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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONER

Contrary to Respondent's arguments, the effect of a shipper's Carmack claim notice turns on the factual information it contains, not the legal theory it asserts. The contrary Eighth Circuit ruling conflicts with this Court's precedent and widens an already-existing circuit split that warrants this Court's review.

Respondent does not dispute that WFE's November 5, 2013 letter to CP (the "Notice") provided all the information necessary under *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U.S. 190, 197 (1916) and the Interstate Commerce Commission ("ICC") regulations to satisfy the uniform bill of lading ("UBL") condition that a notice of claim be submitted within nine months. The Notice declared WFE's intent to hold CP liable for "all losses sustained as a consequence of the derailment of Unit Train 606-282" in Lac-Mégantic, Quebec (59a); identified the damages sought (64a-67a); and, while relying on Canadian law, expressly stated that it was "without prejudice to any of [WFE's] . . . rights to plead and rely upon the laws of the United States of America" (62a), even promising that it "will submit" a Carmack claim (63a).

CP's response to the Notice observed that WFE had mistakenly relied on Canadian law, but it also expressly disallowed liability under Carmack. Nothing in CP's response suggested that CP believed its denial of liability did not trigger the two-year suit limitations period. Any such suggestion would have been ineffective anyway, because a rail carrier is legally prohibited

from voluntarily extending or waiving the suit limitation provisions of the UBL. *See, e.g.*, *Blish*, 241 U.S. at 197; *A.J. Phillips Co.* v. *Grand Trunk W. Ry. Co.,* 236 U.S. 662, 667 (1915); L.S. Tellier, *Waiver of rights by carrier under interstate shipments as constituting unlawful discrimination among shippers*, 135 A.L.R. 611 (1941).

The ICC enacted regulations defining a Carmack claim notice so that a carrier can "know one when it sees one." *Pathway Bellows, Inc.* v. *Blanchette*, 630 F.2d 900, 904 (2d Cir. 1980). The Eighth Circuit disregarded the regulations, ignored *Blish*, and—splitting with every other court of appeals to consider the sufficiency of a Carmack notice—held that even if the notice provides all the information necessary under *Blish* and the ICC regulations, it is nevertheless ineffective unless it also asserts a claim "under this section." Contrary to Respondent's assertions, the Eighth Circuit's rationale applies not only when a shipper purports to disavow a Carmack claim, but *any time* the notice does not seek recovery "under this section," including by asserting no legal theory at all.

The statutory provision relied upon by the Eighth Circuit, 49 U.S.C. § 11706(e), does not "define" a Carmack claim, and does not otherwise support its decision. That provision merely limits the ability of carriers to contractually require shippers to submit claim notices earlier than nine months after delivery. Nor does anything else in the statute define the content of a sufficient claim notice. The implementing ICC regulations do provide such a definition, but nothing in these regulations or in *Blish* treats the shipper's legal theory as relevant. As this Court noted in *Blish* with respect to a shipper's state law trover claim: "If we look beyond its technical denomination, the scope and

effect of the action is nothing more than that of an action for damages against the delivering carrier." 241 U.S. at 197 (quotation omitted).

Nor can Respondent's delay in filing suit be excused by any confusion about the applicable law. Putting aside that the legal theory advanced in a claim notice has no bearing on its sufficiency, WFE knew full well that CP's tariffs incorporated the UBL, even advising the Quebec government months before the Notice that "the Carmack Amendment governs the parties' respective rights and obligations with respect to the crude oil after the derailment." (80a.)

In short, the Eighth Circuit's holding is inconsistent with *Blish* and the ICC regulations, creating a sharp split from other circuit decisions that have correctly applied those authorities to evaluate a claim notice solely by its factual content. Review by this Court is necessary to resolve the split and restore uniformity to construction of Carmack and the implementing ICC regulations.

ARGUMENT

I. THE EIGHTH CIRCUIT'S RULE IS CONTRARY TO *BLISH* AND THE COURTS THAT HAVE APPLIED IT.

A. Respondent Misstates the Record and the Eighth Circuit's Reasoning.

Respondent makes a number of misguided arguments in an effort to make the decision below consistent with *Blish*. Respondent contends that the Eighth Circuit's reasoning is "fact-bound" and announces no rule of "general applicability." (Opp'n at 3, 14.) To the contrary, the Eighth Circuit ruled as a matter of law that (i) under 49 U.S.C. § 11706(e), only a carrier's "denial [of] a claim brought 'under this section'"

will trigger the limitations period for suit and (ii) this requirement is not met when the shipper asserts liability under a different legal theory. (11a-12a.)

The Eighth Circuit's rule cannot be limited to circumstances in which a notice expressly disavows Carmack. A notice that is silent as to its legal theory is no more "brought 'under this section'" than one expressly disavowing Carmack. Construing the sufficiency of a notice letter without regard to its cited legal authority is not only consistent with *Blish*—where the shipper raised no legal theory at all prior to suit—but is also consistent with the manner in which court pleadings are treated.[1]

Nor is it "highly 'unusual'" for a plaintiff to try to avoid asserting a Carmack claim, as Respondent asserts (at 11). Shippers have often sought to avoid limitations on Carmack liability and removal to federal court by claiming they seek liability under state law and *not* Carmack, but courts have not hesitated to find those shippers' notices to be effective Carmack claims. *See, e.g.*, *Am. Synthetic Rubber Corp.* v. *Louisville & Nashville R.R. Co.*, 422 F.2d 462, 468-69 (6th Cir. 1970) (finding shipper's written notice to the carrier sufficient, notwithstanding shipper's position that its claim was in tort and not under Carmack). Respondent tries (at 13) to distinguish these cases on the ground that Carmack preempts state law, but, as noted above, it is equally true here that WFE's claims are necessarily governed by Carmack.

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[1] *See*, *e.g.*, *Johnson* v. *City of Shelby*, 574 U.S. 10, 10 (2014) (per curiam) (plaintiff need only state the "events that . . . entitled them to damages," *not* a "statement of the legal theory supporting the claim"); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("[C]ourt[s are] not limited to the particular legal theories advanced by the parties, but rather retain[] the independent power to identify and apply the proper construction of governing law").

In any event, the Notice did *not* "expressly disavow[]" a Carmack claim. To the contrary, the Notice left no doubt that WFE "will" make that claim—just like the shipper's statement in *Blish* that it "*will* make claim." *Blish*, 241 U.S. at 198 (emphasis added); *see also United States* v. *Kales*, 314 U.S. 186, 196 (1941) ("[U]se of the future tense in stating a claim may . . . rightly be taken as an assertion of a present right") (citing *Blish*, 241 U.S. at 197).

Respondent is also wrong to assert (at 14) that CP acknowledged that the Notice "raised only claims under Canadian law." The opposite is true: CP's response stated that "claims for damaged or delayed goods on Train 282 are governed by . . . *Carmack*" (73a) and then explained why WFE's claim was invalid under U.S. law in light of the limited scope of Carmack liability, the terms of CP's tariffs, and WFE's fraud.[2]

And contrary to Respondent's suggestion (at 17-18) that WFE's subsequent notice expressly asserting Carmack liability became the "relevant Carmack notice," it is well-established that "once an effective . . . disallowance has been made, subsequent correspondence between the parties does not halt the running of the limitations period." *See Combustion Eng'g, Inc.* v. *Consol. Rail Corp.*, 741 F.2d 533, 536 (2d Cir. 1984).

In short, had the Eighth Circuit properly applied *Blish*, it would have affirmed the dismissal here. As this Court explained, a notice need only "apprise[] the carrier of the character of the claim" and "facilitate

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[2] *See* 73a-74a (disclaiming any possibility of liability under Carmack beyond the value of the crude oil, and expressly disavowing Carmack liability for damage to rail-cars, third-party tort claims, and government environmental claims); 76a-77a (tariffs required WFE to select and pay for Full Liability Transportation coverage if it wanted that); 76a (stating that WFE's fraud obviates any CP liability).

prompt investigation" to trigger Carmack's requirements, regardless of the "particular form" the notice takes. *Blish*, 241 U.S. at 196, 198. Following *Blish*, the courts of appeals have been "extremely reluctant" to find notice ineffective "in any situation where a carrier has seen a written document noting damage to a particular shipment and implying the carrier's responsibility therefor." *Pathway Bellows*, 630 F.2d at 903 n.5. Respondent does not and cannot dispute that this standard was fully satisfied here.

Unable to distinguish the reasoning of *Blish* or the courts of appeals that faithfully apply its "practical" inquiry standard, Respondent argues (at 19-20) that these cases simply mean that the notice should always be construed in a manner favoring the shipper "so as not to foreclose potentially meritorious claims."

"[I]n the law," however, "what is sauce for the goose is normally sauce for the gander." *Heffernan* v. *City of Paterson*, 136 S. Ct. 1412, 1418 (2016). If a shipper's notice is sufficient to satisfy the requirement for filing a notice within nine months, then the carrier must be able to trigger the period for filing suit by disallowing the claim asserted in that notice. *Midstate Horticultural Co.* v. *Pa. R.R. Co.*, 320 U.S. 356, 365 (1943) ("In the absence of explicit direction, it cannot be assumed or inferred that Congress intended to adopt one policy for the carrier and another for the shipper."). Otherwise, a shipper could leave the claim in limbo—a notice could be sufficient to stop the running of the nine-month notice period but insufficient for the carrier's disallowance of the claim to trigger the two-years-and-a-day period for filing suit.

Respondent's position that the notice and suit limitations provisions are only for the shipper's benefit also ignores that (i) the purpose of the notice provision is to

protect the carrier from suit unless it has been given timely notice of the factual basis for the claim and an opportunity to investigate; (ii) the UBL gives the carrier—not the shipper—"the power to fix the time when the limitations period begins to run against a shipper" by disallowing the claim, *Combustion Eng'g*, 741 F.2d at 536; and (iii) the purpose of every limitations period is to "protect defendants" by fostering the "elimination of stale claims," *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014) (citations omitted).

B. This Case Provides an Opportunity to Resolve an Existing Split.

Respondent wrongly contends (at 21) that this case provides no opportunity to resolve the existing circuit split regarding whether the ICC regulations that define an effective Carmack claim notice apply to litigated claims. It is true that the result here would be the same under either the ICC regulations (the standard applied by eight circuits) or *Blish* alone (the standard applied by at least one circuit). But that is beside the point. The decision below compounds the split by adding a *third* rule that conflicts with *both* standards. Granting review here will allow this Court to set the correct standard for evaluating sufficiency of a Carmack notice, and in so doing, resolve the existing split. *See*, *e.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 124-25 (2014) (granting certiorari to review "three competing approaches to determining whether a plaintiff has standing to sue under the Lanham Act").

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

Respondent asserts (at 22) that this case is a "poor vehicle" for addressing the question presented because

even if this Court holds that "Carmack notices do not require an explicit invocation of" Carmack, "the Eighth Circuit would almost certainly reach the same conclusion on remand" based on WFE's "explicit disavowal of any Carmack claim." This contention is meritless. If this Court reverses the decision below, the correct result would be reinstatement of the district court's dismissal of Respondent's claim, so there will be nothing for the Eighth Circuit to decide on remand.

WFE also criticizes (at 22) CP's "conduct in this case," asserting that CP never "treated [the Notice] as if it were a Carmack notice." But CP did just that when, *inter alia*, it promptly responded to the Notice, as required by regulation. The title of CP's response even uses the same term as the regulation. (73a ("Disallowance of Loss, Damage and Delay Claims")); 49 C.F.R. § 1035, App. B § 2(b) ("UBL § 2(b)"). And as explained above (*supra*, at 1-2 & 5 n.2), CP's response left no doubt that it "disallow[ed] claims under both Canadian law and the Carmack Amendment."

III. THE DECISION BELOW IS WRONG.

A. The Eighth Circuit's Statutory Holding Is Incorrect.

Contrary to the Eight Circuit's view, Carmack does *not* "specif[y] that the time to file a civil action runs from the disallowance of a claim brought 'under this section.'" (Opp'n at 24.) The statute itself does not set requirements for a shipper's submission of a notice of its claim; it specifies only that "[a] rail carrier may not provide . . . 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." 49 U.S.C. § 11706(e). Nor does the statute define what constitutes a "claim" or how to determine whether it is "under this section."

It is the *UBL* that requires shippers to submit notice of their claims "within nine months after delivery" and that triggers commencement of the limitations period once "the carrier has disallowed the claim or any part or parts thereof specified in the notice." UBL § 2(b). This provision of the UBL does not include the phrase "under this section," nor do the ICC regulations that set the minimum requirements for such a notice. In short, the phrase "under this section"—the linchpin of the Eighth Circuit's analysis—is simply irrelevant.

Moreover, Respondent does not seriously defend the Eighth Circuit's failure to consider the ICC regulations. Those regulations are clearly relevant here, as they define when a notice "sufficient[ly] compli[es] with the provisions for filing claims embraced in the bill of lading." 49 C.F.R. § 1005.2(b). Respondent is correct (at 24) that these regulations define "only the 'minimum' requirements for a Carmack notice," but that does not support WFE's position. The Notice easily satisfied these minimum requirements, and WFE does not contend otherwise.

B. The Decision Below Undermines Carmack's Purposes.

The UBL's notice requirement is "intended to provide carriers with an opportunity to investigate claims," *S&H Hardware & Supply Co.* v. *Yellow Transp., Inc.*, 432 F.3d 550, 556 (3d Cir. 2005), not to "protect shippers," as Respondent asserts (at 25). Although Carmack "guarantee[s a] shipper[] a minimum amount of time" to notify a carrier that it intends to hold the carrier liable for losses (Opp'n at 25), the statute does not guarantee that this time continues to run

beyond the time the shipper sends such a notice and the carrier denies liability. To the contrary, Carmack and the UBL "give[] the carrier the power to fix the time when the limitations period begins to run against a shipper." *Combustion Eng'g*, 741 F.2d at 536.[3]

Here, there is no dispute that in November 2013 WFE submitted a notice to CP that contained sufficient information to investigate its claim. WFE could have waited until the end of the nine-month period before submitting its notice, but once it submitted the Notice and CP disallowed the claim, the limitations period began to run.[4]

Respondent complains (at 26) that under this approach, it would be forced either to abandon its Canadian law claim or assert its U.S. and Canadian law claims together, thereby losing "the benefit of the nine-month notice period guaranteed under" Carmack. But the purpose of the notice requirement is to "facilitate prompt investigation" of claims, *Blish*, 241 U.S. at 196. The shipper's protection against having to litigate too soon is the two-years-and-a-day limitations period triggered by disallowance, not some unstated right to delay claim-assertion after having developed the facts needed to give notice. There is no sound reason for treating as a nullity the disallowance by a carrier of a

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[3] Respondent also claims (at 26) that "Petitioners' rule" would "encourage gamesmanship" by carriers, who might search for "some communication outside the two-year window" to support an argument that the limitations period has run. But the limitations period begins to run upon the carrier's *disallowance* of a claim, making such "gamesmanship" impossible.

[4] Moreover, as discussed above, it was perfectly clear to WFE well before the Notice that Carmack, not Canadian law, would govern the claim. (*Supra*, at 3; 80a.)

Carmack claim once a notice satisfying all the requirements of *Blish* and the ICC regulations has been received.

Resolving the circuit split by recognizing that a valid Carmack claim is stated when the requisite facts are asserted will thus protect carriers and shippers evenhandedly, permitting carriers to trigger the limitations period as the statute contemplates and giving shippers ample time to commence litigation thereafter. This resolution will avoid the uncertainty and inconsistency that would flow from the Eighth Circuit approach and restore the governing principles of *Blish* and the ICC regulations.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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