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Recommended Citation
Rene Sacasas, The Filed Tariff Doctrine: Casualty or Survivor of Deregulation?, 29 Duq. L. Rev. 1 (1990). Available at: https://dsc.duq.edu/dlr/vol29/iss1/3

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The Filed Tariff Doctrine: Casualty or Survivor of Deregulation?

Rene Sacasas*

If you will not undo what you have done, that is, kill him whom you have recovered, desire it not.

Twelfth Night, Act II, Scene I

Three industries - transportation, communications and energy - are essential to economic growth and industrial development. Absent a healthy profile in each of these industries, a nation cannot prosper. Owing to their powerful influence over economic growth, these industries have been viewed as too important to the nation's well-being to be abandoned to individual economic interests. Accordingly, our society has treated them differently. We have regulated them.

History supports our decision. Study reveals that barge traffic on the Nile was regulated by the Pharaohs, and the Romans even regulated the size of the wheels on delivery vehicles operating within their city limits. During the Middle Ages, millers were required to grind for all on equal terms and blacksmiths were penalized for refusing to shoe horses. In England, common carriers were regulated during the reign of William and Mary.

The federal regulation of business in the United States began with the transportation industry. In 1887, after years of public complaints regarding inequitable behavior by the railroads, Congress passed the Act to Regulate Commerce. This legislation created the Interstate Commerce Commission ("I.C.C.") , the federal

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government's first independent regulatory agency, and gave it the power to regulate the practices and rates of the railroads. Included in the Act to Regulate Commerce were a series of legislative provisions intended to control the discriminatory behavior of the railroads, particularly in the setting of rates. These provisions, which have as their common law source the notion that a common carrier's rates must be reasonable, evolved into the "filed tariff doctrine." Although initially imposed upon the railroads, this doctrine was ultimately absorbed into the regulatory law governing other industries, including the other components of the transportation industry, as well as power2 and telecommunications.3

1. A "tariff" encompasses rules, regulations and other requirements which must be met before the prescribed tariff rate applies to the subject transaction. Often, courts refer to the "filed tariff doctrine" as the "filed rate doctrine" when solely discussing the rate component of a filed tariff. The more universally encompassing term will be used in this article.

2. This article will not review the filed tariff doctrine as it applies to the energy industry. Both the electric power and natural gas industries have unique and extraordinarily complex regulatory structures which would require a detailed individualized examination outside the scope of this article. Suffice it to show, for background purposes only, that the filed tariff doctrine is extant within the energy industry.

   The doctrine was first applied to the energy industry by the Supreme Court in *Montana-Dakota Utilities Co. v Northwestern Public Service Co.*, 341 US 246 (1951). In this case, two power companies were managed by interlocking directorates and joint corporate officers. They entered into agreements wherein each company received some of the other's power at filed rates that the Federal Power Commission determined were reasonable. The companies separated. Soon thereafter, Montana-Dakota filed suit alleging that as a result of improper and fraudulent behavior on the part of the interlocking management it had paid unreasonably high rates for the electricity it had received and had been paid unreasonably low rates for the electricity it had sold. The Supreme Court dismissed their claim and held that:

   [Montana-Dakota] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms. . .


3. The first venture of the federal government into the regulation of the telecommunications industry, section 7 of the Mann-Elkins Act was passed soon after AT&T's power over the marketplace had been consolidated in the early 1900's. 36 Stat 539 (1910). This legislation, actively supported by AT&T, declared telephone and telegraph companies to be common carriers subject to the jurisdiction of the Interstate Commerce Commission ("I.C.C."). Chap 309, § 7, 36 Stat 545 (1910). Consequently, it imposed upon these carriers the duty to provide service on request at just and reasonable rates, without unjust discrimination or undue preference and the I.C.C. was given jurisdiction to enforce these obligations. 36 Stat 539 (1910). The Mann-Elkins Act, however, did not subject the telecommunications companies to the broadened I.C.C. tariff regulatory jurisdiction imposed upon the railroads. See, *Western Union Tel. Co. v Esteve Bros.*, 256 US 566, 573 (1921) (all common carriers are subject to the anti-discrimination principle, but differences exist between railroads and telecommunications carriers as to their relationship with the I.C.C.).

In 1920, regulation was enlarged. The Transportation Act increased the I.C.C.'s power to enforce the anti-rebate provisions of the statute against the telecommunications industry, but left the overall regulation of telecommunications common carriers virtually unchanged.
During the last decade, a tension developed between two public...
policy positions: the newly emerged desire for the economic deregulation of the transportation industry and the well-established controls against the excesses of the free marketplace, as represented by the filed tariff doctrine. This article reflects upon that tension and examines the legislative, administrative and judicial efforts to reconcile these principles.

THE FILED TARIFF DOCTRINE—GENERALLY

Simply, the filed tariff doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority. An everyday transaction the capacity of a customer for communications services and that the Bell System would not be required to return any revenues derived under the filed tariff, there was no policy conflict between the antitrust remedy sought and the anti-discrimination purposes of the filed tariff rule.

The court analyzed the issue as follows:

AT&T's primary obligation under the 1934 Act is to adhere, in its dealings with customers, to its filed tariffs. That primary obligation is the heart of public utility regulation because if carriers were free to depart from filed tariffs the prohibition against discrimination among customers could be evaded. However, the filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors in the equipment supply business; competitors are not the intended beneficiaries of that rule of public utility regulation. If this suit were brought by Bell system customers for recovery of damages because the filed tariff imposed excess costs upon them, we would probably have to conclude that the filed tariff doctrine precluded treble damage recovery under section 4 of Clayton Act. But the filed tariff doctrine does not confer immunity from antitrust liability generally.


In Nordlicht v New York Telephone Co., 799 F2d 859 (2nd Cir 1986), the issue was less esoteric. Nordlicht filed a class action suit asserting claims against New York Telephone for money had and received. Nordlicht alleged that he paid, in U.S. dollars, an outstanding credit card bill to N.Y. Telephone for phone calls he had made between the United States and Canada and that N.Y. Telephone had paid the Canadian phone company for the calls in cheaper Canadian dollars and kept the difference in exchange rates. After reviewing the service agreement between N.Y. Telephone and the Canadian phone companies and finding that N.Y. Telephone had charged Nordlicht the same filed tariff rate it charged all customers using this long distance service, the court neatly disposed of Nordlicht's argument by ruling that:

NYTel has not inequitably retained his money by collecting an amount greater than necessary to satisfy his debt with a Canadian phone company. Rather, it has merely collected a charge according to established United States rates from one of its customers. As the District Court noted, the filed rate doctrine requires NYTel to bill its phone calls in accordance with its tariffs and prevents Nordlicht from making any challenge to these rates. How NYTel shares its profits with the Canadian phone companies is of no concern to Nordlicht.

799 F2d at 866.

4. Under the Interstate Commerce Act, carriers initiate rates and include them in tar-
tion giving rise to the possible enforcement of the doctrine might occur as follows:

An interstate motor common carrier, enters into a contract with a shipping customer to provide transportation freight services for a container of the shipper's product from Miami, Florida to Denver, Colorado. Because of the carrier's competitive interest in obtaining this particular shipper's business, the carrier contracts to provide this service at a rate lower than what the carrier usually charges other shippers and different than the tariff rate which the carrier has filed with it's regulatory authority, the I.C.C.

In any other business, this act would be unremarkable and expected. Prices are meant to be adjusted to meet competition in a free market economy. Regulated businesses, such as the interstate motor carrier in the example, must dance to a different rhythm. In the short theoretical case presented, the motor carrier or its successor in interest, frequently its trustee in bankruptcy, may pursue and recover from the shipper the difference between what it actually charged and the freight tariff rate formally registered with the I.C.C., the "undercharge." The recovery of this undercharge is permitted notwithstanding any private agreement or contract between the carrier and its customer to the contrary. Our hypothetical carrier receives both the benefit of obtaining the client at a contracted price and collecting the higher rate for its freight transportation services which the market, arguably, may not have supported when the agreement occurred. The reverse is also true. If the carrier charged above the rate filed, the shipper may recover the "overcharge." Such is the power of the filed tariff doctrine.

Historically, Congress and the courts have given forceful reasons for permitting this apparent unfairness to take place. They have observed that the public policy foundations of the original Act, its progeny, and the included filed tariff doctrine are the preservation of the responsible federal agency's primary jurisdiction over unjust discrimination in interstate commerce as well as the agency's con-

iffs. 49 USC §§ 10101-11916 (1982 ed) If the Interstate Commerce Commission fails to reject a proposed tariff within the statute's applicable notice period (30 days for motor carriers and 20 days for railroads), the tariff becomes effective automatically. 49 USC §§ 10762(a)(2)(d), 10762(c)(3)(d), 10762. During the notice periods, the I.C.C. may suspend a tariff on its own or upon the motion of any interested party. 49 USC §§ 10707 (a), 10708(a). Again, see also, Arkansas Louisiana Gas Co. v Hall, 453 US 571, 577 (1981); see for example, T.I.M.E. Inc. v U.S., 359 US 464, 473 (1959).


6. Under the Interstate Commerce Act a carrier may not charge any person a different rate for a like or contemporaneous service under substantially similar circumstances, nor charge a higher rate for short distance transport as opposed to long distance transport over the same line in the same direction, nor give any undue preference to any person, region,
trol over the reasonableness of rates, and the assurance that regulated companies charge only those rates of which the appropriate agency, and the public, have been made aware.

Although renamed and amended over the last one hundred years, the essential provisions of the Act to Regulate Commerce, which gave legislative bottom to the filed tariff doctrine by prohibiting unreasonable discrimination as to rates and charges by common carriers and requiring common carriers to adhere to published tariffs, have been retained and remain in effect.

THE FILED TARIFF DOCTRINE AND THE TRANSPORTATION INDUSTRY

A. The Railroad Industry

The development of the filed tariff doctrine is inextricably

traffic or territory. 49 USC §§ 10741(a), 10726, 10741(b).

7. The Interstate Commerce Commission is also empowered and has primary responsibility to determine the reasonableness of a proposed tariff's rate schedule. The Act states that "[a] rate . . . classification, rule, or practice related to transportation or service . . . must be reasonable." 49 USC § 10701(a). Further, the Act states that when reviewing the reasonableness of a carrier's rates, the Commission " . . . shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expenses . . . plus a reasonable profit." 49 USC § 10701(e). The I.C.C. has been given wide latitude by the courts in the exercise of their discretion regarding rate making. See, Baltimore & Ohio R.R. v U.S., 345 US 146, 150 (1952) and Texas & Pacific R. Co. v Abilene Cotton Oil Co., 204 US 426, 440-42 (1907). The I.C.C.'s range of action in this area is prescribed by the common and statutory legal concepts of a "zone of reasonableness." See, U.S. v Chicago, Milwaukee, St. Paul & Pacific R.R., 294 US 499 (1935). The I.C.C. historically has used, inter alia, the following standards in determining whether a rate is reasonable and just: existence of competition; volume of shipments; distance of transport; type of commodity shipped; relationship between the rate proposed and variable cost.

8. The Interstate Commerce Act obligates all carriers to "publish and file with the Commission tariffs containing the rates for transportation it may provide," as well as provide interstate transportation services only at the rates listed in the tariffs filed with the I.C.C. 49 USC §§ 10762(a)(1), 10761(a). See for example, City of Cleveland v FPC, 525 F2d 845, 854 (D C Cir 1975) (dicta reversed on other grounds, 453 US 583), and City of Piqua v FERC, 610 F2d 950, 955 (D C Cir 1979). Deviation from the filed rate may result in the imposition of civil or criminal sanctions against either the carrier or the shipper. 49 USC §§ 11902-11904.

9. 49 USC § 10741.

10. 49 USC § 10761(a).

11. The Interstate Commerce Act retained this legislative scheme and requires common carriers to file their rates with the I.C.C. in the form of a tariff, 49 USC § 10762(a)(1) (1982 ed); prohibits common carriers from transporting goods at rates other than their tariff rates, 49 USC § 10761(a) (1982 ed); and requires them to treat like customers alike, 49 USC § 10741 (1982 ed). The Act and the courts, however, recognize exceptions (i.e., motor common carriers may charge reduced rates for transportation of recyclable materials without filing those rates in the carrier's tariff). 49 USC § 10733; West Coast Truck Lines, Inc. v Arcata Community Recycling Center, Inc., 846 F2d 1239 (9th Cir 1988), cert denied 109 SCt 147 (1988).
linked to the history of the American railroad industry. Between 1830 and 1870, over 50,000 miles of railroads were constructed in the United States. During this period, railroad regulation was limited to the court enforcement of the companies' charters and interpretation of common law. In some states, railroad commissions were established, but they exerted little control and had no power over rates. Although there was strong anti-railroad sentiment throughout the nation, no real movement toward control of railroad rates and other practices was seen until several western states acted upon their citizens' displeasure and passed laws subjecting railroads to state regulation, including statutorily prescribed maximum freight rates. These state laws, which for the first time directly controlled the freight rates that railroads charged, were energized by, and passed in response to, the historically significant Granger movement of the early 1870's.

These Granger laws, however, were not to last. They were soon repealed as the railroads waged a strong campaign against them citing their potential harm to business and agricultural interests. Further, the laws had been quickly and crudely drawn and the public discovered that many of the statutes' provisions were unsound. The Granger movement and its concomitant legislation, however, did not die a quiet death. The Granger laws resulted in a series of Supreme Court opinions ("Granger cases") upholding the validity of railroad regulation and providing the basis for our current regulatory system.

12. Some attempts were made to regulate railroads prior to the 1870's. Early railway charters, which were grants of authority under which the railroad corporations were organized, contained provisions designed to protect the public interest and schedules of maximum charges for freight. Charter regulations, however, accomplished little to prevent railway abuses. Maximum rates prescribed by the charters were generally higher than the railroads charged and, consequently, rarely acted as a control on rates; nor did they speak to the issue of discrimination. D. Philip Locklin, *Economics of Transportation*, pp 211-83 (7th ed 1972).

13. Id.

14. The Granger movement was an agrarian revolt. One of its significant manifestations was an anti-railroad sentiment. The movement was occasioned by a decline in agricultural prices caused by the inflation of currency during the Civil War and the rapid settlement of the West. Farmers in the West believed that the railroads were responsible for many of their difficulties and complained bitterly that freight rates were too high and that the railroads discriminated against the "little man." See generally, S.J. Buck, *The Granger Movement* (Cambridge: Harvard University Press 1913).

15. Locklin, *Transportation*, pp 211-83 (1972) (cited in note 12). The Panic of 1873 was possibly the most critical element in the repeal of these statutes. It stopped the construction of railroads and gave substance to the railroads' claim that the Granger laws were scaring capital away from the railroad business.

16. See, *Munn v Illinois*, 94 US 113 (1877); although this case did not involve rail-
The railroads' rapid growth in the West through wholesale extension of lines and a rising public disquiet over the perceived excesses of the industry created a climate for federal regulation of the railroads during the 1870's and 1880's. In 1874, the Senate's Windom Committee investigated the industry, cataloged the industry's indiscretions and recommended both government construction of competing railroads and development of inland waterways to combat these problems. Although the recommendations of this committee were not implemented, the "railroad problem" was before the American public. In 1886, after a decade of half-starts at regulatory legislation, a special Congressional committee, the Cullom Committee, was appointed to make another complete analysis of the railroad question. The Cullom Report, which ultimately served as the blueprint for Congressional regulation of the railroads, discovered much the same as its predecessor and emphasized the discrimination, as well as rates.17

As Congress debated railroad regulation, the Supreme Court changed the rules of the game. In 1886, it decided in Wabash, St. Louis and Pacific Ry. Co. v Illinois,18 that a state could not control rates on interstate commerce. Prior to the Court's decision in Wabash, it was assumed that a state could regulate the intrastate portion of an interstate shipment of goods. The Supreme Court dismissed that assumption by holding that until the federal government acted, i.e., passed federal regulatory legislation, the individual state restrictions could not apply to goods in interstate commerce and such commerce, therefore, remained unregulated. This unexpected decision mandated congressional action as fully three-quarters of all United States railroad traffic was interstate in character and, therefore, not subject to state regulation according to the Wabash decision.19 Congress moved quickly and passed the Act to Regulate Commerce of 1887 to fill this vacuum.

The Act to Regulate Commerce of 1887 was the first earnest attempt made by Congress to regulate the railroad business. This Act's main purpose was subsequently articulated by the Supreme Court as follows:

... to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, pref-

18. 118 US 557 (1886).
This landmark piece of federal legislation applied to all common carriers by railroad engaged in interstate and foreign commerce. It created and was administered by an independent agency, the Interstate Commerce Commission. The Commission was given jurisdiction over interstate rates charged by the railroads and the railroads were required to make their rates public, file them with the Commission and adhere to the published tariffs. The legislative structure for the filed tariff doctrine was in place. Soon after its passage in 1887, Congress discovered that the Act required emendation. Flagrant violations, primarily of the rate publication and filing provisions of the statute, continued to occur and Congress determined that penalties for failure to comply with the Act needed to be stiffened. Consequently, Congress gave the statute, as well as the filed tariff doctrine, more “bite” by passing the Elkins Act in 1903 and the Hepburn Act in 1906.

In 1915, the Supreme Court, after reviewing the applicable statutory provisions, ruled that a passenger who purchased a railroad ticket at a rate misquoted by the ticket agent did not have a defense against the subsequent collection of the higher tariff rate filed by the railroad. Justice Hughes, in *Louisville & Nashville Ry. v Maxwell*, delineated and gave judicial reinforcement to the filed tariff doctrine as follows:

22. As previously outlined, railroads historically loaded their high fixed costs onto shippers who had poor competitive alternatives and charged lower prices to shippers who had a favorable position by reason of their size or location. This, we have observed, created a difference in transportation costs hurtful to shippers who paid high railroad rates and were competing with shippers who paid low rates. This rate incongruity led to the regulatory scheme in which railroads were forbidden both to price off tariff and to refuse service to any shipper at the tariffed rate. This regulatory system has been enforced by the filed tariff doctrine since the turn of the century.
23. The Act’s provision requiring the filing of tariffs and their observance, (49 USC § 10761) did not reach maximum effectiveness until 1903 with the passage of the Elkins Act which provided that tariffs must be observed, strengthened the rules against rebating and made shippers liable for receiving rebates. 32 Stat 847 (1903). The Hepburn Act passed in 1906, making the assessment and payment of special secret rates a criminal activity, completed the enforcement scenario. 34 Stat 587 (1906).

The courts have given the Act a broad judicial construction and have been diligent in vigorously attacking the rate discrimination envisioned by the statute. See for example, *Armour Packing Co. v U.S.*, 209 US 56 (1908), *U.S. v Koenig Coal Co.*, 270 US 512 (1926), and *U.S. v Union Pacific R. Co.*, 173 F Supp 397, 412 (S D Iowa 1959).
the rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travellers are charged with notice of it, and they as well as the carrier must abide by it. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.\textsuperscript{24}

Since 1887, federal regulation of the railroads through the Interstate Commerce Act has gone through three major phases: 1) restrictive regulation of railroads (1887-1919), 2) positive and extended regulation of railroads (1920-1970), and 3) deregulation and aid to railroads (1970-date).\textsuperscript{25}

The first period reflected the people's strong sentiment for federal regulation of the nation's railroads. This phase saw the enactment of the Interstate Commerce Act and its progeny. These legislative acts emphasized and were designed to reinforce the pro-competition/anti-monopoly regulatory philosophy reflected by and first articulated in the 1887 Act. During this period, the filed tariff doctrine was created and woven into the regulatory tapestry of the railroad industry.\textsuperscript{26}

During the second period, however, the public policy intent of railroad regulatory legislation was broadened. Industry structural problems encountered during the first World War led to the passage of the Transportation Act of 1920 which recognized the nation's need for a sound national transportation system, accepted the view that a fair rate of return to the carriers was required, and began a policy of protecting the railroads from harmful competition by controlling entry into the industry and minimum rates. The regulatory system moved from an anti-monopolistic model to one favoring protection of the industry.\textsuperscript{27} Despite this alteration of course, the filed tariff doctrine remained in full force and effect.

The current period, one of deregulation, began in 1970 as a re-

\textsuperscript{24} 237 US 94, 97 (1915). The “filed tariff doctrine” was administratively enforced by the Interstate Commerce Commission in its regulation of railroads under the original Interstate Commerce Act. See also, Kansas City Southern Ry. v Carl, 227 US 639, 652-53 (1913); Poor v Chicago, Burlington & Quincy Ry., 12 ICC 418, 421-25 (1907); Southern Pacific Transportation Co. v Commercial Metals Co., 456 US 336, 352 (1982) (shippers ignorance or carrier's misquotation of the applicable rate not permitted as a defense to the collection of the filed rate).

\textsuperscript{25} See, M.L. Fair and J. Guandolo, Transportation Regulation pp 26-32 (9th ed 1983).

\textsuperscript{26} Id.

\textsuperscript{27} Id. See also, Locklin, Transportation pp 211-83 (1972) (cited in note 12).
TheFiled Tariff Doctrine
sult of the major economic crisis faced by the United States' rail-
roads and was occasioned by what was perceived to be excessive
regulation. The landmark acts of this era with respect to the rail-
road industry are the Railroad and Revitalization and Regulatory
Reform Act of 1976 and the Staggers Rail Act of 1980. The first
piece of legislation, among other things, initiated the deregulatory
process by giving railroad managers significantly more power and
flexibility over the freight rates they charged. The Staggers Rail
Act continued the process by completely recasting the railroad
freight business. Under the Act, rail carriers were authorized for
the first time to enter into private contract rates which were im-
mune from regulation subject to certain statutory proscriptions,
i.e., no unreasonable discrimination and no impairment of their ob-
ligations as common carriers. Further, the Act outlined and set a
public policy agenda of maximum reliance on the competitive
forces within the interstate transportation market. In summary, in-
terstate freight rail rates were deregulated and the carriers were
free to enter into negotiated contract rates for the shipment of
freight as long as they complied with the filing requirements of the
Act.

Herein, however, lies the rub. The casual observer might assume
that Congress, in deliberating the passage of the Railroad and Re-
vitalization and Regulatory Reform Act and the Staggers Rail Act,
reflected upon and critically examined the latent conflict between
the filed tariff doctrine, an unyielding regulatory scheme based
upon the theory that decontrolled pricing of freight rates inevita-
ably leads to carrier excesses and discrimination, and Congress' new
public policy of railroad carrier deregulation as manifested
by
these two legislative acts. Congress, however, notwithstanding
lengthy hearings and debate, did not alter the provisions of the
filed tariff doctrine as it applied to the railroad industry. Despite
the new deregulated “private negotiated contract” rights provided
for the carriers under the Staggers Rail Act, the filed tariff doc-
trine still lay in wait for both carriers and shippers.

Soon thereafter, the Fifth Circuit in Aberdeen & Rockfish R.R.

28. The Railroad and Revitalization and Regulatory Reform Act, Pub L 94-210, 90
30. Id. Under regulations promulgated by the I.C.C. pursuant to the Staggers Act, a
railroad carrier has to file only two documents: the confidential contract and a contract
summary. The summary, but not the contract, is made available to the public. See, 49 CFR
Part 1039.
Co. v U.S.,\textsuperscript{31} made it clear that the filed tariff doctrine was still a viable regulatory instrumentality. This 1982 opinion, which was written subsequent to the passage of the Staggers Rail Act, upheld an Interstate Commerce Commission regulation requiring compliance with tariff symbolization requirements\textsuperscript{32} for any changed rates. Neither the litigating parties nor the Fifth Circuit discussed the recent statutory activity occasioned by deregulation, but rather the court reiterated the statutory litany which serves as the bottom for the filed tariff doctrine.\textsuperscript{33} If there was any doubt whether the filed tariff doctrine would survive the railroad deregulation movement and legislation, this decision demonstrated that, at least in the Fifth Circuit, the doctrine remained untouched.\textsuperscript{34}

\textsuperscript{31} 682 F2d 1092 (5th Cir 1982).

\textsuperscript{32} Aberdeen, 682 F2d at 1092, 1095.

One such regulation governs the symbolization of changed rates, requiring that [t]ariff publications shall indicate changes made in existing rates, charges, classifications, rules, or other provisions by use of the following uniform reference marks in connection with each such change:
[mark] or (R) to denote reductions
[mark] or (A) to denote increases
[mark] or (C) to denote changes which result in neither increases nor reductions in charges
49 CFR § 1310.10(f)(1). As justified by the Commission, these requirements "are designed to allow tariff users to rely on symbolization to (1) discover changes and (2) evaluate those changes. Discovery and evaluation are vital to tariff users' rights to timely protest proposed tariff changes. 44 Fed. Reg. 60123 (1979)." Aberdeen, 682 F2d at 1095.

\textsuperscript{33} Aberdeen, 682 F2d at 1092, 1094-95. The court stated as follows:
The Revised Interstate Commerce Act (the Act) requires carriers providing transportation or service subject to the jurisdiction of the Commission to publish and file with the agency tariffs containing the rates that are charged to shippers. See generally 49 U.S.C. § 10762. Regulated carriers may collect only the rates that are contained in tariffs on file with the Commission, see 49 U.S.C. § 10761, and departure from the filed rate schedule will subject a carrier to civil and criminal liability, 49 U.S.C. §§ 11901, 11903. The Commission is empowered to proscribe the form and manner of publishing, filing, and keeping the tariffs open for public inspection. 49 U.S.C. § 10762(b)(1). However, the Act itself clearly states that newly filed tariffs must "plainly identify" any proposed rate change and indicate its proposed effective date. 49 U.S.C. § 10762(c)(3). Normally a new tariff will become effective thirty days or, in the case of railroads, twenty days, after the carrier files it, id, unless the Commission suspends the proposed rate pending the outcome of an investigation pursuant to 49 U.S.C. § 10707(a) or § 10708(a).

As authorized by 49 U.S.C. § 10762(b)(1), the Commission has promulgated regulations prescribing the form in which tariffs are to be published and filed. One such regulation governs the symbolization of changed rates. . . ."

Id at 1094-95.

\textsuperscript{34} In reaching its conclusion in the case, the court restated the binding precedent without equivocation:
The filed rate doctrine . . . forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory author-
In 1984, the Fifth Circuit again revisited the filed tariff doctrine as applied to the railroad industry. The court in *Southern Pacific Transportation Co. v San Antonio, Texas* was asked to consider, inter alia, whether the City of San Antonio was required to pay a freight rate for the shipment of coal which had been published and filed with the I.C.C. The reasonableness of the rate had been in dispute between the parties for several years. The railroads had properly filed new tariffs which included the rates as ordered by a prior court order and the City still refused to pay, seeking instead a further stay from the court. The court reviewed the process, ordered the City to promptly pay the outstanding freight rate due under the filed tariffs, and reiterated its support for the filed tariff doctrine by holding that:

... the ongoing delay in payment of the rate is inconsistent with the traditional "filed rate" doctrine. That doctrine is premised on a distinction between a "legal" rate and a "lawful" rate. The legal rate is the tariff rate published and filed with the I.C.C. The lawful rate is a legal rate which has also been determined by the Commission to be reasonable and acceptable under the requirements of the Interstate Commerce Act. [Citations omitted.] A railroad is required to charge the legal (filed) rate, and a shipper is required to pay that rate when due...

The next significant post-deregulation decision applying the filed tariff doctrine to the railroad industry was *Louisville and Nashville R.R. Co. v Mead Johnson & Co.* This case involved a quarrel over rail freight charges for shipments of "milk food liquid" by Mead Johnson & Co. from its plant in Indiana to its warehouse in New Jersey. Prior to 1977, Mead Johnson shipped milk food product via Chicago and Buffalo. Several shipments along this northern route were delayed, and the goods were damaged by freezing. Representatives of the parties met and agreed that Mead Johnson would ship to New Jersey via Cincinnati, Ohio and Hagerstown, Maryland. All of the shipments in dispute were made along this southern route.

Unfortunately for the shipper, the freight tariffs for the southern route differed from those for the northern route. The northern route had an approved commodity rate tariff which was lower than...
the class rate tariff for the southern route. The railroads, nevertheless, charged Mead Johnson the lower rate, thereby failing to comply with the filed tariff doctrine which required the railroads to charge the higher rate for the southern route unless a new tariff was filed and approved. The railroads subsequently sued for the difference between the rates. The shipper argued that they had contracted for and paid the rate required by the carrier and it would be manifestly unfair to permit the railroads to collect the undercharge. The railroads, arguing the filed tariff doctrine, prevailed and received judgments for the total amount of the undercharges.

The Seventh Circuit upheld the court below. In an opinion resonating with the words written by Justice Hughes some seventy years previous to this case, the court strongly reaffirmed the pre-eminence of the filed tariff doctrine, despite the apparent harsh result in this particular case wherein the railroads, unquestionably, received a windfall. The court chided Congress as follows:

Recent legislation moving toward modified deregulation of the railroad industry (involving greater reliance on competitive forces) might suggest the need for a second look at policies requiring strict adherence to filed tariffs. [Citations omitted.] Greater rate flexibility, for example, might seem appropriate where competitive forces are at work and monopoly or [monopolistic] power has abated. However, Congress has not yet amended the Act to permit greater flexibility in situations like the one before us, and we are unwilling to engage in deregulation by adjudication.

In 1985, the Ninth Circuit got its chance to review the filed tariff doctrine in the new deregulatory environment in *Farley Transportation Co. v Santa Fe Trail Transportation Co.* In late 1979, Farley filed an anti-trust action against Santa Fe and others, alleging violations of the anti-trust laws and the Interstate Commerce Act. Santa Fe counterclaimed for breach of contract, alleging that Farley owed unpaid freight and other charges. Subsequently, Santa Fe's counterclaim was amended to include Class 70 tariff charges arising from Farley's refusal (upon the advice of counsel) to permit the Trans-Continental Freight Bureau from auditing the records of shipments made on Santa Fe. The Class 70 rate is equal to ten

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38. *Louisville*, 737 F2d at 684-86.
39. Id at 690 (see note 5).
40. 778 F2d 1365 (9th Cir 1985).
41. The Bureau acts as an agent for railroads "pursuant to tariffs approved by the Interstate Commerce Commission. The Bureau is authorized to audit shippers' records of shipments on common carriers to ensure that shippers have correctly described the commodity and weight of items shipped and applied the proper tariff. If a carrier or its author-
times the shipping charge for each bill of lading withheld from inspection. The Class 70 tariff is designed to discourage unlawful shipping practices and to compel disclosure of freight charge documentation.

Farley contended that the district court's application of the Class 70 tariff was arbitrary and unjust as a matter of law; after all, they were in litigation with the carrier and ultimately did provide the requested records through court supervised discovery. Unfortunately, Farley ran headlong into the filed tariff doctrine. The court refused to entertain Farley's argument and held that:

A duly published tariff is binding on the parties and has the force of law. [Citation omitted.] A tariff must be applied equally to all since any deviation from the lawful rate would involve either undue preferences or unjust discrimination. [Citation omitted.] Application of a published tariff is required regardless of the intentions of the parties or the equities existing between carrier and shipper. [Citation omitted.]

Farley nevertheless contends that the Class 70 tariff should not be applied because Santa Fe was not prejudiced by Farley's decision to produce the shipping records directly to Santa Fe pursuant to court-supervised discovery rather than indirectly to its agent. . . . Farley relies on Glickfield v Howard Van Lines, Inc. [citation omitted], which states that a tariff should not "be read or applied in a manner which would lead to an unjust or absurd conclusion." That precept, however, is a general rule of contract construction and is inapplicable unless a tariff is ambiguous. [Citation omitted.] If a tariff is not ambiguous, the parties are bound by its terms, and aids to construction are irrelevant. In this case, the tariff is straightforward and unambiguous, and the district court was correct in declining to determine whether its application was arbitrary or unjust.

Farley has failed to provide Santa Fe with timely access to relevant shipping records as required by the tariff. We see no reason to disturb the district court's decision.42

The attempted deregulation of the railroad industry reminds one of the infamous television commercial for margarine, "If you think it's butter but it's not . . ." Many believed that the [de]regulatory acts were intended to dismantle the rigid filed tariff rate structure which governed the industry prior to the 1980's. To some degree, they did. If a shipper and carrier enter into a private contract which provides for private contract freight rates which are applicable to that particular shipper for a specific product shipped over a set route, the carrier may file the contract in secret with the I.C.C. pursuant to the Staggers Rail Act, and feel secure that the contract

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42. Id at 1372-73.
rates will be unchallenged and enforced by the regulatory authority. If, however, the transaction does not have or economically warrant a separate contract, or the carrier forgets to file the contract, or reverts to old habits and quotes a freight rate based on a previously filed tariff but alters the contract rates to suit the particular transport deal under negotiation, the circuit courts' recent decisions advise that either the shipper or the carrier may well get bitten by that old bulldog, the filed tariff doctrine.

B. The Water Carrier Industry

Government intervention in the water carrier industry was limited during the early years of the nation's existence. No regulation of rates and trade practices occurred until the passage of the Act to Regulate Commerce of 1887, and the effects of this Act were very limited. The Act, despite its limitations, gave the Interstate Commerce Commission jurisdiction over any carrier engaged in the transportation of persons or property "... partly by railroad and partly by water when both are used under a common control, management, or arrangement for continuous carriage or shipment." For the next several years, the Commission's control over water carriers was limited to joint rail and water traffic and did not extend to port-to-port traffic of the water carrier, although the Commission was empowered to demand accounts and reports of the carriers covering their whole operations.

Water carriers were regulated further in the areas of rates and trade practices by the Shipping Act of 1916. This Act created the U.S. Shipping Board and gave it jurisdiction over common carriers by water operating in interstate or foreign commerce on the high seas or upon the Great Lakes. It excluded, however, important sectors of the industry: (a) contract carriers (those carriers providing for-hire transportation under private agreements with shippers by assigning ships to the shipper's exclusive use), (b) water carriers operating on inland waterways other than the Great

45. The Shipping Act, Chap 451, 39 Stat 728 (1916) codified at 46 USC § 801 et seq. For example, section 18(b)(3) of the Shipping Act, 46 USC § 817(b)(3), requires carriers by water in foreign commerce to charge on the basis of their filed rates. However, under the current statute, filed rates may be amended at any time, even up to 180 days subsequent to shipment.
46. In 1961 it became the independent regulatory agency known as the Federal Maritime Commission.
Lakes, and (c) those carriers already under the jurisdiction of the Interstate Commerce Commission.\textsuperscript{47}

In addition to protecting carriers from unfair competitive practices, the Act contained the following provisions, incorporating the basic tenets of the filed tariff doctrine:

1. Common carriers by water engaged in interstate commerce were required to publish and file with the Board their maximum rates. They could not charge more than their maximum rates and the filed rates could not be changed unless ten days notice was given. It did not, however, require that the carriers publish their actual rates.
2. All rates of interstate common carriers by water should be reasonable and just.
3. Any undue or unreasonable preference to any person, locality or description of traffic, or any unjust discrimination was forbidden.\textsuperscript{48}

Further regulation occurred in 1933. As a result of fierce competition in intercoastal trade after the First World War, Congress passed the Intercoastal Shipping Act\textsuperscript{49} to manage this area. This Act applied to common and contract carriers operating in intercoastal commerce via the Panama Canal. It increased control over rate-making by requiring carriers to file their actual rates with the Shipping Board, rather than just filing the maximum rates required under the Shipping Act, and directing that those filed rates be strictly adhered to by the carriers.

The year 1940 brought another restructuring of the regulation of the water carrier industry. The Transportation Act of 1940\textsuperscript{50} extended the Interstate Commerce Commission's jurisdiction over domestic water carriers and set up a regulatory system for them, including the filed tariff doctrine, which was similar to that applicable to the railroads. The Maritime Commission, however, retained jurisdiction over water transportation in foreign commerce and also over commerce between points in the continental United States and Hawaii, Alaska, and the various possessions of the United States.\textsuperscript{51}


\textsuperscript{48} See note 45.

\textsuperscript{49} 46 USC § 843 et seq (1975 and Supp 1990).

\textsuperscript{50} 54 Stat 898 (1940).

\textsuperscript{51} See for example, \textit{Trailer Marine Transport Corp. v Federal Maritime Comm'n}, 602 F2d 379 (D C Cir 1979) and \textit{Puerto Rico Maritime Shipping Authority v Valley Freight Systems, Inc.}, 856 F2d 546, 548 (3d Cir 1988).
The original Shipping Acts\textsuperscript{52} regulating interstate and foreign water carriers were modeled on the Interstate Commerce Act. When asked to review them, the Supreme Court held that Congress intended that these acts "...should have a like interpretation, application and effect ..."\textsuperscript{53} within their own regulatory area. Disputes arose, however, as to whether a private party had a cause of action for the recovery of an undercharge. Because the Shipping Acts contain nearly identical terms to the rate filing provisions of the Interstate Commerce Act, which serve as the foundation of the filed tariff doctrine,\textsuperscript{54} the First and Second Circuits held, in the following decisions, that water carriers regulated by these Acts have a private right to recover undercharges from shippers if the carrier failed to charge the filed tariff rate.

In 1932, in \textit{Prince Line, Ltd. v American Paper Exports, Inc.},\textsuperscript{55} the Second Circuit was asked to determine whether a water common carrier engaged in foreign commerce between New York and the Far East could recover from their shipper client the difference between their contracted rate with a shipper and their filed tariff rate, i.e., the "undercharge." Simply, were the Shipping Act's filed tariff rate enforcement provisions to be interpreted in the same manner as the Interstate Commerce Act's filed tariff doctrine? Judge Learned Hand held that:

\begin{quote}
The statute overrides all such contracts, and imposes a liability upon him which the carrier may, and indeed, must enforce. Within its own ambit, the same remedies attend a violation of the Shipping Act, as have been accorded under the Interstate Commerce Act.\textsuperscript{56}
\end{quote}

\textsuperscript{52} 46 USC § 801 et seq (Shipping Act of 1916, cited in note 45) and 46 USC § 843 et seq (Intercoastal Shipping Act of 1933, cited in note 49).


\textsuperscript{54} Section (a) of the Shipping Act, 46 USC § 817, requires common carriers by water in interstate commerce to "establish, observe, and enforce just and reasonable rates, fares, charges, classifications and tariffs," to charge on the basis of their filed tariffs and to file said tariffs with the Federal Maritime Commission. 46 USC § 817(a). Filed tariffs, however, may be amended at any time. Prior to 1988 there was an express proviso that if a carrier inadvertently fails to amend its tariff before the shipment, it could waive or refund a portion of the charges by filing a new tariff with the Commission and make application for authorization of the waiver or refund, but the application must have been made within 180 days after the sailing of the vessel. 46 USC 817(b)(3) (repealed 1988) partially replaced by 46 CFR 560 (1989). See also, \textit{Roco Worldwide, Inc. v Constellation Navigation}, 660 F2d 992, 993 (4th Cir 1981).

Section 2 of the Intercoastal Shipping Act imposes similar obligations on carriers in intercoastal commerce. 46 USC § 844 (cited in note 49).

\textsuperscript{55} 55 F2d 1053 (2nd Cir 1932).

\textsuperscript{56} \textit{Prince Line}, 55 F2d at 1056.
Thirty-four years later, as the specter of deregulation in the other transportation industries appeared over the horizon, a circuit court again was asked to pass on the efficacy of the filed tariff doctrine as applied to the water carrier industry. In *Maritime Service Corp. v Sweet Brokerage De Puerto Rico, Inc.*,\(^{57}\) the First Circuit had little difficulty determining that the precedents flowing from *Louisville & Nashville R.R. v Maxwell*,\(^ {58}\) were applicable to and binding upon the water carrier industry. Agreeing with the reasoning in and citing *Prince Line, Ltd.*,\(^ {59}\) the court held that the filed tariff doctrine was grafted upon both Shipping Acts, that carriers had a private cause of action to enforce the doctrine and that, therefore, freight undercharges were recoverable by the carrier from the shipper.\(^ {60}\)

The Fourth Circuit, however, viewed the issue quite differently. In *Roco Worldwide, Inc. v Constellation Navigation*,\(^ {61}\) a case decided in 1981, an ocean carrier brought an action against four of its customers for the difference between the negotiated rates it had actually charged for transportation services and the carrier’s unamended tariff rate. The carrier had expected to amend the filed tariff rates to conform with the negotiated rates but had negligently failed to do so within the 180 day grace period permitted by section 18(b)(3) of the Shipping Act. The court held that enforcement of the filed tariff doctrine was inappropriate under the Shipping Act in light of industry practices.\(^ {62}\) The court held that:

The “filed rate” doctrine simply has no application to that portion of the shipping business in which tariffs are readily amended to reflect specific agreements with shippers, and in which such amendments are even author-

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57. 537 F2d 560 (1st Cir 1976).
59. Cited in note 55.
60. Further, the First Circuit found that the close parallels between the tariff provisions of the Shipping Act and the Interstate Commerce Act supported a private cause of action for carriers under the Shipping Act. The court refused to make any distinction between the two Acts merely because the Interstate Commerce Act, unlike the Shipping Act, contained explicit provisions allowing carriers to recover tariff charges. *Maritime Service*, 537 F2d at 563. The court noted that the Supreme Court had found an implied private cause of action in carriers under the Interstate Commerce Act long before Congress enacted these explicit provisions. Id. Before the enactment of the explicit provisions, the only basis for construing a private cause of action under the Interstate Commerce Act was statutory language similar to that found in the present Shipping Act.
62. *Rocco*, 660 F2d at 995. Further, the court held that Congress did not intend to allow carriers to bring private actions under the Shipping Act to remedy deviations from published tariff rates. Id.
ized during a period of 180 days after the shipment.\footnote{63}

It can be inferred from the court's reasoning that, in its opinion, the statute's permissive amendment provisions when coupled with the shipping industry's practice of permitting tariffs to be amended freely had, de facto, deregulated the industry. Judge Widener dissented and argued forcefully that he:

\[\ldots\] doubt[ed] that the custom and practice in an industry is sufficient to overcome a statutory command. However harsh the application of such a rule would make the result in this case, permitting a carrier with regulated rates to deregulate itself by virtue of custom would seem to me to be far worse.\footnote{64}

This set the stage for \textit{Sea-Land Service, Inc. v Murrey & Son's Co., Inc.}\footnote{65} In this case, Sea-Land transported a thirty-five foot shipping container containing billiard tables from Long Beach, California to Saudi Arabia for Murrey & Sons. The shipment was performed pursuant to a properly filed Sea-Land ocean freight tariff. Pursuant to the tariff, the applicable rate for the shipment was $5,820, and the insurance surcharge was $200. Sea-Land billed Murrey for $6,020. Murrey paid $3,010 and refused to pay the balance, contending that Sea-Land had contractually agreed to ship the tables for $3,010. Sea-Land brought an action to recover the amount remaining under the tariff. The district court entered summary judgment on behalf of Sea-Land and followed the \textit{Maritime} precedent, holding that the Shipping Act of 1916, and the case law interpreting same, provides an ocean carrier a private cause of action to collect freight charges required by a filed tariff. The Ninth Circuit agreed with the reasoning in \textit{Maritime} and the dissent filed in \textit{Roco}.

Judge Pregerson, speaking for the court, stated:

\begin{quote}
We do not find the Fourth Circuit's reasoning persuasive. \textit{Roco's} argument that carriers are not "special beneficiaries" of the Shipping Act could be applied as easily to carriers operating under the Interstate Commerce Act. Although the provisions of the Interstate Commerce Act appear to be designed to run against carriers, courts have traditionally construed that Act to allow carriers to sue shippers to recover the charges established in the tariffs. [Citation omitted.] Moreover, carriers do benefit from the Shipping Act. The requirement that carriers place their tariffs on file with the Federal Maritime Commission prevents one carrier from luring away an-
\end{quote}
This schism among the circuits remains unbreached. The First and Ninth Circuits have applied the Supreme Court’s opinion in a modern context and have arrived at the same position that Judge Learned Hand did in 1932: the filed tariff doctrine applies to the water carrier industry despite the recent private deregulatory activity in the industry. The Fourth Circuit stands alone, echoing what it perceives to be the deregulatory will of the 1980’s. Their disagreement awaits resolution—in the interim, life goes on.

C. The Motor Carrier Industry

In no other regulated industry has the inherent conflict between the filed tariff doctrine and Congress’ shift toward economic deregulation flared more intensely than in the interstate motor carrier industry. Prior to July 1, 1980, this industry operated in a highly regulated environment characterized by intricate rules and ritualized protection. The Motor Carrier Act of 1980 (“MCA”) deregulated the industry and forced all its participants, large and small, into a new world.

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67. See, *Motor Carrier Act of 1935*, 49 Stat 453 (1935), which brought motor carriers of property and passengers under the jurisdiction of the I.C.C. In 1935, the Interstate Commerce Act was amended by this Act. This amendment divided the Interstate Commerce Act into two parts. The original Interstate Commerce Act was labelled “Part I.” The Motor Carrier Act of 1935 was added as “Part II.”
69. The Motor Carrier Act of 1980, deregulated the motor carrier industry in several ways in an attempt to “promote competitive and efficient transportation services.” The Motor Carrier Act, Pub L 96-296, § 4, formerly codified at 49 USC § 10101(a)(7) (1976 ed, supp V). In addition to loosening entry controls, see, section 5, codified at 49 USC § 10922 (1982 ed), the MCA also created a “zone of reasonableness” within which carriers can raise rates without interference from the I.C.C. See, section 11, codified at 49 USC § 10708 (1982 ed). The MCA also permits motor carriers to operate as both common carriers and contract carriers. See, Pub L 96-296, § 10(b)(1), amending 49 USC § 10930(a) (1982 ed). A contract carrier transports property under exclusive agreements with a shipper, see, 49 USC § 10102(14) (1982 ed), and the I.C.C. exempted all motor contract carriers from the requirements of sections 10761 and 10762. See, *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 MCC 150 (1983), aff’d sub nom, *Central & Southern Motor Freight Tariff Assn., Inc. v United States*, 757 F2d 301 (D C Cir 1985), cert denied, 474 US 1019 (1985). The I.C.C. has also allowed decreased rates to go into effect one day after the
Before 1980, the filing of interstate motor carrier tariffs with the I.C.C. was a routine process except in those few cases where a shipper protested the rate as being too high. A collectively set tariff was filed with the Commission by a Motor Carrier Rate Bureau on behalf of a number of motor carriers subscribing to the tariff, or a carrier filed its own with the I.C.C., and that was that; unless challenged—a rare event—the tariff went into effect.

Following deregulation, thousands of motor carriers issued their own tariffs, often tailored to the needs of a particular shipper customer or group of customers. This outcome was expected. Individual, or contract, pricing reflected one of the primary objectives of deregulation, namely, the achievement of real price competition in the motor carrier industry.

The Motor Carrier Act of 1980 may have deregulated the industry and permitted price competition, but it did not abrogate the filed tariff doctrine as applied to the motor carrier industry. The old rules still apply. Accordingly, any motor carrier holding I.C.C. certificates is still required to file their interstate tariffs with the Commission in order to make those tariffs effective. Failure to file a tariff results in the carrier being required to charge the previously filed tariff rate, despite what may have been contracted for by the parties.70 Given the rate wars resulting from deregulation, and the pricing concessions made by many motor carriers desperate to generate cash flow, it was inevitable that many new tariffs—including many not filed with the I.C.C. - would reflect lower rates than earlier tariffs.71

The deregulation-induced interstate motor carrier rate wars produced two results relevant to the filed tariff doctrine. First, these

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70. The filed rate doctrine, as applied to the motor carrier industry for the last fifty-five years, basically provides that the freight rate filed with the I.C.C. is the only legal rate to be charged and bars courts from considering any equitable defenses to a carrier's action to collect undercharges. During the 1980's, the I.C.C. refused to enforce the filed rate doctrine when a carrier and shipper had negotiated a lower rate for a shipment and the carrier later attempted to collect the higher filed rate. The I.C.C. took the position that it could forbid collection of the higher filed rate pursuant to its authority under the Interstate Commerce Act to ensure that all carrier practices were "reasonable." See, 58 USLW 1110 (Jan 23, 1990).

71. It is conservatively estimated that there are currently $30 million in undercharge claims facing shippers. An interesting article aimed at the practitioner outlines a shipper's possible defense approach to an undercharge claim. Undercharges Addressed by Logistics Managers, 30 Transportation and Distribution 40 (August 1989).
rate wars were the primary cause of several thousand motor carrier bankruptcies in the 1980’s, thus turning loose a horde of bankruptcy trustees looking for assets. Second, the evidence was clear that in rate war situations, an earlier (filed) tariff was likely to be supplanted by a subsequent (unfiled) tariff containing lower rates. This meant that if the filed tariff doctrine was enforced, hefty underpayments were due from shippers who had dealt with now bankrupt carriers.\(^7\)

As with the railroads and water carriers, the primary focus of the filed tariff doctrine, as applied to the interstate motor carrier industry, was the prevention of large suppliers and shippers from negotiating “under the table” tariffs which were lower than filed tariffs, thereby undercutting competition from smaller suppliers who also had to use the highways of interstate commerce to get their goods to market. As we have seen, the filed tariff doctrine has not been a “soft” rule. Since codified and interpreted, the courts have been scrupulous in its application. Recently, the doctrine was given additional bite. In 1982, with motor carrier deregulation in place and its concomitant undercharge problems emerging, the Supreme Court ruled that carriers have “. . . not only the right but also the duty to recover its proper charges for services performed.”\(^7\)

Further, the courts have reemphasized the long-standing rule that this right to recover the undercharge is not subject to the common law contract defenses of estoppel or mistake.\(^7\)

A review of the federal case law since 1980 reveals that cases involving motor carrier undercharges fall into the following patterns: 1) when the carrier miscalculates the amount due under the filed tariff rate applied to the shipper; or 2) when the carrier, inadvertently or by design, fails to file the tariff containing a lower rate with the I.C.C. as required by statute. The latter omission, as previously stated, is extremely dangerous to the shipper because if the


tariff applied is not properly and timely filed with the I.C.C., the filed tariff doctrine, as we know, requires that the applicable tariff used to calculate any undercharges must be the last tariff properly filed by the carrier. Notice how in the following cases, carelessness by the carrier can work an economic hardship on the shipper and permit the carrier a windfall.

In the early 1980’s, just subsequent to the formal deregulation of the motor carrier industry, the Seventh Circuit faced the task of enforcing the filed tariff doctrine in the new deregulated environment. Shippers and carriers watched as the Western Transportation Company, a bankrupt trucker, initiated the attack. This carrier, while marshalling its assets to satisfy its creditors, discovered a series of executed shipping contracts wherein it had failed to charge the shippers the correct filed tariff rates at the time of shipment - a case falling within the first group. Consequently, Western filed a series of lawsuits using the filed tariff doctrine as the vehicle for its complaint and seeking payment for the undercharged freight transported.75

In Western Transportation Company v Wilson and Company, Inc.,76 the carrier had agreed with the shipper to transport meat under a tariff applicable “. . . only when the shipment is loaded into or onto the truck by the shipper and unloaded therefrom by the consignee.”77 The facts accepted by the court reflected that the shipper complied with this requirement. Unfortunately for the shipper, however, this filed tariff also required that the bills of lading contain a notation that the consignor and consignee were to load and unload the shipment. Western discovered that several shipments failed to have the required notation on the bills of lading and properly sued the shipper, as required by the doctrine and its fiduciary duty owed to its creditors, for the difference between what it charged under this tariff and what it would have charged under the different tariff that would have been applicable.

The trial court adopted the shipper’s argument that the notation requirement rendered the filed tariff ambiguous. The filed tariff doctrine was, therefore, not applicable and the document was subject to the rules of interpretation and reformation like any other contract. After taking evidence as to the intention of the parties,

75. See also, Western Transportation Co. v Webster City Iron & Metal Co., 657 F2d 116 (7th Cir 1981) and Western Transportation Co. v E.I. DuPont de Nemours and Co., 682 F2d 1233 (7th Cir 1982).
76. 682 F2d 1227 (7th Cir 1982).
77. Western Transportation, 682 F2d at 1230.
the lower court concluded that the tariff was drafted with the intent to have the shipper pay the contracted lower rate and dismissed Western's complaint.

While sympathizing with the defendant/shipper that the filed tariff doctrine is "... a harsh rule" and admitting that Western's recovery of these undercharges would result in unjust enrichment by compensating the carrier for services it did not provide to the shipper, the Seventh Circuit disagreed and strictly applied the filed tariff doctrine. The court disputed the trial court's finding of ambiguity in the filed tariff reasoning that if "... the duty to load and unload and the duty to say you will load and unload were contradictory, the tariff - construed, as every document must be construed, as a whole - would be ambiguous. They are not, and it is not."79

Recognizing its own rule announced in National Van Lines, Inc. v U.S.,80 that "... a tariff should be interpreted to avoid unjust, absurd, or improbable results ..." and that "... the practical application of tariffs by interested persons should also be considered in determining the meaning of the tariffs ...,"81 the court held that those announced principles only applied if the tariff is ambiguous. If the tariff is found to be unambiguous, as in the present case, the parties are bound to its terms and the common-law aids to contract construction are irrelevant. Interpretation, the court reasoned, is permitted only when the tariff is ambiguous, so that a literal reading is impossible.

This court, despite strictly applying the filed tariff doctrine, bridled against the inflexible standard that motor carriers are forbidden to receive different compensation from the rate fixed in an unambiguous applicable filed tariff, especially in light of the new deregulated environment. Its discomfort was manifested by the court outlining in its opinion a method for the defendant to circumvent its decision. The court instructed the defendant to use a method this shipper had successfully used in the past and which proved to be a frequently used technique during the early 1980's. It told the shipper to request a stay from the trial court and apply to the I.C.C. to have the offensive tariff notation provision declared unreasonable, a right reserved to the I.C.C. under statute. The I.C.C. had done this in the past and, apparently, was viewed as a

78. Id at 1229.
79. Id at 1230.
80. 355 F2d 326 (7th Cir 1966).
friendlier forum in the newly deregulated environment.\textsuperscript{82} This declaration by the I.C.C., if made, would preclude the carrier’s collection of the undercharges.\textsuperscript{83} Nevertheless, in 1982, this circuit court and the party litigants found the filed tariff doctrine still alive and dangerous.

In 1986, the I.C.C. formalized the procedure it had been following since the early 1980’s. It concluded in \textit{NITL - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (Negotiated Rates I)}\textsuperscript{84} that changes in the motor carrier industry “... clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases.”\textsuperscript{85} Under this new agency policy, when cases were referred to the I.C.C., it “... decid[ed] if the collection of undercharges would be an unreasonable practice.”\textsuperscript{86}

In \textit{Negotiated Rates I}, the I.C.C. used as support for its decision evidence indicating that carriers and shippers negotiated rates lower than those filed with the I.C.C. and that the shippers paid the negotiated rate. Frequently, the evidence showed that the negotiated rate was never filed with the I.C.C. With alarming regularity, as previously discussed, carriers were filing for bankruptcy and the trustee billed the shipper for the difference between the tariff rate and the negotiated rate, contending that section 10761 compelled the collection of the filed rather than the negotiated rate.\textsuperscript{87} The Commission decided that “... it could be fundamentally unfair not to consider a shipper’s equitable defenses to a claim for undercharges.”\textsuperscript{88} It reasoned that the enactment of the Motor Car-

\textsuperscript{82} See, \textit{Iowa Beef Processors, Inc. v Western Transportation Company}, ICC Docket No. 32521F (Sept 14, 1981). Interestingly, in this case, the Commission found the tariff to be unambiguous but ruled it unreasonable nonetheless.

\textsuperscript{83} The court instructed that under 49 USC section 10704(a), a tariff provision is required to be reasonable. If not, it violates the statute and the I.C.C., under 49 USC section 11701, can compel compliance, i.e., vitiate the offensive clause.

\textsuperscript{84} 3 ICC2d 99 (1986).

\textsuperscript{85} Id at 106.

\textsuperscript{86} Id at 100.

\textsuperscript{87} Id at 99.

\textsuperscript{88} Id at 103.
rrier Act of 1980 justified the change in policy because the new competitive atmosphere it created made strict application of section 10761 unnecessary to deter discrimination.\textsuperscript{89} Furthermore, the Commission asserted that it had been given the power under section 10701 to decide whether the collection of the undercharge in a specific case constituted an unreasonable practice.\textsuperscript{90}

The I.C.C. further explained this new policy in \textit{NITL — Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (Negotiated Rates II)}.\textsuperscript{91} The I.C.C. stated that its policy did not recognize "equitable defenses," which, historically, have been denied to shippers under case law, but instead applied the statutory requirement of section 10701 that a carrier's practices be reasonable.\textsuperscript{92} The Commission further explained that "... \textit{Negotiated Rates} policy does not represent a relaxed interpretation of section 10761, but rather a separate determination under section 10701. But even if it were viewed as a reinterpretation of a previously strict construction of section 10761, it would be ... well within this agency's authority (and indeed duty) to reinterpret the Interstate Commerce Act, based on upon experience gained and changing circumstances."\textsuperscript{93}

\begin{itemize}
\item \textsuperscript{89} Id at 106.
\item \textsuperscript{90} Id at 103. The I.C.C. further stated that \textit{Negotiated Rates I} did not "... abrogate Section 10761. Rather we emphasize that carriers must continue to charge the tariff rate as provided in the statute. The issue here is simply whether we have the authority to consider all the circumstances surrounding an undercharge suit." Id at 103. Interestingly, the I.C.C. refused in \textit{Negotiated Rates I} to declare that a negotiated rate be considered the maximum reasonable rate. It found that this notion conflicted with section 10761 because it created a "... per se determination that, as a matter of law, the negotiated rate would apply." Id at 102.
\item \textsuperscript{91} 5 ICC2d 623 (1989).
\item \textsuperscript{92} Id at 631.
\item \textsuperscript{93} 5 ICC2d 623, 631 (1989).
\end{itemize}


Recently, the Commission, on a referred case from a Tennessee state circuit court, ruled that a negotiated rate agreed upon by both parties would be enforced notwithstanding a different filed tariff rate and declared the filed tariff rate unreasonable solely by virtue of its inconsistency with the negotiated rate. This decision, \textit{Sunshine Mills Inc. v Rebel Motor Freight Inc.}, MCC 30140 (July 31, 1989), further evidenced the aggressive strategy pursued by the I.C.C. throughout the 1980's of declaring filed tariff rates unreasonable in light of different negotiated rates, thereby eroding the efficacy of the filed tariff doctrine before the I.C.C.. In another Tennessee case referred to the I.C.C. involving Rebel Motor Freight Inc., the Commission again held that it would be an unreasonable practice for shippers to pay additional undercharges in negotiated rate cases. \textit{Ideal Chemical and Supply Co. v Rebel Motor Freight Inc.}, MCC 30139 (August 21, 1989). See also, \textit{B&B Beverage Co. v Eazor...}
In early 1989, the Fifth Circuit dealt with the second prototype undercharge claim under the filed tariff doctrine: a failure to file with the I.C.C. the tariff rate contracted for with the shipper as required by statute. In the Matter of Caravan Refrigerated Cargo, Inc., the court reviewed what it described as an "archetypal negotiated rate case." A shipper had a long-standing agreement with Caravan, a refrigerated transport carrier, that Caravan would "meet or beat" any motor carrier rate quoted by a competing carrier. During their relationship, the shipper and Caravan negotiated rates to assure competitiveness. Caravan billed the shipper for the contracted rates and the shipper paid. The rates charged, however, were not the same rates which Caravan had filed with the I.C.C. The rates properly filed with the Commission were higher than the contracted rates. The shipper contended that it was unaware of the variance and relied upon Caravan's rate quotations. Caravan filed for bankruptcy and its trustee filed an action to recover the difference between the negotiated rates and the filed tariff rates.

Unlike the defendant in Western Transportation, this shipper attempted to have the case referred to the friendly confines of the I.C.C. for a determination of the reasonableness of the filed rates, arguing the "... primary jurisdiction doctrine." The district court refused to refer the case to the I.C.C. and, further, did not

Special Services Inc., MCC 30137 (August 21, 1989).

This course of action appeared to be the Commission's method of implementing what it perceived to be Congress' intent with respect to deregulation of rates without actually legislatively abrogating the doctrine. It has been reported that Rep. Glenn Anderson (D Calif) has stated his intent to introduce legislation which will require that all undercharge cases be considered by the I.C.C. before they can be sent to bankruptcy court. This solution is allegedly being pursued because it appears unclear whether judicial action would produce uniform results. Schultz, 219 Traffic World 14 (August 28, 1989).

94. 864 F2d 388 (5th Cir 1989), rehearing denied en banc, 869 F2d 1487 (5th Cir 1989).
95. Id at 388.
96. See for example, City of New Orleans v Southern Scrap Material Co. Ltd., 704 F2d 755, 758 (5th Cir 1983) and I.C.C. v Atlantic Coast Line Ry., 383 US 576, 579 (1966) wherein the doctrine that "... a district court trying a case arising under the Interstate Commerce Act must, if presented with such an issue, stay its proceedings and refer the case to the Commission" was presented. Further, the Fifth Circuit had previously ruled that when the reasonableness of the rate is at issue, "... there must be a preliminary resort to the Commission." Southern Pacific Transportation Co. v City of San Antonio, 748 F2d 266, 272 (5th Cir 1984) (quoting Great Northern Ry. v Merchants Elevator Co., 259 US 285, 291 (1922)).

97. The primary jurisdiction doctrine is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are "... within the special competence of an administrative body." United States v Western Pacific R.R. Co., 352 US 59, 64 (1956). This doctrine has its origins in the famous case of Texas & Pacific R.R. v Abilene Cotton Oil Co., 204 US 426 (1907), where the Supreme Court adopted
accept the shipper's argument, filed in opposition to Caravan's motion for summary judgment, that if the matter was not referred to the I.C.C. for determination the trial court should rule that the tariff rate was unreasonable.

In another strong reaffirmation of the filed tariff doctrine, the Fifth Circuit deftly disposed of the shipper's arguments for referral. While recognizing the primary jurisdiction doctrine, the circuit court agreed with the district court that the facts of this case did not raise any "... technical or complex issues ... that require the expert administration of the Commission ..." The court so ruled because the shipper's "unreasonableness" argument was bottomed solely on the charge that having to pay the filed rate because Caravan "... failed to get its paperwork done ..." would be unfair. Accordingly, the court reasoned that under the facts and arguments presented the filed tariff doctrine gave clear guidance and there was no need for referral.

Second, the court refused to accept the shipper's contention that the Motor Carrier Act of 1980 abrogated the filed tariff doctrine. The court reasoned that despite the intent of the Act, i.e., economic deregulation of the motor carrier industry, Congress had examined the area thoroughly when the legislation was being enacted and did nothing to eliminate or limit this long-standing doctrine. The Congress, the court reasoned, by its inaction apparently intended to leave the filed tariff doctrine intact.

Further, in an apparent blow to the persuasiveness of I.C.C. opinions before the circuit court, the Fifth Circuit refused to apply the Commission's advisory opinion which the court viewed as allowing equitable defenses in disputes regarding reasonableness of

the view that shippers seeking reparation predicated upon the unreasonableness of the established rate must primarily invoke redress through the I.C.C. It has come to mean that the I.C.C. has jurisdiction over matters of fact and administrative matters; however, if words are used in their ordinary sense, introduction of evidence is unnecessary and the courts need not refer the matter to the I.C.C. See, Farley Transportation Co., Inc. v Santa Fe Trail Transportation Co., 778 F2d 1365 (9th Cir 1985) where the court also refused to refer a tariff question to the I.C.C.; and Puerto Rico Maritime Shipping Authority v Valley Freight Systems, Inc., 856 F2d 546 (3d Cir 1988) where the filed tariff doctrine was enforced and the court did not refer.

98. Caravan, 864 F2d at 388, 389-90.
99. Id at 390.
100. The court cited, by analogy, the Supreme Court's refusal to overturn doctrine established prior to the Motor Carrier Act which Congress did not expressly abrogate. Id at 391 (citing Square D Co. v Niagara Frontier Tariff Bureau, 476 US 409 (1986) and Keogh v Chicago & Northwestern Ry., 260 US 156 (1922)).
Although the I.C.C. might soften and permit shippers to escape from the filed tariff doctrine, the Fifth Circuit would have none of it. If the doctrine was to be nullified, the court sent the message that it would have to be Congress that would have to do it.

Finally, the court distinguished a recent Eleventh Circuit opinion, *Seaboard System R.R. v U.S.*,\(^1\) which had recognized the Commission's authority to find that misquotation of rates constitutes unreasonable practice under the statute. The court explained that in *Seaboard*, the Commission had determined that the tariff sought to be enforced was not "... plain to the ordinary user."\(^2\) Since the shipper in this case had not claimed nor offered any evidence that rates filed by Caravan were not plain to the ordinary user, the *Seaboard* precedent was inapplicable and there was, therefore, no discord between the circuits.

In mid-July, 1989, the Eighth Circuit fired a salvo on behalf of the shippers in a ruling diametrically opposed to that made by the Fifth Circuit in *Caravan*. In *Maislin Industries, Inc. v Primary Steel, Inc.*,\(^3\) the Eighth Circuit faced the issue of whether the filed tariff doctrine obligated Primary Steel, Inc. to pay Maislin Industries, Inc. an amount greater than that which the parties negotiated. The case arose from an action by Maislin Industries, Inc. to recover freight undercharges for over one thousand interstate shipments performed for Primary Steel by Maislin's subsidiary, Quinn Freight Lines, an interstate motor carrier. From 1981 to 1983, Quinn negotiated rates with Primary that were lower than Quinn's filed rates. Quinn failed to file the negotiated rates as required by the I.C.C.

In 1983, Maislin filed for bankruptcy, and an audit of its accounts revealed undercharges of $187,923.36 resulting from billing Primary at the negotiated rather than the required filed rates. Maislin's trustees in bankruptcy billed Primary for the undercharges. Primary refused to pay and the bankrupt estate brought suit under 49 USC section 11706(a) for the difference between the filed rates and the negotiated rates.

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1. 864 F2d at 391 (citing *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 ICC2d 99 (1986)).
2. 794 F2d 635 (11th Cir 1986). *Seaboard* held that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." Id at 638.
3. Id at 637.
4. 879 F2d 400 (8th Cir 1989).
In its answer, Primary contended, inter alia, that since the parties had negotiated lower rates, collecting the tariff rates would constitute an unreasonable practice in violation of section 10701, and that the tariff rates themselves were not "reasonable" within the meaning of the statute. The district court, finding these matters to be within the primary jurisdiction of the I.C.C., stayed the proceeding at Primary's request and referred the case to the Commission.

The I.C.C. ruled in Primary's favor, relying upon Negotiated Rates I and rejecting Maislin's argument that the Commission lacked the statutory power to release a shipper from liability for such undercharges. The Commission found that Quinn and Primary had negotiated rates other than the tariff rates and that Primary had relied on Quinn to file the rates with the I.C.C. Since the I.C.C. felt that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Primary and Quinn, and that full payment was made by Primary, Maislin was not entitled to recover the filed rates.

The case returned to the district court where both parties moved for summary judgment. The court granted summary judgment for Primary, rejecting Maislin's argument that the I.C.C.'s new policy was, in effect, an impermissible recognition of equitable defenses to the application of the filed rate. The district court held that the I.C.C.'s policy of determining case-by-case whether the collection of undercharges would be an unreasonable practice under section 10701 was based on a permissible construction of the Act. On appeal to the Eighth Circuit, Maislin challenged the district court's referral of the issue to the I.C.C. and its subsequent affirmance of the I.C.C. decision.

First, the circuit court upheld the district court's reliance on the primary jurisdiction doctrine in referring the questions of whether Maislin's freight rates and charges were unreasonable and whether Maislin's practice of assessing and rebilling Primary Steel for tariff rates higher than those originally negotiated by the parties constituted an unreasonable practice in violation of 49 USC section 10701(a) to the I.C.C.

As outlined previously, upon receiving the referral, the I.C.C. relied upon its earlier decision in NITL—Petition to Institute

105. 705 F Supp 1401, 1405-06 (W D Mo 1988).
Rulemaking on Negotiated Motor Common Carrier Rates (Negotiated Rates I)\(^{106}\) and held that it could inquire into whether the imposition of undercharges would be an unreasonable practice under section 10701(a). The I.C.C. then found that Maislin had quoted a rate other than a tariff rate to Primary Steel, that an agreement had been reached between the parties, and that Primary Steel had, in fact, reasonably relied on the rate quotation. The I.C.C. concluded that Maislin would commit an unreasonable practice in requiring Primary Steel to pay undercharges for the difference between the negotiated rates and the tariff rates. The district court left the I.C.C.'s findings intact and the Eighth Circuit, unlike the Fifth, agreed.

Further, and of greatest significance, the circuit court ruled that the district court properly rejected the applicability of the filed tariff doctrine because of the I.C.C. policy change announced in Negotiated Rates I.\(^{107}\) As outlined previously, Negotiated Rates I permits the I.C.C., upon a court's request, to determine whether the collection of undercharges would constitute an unreasonable practice under section 10701. The district court observed that the I.C.C. had not abolished the requirement that mandates carriers to charge the tariff rate. Rather, the I.C.C. changed its policy on enforcing the "unreasonable practice" provision of section 10701(a), by allowing the consideration of equitable defenses. The district court held that nothing prohibits the I.C.C. from changing its policy and that this change in policy was justified and consistent with its practices under the Interstate Commerce Act.\(^{108}\) Again, the circuit court agreed. The split between the Eighth and Fifth Circuits was irreparable.\(^{109}\) The U.S. Supreme Court quickly granted certio-

\(^{106}\) 3 ICC2d 99 (1986).

\(^{107}\) Id.

\(^{108}\) The Ninth Circuit in West Coast Truck Lines, Inc. v Weyerhaeuser Co., 893 F2d 1016 (9th Cir 1990) agreed with the reasoning of the Eighth Circuit and held that the question whether a carrier's negotiated rate practices are reasonable should be decided first by the I.C.C. It then went on to decide that the I.C.C.'s recent refusal to adhere strictly to the filed rate doctrine is consistent with congressional intent. The court observed that the 1980 Motor Common Carrier Act relaxed the regulatory environment and that the I.C.C.'s easing of the burden on shippers to discover the myriad of filed tariffs is a practical response. It also said the I.C.C.'s new policy will prevent carriers from engaging in unfair competitive practices.

\(^{109}\) A recently decided case reaffirmed the Eighth Circuit's commitment to the reasoning in Maislin, accord, INF, Ltd. v Spectro Alloys Corp., 881 F2d 546 (8th Cir 1989). The Second and Ninth Circuits have also agreed with the Maislin rationale, see, Delta Traffic Service, Inc. v Appco Paper & Plastics Corp., 893 F2d 472 (2d Cir 1990) and West Coast Truck Lines, Inc. v Weyerhaeuser Co., 893 F2d 1016 (9th Cir 1990). The First Circuit recently joined the majority in holding that the question of reasonableness of rates should be
referred to the I.C.C. under the primary jurisdiction doctrine. Delta Traffic Service, Inc. v Transtop, Inc., 1990 US App LEXIS 6272 (1st Cir 1990). The Seventh Circuit in Orschelin Bros. Truck Lines, Inc. v Zenith Electric Corp., 899 F2d 642 (7th Cir 1990) also joined the majority opinion and stated its position as follows:

Strict, mechanical adherence to the filed-rate doctrine produces absurd results well illustrated by the present case. The carrier and the shipper negotiated a mutually attractive rate. The carrier told the shipper that the rate was in a tariff that it had just filed. The shipper could have checked, because there are “watching services” to which one can subscribe that check the tariff filings in the Commission every day. But the shipper did not consult a watching service and through some inadvertence the carrier neglected to file the tariff... The shipments were made, and the shipper paid the agreed-on price, which it believed was the tariffed price. Years passed. The carrier went broke. The trustee in bankruptcy—unconcerned about the effects on customer good will of suing for undercharges, because the carrier was being liquidated—combed through the carrier’s invoices, looking for deviations from the tariffed rates. This is a pastime of trustees of bankrupt carriers. [Citation omitted.] The trustee found that the tariff which the shipper had thought the carrier had filed had not been filed, and he brought this suit.

The suit serves no social purpose, yet Congress has not amended section 10761(a), which by stating that carriers shall price only in accordance with their filed tariffs (a “carrier may not charge or receive a different compensation... than the rate specified in the tariff”) enacts, in the view of the carrier, the filed-rate doctrine. The Interstate Commerce Commission has no authority to repeal a section in an Act of Congress, even if Congress itself would surely have done so had it realized how the section interacted with the amendments it was making to the Act. But this is not what the Commission has done. Section 10761(a) does not enact the filed-rate doctrine. It does require pricing in accordance with published tariffs, but it does not prescribe the consequences if the parties deviate from the tariff by mistake. It is the filed-rate doctrine that prescribes them, and the doctrine emanates not from section 10761(a) alone but also from the requirement in sections 10701(a) and 10704(a)(1) that a carrier’s practices be reasonable. The Commission has not modified any statute. It has modified a Commission-made doctrine by holding that the carrier who leads the shipper to believe that there was a tariff on file covering the agreed shipment at the agreed price will be estopped to contend otherwise—will in other words be guilty of an unreasonable practice... Section 10761(a) creates the basic prohibition, but it is left to the Commission, in the exercise of its broad discretionary powers under the reasonable-practice provisions of the Transportation Code, to shape the remedy for violations of the prohibition. It is in failing to consider the interplay between section 10761(a), which requires pricing in accordance with filed tariffs, and sections 10701(a) and 10704(a), which require carriers to adhere to reasonable practices, that the Fifth Circuit went astray (we respectfully suggest) in In re Caravan Refrigerated Cargo, Inc. [citation omitted], the case that created an intercircuit conflict on the validity of the Commission’s new approach to filed-rate questions. The Fifth Circuit treated the filed-rate doctrine as an interpretation of section 10761(a) that the Supreme Court had, by approving, placed beyond power of change by the Commission, by a lower federal court, or perhaps by any body other than Congress. But all that section 10761(a) requires is pricing according to filed tariffs. The proposition that a deviation from such pricing, however innocent, should exact from the shipper the forfeiture of his bargain in any and all circumstances is an interpretation of the concept of a “reasonable practice,” a concept the provenance of which is section 10701(a) rather than 10761(a).
Unquestionably, the reported federal circuit court cases since 1980 reflected that the filed tariff doctrine had collided head on with the observable result of motor carrier deregulation: the shake-out of several thousand motor carriers since 1980, many of them bankrupt. A review of these federal circuit court decisions revealed that, although the courts had taken cognizance of the impact of deregulation, there was disagreement among the circuits whether to accept the I.C.C.'s Negotiated Rates position, and therefore, render inert the filed tariff doctrine, or to follow announced precedent which had stood vigil over the transportation industry for nearly three-quarters of a century. The industry awaited the resolution of the conflict between the Eighth Circuit, which had been joined by the Second, Seventh and Ninth Circuits, and the Fifth Circuit.

They did not have to wait very long. On June 21, 1990, barely two months after oral argument, the Supreme Court ruled; shippers who had been sleeping soundly, relying on the I.C.C.'s recent favorable holdings as well as the support of a majority of the circuit courts for their position, awakened to their worst nightmare. Justice Brennan struck the blow in the first paragraph of the opinion:

Under the Interstate Commerce Act (Act), 49 U.S.C. § 10101 et seq. (1982 ed.), motor common carriers must file their rates with the Interstate Commerce Commission (ICC or Commission), and both carriers and shippers must adhere to these rates. This case requires us to determine the validity of a policy recently adopted by the ICC that relieves a shipper of the obligation of paying the filed rate when the shipper and carrier have privately negotiated a lower rate. We hold that this policy is inconsistent with the Act.\(^1\)

The Court's opinion methodically reviewed the public policy, statutory and case law foundation of the filed tariff doctrine. Recalling and reflecting upon precedents set over the last seven decades,\(^2\) Justice Brennan reminded the parties that the duty to file rates under the statute, as well as the obligation to charge only those rates filed, had always been viewed by the Court as indispensable in preventing the price discrimination which is the statute's

\(^1\) Maislin Industries, Inc. v Primary Steel, Inc., --- US ---, 110 S Ct 2759, 2762 (1990).

raison d'être. The Court spoke to the issue as follows:

Compliance with sections 10761 and 10762 is "utterly central" to the administration of the Act. "Without [these provisions]... it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory,... and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." [Citations omitted.] Although the ICC argues that the Negotiated Rates policy does not "abolish" the requirement in section 10761 that carriers must continue to charge the tariff rate,... the policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of unfiled rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC. Thus, although we agree that the Commission may have discretion to craft appropriate remedies for violations of the statute,... the "remedy" articulated in the Negotiated Rates policy effectively renders nugatory the requirements of §§ 10761 and 10762 and conflicts directly with the core purposes of the Act.\footnote{113. Maislin Industries, Inc. v Primary Steel, Inc., 110 S Ct 2766-67 (1990).}

Next, the Court took on the Commission's argument that a carrier engages in an "unreasonable practice" when it attempts to collect the filed rate after the parties have negotiated a lower rate and, therefore, the Commission has the authority under the statute and Maxwell to declare the filed tariff unenforceable. The Court, in refusing to accept the Commission's premise, again reflected on the historical public policy underpinnings of the filed tariff doctrine and demolished the Commission's carefully constructed position announced in Negotiated Rates:

The filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable. The filed rate doctrine, therefore, follows from the requirement that only filed rates be collected,... the requirement that rates not be discriminatory,... and the requirement... that carriers adopt reasonable rates and practices. [Citations omitted.] In the instant case, the Commission did not find that the rates were unreasonable but rather concluded that the carrier had engaged in an unreasonable practice in violation of section 10701 that should preclude it from collecting the filed rates. The Commission argues that under the filed rate doctrine, a finding that the carrier engaged in an unreasonable practice should, like a finding that the filed rate is unreasonable, disentitle the carrier to collection of the filed rate. We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule. [Citations omitted.] But we need not resolve this issue today because we conclude that the justification for departure from the filed tariff schedule that the ICC set forth in its Negotiated Rates policy rests on an

\footnote{114. Maislin, 110 S Ct 2769.}
interpretation of the Act that is contrary to the language and structure of
the statute as a whole and the requirements that make up the filed rate
doctrine in particular . . . Under the Negotiated Rates policy, the ICC has
determined that a carrier engages in an unreasonable practice when it at-
ettempts to collect the filed rate after the parties have negotiated a lower rate.
The ICC argues that its conclusion is entitled to deference because section
10701 does not specifically address the types of practices that are to be con-
sidered unreasonable and because its construction is rational and consistent
with the statute. [Citations omitted.] We disagree. For a century, this Court
has held that the Act, as it incorporates the filed rate doctrine, forbids as
discriminatory the secret negotiation and collection of rates lower than the
filed rate . . . By refusing to order collection of the filed rate solely because
the parties had agreed to a lower rate, the ICC has permitted the very price
discrimination the Act by its terms seeks to prevent . . . Congress has not
diverged from this interpretation and we decline to revisit it ourselves . . .
Stripped of its semantic cover, the Negotiated Rates policy and, more spe-
cifically, the Commission's interpretation of "unreasonable practices" thus
stand revealed as flatly inconsistent with the statutory scheme as a whole
and sections 10761 and 10762 in particular. [Citations omitted.]118

Next and finally, the Court took aim upon the Commission's ar-
gument that the passage of the Motor Carrier Act of 1980 justified
its policy set in Negotiated Rates I & II. Again, the Supreme
Court said no to the I.C.C.:

The ICC maintains, however, that the passage of the Motor Carrier Act of
1980 (MCA), justifies its Negotiated Rates policy. The MCA substantially
deregulated the motor carrier industry in many ways in an effort to "pro-
mote competitive and efficient transportation services." [Citations omitted.]
In addition to loosening entry controls, . . . the MCA also created a zone of
reasonableness within which carriers can raise rates without interference
from the ICC . . . More importantly, the MCA also allows motor carriers to
operate as both common carriers and contract carriers. [Citations omitted.]
A contract carrier transports property under exclusive agreements with a
shipper, . . . and the Commission has exempted all motor contract carriers
from the requirements of §§ 10761 and 10762 . . . The Commission has also
relaxed the regulations relating to motor common carriers, most signifi-
cantly, by allowing decreased rates to go into effect one day after the filing
of a tariff . . . In Negotiated Rates I and II, the Commission concluded
that in light of the more competitive environment, strict adherence to the
filed rate doctrine "is inappropriate and unnecessary to deter discrimination
today." According to the Commission, "the inability of a shipper to rely on
a carrier's interpretation of a tariff is a greater evil than the remote possibil-
ity that a carrier might intentionally misquote an applicable tariff rate to
discriminate illegally between shippers." [Citations omitted.] . . .
We reject this argument. Although the Commission has both the authority
and expertise generally to adopt new policies when faced with new develop-

115. Id at 2767.
ments in the industry [citations omitted], it does not have the power to adopt a policy that directly conflicts with its governing statute. Nothing in the MCA repeals §§ 10761 and 10762 or casts doubt on our prior interpretation of those sections. Generalized congressional exhortations to "increase competition" cannot provide the ICC authority to alter the well-established statutory filed rate requirements. As we said in *Square D Co. v Niagara Frontier Traffic Bureau, Inc.*, with respect to a similarly longstanding judicial interpretation of the Act: "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and . . . Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. [Respondent has] pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding . . . construction; harmony with the general legislative purpose is inadequate for that formidable task." [Citations omitted.]

The repercussions of the Supreme Court's decision in *Maislin* will be profound. Shippers, most of whom are financially solvent, have lost their immunity from undercharge liability. They will have to pay. As presented previously, the statistics indicate that the bill may run well into the hundreds of millions of dollars. Motor carriers, a substantial number of them already bankrupt, have had their balance sheets injected with heretofore uncollectible accounts receivable. Although too late for many carriers, their creditors must be gloating as they prepare to pick up all the chips in this high stakes poker game. The proponents and would-be enforcers of deregulation may ultimately be the biggest losers. Presently, they can do little else but lick their wounds, reflect on what went wrong and plan how to approach an American public and a Congress much less enamored with the idea of deregulation today than in 1980.

**A Look Forward: Synthesis and Perspective**

Prior to the deregulation movement, filed tariff rates reflected the stability of the transportation industry. Rates moved slowly in a market which saw only moderate competition. If a carrier stepped out of line and charged its favorite shipper lower freight rates than those filed with the I.C.C., the filed tariff doctrine was there to quickly remedy the breach of discipline. Deregulation, however, sent a message which stated that unfettered competition, especially in the area of rates, was the new order. Unfortunately, Congress failed to recognize the inherent conflict between deregu-
lation and the filed tariff doctrine. As one circuit court eloquently stated:

Recent legislation moving toward modified deregulation . . . (involving greater reliance on competitive forces) might suggest the need for a second look at policies requiring strict adherence to filed tariffs . . . Greater rate flexibility, for example, might seem appropriate where competitive forces are at work and monopoly or [monopolistic] power has abated. However, Congress has not yet amended the Act to permit greater flexibility . . . and we are unwilling to engage in deregulation by adjudication.\textsuperscript{117}

For reasons unclear, Congress did not repeal or modify the statute which legislatively supports the filed tariff doctrine to reflect the new deregulatory order. The I.C.C., at least in the motor carrier industry, attempted to fashion the escape mechanism Congress had failed to legislate. The Supreme Court quickly disposed of that method in \textit{Maislin}.

Prior to the decision in \textit{Maislin}, one could argue that the filed tariff doctrine was living on borrowed time. Unquestionably, that conviction can no longer be sustained. Will the \textit{Maislin} decision be used to impose consistency among the circuits regarding the application of the filed tariff doctrine in the other component parts of the transportation industry? One can speculate that it will. The filed tariff doctrine appears stronger than ever. Accordingly, if there is going to be a change, Congress will have to make it.\textsuperscript{118}

While it ponders the future, Congress should reflect on Sebastian’s admonition to Antonio in \textit{Twelfth Night} and either undo the burden imposed by the filed tariff doctrine or anticipate that its deregulatory legislative will may be occasionally thwarted by the continued enforcement of a doctrine from a long passed regulatory period in the economic history of the United States.

\textsuperscript{117} \textit{Louisville & Nashville R.R. Co. v Mead Johnson & Co.}, 737 F2d 683, 690 (1984).

\textsuperscript{118} Since the \textit{Maislin} decision, shippers have marshalled an effort to petition Congress for legislative relief from the undercharge claims. On July 31, 1990, the Senate Commerce Committee reported S. 2933, a bill introduced by Senator J. James Exon, which attempts to ameliorate the effects of the Court’s ruling. The legislation received fierce opposition from creditors, including the Teamsters Pension Fund, and its passage appears in serious doubt during the 101st session of Congress.