carmack claim, not to provide carriers with a convenient defense to liability.[3]

The Eighth Circuit's decision also fosters certainty by respecting the expressed intent of the parties. Petitioners' rule, on the other hand, would create uncertainty. According to petitioners, regardless of what the parties say or intend, the notice requirement is satisfied as soon as the shipper communicates enough facts to allow the carrier to investigate the shipper's claim. And any denial by the carrier after that point is enough to start the shipper's two-year clock for filing a civil suit. Both shippers and carriers would be forced to litigate the

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[3] Petitioners' suggestion (at 30) that the Eighth Circuit's holding might harm "unwary shippers" by resulting in dismissal in cases where "shippers file only a single notice within the nine-month period, and that notice either does not assert a legal theory or asserts a legal theory other than Carmack" merely reiterates petitioners' repeated mischaracterization of the decision below. As already explained, that decision did not hold that a notice must expressly invoke the Carmack Amendment to be a valid Carmack notice. *See supra* 14.

question at what point in the course of communications between the parties the shipper provided sufficient information to allow the carrier to investigate the claim.

Petitioners' rule would also encourage gamesmanship by carriers. Carriers would have an incentive to identify some communication outside the two-year window in which the shipper arguably provided enough information to allow the carrier to investigate the shipper's Carmack claim. Meanwhile, both shippers and carriers would be unsure when a Carmack Act suit is timely. By simply taking the parties at their word, the Eighth Circuit's decision avoids that substantial uncertainty.

Petitioners are also wrong to claim (at 23) that allowing a shipper to disavow making a Carmack claim "would serve no purpose." It is true that, in purely domestic suits, Carmack necessarily governs regardless of the legal theory asserted in the notice of claim, because the Carmack Amendment preempts all other remedies provided under federal and state law. *See Adams Express*, 226 U.S. at 505-506; 49 U.S.C. §10501(b) (stating that the "remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law").

The Carmack Amendment does not, however, purport to preempt any foreign law. Thus, in multinational cases like this one, the Eighth Circuit's rule serves an important purpose. Under petitioners' approach, WFE would either have had to raise both its Canadian and its U.S. claims within four months of the incident, losing the benefit of the nine-month notice period guaranteed under the Carmack Amendment, *or* take advantage of the Carmack Amendment's nine-

month notice period and abandon its Canadian claims. Considering the "unusually complicated multi-national" nature of this case, the decision below correctly refuses to put shippers to that kind of choice. Pet. App. 11a. Instead, the Eighth Circuit's holding ensures that shippers transporting their goods across international borders will not have their rights under the Carmack Amendment limited by competing requirements of foreign law. *Cf. Reider* v. *Thompson*, 339 U.S. 113, 119 (1950) ("To hold otherwise than we do would immunize from the beneficial provisions of the Amendment all shipments originating in a foreign country when reshipped via the very transportation chain with which the Amendment was most concerned."). The decision below thus ensures that Congress's decision to guarantee shippers a minimum of nine months to notice a claim will prevail even when some foreign law might otherwise have the effect of cutting that period short.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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