1990

The Negotiated Rates Doctrine [Maislin Industries v. Primary Steel, Inc., 879 F.2d 40 (8th Cir. 1989), cert. granted, 110 S. Ct. 834 (1990)]

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THE NEGOTIATED RATES DOCTRINE†

[Maislin Industries v. Primary Steel, Inc., 879 F.2d 400 (8th Cir. 1989), cert. granted, 110 S. Ct. 834 (1990)].

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† The author would like to acknowledge the assistance and encouragement of Byron D. Olsen of Felhaber, Larson, Fenlon and Vogt; and Troy A. Wolf, William Mitchell student.
INTRODUCTION

In the decade of intense competition since Congress partially deregulated the interstate trucking industry,¹ most motor carriers² have abandoned their former practice of strictly observing collectively-established freight rates.³ Instead, they have adopted the general practice of negotiating to transport a shipper's⁴ goods at freight rates which have often been substantially lower than carriers have charged for the same transportation in the past. In the wake of regulatory reform, carriers remained legally obligated to update the old rates by filing the new negotiated rates with the Interstate Commerce Commission (ICC or Commission).⁵ However, many carriers have inten-


2. A motor carrier in the context of this comment is an ICC-regulated motor common carrier, or trucking company, engaged in the interstate transportation or "carriage" of goods for hire via motor vehicles.

"[M]otor common carrier" means a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes or both." 49 U.S.C.S. § 10102(14) (Law. Co-op. Supp. 1989).

A common carrier is "[o]ne who holds himself out to the public as engaged in business of transportation of persons or property . . . and who offers services to the public generally." BLACK'S LAW DICTIONARY 249 (5th ed. 1979).

For a discussion of motor carriers exempted from ICC regulation, see infra note 86.

3. Prior to regulatory reform in 1980, motor carriers generally adhered to the rates set by regional rate bureaus and were exempt from antitrust liability for doing so. See infra notes 90, 91, 102, & 103 and accompanying text. See, e.g., West, The Challenge of the Eighties—What a Major Carrier Is Doing, TRAFFIC WORLD, July 1, 1985, at 50 (motor carrier which had filed less than 25 independent rates prior to 1980 filed over 1,200 independent rates after regulatory reform).

4. A shipper in this context is an organization that "ships"—as either a sender or receiver—materials, supplies, parts, products, or goods in interstate commerce via motor carriers. See Star Line Trucking Corp. v. Department of Indus., Labor and Human Relations, 109 Wis. 2d 266, 278, 325 N.W.2d 872, 878 n.10 (1982) ("term 'shipper' . . . commonly understood to mean the owner or person for whose account the carriage of goods is undertaken").

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tionally, negligently, or otherwise failed to do so.6

As across-the-board rate discounting became the norm in the newly competitive industry, numerous motor carriers found themselves unable to balance their accounts and have gone into bankruptcy.7 Months or years after negotiating the lower rates, many of these carriers, or more often their bankruptcy trustees or freight rate audit houses, have been re-billing shippers for the difference between the higher filed rates and the negotiated rates the carrier collected but failed to file.8 All too often, shippers unwilling to pay these undercharges9 have become defendants in suits brought for their collection.10

The practice of doing business at negotiated rates and then using the filed rates as the basis for undercharge suits has created a conflict between two provisions of the Interstate Commerce Act (ICA).11 The first is the ICA’s century-old “filed rate doctrine,” which prohibits a carrier from collecting rates for its services different from those

6. For a discussion of the causes of the unfiled negotiated rates problem, see infra notes 104–19 and accompanying text.
7. For a discussion of motor carrier bankruptcies in the 1980s, see infra notes 114–16 and accompanying text.
8. “[T]he auditors are continuing to grind [these bills] out like sausages .... [T]he shipping public looks on all this as the biggest legalized ripoff in the history of regulated transportation—and as an enormous betrayal of trust as well.” Bohman, Getting off the Hook on Overcharges, TRAFFIC MGMT., August 1987, at 25. “[T]housands of undercharge claims are under collection from scores of bankrupt carriers.” ICC to Move Against Phoney Undercharge Claims, PURCHASING, June 16, 1988, at 47.
9. “While there is no statutory definition of ‘undercharge,’ it results from the application of a rate which makes charges less than those which were specified in the tariff as legally applicable to the movement.” Meiklejohn, Overcharges, Undercharges and Reparations, 1975 TARIFFS, RATES AND PRACTICES—PART II 163, 165 (papers and proceedings of the 1971 Transportation Law Institute).
10. Hundreds of negotiated rates undercharge suits have been filed since the early 1980s. When combined with disputed undercharge claims that have not yet found their way into court, the total value may amount to as much as $100 million. MacDonald, ICC Action Adds New Spin to Ongoing Undercharge Contest, TRAFFIC MGMT., July 1989, at 15. “The balance-due bill situation has become a world-class mess. How else to describe the spectacle of more than 1,700 undercharge suits being dumped in one day on a U.S. Bankruptcy Court?” Quinn, Let’s End the Balance-Due Bill Blues, TRAFFIC MGMT., June 1988, at 11. For a discussion of the outcome of this litigation, see infra notes 19 & 20 and accompanying text.
11. The present codification of the ICA is found at 49 U.S.C.S. §§ 10701–11917 (Law Co-op. 1979 & Supp. 1989) (current version of An Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887)). The 1887 Act, along with its amendments and recodifications, has long been popularly known as the Interstate Commerce Act. See, e.g., Texas & Pac. Ry. v. Southern Pac. Co., 137 U.S. 48, 51 (1890). In 1920, Congress formally changed the title to conform with this popular usage. Transportation Act of 1920, ch. 91, § 27, 41 Stat. 456, 499. Thus this comment will refer to the 1887 Act and its later and current formulations as the Interstate Commerce Act or ICA.
contained in tariffs filed with the ICC.\textsuperscript{12} The second is the ICA's longstanding requirement that a carrier's practices be reasonable.\textsuperscript{13} At issue is whether the filed rate doctrine precludes the ICC from finding under the ICA's reasonableness requirement that collection of the filed rates would be an unreasonable practice.

The interpretation of these provisions in the era of reduced regulation has become a hotly contested issue among shippers, motor carriers, freight rate audit houses, bankruptcy trustees, Congress, the courts, and the ICC. The ICC has declared that it has primary jurisdiction to determine the reasonableness of such billing practices,\textsuperscript{14} that it may allow equitable defenses to the filed rate doctrine when carriers have engaged in such practices,\textsuperscript{15} and that the collection of undercharges would in most cases\textsuperscript{16} be an unreasonable practice barred by the ICA.\textsuperscript{17} As Congress considers a bill intended to unscramble the contro-

\begin{itemize}
  \item 12. 49 U.S.C.S. § 10761(a) (Law. Co-op. 1979) (current version of Interstate Commerce Act, ch. 104, § 6, 24 Stat. 379, 380–81 (1887)): “Except as provided under this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter . . . . That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.” (emphasis added). For a discussion of the origin and purpose of the filed rate doctrine, see infra notes 51–69 and accompanying text.
  \item 13. 49 U.S.C.S. § 10701(a) (Law. Co-op. 1979 & Supp. 1989) (current version of the Mann-Elkin's Act, ch. 309, § 7, 36 Stat. 539, 546 (1910)): “A rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable.” (emphasis added). For a discussion of the origins and purpose of the ICA's reasonableness requirements, see infra notes 28–50 and accompanying text.
  \item 15. National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Common Carrier Rates (ex parte No. MC-177), 3 I.C.C.2d 99, 99 (1986) [hereinafter Negotiated Rates I] (when deciding on a case-by-case basis whether a carrier's collection of undercharges would be an unreasonable practice, the ICC has concluded that it has the authority to consider all circumstances, or equitable defenses, surrounding the dispute). For a discussion of the rule against equitable defenses to the rate filing requirements, see infra notes 57–69 and accompanying text.
  \item 16. As it has turned out, the ICC “has never seen a negotiated rate it didn’t like.” Wastler, Commission Revises Policy on Negotiated Rates Cases, TRAFFIC WORLD, May 8, 1989, at 36 (quoting then-ICC Chairman Gradison).
\end{itemize}
versy, the courts remain deeply divided over the interpretation and resolution of these issues. Courts in the majority of jurisdictions refer these disputes to the ICC, uphold the ICC's determination, allow equitable defenses, and bar the collection of undercharges by holding that their collection would be unreasonable. A minority of courts refuse to recognize the ICC's primary jurisdiction, holding that even where a carrier conducted business at unfiled negotiated rates, the filed rate doctrine strictly requires the collection of the higher filed rate.

18. For a discussion of the bill, see infra notes 149-55 and accompanying text.

19. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits agree that the doctrine of primary jurisdiction compels the courts within their jurisdictions to refer such undercharge cases to the ICC and have held in favor of the shippers. See West Coast Truck Lines v. Weyerhaeuser Co., 893 F.2d 1016 (9th Cir. 1990); Delta Traffic Serv. v. Appco Paper and Plastics Corp., 893 F.2d 472 (2d Cir. 1990) (ordering referral to ICC); Carrier's Traffic Serv. v. Anderson, Clayton & Co., 881 F.2d 475 (7th Cir. 1989); INF, Ltd. v. Spectro Alloys Corp., 881 F.2d 546 (8th Cir. 1989) (decided three weeks after Maislin). See also Seaboard Sys. R.R. v. United States, 794 F.2d 635 (11th Cir. 1986) (upholding the referral of railroad undercharge case involving an ambiguous tariff to ICC and upholding ICC's decision to allow equitable defenses).


20. The effect of such refusal is in most cases to deny referral to the ICC and to allow recovery by the carrier. The Fifth Circuit stands alone among the circuits in refusing to refer such cases to the ICC. See In re Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3006 (May 30, 1989) (No. 88-1558); see also Delta Traffic Serv. v. Armstrong World Indus., 703 F. Supp. 525 (S.D. Miss. 1988) (shipper is held to the filed rate although the carrier "fraudulently or negligently misrepresented the applicable rates and conducted business with [the shipper] on the basis of the negotiated rates rather than on the rates actually on file"); Delta Traffic Serv. v. Georgia-Pacific Corp., 684 F. Supp. 769, 770 (D. Conn. 1987) (referral to ICC denied; rule against equitable defenses enforced because the ICC has no primary jurisdiction where the question raised "is what the appropriate tariff rates are"); Rebel Motor Freight, Inc. v. Southern Beverage Co., 673 F. Supp. 785, 790 (M.D. La. 1987) (referral to ICC granted but not to review the rule against equitable defenses because the ICC has no authority to waive the rule); Sallee Horse Vans, Inc. v. Pessin, 763 S.W.2d 149, 151 (Ky. App. 1988) ("[T]he courts clearly have no power to alter the terms of a duly published tariff of a common

Published by Mitchell Hamline Open Access, 1990
The Eighth Circuit Court of Appeals was confronted for the first time with a post-regulatory reform undercharge case in *Maislin Industries v. Primary Steel, Inc.* The plaintiff-carrier in *Maislin* engaged in the course of conduct followed by most carriers involved in negotiated rates undercharge litigation. It vigorously competed for the defendant-shipper's business by negotiating lower rates. It failed to file those rates with the ICC, went bankrupt and allowed a freight audit house to comb through its tariffs for the previous three years in search of undercharges. It then attempted to recoup some of its losses by twisting the filed rate doctrine to its advantage. The Eighth Circuit agreed with the decisions of the ICC and the district court and held that the carrier was not entitled to recover the undercharges. In so doing, the court reached a decision contrary to that reached by the Fifth Circuit in *In re Caravan Refrigerated Cargo, Inc.* and set the stage for the final settling of accounts by the United States Supreme Court.
In the wake of these ICC policy revisions and conflicting court decisions, a new basis for avoiding the strict application of the filed rate doctrine in motor carrier undercharge cases has emerged: the negotiated rates doctrine. The doctrine states: a motor common carrier which (1) negotiates with a shipper a rate that the carrier represents as, and the shipper reasonably believes is or will become the lawfully filed rate, (2) fails, for whatever reason, to file the lower negotiated rate with the ICC, (3) bills and accepts payment from the shipper at the negotiated rate, and (4) later demands payment of the difference between the filed rate and the negotiated rate, has engaged in an unreasonable practice in violation of the Interstate Commerce Act and is estopped from collecting any undercharges thus arising.27

The purpose of this comment is to present and analyze the negotiated rates doctrine as an appropriate solution to the current undercharges conflict. The comment examines the issue in the context of a decade—and century—in which fundamental changes have occurred in the motor common carrier industry. In order to provide a basic understanding of those changes, as well as a working knowledge of the law involved, this comment explores the regulation of the interstate transportation industry from the historical and statutory perspective of the ICA.

The comment then traces and analyzes the trucking industry's regulation, from the appearance of the first motor trucks at the turn of the century to federal regulation of the industry in 1935 to the industry's partial deregulation forty-five years later. It then discusses the causes of the current controversy and the attempts by the ICC, the courts, and Congress to reinterpret the regulatory scheme in light of the fundamental changes brought about by partial deregulation. The Eighth Circuit's opinion in Maislin is examined in detail. Finally, the comment explains the negotiated rates doctrine and suggests its adoption as a solution to the problem which became the greatest scourge to visit the American interstate surface transportation industry in the 1980s.

Ct. 834 (1990), and heard oral arguments on April 16, 1990. The Court is expected to issue its decision in the summer of 1990. See also Schulz, 'Classic' Undercharge Conflict Seen Headed For Supreme Court Decision, TRAFFIC WORLD, October 9, 1989, at 18–19.

"In sports, they were called 'classic confrontations.' ... In undercharges, it is the 8th U.S. Circuit Court of Appeals, St. Louis, v. the 5th U.S. Circuit Court of Appeals, New Orleans. ... You cannot read Supreme Beef and Maislin and come to the same conclusion. They are diametrically opposite." Id.

27. For the full discussion of the author's formulation of the negotiated rates doctrine, see infra notes 242–53 and accompanying text. See also infra notes 120–55 and accompanying text (discussing the evolution of the doctrine).
I. BACKGROUND

A. The Reasonableness Requirement

1. Rates

Prior to the beginning of federal transportation regulation in 1887, the common law governed the activities of all common carriers. Central to the common law was the requirement that carriers charged shippers fair and reasonable rates. Courts imposed liability for damages on carriers who charged or collected unreasonable rates.

In the age of unrestrained transportation competition during the second half of the nineteenth century, carriers were free to discriminate among shippers by charging more favorable rates to some shippers than to others. The consequence was a system of undue

28. See infra note 36.

Transportation has been a fundamental element in the growth of civilization and industrial development, and has had a profound effect on collective economic growth. Long ago, people recognized the essential role of transportation and began to treat it differently from other industries, thereby allowing the public interest to prevail over individual economic interests. Traditionally the transportation industry has been deemed too important to be left to the vicissitudes of the marketplace.

30. See Southern Pac. v. Colorado Fuel & Iron Co., 101 F. 779, 786 (8th Cir. 1900), appeal dismissed, 183 U.S. 695 (1901). Beyond the rate reasonableness requirement, the common law “demanded little more than that [common carriers] should carry for all persons who applied . . . in the order in which the goods were delivered to the particular station.” Baltimore & O. R.R., 145 U.S. at 275.
31. Southern Pac., 101 F. at 786. The carrier “may be called to account by the shipper in an action at law for damages [where] any unreasonable or unjust rate or charge is either exacted from the shipper or demanded.” Id.
32. See Lundquist v. Grand Trunk W. R.R., 121 F. 915 (C.C. Ill. 1901). “Under the common law, . . . discrimination . . . was permitted to common carriers, inasmuch as [they] were not under any obligation to treat all shippers alike. The carrier was only required to make reasonable carrying charges to all.” Id. H.B. Fuller, The Act to Regulate Commerce Construed by the Supreme Court 59 (1915):

Although the weight of authority in this country favored the rule that charges must be equal to all persons for the same services it was at least doubtful whether the railroads were bound to this course and whether they
preference and unjust discrimination which resulted in the unfair and unreasonable treatment of disadvantaged shippers. Public dissatisfaction with this arrangement and with the increasingly destructive competitive warfare among railroads convinced Congress that federal regulation of interstate transportation was necessary.35

With the enactment of the ICA,36 Congress expressly adopted the common law prohibition against unreasonable rates by requiring that interstate railroad charges be reasonable.38 Congress had two

might not charge one person more than another for either a similar or exactly the same service.

33. Undue preference is an unfair advantage given by a carrier to one shipper over another shipper. See Baltimore & O. R.R., 145 U.S. at 275.

34. Unjust or unreasonable discrimination is "a breach of the carrier's duty to treat all shippers alike, and afford them equal opportunities to market their products. A carrier's failure to treat all alike under substantially similar conditions." BLACK'S LAW DICTIONARY 420 (5th ed. 1979).

35. See Tollefson, Judicial Review of the Decisions of the Interstate Commerce Commission, 11 MINN. L. REV. 389, 389-92 (1927) (railroad abuses and competitive warfare resulted in monopolies and rates that were unfair and discriminatory); Motor Carrier Act of 1935: Hearings on S. 1629, S. 1632, and S. 1635 Before the Senate Comm. on Interstate Commerce, 74th Cong., 1st Sess. 47 (1935) (ICC Commissioner Eastman: "unrestrained competition led to all manner of unjust discriminations between shippers, communities, and localities with the benefits going to the biggest"). See also H.B. FULLER, supra note 32, at 59-60:

The evils which were naturally incident to a policy of unrestricted competition accumulated and suggested the necessity of some measure of legislative control . . . . The inefficiency of [state laws designed to prevent discrimination] beyond the confines of the states because of constitutional limitations, the manifest impossibility of securing concerted action by all legislatures toward the regulation of traffic between and among the various states, and the growing abuses in railroad management and railroad transportation, all combined to demonstrate the necessity for legislation by Congress to control the problem under its constitutional power to regulate commerce among the several states.

36. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C.S. §§ 10701-11917 (Law. Co-op. 1979 & Supp. 1989)). Congress' authority to regulate interstate commerce is based on the commerce clause of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 2 ("The Congress shall have Power To . . . regulate commerce with foreign Nations, and among the several States."). Congress created the ICC, as the first federal regulatory agency, to implement and enforce the provisions and policies of the ICA. "It became . . . necessary for the legislative power to establish some one body with the power to determine the reasonableness of rates in order to do away with . . . confusion and to establish a uniform standard—possessed of a jurisdiction broad enough to comprehend all such controversies which might arise." H.B. FULLER, supra note 32, at 131. For a discussion of the ICC's primary jurisdiction, see infra notes 70-82 and accompanying text.

37. See Tift v. Southern R.R., 123 F. 789, 792 (C.C. Ga.) (ICA "express adoption" of common law principle which is "as old as the existence of common carriers, to wit, that rates must be reasonable"), aff'd, 148 F. 1021 (5th Cir.), aff'd, 206 U.S. 428 (1903).

main goals: to ensure for shippers "just and reasonable" transportation charges,39 and to ensure the equality of rates.40 To that end, Congress prohibited the railroads from unjustly discriminating among shippers41 and from granting undue preferences to particular

39. Id. "All charges made for any service rendered or to be rendered in the transportation of passengers or property . . . or in connection therewith . . . shall be reasonable and just; and every unjust and unreasonable charge for any such service is prohibited and declared to be unlawful." Id. (emphasis added). The courts interpreted this section, as well as the common law, as limiting a carrier's charges to rates which reasonably corresponded to the services provided by the carrier to the shipper. "Reasonable compensation for the service actually rendered is all that the railroad is permitted to exact." Tift, 138 F. at 753, 764. For a review of early ICC "just and reasonable" interpretations, see Hull, supra note 29.

"As there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact." New Haven R.R. v. Interstate Commerce Comm'n, 200 U.S. 361, 367 (1905). See generally Walrath & Brown, Reasonableness of Motor Carrier Rates on Particular Movements of Commodities, 1972 TARIFFS, RATES AND PRACTICES—PART I 403 (papers and proceedings of the 1970 Transportation Law Institute); Note, The Shipper's Right to Recover for Unreasonable Railroad Rates, 21 IOWA L. REV. 751 (1936).

40. [T]he great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates 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, preferences and all other forms of undue discrimination. New Haven R.R. v. Interstate Commerce Comm'n, 200 U.S. 361, 391 (1905). See also Interstate Commerce Comm'n v. Baltimore & O. R.R., 145 U.S. 263 (1892); H.B. Fuller, supra note 32, at 59–61 (discussion of ICA's purpose).


The current rule against discrimination states that an ICC-regulated carrier "may not charge or receive . . . a different compensation (by using a special rate, rebate, drawback, or other means) for a service rendered . . . than it charges or receives from another person for performing a like and contemporaneous service . . .
shippers.42

2. Practices

In 1906, Congress amended the Act to preclude unreasonable carrier practices insofar as those practices affected rates.43 In so doing, Congress expanded both the ICA’s reasonableness requirement and the ICC’s power to determine the reasonableness of a carrier’s practices.44 With the Mann-Elkins Act in 1910, Congress firmly established the reasonable practice requirement by giving the ICC authority to enter orders regarding a carrier’s practices, classifications, or regulations irrespective of whether they affected the carrier’s rates.45

The term “practice” was not defined in the amendment or in the


To make out a case for a violation of the anti-discrimination provision, the complainant, typically an aggrieved shipper, must show that: “1. A rate disparity exists; 2. There is actual or potential competitive injury; 3. The defendant is the common source of both the prejudicial and preferential rate; and 4. The rate disparity is not justified by transportation conditions.” Dresser Indus., Inc. v. I.C.C., 714 F.2d 588, 598 (5th Cir. 1983). The complainant has the burden to show the first three elements. The burden then shifts to the carrier to show that particular transportation conditions justified its actions. Id. For example, “competition is a transportation condition justifying [an] otherwise unreasonable rate disparity.” Id. at 599.

Finally, “[i]t should also be remembered that not all discriminations and preferences are unlawful, only those that are unjust or unreasonable.” Goff, supra note 41, at 107. For annotations of cases involving unjust discrimination, see Goff, supra note 41, at 108–12.


43. The Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906) (amending § 15) (codified as amended at 49 U.S.C.S. § 10704(a)(1) (Law. Co-op. 1979)): “[T]he commission is authorized and empowered . . . whenever . . . it shall be of the opinion . . . that any regulations or practices whatsoever of such carriers . . . affecting such rates . . . are unreasonable . . . to determine and prescribe what will be the just and reasonable rate or rates.” (emphasis added).

44. “One of the outstanding purposes of the creation of the commission was that there might be established a body of experts to pass upon the reasonableness of rates, practices, and charges.” Tollefson, supra note 35, at 413 (emphasis added).

45. The Mann-Elkins Act, ch. 309, § 7, 36 Stat. 539 (1910) (amending § 1) (codified as amended at 49 U.S.C.S. §§ 10701(a) (Law. Co-op. 1979 & Supp. 1989) and 10704(a)(1) (1979)). “[E]very such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.” Id. at 546 (emphasis added). “[W]hen ever . . . the commission shall be of opinion . . . that any . . . classifications, regulations, or practices whatsoever of . . . [a] carrier . . . are . . . unreasonable . . . the
Although legislative history. The courts have interpreted the term to mean something less than everything a carrier may do. For example, while the term includes carrier routing practices, credit practices, and other procedures which may unreasonably and arbitrarily affect a shipper, the ICC’s unreasonable practice jurisdiction does not extend to discretionary accounting methods employed by connecting carriers when dividing fees.

B. The Filed Rate Doctrine

1. The Rate Filing Requirements

As a means of facilitating the ICC’s regulatory function, the ICA stipulates that common carriers must publish their rates in tariffs and file them with the ICC. Congress created this rate filing system to be the starting point from which the ICC would execute the ICA’s goals of preventing unjust and unreasonable rates, securing equality of rates, and eliminating discrimination and favoritism. Congress

46. “ ’Practice’ as employed in the statute cannot have a meaning co-extensive with any exigency deemed to exist, or elastic enough to embrace everything a carrier may do.” Northern Pac. R.R. v. United States, 41 F. Supp. 439, 443 (D. Minn. 1941). Rather, courts have limited their interpretation of the term by reasoning that the proximity of the term “practices” to the terms “classifications” and “regulations” was intended to confine it to acts or conduct having the same purpose as its associates.” United States v. Pennsylvania R.R., 242 U.S. 208, 229 (1916).


49. The term “practice” as used in the Act “’embrace[s] those things that affect arbitrarily and unreasonably the purse of the shipper.... The prime solicitude of the Interstate Commerce Act is the protection of passengers, shippers, and consignees.” Northern Pac. R.R., 41 F. Supp. at 443 (emphasis added).


reasoned that these goals could best be realized if the ICC was first made aware of and given the power to approve or reject the rates carriers charged shippers and the practices in which carriers engaged.\(^\text{52}\)

In addition, and most critically, once a carrier has made such a filing, "[t]hat carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff [filed with the ICC]."\(^\text{53}\) For over a century this portion of the ICA has remained substantially unchanged.\(^\text{54}\) It has become one of the primary mechanisms by which the ICC and the courts enforce the policies of the ICA.\(^\text{55}\) Coupled with the rule against equitable de-

\(^{52}\) See, e.g., New York, N.H. & H. R.R. v. Interstate Commerce Comm'n, 200 U.S. 361, 391 (1906) (ICA's goals achieved "by requiring publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination"); Kansas City S. R.R. v. C.H. Albers Comm'n Co., 223 U.S. 573, 597 (1912) (ICA's goals achieved through the filing and publication of rates, the inflexibility of rates while in force, and the unalterability of rates except by prescribed mode). See also S. REP. No. 46, 49th Cong., 1st Sess. 200 (1886). The ICC and the filing requirements were created "with the . . . purpose of securing publicity . . . [so] that it can focus public attention on the individual abuses [of carriers]." Id.

\(^{53}\) 49 U.S.C.S. § 10761(a) (Law. Co-op. 1979). For the text of this statute, see supra note 12.

\(^{54}\) The original version stated:

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same.

Interstate Commerce Act, ch. 104 § 6, 24 Stat. 379, 381 (1887) (current version at 49 U.S.C.S. § 10761(a) (Law. Co-op. 1979)).


"A carrier cannot waive or modify legally applicable tariffs, . . . and individual hardship is not a defense to the application of such tariffs." Illinois Cent. Gulf R.R. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588, 592 (5th Cir. 1978). The purpose of the filed rate doctrine is "to preserve the integrity of filed rates." Bowser & Campbell v. Knox Glass, Inc., 390 F.2d 193, 196 (3d Cir. 1968). "[T]he provisions of the tariff, as published, are binding upon both the shipper and the carrier as a matter of law." Glickfeld v. Howard Van Lines, Inc., 213 F.2d 723, 726 (9th Cir. 1954). "'Until changed tariffs bind both carriers and shippers with force of law.'" Crancer
fenses, it has come to be known as the filed rate doctrine.\footnote{As commonly formulated, the filed rate doctrine “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.” Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981) (enforcing the Natural Gas Act’s filed rate doctrine). While the Supreme Court’s decisions prior to 1980 “established rather clear contours for the doctrine,” the Court used the term “filed rate doctrine” for the first time in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 599 (1981) (Stevens, J., dissenting). See generally Robinson, The Filed Rate in Public Utility Law: A Study in Mechanical Jurisprudence Law, 77 U. Pa. L. Rev. 213, 231-254 (1928) (filed rate doctrine’s origins, purpose, and early application). See also Linsenmeyer, supra note 42, at 370-77 (how to bring an undercharge suit based upon the filed rate doctrine).}

\section{2. \textit{The Rule Against Equitable Defenses}}

In order to execute the policies of the ICA, the United States Supreme Court adopted a strict construction of the rate filing requirements. Because equitable defenses would controvert the strict

\footnote{As commonly formulated, the filed rate doctrine “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.” Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981) (enforcing the Natural Gas Act’s filed rate doctrine). While the Supreme Court’s decisions prior to 1980 “established rather clear contours for the doctrine,” the Court used the term “filed rate doctrine” for the first time in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 599 (1981) (Stevens, J., dissenting). See generally Robinson, The Filed Rate in Public Utility Law: A Study in Mechanical Jurisprudence Law, 77 U. Pa. L. Rev. 213, 231-254 (1928) (filed rate doctrine’s origins, purpose, and early application). See also Linsenmeyer, supra note 42, at 370-77 (how to bring an undercharge suit based upon the filed rate doctrine).}
enforcement of these policies, their admission in suits brought to enforce the collection of the filed rate has generally been forbidden.\footnote{57} In its often-quoted 1915 formulation of the filed rate doctrine, the Court allows only one exception:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the filed rate. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.\footnote{58}

\footnotetext{57} Ibid. at 910.

Thus, a majority of courts generally dismiss shippers' counterclaims as well. See, e.g., Pennsylvania R.R. v. Marcelletti, 256 Mich. 411, 412, 240 N.W. 4, 5 (1932) (shipper's counterclaim in undercharge suit barred by policies of courts and ICA requiring strict application of filed rate). See also F. Burkhart Mfg. Co. v. Fort Worth & D.C. Ry., 149 F.2d 909 (8th Cir. 1945). The courts reason that "[t]he [carrier] . . . as one who was conclusively presumed and legally bound to know the [filed] rate, cannot be heard to say that it was deceived or damaged by false representations about the [filed] rate." Id. at 910.

In the typical counterclaim, the shipper seeks to argue that the common law principles of negligence and misrepresentation should operate to hold the carrier liable for any undercharges where the carrier agreed but failed to file a negotiated rate. See Bowser & Campbell v. Knox Glass, Inc., 390 F.2d 193 (3d Cir. 1968). In Knox Glass, a shipper unsuccessfully sought to circumvent the filed rate doctrine by "reasoning . . . that the [carrier]'s failure to file the rate agreed on with the shipper amounted to a breach of contract for which the damages are to be measured at precisely the amount of the undercharges." Id. at 197.

Such a counterclaim was recently allowed for the first time by a court which held that "permitting defendants to maintain a cause of action in negligence would not, under every set of facts defendants might possibly make out, lead to a result inconsistent with the results of the Motor Carrier Act." Coliseum Cartage Co. v. Continental Coffee Products, Inc., No. 88-347, slip op. at 9 (M.D.N.C. Mar. 23, 1989). See also Murphy, First Undercharge Counterclaim Allowed in Federal Court Suit, Traffic World, April 3, 1989, at 8.

The rule against equitable defenses is based upon the same over-riding policies as the rate filing requirements: the assurance of uniform rates and the prevention of discrimination and its destructive effects. The rule is commonly justified on the grounds that such defenses would operate to circumvent the filing requirements and thus, the anti-discrimination policies behind them.\(^59\)

The highlighted phrase is the exception to the doctrine's strict application. See Pumice Aggregate Sales Corp. v. Atchison, T. & S.F. Ry., 277 ICC 351, 355 (1950) (since the carrier's practice of charging for transportation at closed car rather than open-top car rates as specified by shipper was unreasonable, shipper authorized to waive the undercharges); Jasper Novelty Furniture Co. v. Southern Ry., 272 I.C.C. 513, 517 (1948) (undercharges waived where "unforeseen events wholly beyond the control of any of the parties" (a strike) would make the application of the filed rate unreasonable). See also Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F.2d 1219 (8th Cir. 1972). Allowing consignee's defenses to the filed rate doctrine "will not erode the purpose underlying [the doctrine] as long as the grounds for estoppel do not serve directly or indirectly as a cover for freight rate discrimination." \(\text{Id. at 1222.}\) Additional examples of the application of the unreasonableness exception may be found in Buckeye Cellulose Corp. v. Louisville & N. R.R., 1 I.C.C.2d 767, 772 (1985).

In 1903, the Elkins Act criminalized any deviation from the filed rate by subjecting both carriers and shippers to misdemeanor prosecution for charging or paying a rate other than that filed with the ICC. Act of February 19, 1903, ch. 708, § 1, 32 Stat. 847 (1903) (codified as amended at 49 U.S.C.S. §§ 11703, 11902-11903, 11915-11916 (Law. Co-op. 1979 & Supp. 1989)). The policy behind the Elkins Act is to ensure equality of rates by requiring "that the only rate charged to any shipper for the same service under the same conditions should be the [filed rate]. [T]he intention was to prohibit any and all means that might be resorted to obtain or receive concessions and rebates from the fixed rates." Armour Packing Co. v. United States, 209 U.S. 56, 72 (1908).

Any deviation from the filed rate is now a felony, currently the only felony provision in the entire ICA. 49 U.S.C.S. § 11903(a) (Law. Co-op. 1979 & Supp. 1989). See, e.g., United States v. Atchison, T., & S.F. R.R., 725 F.2d 469, 470 (9th Cir. 1980) (criminal liability imposed under the Elkins Act where carrier failed to strictly abide by the terms of the filed rates); United States v. Duncan Ceramics, Inc., 544 F. Supp. 1297, 1303 (E.D. Cal. 1982) (the issue of whether undercharges could be collected from the shipper is irrelevant and "does not absolve [the carrier] from criminal liability for charging rates based on services it could not legally provide."). See generally, Goodman, Agency Policymaking Beyond the Law: The New Exemptions From Criminal Prosecution at the ICC, 54 TRANS. PRAC. J. 377 (1987) (discussion of the ICA's criminal penalties past, present, and future).

\(^59\) "If the rates are subject to secret alteration by special agreement then the [ICA] will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart." Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908). "Otherwise the primary purpose of the [ICA]—to obtain equal treatment of all shippers and the enforcement of one rate [for] all—would be defeated by a multiplicity of oral agreements for the carriage of goods at rates different from those set forth in the published tariffs." H.B. FULLER, supra note 32, at 278-79.

Obviously it would be virtually impossible to prove that a carrier would not
Those who favor an interpretation of the ICA which would allow courts to consider equitable defenses—such as ignorance or misquotation of rates—reason that it is unfair or “inequitable” for the filed rate doctrine to force a shipper to pay a higher rate where a carrier misquoted a lower rate upon which the shipper relied. In the typical undercharge suit, the shipper argues that the “inequity” results when a carrier is allowed to hide behind the filed rate doctrine and collect the higher filed rate when the carrier did business at lower negotiated rates and agreed to file them but failed to do so.60

The courts, however, have not been particularly concerned with balancing the equities between individual carriers and shippers.61 Instead, courts have based the strict application of the filed rate doctrine on two fundamental concepts. First, because shippers are charged with constructive knowledge of the filed rate, they are conclusively presumed to know that rate.62 Second, when the ICC has approved the reasonableness of a filed rate, that rate is the legal rate and has the force of statute.63

offer similar rates to other shippers similarly situated. Hence, the [common law] offered no protection to the shipper against discrimination. Cast in this background the rigidity of the present rule that the carrier must collect the full applicable tariff rate becomes excusable.

Kenworthy, supra note 57, at 292.

60. In the current undercharge controversy, however, the ICC reasons that the use of the term “equitable defense” to describe such arguments has become a misnomer because shippers’ defenses to claims brought to collect the filed rate are based on a statute, on the reasonableness requirement of 49 U.S.C. § 10701(a), rather than on principles of equity. Negotiated Rates II, supra note 14, at 627–28. See infra notes 206-08 and accompanying text for a discussion of the implications of this interpretation. For a thorough discussion of the traditional rule against equitable defenses to undercharge claims, see Comment, Right of Interstate Carrier to Collect Undercharges, 45 Yale L.J. 142 (1935).

61. The duty embodied in the filed rate doctrine “is not to be measured . . . by the apparent equities between the carrier [and the shipper. Rather, it] is a duty owed likewise to the public in order to prevent discrimination and the damage which discrimination can inflict.” Southern Ry. v. Mayer Meyers Paper Co., 191 Tenn. 164, 171, 232 S.W.2d 20, 23 (1950).


63. “A tariff which is filed, approved and published in accordance with the Interstate Commerce Act has the force and effect of a statute.” United States v. United States Steel Corp., 645 F.2d 1285, 1290 n.7 (8th Cir. 1981) (citing Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908)).

However, an inquiry into the applicable rate does not end there. Most courts use the Maxwell exception to the filed rate doctrine found to make the important distinction between the legal rates, those that have the “force of statute,” and the lawful rates, those that are reasonable per 49 U.S.C.S. § 10701(a). The “rate which is filed with the Commission is not ipso facto a lawful rate. It is the applicable rate which the carrier must . . . charge to shippers in the regular course of business. . . . [M]erely because the carrier is bound to charge the filed rate, it does not follow that he is necessarily entitled to keep it.” Midwest Motor Freight v. United States, 433 F.2d 212, 238 (8th Cir. 1970) (emphasis in original), cert. denied, 402 U.S. 999 (1971).
According to this reasoning, it is irrelevant whether the carrier acted dishonestly or in bad faith. It is also irrelevant whether the shipper was ignorant of the filed rate, or had relied to its detriment upon the carrier's representations regarding that rate. As a result, courts have routinely nullified contracts and other agreements

"[T]he legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under [the ICA], the shipper [is] bound to pay the legal rate; but, if he [can] show that it was unreasonable, he might recover reparation." Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 384 (1932). "Thus a legal rate ... may at the same time be unlawful because it is preferential, discriminatory, unjust or unreasonable." Meiklejohn, supra note 9, at 164.

64. "Neither the intentional nor accidental misstatement of the applicable rate will bind the carrier or shipper" to any rate other than the filed rate. Kansas City S. Ry., 227 U.S. at 653. "Should the carrier's agent intentionally or unintentionally grant the shipper a lower freight rate than the tariff requires, the carrier may collect this undercharge or rebate from the shipper." St. Louis-S.F. Ry. v. Pollard, 202 Ark. 917, 918, 154 S.W.2d 9, 10 (1941).


66. "Ordinary principles of estoppel do not apply to a carrier's right to collect the approved published tariff rate even in cases where the carrier has knowingly quoted an illegally low rate and the shipper ... has innocently relied on such quotation, without inquiry or investigation, to its later detriment." Hughes Transp., Inc. v. United States, 121 F. Supp. 212, 235 (Cl. Ct. 1954). "To permit an estoppel ... would permit favoritism and discrimination. ... The lawful rate must be collected." Kansas Elec. Power Co. v. Thomas, 123 Kan. 321, 325, 255 P. 33, 35 (1927). But see United States v. Western Pac. R.R., 352 U.S. 59, 74-76 (1956) (estoppel available to federal government as shipper-defendant); Griffin Grocery Co. v. Pennsylvania R.R., 93 Ga. App. 546, 550, 92 S.E.2d 254, 256 (1956) (carrier estopped from charging filed rate in non-undercharge case where anti-discrimination policy would not be controverted).

67. [Most] transportation contracts ... are fundamentally different from the ordinary contract in that the respective duties of the contracting parties are carefully defined by statute, and their rights—indeed, their very freedom to contract in certain respects—are strictly limited by those statutes regardless of the parties' knowledge of those restrictions or of their manifest desire to contract otherwise.

Hughes Transp., Inc., 121 F. Supp. at 228 (footnote omitted).

See also New York Cent. & H.R. R.R. v. York & Whitney Co., 256 U.S. 406, 408 (1921) (parties powerless to agree to a rate lower than the filed rate). "The broad purpose of the [Interstate] Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper ...." Chicago & Alton R.R. v. Kirby, 225 U.S. 155, 166 (1912). See also Texas & Pac. R.R. v. Mugg, 202 U.S. 242 (1906) (parties bound by filed rate rather than negotiated rate appearing in bill of lading).


[U]nder the [FERC's] filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls. ... [T]o permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme: granting the
which specified a rate different from the filed rate even when the carrier's failure to file the negotiated rate was due to its mistake, negligence, or fraud.\(^6^8\) or fraud.\(^6^9\)

### C. The Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction was developed by the United States Supreme Court and allows the ICC to interpret and harmonize the competing demands of the ICA, including the sometimes conflicting exigencies of the reasonableness requirements and the filed rate doctrine.\(^7^0\) In general, the doctrine of primary jurisdiction requires a court to refer the interpretation of certain issues to the administrative agency created by Congress to regulate and resolve

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Commission the opportunity in every case to judge the reasonableness of the rate.

But see Exemption of Motor Contract Carriers from Tariff Filing Requirements (ex parte No. MC-165), 133 M.C.C. 150 (1983) [hereinafter Contract Carrier Exemption], in which the ICC exempted contract carriers from the tariff filing requirements the ICA, and thus from the operation of the filed rate doctrine. For a discussion of the exemption's broad implications in the current undercharges controversy, see infra note 106.

\(^6^8\) See, e.g., New York Cent. & H. R. R. R., 256 U.S. at 407-08 (irrelevant that shipper would not have shipped with carrier but for the rates carrier mistakenly quoted and charged); Pittsburgh, C., C. & St. L. Ry. v. Fink, 250 U.S. 577 (1919) (shipper and carrier mistake as to applicable rate absolved neither from their respective duties to remit and collect the filed rate); Illinois Cent. R.R. v. Henderson Elevator Co., 226 U.S. 441 (1913) (carrier has a right and duty to collect the higher rate notwithstanding its mistake); Chicago, M. & St. P. R.R. v. Greenberg, 139 Minn. 441, 166 N.W. 1073 (1918) (shipper liable for the higher, filed rate where shipper relied on the lower rate mistakenly published in carrier's bill of lading).

\(^6^9\) See, e.g., F. Burkhart Mfg. Co. v. Fort Worth & D. C. Ry., 149 F.2d 909 (8th Cir. 1945) (purchaser bound to filed rate even where carrier and shipper conspired to erroneously classify shipment at lower rate); Graves Truck Line v. Hy Plains Dressed Beef, Inc., 204 Kan. 275, 462 P.2d 130 (1969) (shipper must pay filed rate even where carrier's agents misrepresented that rate).

\(^7^0\) In the 1887 Act, Congress conferred jurisdiction over disputes involving ICC-regulated carriers upon both the courts and the ICC. Interstate Commerce Act, ch. 104, § 9, 24 Stat. 379, 382 (1887) (current version at 49 U.S.C.S. § 10705(c)(1) (Law. Co-op. 1979 & Supp. 1989)). However, the Supreme Court interpreted the ICA as requiring an initial determination by the ICC when the suit involves an interpretation of the reasonableness of a carrier's rates or practices. "[A] shipper seeking reparations predicated upon the unreasonableness of the established rate must, under the [ICA], primarily invoke redress through the [ICC], which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule . . . ." Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). This has come to be known as the doctrine of primary jurisdiction. "The doctrine originated with Mr. Justice (later Chief Justice) White in Texas & Pacific R. Co. v. Abilene Cotton Oil Co." United States v. Radio Corp. of America, 358 U.S. 334, 346 (1959) (citation omitted). Thus it was "by judicial legislation, [that the Court] gave practical effect to the intent of Congress to make the . . . [ICC] the agency for the determination of the reasonableness of rates." Miller, The Necessity for Preliminary Resort to the Interstate Commerce Commission, 1 Geo.Wash. L. Rev. 49, 58–59 (1932) (footnote omitted).
those issues. Issues properly referred include those not within a court's conventional knowledge and those which require the unique competence of an administrative agency.

Primary jurisdiction enables an administrative agency such as the ICC to ensure the uniform treatment of regulated entities by minimizing conflicts between that agency and the courts. With primary jurisdiction, that administrative agency can better utilize its special knowledge, experience, and expertise to execute the administrative policy which Congress has entrusted to it.

Issues of fact which require the ICC’s discretion and expertise in technical matters must be referred to the ICC. Since reasonableness determinations characteristically require a knowledge of transportation regulation and involve extensive and conflicting evidence, and since only the ICC possesses such knowledge and capabilities, a court must submit such questions to the ICC’s primary jurisdiction. Thus “whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission.”

71. “Primary Jurisdiction,” ... applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.


72. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.


For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question.


See also in re Long Distance Telecommunication Litig., 612 F. Supp. 892 (D.C. Mich. 1985). The ICC has primary jurisdiction where “there exists a danger of inconsistent rulings disruptive of a statutory scheme.” Id. at 896.

74. See Great N. Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922). “[I]n such [cases] the judicial process is suspended pending referral of such issues to the administrative body for its views.” Western Pac. Ry., 352 U.S. at 63-64.

75. Great N. Ry., 259 U.S. at 291:
A court has traditionally had the prerogative to adjudicate a case without initial reference to the ICC only if the ICC's expertise and discretion would not be helpful. Such disputes often involve variations from a carrier's filed rate because the ICC's expertise and discretion is not commonly required where a rate has been filed with and approved by the ICC. In the past, undercharge suits typically involved nothing more than the construction or application of a rate or tariff. Thus most courts have customarily held that preliminary reference to the ICC in such cases is unnecessary.

Once a court has deferred to the ICC's primary jurisdiction, the ICC may conduct an investigation, hold hearings, and make findings of fact. The ICC will ultimately issue a decision to the referring court. However, an opinion rendered by the ICC is merely advisory, and the referring court has the discretion to accept or reject all or part of it. Nevertheless, ICC decisions will not "be lightly dis-

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76. See Miller, supra note 70, at 62-64. A rate or provision contained in a filed tariff and approved by the ICC is "to be treated as though it . . . [is] a statute, binding as such upon . . . [carrier] and shipper alike." Pennsylvania R.R. v. International Coal Mining Co., 290 U.S. 184, 197 (1912). However, the filing of a particular rate does not preclude relief from that rate if it is later found by the ICC to be unreasonable and hence unlawful.

77. But see Meiklejohn, supra note 9, at 167: "The line between the interpretation problem which may be resolved by the court and the one which must be referred to the Commission is incapable of precise delineation." The general rule against the referral of undercharges is "limited to those involving no question of fact or of administrative discretion." Miller, supra note 70, at 74 (footnote omitted).


79. 28 U.S.C. 1336(b) (1982);

When a district court or the United States Claims Court refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.
turbed"\textsuperscript{80} and are generally given "great deference"\textsuperscript{81} unless contrary to law.\textsuperscript{82}

\textbf{D. Regulation and the Motor Carrier Act of 1935}

Prior to 1935,\textsuperscript{83} there was virtually no federal regulation\textsuperscript{84} of motor vehicle transportation, and only scattered state regulation.\textsuperscript{85} As amended by the federal Motor Carrier Act of 1935, Congress extended the regulations of the ICA to include transportation by common motor carriers involved in interstate commerce.\textsuperscript{86} Congress intended to restrict competition between motor carriers and the railroads, to limit competition among motor carriers, and to ensure adequate and safe service at reasonable rates.\textsuperscript{87}

\textsuperscript{80.} Pennsylvania R.R. v. United States, 40 F.2d 921, 923 (W.D. Pa. 1930).
\textsuperscript{81.} Franzen, supra note 45, at 615.
\textsuperscript{82.} The authority to enjoin or set aside orders of the ICC is "confined to determining whether there ha[ve] been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred." Kansas City S. Ry. v. United States, 231 U.S. 423, 440 (1913). See generally Tollefson, Judicial Review of the Decisions of the Interstate Commerce Commission, 5 GEO. WASH. L. REV. 503 (1937); Tollefson, supra note 35.
\textsuperscript{83.} The first trucks appeared on the American market in about 1900. Four hundred and ten trucks were registered in 1904. By 1934, about 3,500,00 trucks were registered. Although most were in private use, common carriers operated 25,000 trucks in 1926, "and the number grew rapidly thereafter." Dively, Applications of Regulatory Theory to the Trucking Industry, 6 RES. L. & ECON. 211, 212-18 (1984).
\textsuperscript{84.} In 1906, Congress expanded the ICA's regulations to include the activities of express companies engaged in interstate transit. These regulations extended to motor vehicles owned by these companies. Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584 (1906).
\textsuperscript{87.} Id. § 202, 49 Stat. at 543 (codified as amended at 49 U.S.C.S. § 10101 (Law. Co-op. 1979 & Supp. 1989)). Commentators generally agree that the primary intent of a Congress grappling with the negative effects of the Depression upon the railroads was to limit competition between motor carriers and the railroads. See, e.g., Franzen, supra note 45, at 600-01; Note, Federal Motor Carrier Act, 36 COLUM. L. REV. 945, 947 & n.15 (1936); Jacobs, Regulated Motor Carriers and the Antitrust Laws, 58 CORNELL L. REV. 90, 91 (1972):

[In the 1930s,] the ICC faced the phenomenon of a new, fast, flexible alternative for the movement of [short-haul and other goods] by truck. It was clearly in the interest of the Commission and its rail protectorate to secure the regulation of motor carriers as long as railroads had to operate with politically dictated rates that did not reflect cost-of-service pricing.
Under the 1935 Act, the interstate trucking industry became one of the most heavily regulated sectors of the economy. Entry was tightly controlled and the industry became highly concentrated.\(^{88}\) Carriers were required to file proposed rate changes at least thirty days before the new rates were to become effective.\(^{89}\) Those rates were rigorously administered and enforced by the ICC.

Since private rate bureaus allowed truckers to collectively fix rates without fear of antitrust liability,\(^{90}\) few carriers exercised their prerogative to set and file new rates. They instead relied upon the rate bureaus to print, distribute, and file the tariffs established by the group. Thus, prior to 1980, ICC-regulated motor carriers had no use for free market theories or practices.\(^{91}\) Consequently, they had little if any experience establishing and implementing new rates and dealing with the rigors of competition in a free market.

\section*{E. Partial Deregulation and the Motor Carrier Act of 1980}

By the late 1970s, a combination of forces culminated in the partial

\(^{88}\) Upon passage of the Act in 1935, "only 18,000 out of 90,000 motor carrier 'grandfather' applications were granted. Entry control was further tightened, until by 1977 the number had been reduced to but 15,000. . . . In 1972 the top eight firms had seventeen percent of the trucking business, and a quarter of all income." Hardaway, \textit{Transportation Deregulation (1976–1984): Turning the Tide}, 14 \textit{Transp. L. J.} 101, 127 (1985).


\(^{91}\) One commentator noted:

Rates are alleged to be established without apparent regard to the cost of service, the basis for measuring rates of return and carrier revenue requirements is claimed to be meaningless, the freight rate structures are said to be distorted by the uneven effects of general increases in rates, and the tariff publications are regarded as unduly complicated. Hardin, \textit{Corrective Actions by the Commission in the Regulation of Rates: How Fast and How Far?}, 1975 \textbf{Tariffs, Rates, and Practices—Part II} 323, 324 (papers and proceedings of the 1971 Transportation Law Institute). \textit{See also Steinfeld, Regulation Versus Free Competition—The Current Battle Over Deregulation of Entry into the Motor Carrier Industry, 45 I.C.C. Prac. J. 590, 591 (1977–78) (no free market existed for ICC-regulated carriers).}
deregulation\textsuperscript{92} of the motor carrier industry.\textsuperscript{93} Prominent among these was a broad political consensus in Washington favoring deregulation in general,\textsuperscript{94} a widespread dissatisfaction with the anticompetitive ratemaking and entry restrictions of ICC-regulated motor carriers,\textsuperscript{95} and a need to control inflation\textsuperscript{96} and fuel consumption.\textsuperscript{97}

\textsuperscript{92.} Since the Act was the result of a compromise between supporters and opponents of regulatory reform, the use of the word deregulation to describe it is a misnomer. "What emerged from Congress was not a deregulation bill, but a law which provided new standards, not termination, for the ICC." Thorns, \textit{Rollin' On... To a Free Market: Motor Carrier Regulation 1935–1980}, 13 TRANSP. L. J. 43, 75 (1983). "[T]he Act should be termed 'trucking reregulation.'" Kretsinger, \textit{The Motor Carrier Act of 1980: Report and Analysis}, 50 UMKC L. REV. 21 (1981).


\textsuperscript{93.} The Motor Carrier Act of 1980, \textit{supra} note 1.

\textsuperscript{94.} The Carter Administration presided over airline deregulation and the sunset of the Civil Aeronautics Board in the late 1970s. Reagan was elected on a platform calling for a continued retreat from regulation. See Thoms, \textit{supra} note 92, at 69, 71–73.

\textsuperscript{95.} Over the course of the last decade, transportation officials, economists, and political leaders of every ideological persuasion have called for drastic curtailment in federal regulation of the trucking industry. The reasons are simple. It imposes enormous economic costs without demonstrable social benefits, and it stifles competition. Regulation keeps people out of the industry who want to provide needed truck services; it prevents firms in the industry from competing with each other on the routes they serve and on the prices they charge; and it promotes concentration by forcing large companies to buy small or marginal firms in order to acquire routes they cannot obtain from the ICC.

\textit{Economic Regulation of the Trucking Industry: Hearing Before the Committee on Commerce, Science, and Transportation of the U.S. Senate, 96th Cong., 1st Sess. 8} (1979) [hereinafter \textit{1979 Senate Hearing}].

Liberalizing regulatory reform in some form had the overwhelming support of most smaller carriers, shippers, public interest groups, and the Justice Department, among others. See Dively, \textit{supra} note 83, at 220. Perhaps the strongest supporter of regulatory reform was the ICC itself. Throughout the 1970s, the Commission took an increasingly liberal view towards certain regulatory functions and began the "de facto deregulation of the trucking industry." Kretsinger, \textit{supra} note 92, at 36 (The most prominent among these was the ICC's less stringent enforcement of entry requirements.).

"By 1979 the ICC was granting ninety-eight percent of the applications filed for motor carrier operating authority. The Commission supplemented its efforts to open the floodgates of entry and to deregulate ratemaking with numerous liberal decisions and rulemakings." Dempsey, \textit{The Interstate Commerce Commission—Disintegration of an American Legal Institution}, 34 AM. U.L. REV. 1, 4 (1984). Thus, "[t]he Act is not a new departure, but a codification of much of what the ICC had done in the past decade." Thoms, \textit{supra} note 92, at 73–75.

Opponents included the American Trucking Association and other trade groups whose members stood to lose from regulatory reform. See Johnson, \textit{Ready Or Not—}
Congress correctly believed that greater rate freedom, fewer operating restrictions, and relaxed entry requirements would lead to


96. “There are very few actions that can be taken in the Congress ... which can deal with the problem of inflation as directly as eliminating the antitrust exemption for price-fixing and making regulatory changes that would encourage competition in the pricing practices of freight motor carriers.” 1979 Senate Hearing, supra note 95, at 13 (Senator Kennedy).

97. Motor carrier operating certificate restrictions often resulted in wasted fuel because the limitations often left carriers with no choice but to travel empty on backhauls (return trips).

98. 49 U.S.C.S. § 10708(d) (Law. Co-op. Supp. 1989) creates a ten percent zone of reasonableness within which motor carriers may charge higher or lower rates without the threat of suspension or revocation of those rates by the ICC.

99. 49 U.S.C.S. § 10922(i) (Law. Co-op. Supp. 1989) removed operating restrictions which had previously limited the activities of ICC-regulated carriers. In addition to its role as a common carrier, for example, a motor common carrier after 1980 may also function as a freight forwarder and a contract carrier, and receive round-trip authority where only one-way authority had existed in the past.

A freight forwarder is “[o]ne who in the ordinary course of business assembles and consolidates small shipments into a single lot and assumes responsibility for transportation of such property from point of receipt to point of destination.” BLACK'S LAW DICTIONARY 599 (5th ed. 1979). See also 49 U.S.C.S. § 10102(9) (Law. Co-op. Supp. 1989).

A motor contract carrier is “a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons ... designed to meet the distinct needs of each such person.” Id. § 10102(15)(B)(ii).

In 1983, the ICC relieved motor contract carriers from the tariff filing requirements. See Contract Carrier Exemption, supra note 67. The ICC’s authority to do so was derived in part from 49 U.S.C.S. § 10761(b) (1979), which states that “[t]he Commission may grant relief from [the tariff rate requirements] to contract carriers when relief is consistent with the public interest and the transportation policy of ... [49 U.S.C.S. § 10101].”

This exemption is important in the current undercharge controversy because many of these disputes could have been avoided if the carrier had received contract authority and included its negotiations with shippers in a contractual agreement. That is, the carrier would have been providing services as a contract carrier and thus would not have been beholden to the filing or compliance requirements that got the carriers and shippers into this mess to begin with. See Dempsey, supra note 95. “The decision to exempt contract carriers from their obligation to file tariffs, therefore, has implications far beyond the ... limited contract carrier industry. The [common] motor carrier industry may also use the decision to avoid its statutory obligation to file tariffs with the Commission.” Id. at 39.

Most shippers failed to take advantage of contract carriage because of several misconceptions about its ramifications. See Hoffman, The Tariff Trap, DISTRIBUTION, Sept. 1989, at 36, 44. This is unfortunate, because “[i]n the long run, bilateral contractual arrangements would avoid the litigious, expensive and frustrating by-products of the filed rate doctrine. In a deregulated transportation world, motor carrier tariffs have become an anachronistic trap which, fortunately, can be avoided with ease.” Id. See also Calderwood, Buyer Beware Governs Contract Carriage, TRANSP. & DISTRIBUTION, Dec. 1989, at 53.

more competition which would in turn lead to enhanced cost efficiency, lower rates for shippers, and lower prices for consumers.101

Along with the relaxed entry requirements, the most significant improvement from the standpoint of the free market was the loss of the rate bureaus' cartel-like ratemaking authority.102 In place of collectively-established rates, the Act encouraged motor carriers to independently determine their own rates according to market conditions.103 Nevertheless, the Act came far short of total deregulation. Much of the entry framework survived, and a myriad of other regulations remained in force. Most significantly, Congress left the tariff filing requirements virtually unchanged. In these respects, the ICC-regulated motor carrier industry remained very much regulated.

F. From Negotiated Rates to Undercharge Suits

In response to the 1980 Act's call for "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping . . . public,"104 motor carriers and shippers developed an array of independent ratemaking techniques and initia-

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101. One Congressman concluded, "while the marketplace is not perfect by any means, it is a better regulator of resources and services than a small group of bureaucrats in Washington, D.C." S. REP. No. 96-641, 96th Cong., 2d Sess. 3 (1980)(Senator Cannon). As it turned out, "[i]n a few short years, deregulation has accomplished virtually everything the economists had predicted . . . ." Hardaway, supra note 88, at 150-51.


103. 49 U.S.C.S. § 10706 (Law. Co-op. Supp. 1989). "This has resulted in a dramatic increase in the number of independent action filings, which now account for two out of every three rates filed." Popper, supra note 90, at 291.

NEGOTIATED RATES

The result was discounted rates which ranged from a few percentage points to more than fifty percent below rates contained in established tariffs. For shippers seeking "to reap the benefits of trucking deregulation," negotiating a lower rate than the shipper had paid for the same transportation in the past became the norm.

However, the negotiated rates were usually lower than the rates that the carrier had on file with the ICC for that transportation. Carriers negotiating a lower-than-filed rates remain legally obligated to replace the higher rate by filing the negotiated rate with the ICC. Yet many carriers intentionally, negligently, or otherwise failed to do so. Although shippers remained legally obligated to know the filed rates, few had the time, energy, patience, or ability to verify those rates.

See, e.g., R. Bohman, Jr., Foreword to Guide to Cutting Your Freight Transportation Costs Under Trucking Deregulation (2d ed. 1982). See also Betz, Taking the Crooked Route, DISTRIBUTION, April 1986, at 69 (summary of some of the shadier rate setting techniques practiced by both shippers and carriers).

See also R. Bohman, Jr., supra note 105 (discounts "ranging from 3 to 57 percent"). See also N. Glaskowsky, Effects of Deregulation on Motor Carriers 65 (1986) (larger shippers given rates "lower than anyone reasonably expected prior to deregulation").

The ICC has been unable to determine why the unfiled negotiated rates problem developed, whether from carrier inadvertence or intent. Negotiated Rates I, supra note 15, at 105. One commentator has concluded that "only a few phantom-rate situations result from deliberate fraud. Most flow from condemnable, but honest, carrier negligence." Chapman, Phantom Rates—Another Freight Bill Goblin, DISTRIBUTION, May 1985, at 111, 112.

Prior to 1980, motor carriers almost universally adhered to the rates collectively established and filed by the rate bureaus. Independent deviation from these schedules, while allowed, was uncommon. In the competitive post-1980 environment, however, the rate bureau tariffs often merely served as points of departure for negotiated discounts. Discount negotiations typically occurred through informal telephone conversations, with the shipper believing that the carrier would properly file the discount rate. In the fast-moving deregulated market, the paperwork required to file the rates often backed up, and the new rates were frequently forgotten and remained unfiled. Id.

See Quinn, A Business . . . Not a Bureaucracy, TRAFFIC MGMT., June 1985, at 9 (editorial lamenting the negotiated rates quagmire). There are several reasons for the shippers’ general inability to keep up with the filed rates. The sharp increase in independently-filed rates, coupled with the general decline of the function of rate bureaus, which before regulatory reform had generally ensured that rates were filed with the ICC, led to a chaotic rate environment. "The inevitable result of free market needs still tied to a filed tariff system [was] an avalanche of paper. The volume and
To make matters worse, conditions at the ICC were such that the ICC was unable to respond to shipper rate inquiries in a timely manner, if at all.\textsuperscript{111} In addition, the ICC was unlikely to discover unfiled negotiated rates on its own. Between 1980 and 1987, the number of ICC employees and field offices was more than halved, while the number of independently-filed carrier pricing initiatives more than tripled.\textsuperscript{112} The ICC was unable or unwilling to keep up,\textsuperscript{113} the tariff filing system collapsed, and carriers hauled freight throughout the country at unfiled negotiated rates.

\textit{variety of tariff matter increase[d] exponentially as the number of carriers and services expand[ed] to meet competitive demands.}” Hoffman, \textit{supra} note 99, at 38. Moreover, the number of tariffs on file with the ICC has been estimated at approximately three trillion. Bohman, \textit{The Tariff Boom, \textit{Traffic Mgmt.}}, May 1988, at 27, 28. Where many shippers had maintained tariff libraries in the past, “[t]hey just don’t have large enough staffs to maintain tariff libraries anymore.” Trunick, \textit{Undercharges Won’t Go Away, \textit{Transp. \& Distribution}}, July 1989, at 7. Finally, if the sheer number of published tariffs were not daunting enough, a tariff itself can be difficult if not impossible to interpret. “For example, a single tariff of one carrier consists of more than 200 separate volumes, each having 400 to 500 pages, all without any index or other finding aids.” Hoffman, \textit{supra} note 99, at 38. In this environment, it has become unrealistic to expect shippers, especially small shippers, to verify filed rates. But see, \textit{Overwhelmed With New Rates? Here’s One Company’s Solution, \textit{Handling \& Shipping Mgmt.}}, March 1983, at 52 (large shipper uses computers and progressive management to stay abreast of the new competitive rate-making situation).

Nevertheless, Congress and the ICC have long been aware of the problems shippers encounter when attempting to ascertain the filed rate. The present controversy is not the first time shippers have been faced with a situation where their inability to ascertain the rates applicable to their shipments compelled them to rely on the representations of carriers, and left them without a defense when undercharges resulted. In order to force carriers to be more forthright when quoting rates and representing the rates as being filed, Congress in 1910 adopted an amendment that provided for civil damages of up to $250 payable to the government where the carrier “through its proper agent refuses or omits to give a statement of the proper rate for a described shipment requested in writing, or misstates the rate, as a result of which the shipper suffers a loss.” H.B. Fuller, \textit{supra} note 32, at 280–81 (referring to Act of June 18, 1910, ch. 309, § 9, 36 Stat. 539, 548). However, no redress was provided the shipper, who remained “conclusively presumed” to know and expected to abide by the filed rates. \textit{Id.} at 281–82.

\textsuperscript{111} See Quinn, \textit{supra} note 110.

\textsuperscript{112} The number of ICC employees decreased from 1,952 in 1980 to 735 in 1988; the number of ICC field offices decreased from 55 in 1985 to 22 in 1988; the number of independently-filed rates increased from 394,000 in 1979 to 1.2 million in fiscal year 1987. \textit{Economic Regulation of the Motor Carrier Industry: Hearing Before the Subcomm. on Surface Transportation of the Comm. on Public Works and Transportation, House of Representatives, 100th Cong. 2d Sess. 40, 56 (1988) [hereinafter 1988 House Hearing].}

\textsuperscript{113} Then-ICC Chairman Gradison testified that the ICC could not “police the millions of transactions that take place in a given year, nor should [it]. It’s impossible to fathom going back and instigating charges against parties for perfectly reasonable, mutually-agreed upon transactions which took place as long as five years ago.” \textit{Id.} at 38. Indeed, “[t]he ICC has become a quiet repository of unread tariffs.” N. Gaskowsky, \textit{supra} note 106, at 65.
Meanwhile, relaxed entry requirements meant intensified competition as the number of ICC-regulated motor carriers more than doubled between the years 1979 and 1988. Consequently, price cutting and across-the-board discounting became even more widespread among motor carriers struggling for business in the recessionary market of the early 1980s. Declining profits resulted in bankruptcy for many and hastened the industry's consolidation. Between 1978 and 1985, the failure rate in the ICC-regulated trucking industry more than quintupled.

Enter the bankruptcy trustees, the credit companies, and the freight-bill audit houses. Once a defunct carrier's billing records were made available to one of these agents during bankruptcy proceedings, shippers who negotiated and paid a rate lower than the filed rate began to receive balance-due notices for the undercharges. Countless carriers or carrier agents brought suit against shippers who refused to settle. By arguing that the filed rate doctrine strictly precludes payment of any rate other than the rate filed with the ICC, the shipper's shield was turned into the carrier's sword. Undercharge suits had become the “poor stepchildren” of regulatory reform.

G. The Development of the Negotiated Rates Doctrine

1. Buckeye Cellulose

In 1985, the ICC made the first significant chink in the filed rate


115. See, e.g., The No. 1 Trucker Joins a Price-Cutting Convoy, BUSINESS WEEK, Feb. 8, 1982, at 32. For an excellent discussion on the rise of rate discounting and its effects, see Breen, supra note 107.

116. The number increased from about 27 per 10,000 companies in 1978 to about 190 per 10,000 companies in 1985. AMERICAN TRUCKING TRENDS, supra note 114, at 30 (failure data in graph form). Approximately 20 of the largest 100 carriers failed, including the fifth and sixth largest ranked firms. N. GLASKOWSKY, supra note 106, at 8. During the same period, the failure rates for all businesses rose at a lower rate, from about 25 per 10,000 to about 110 per 10,000. AMERICAN TRUCKING TRENDS, supra note 114, at 30. See also Chow & Gritta, Motor Carrier Bankruptcy in an Uncertain Environment, 14 TRANSP. L. J. 39 (1985).

117. See, e.g., Hoffman, Are Your Freight Bills Coming Back to Haunt You?, DISTRIBUTION, March 1985, at 45, 50. “[T]here's a logical explanation why these freight-bill nightmares tend only to surface after a carrier's demise.” Id. Carriers aren't likely to point out mistakes or to send balance-due bills which could result in undercharges for fear of alienating shippers. “But collection agencies [appointed by the bankruptcy court] aren't the least bit shy.” Id.

118. Shippers to Fight Carrier Undercharges, TRAFFIC MGMT., April 1985, at 16.

doctrine’s armor with *Buckeye Cellulose Corp. v. Louisville & Nashville R.R.* 120 On referral from federal district court, the ICC in *Buckeye* modified its interpretation of the filed rate doctrine to permit equitable defenses where the shipper had relied on a rail carrier’s misquotation of a tariff “whose meaning was not plain to the ordinary user.” 121 The ICC held that in light of the changes brought about by partial deregulation 122 it would be an unreasonable practice for the carrier to collect the undercharges, and authorized their waiver. 123 In so doing, the ICC broke new ground in several respects.

The ICC declared that the issue of whether the collection of undercharges would be an unreasonable practice was within its primary jurisdiction. 124 Relying on a more liberal interpretation of sections 10701(a) and 10705, 125 the ICC concluded that the language of the statute and the meaning of the word “practice” was broad enough to allow it to prevent “the practice of unreasonably collecting un-

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121. *Id.* at 773. At issue was the difference between the negotiated and paid multi-car rate and the higher, single-car, filed rate. *Id.* at 768. The ICC held that “the publication of a tariff whose meaning is not plain to the ordinary user [but not necessarily technically ambiguous], coupled with a misquotation . . . to its detriment, constitute circumstances under which we may find that the collection of the undercharges would be an unreasonable practice.” *Id.* at 773. The court limited its holding by emphasizing that it “applies only where the difficulty of interpreting a tariff is such that the shipper reasonably relies on the carrier’s interpretation and does so to its detriment.” *Id.*

On the issue of equitable defenses, the ICC cited several cases in which courts and the ICC had “absolv[ed] shippers from liability to pay the tariff rate in particularly egregious circumstances.” *Id.* at 772. The ICC reasoned that “it is well established that we have the right to address both equity and policy considerations in deciding whether a particular remedy is appropriate.” *Id.*

122. Congress partially deregulated the interstate rail carrier industry with the Staggers Railroad Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in various sections of 11, 45, and 49 U.S.C.S. (Law. Co-op. 1989)). Its purpose was “to provide for the restoration and improvement of the physical facilities and financial stability of the rail system of the United States.” *Id.* at 1897.

Regarding the interplay between regulatory reform and the ICA’s antidiscrimination provisions, the ICC reasoned:

> Today, the inability of a shipper to rely on a carrier’s interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers. A shipper has a duty to ascertain the correct rate for itself, but where there is a substantial question as to the correct interpretation of a tariff, even if the tariff is not technically ambiguous, it is reasonable for the shipper to rely on the carrier’s interpretation... 

The present case perfectly illustrates circumstances under which the collection of undercharges should be deemed an unreasonable practice.

*Buckeye Cellulose Corp.*, *I.C.C.2d* at 773.
123. *Buckeye Cellulose Corp.*, *I.C.C.2d* at 774.
124. See *id.* at 771.
2. Negotiated Rates

Although the ICC's decision in *Buckeye* arose in the context of undercharges by a rail carrier, the ICC used the term "carrier" broadly, laying the foundation for a decision devoted exclusively to motor carriers a year and a half later in *Negotiated Rates I*. In September of 1985, six months after its decision in *Buckeye*, the ICC began an investigation to determine how it should respond to the growing number of defunct motor carrier bankruptcy trustees and others who were abusing the new rate flexibility by sending balance-due notices to, and often bringing suit against, shippers that paid for carriage under discounted but unfiled rates. The ICC began its investigation in response to a petition filed by the National Industrial Transportation League (NITL), a shipper's group. The NITL proposed that the ICC adopt a rule, the substance of which has since emerged as the negotiated rates doctrine.

The ICC refused to adopt the NITL proposal. The ICC instead declared that it would accept cases only on referral from a court and that its determinations in motor carrier negotiated rates undercharge suits would be merely advisory. The ICC adopted a statement de-

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126. *Buckeye Cellulose Corp.*, 1 I.C.C.2d at 771 & n.12.
129. *Id.*
130. *Id.* at 99–100.
This first version of the negotiated rates doctrine would have created a rebuttable presumption in favor of the application of the negotiated rate. *Id.* at 102 n.8. The NITL's proposed rule stated:

Where a motor common carrier and shipper have negotiated and agreed upon a specific rate for particular traffic, and the carrier has failed to file the rate in the tariff form with the [ICC], the negotiated rate is the maximum reasonable rate which may be charged by the carrier for all shipments which have been tendered by the shipper to the carrier to be transported under the negotiated rate if the shipper acted with a good faith belief that the negotiated rate was the legally applicable rate.

*Id.* at 99 n.1.
131. The ICC stated its first negotiated rates policy as follows:

[We offer to undertake an advisory analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts. We would, at a court's request, determine, based on all relevant circumstances, whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this
claring that "the filed rate doctrine does not necessarily bar equita-
ble defenses" in motor carrier undercharge litigation.132

While the adoption of this statement was significant, the ICC in
*Negotiated Rates I* broke no new ground other than to apply the princi-
pies of *Buckeye* more broadly to motor carriers. The result was a dis-
appointment to almost everyone. Shippers believed that the ICC had not gone far enough,133 and motor carriers and their agents feared it had gone too far.134

In the process, the ICC lost much of its credibility in the eyes of
many shippers, carriers, commentators, and courts.135 It had missed
an opportunity to significantly stem the flow of undercharge suits, exacerbating one of the very problems Congress had charged it to resolve: unreasonable practices.  

3. Negotiated Rates II

A year and a half later, the undercharge problem continued to cause headaches for nearly everyone in the transportation community. The NITL and other shipper groups remained greatly dissatisfied with the reactions of many courts to the ICC's indecisive approach to undercharge claims in Negotiated Rates I. So in February of 1988 the NITL again requested the ICC to invalidate such claims by issuing a general order declaring it to be an unreasonable practice per se for motor carriers to do business at unfiled negotiated rates and to later use the filed rate as the basis of an undercharge suit. The ICC again refused. In a decision published in June of  

claims have taken a strong stand against referring cases to the ICC." Courts Tell ICC: Get Off Our Turf, PURCHASING, June 30, 1988, at 31. This has cast "serious doubt on the ICC's ability to influence court rulings through a declaratory order." Courts' Refusal to Refer Undercharge Cases to ICC Erodes Agency Action, TRAFFIC WORLD, May 9, 1988, at 41.

See also Dempsey, supra note 95, at 2-3 lamenting the ICC's general deregulatory bent: "What has happened to this venerable and highly respected legal institution of the American Government? How could an agency on the pinnacle of integrity, competence, and independence fall to the depths of irresponsibility in so short a period of time?"

136. See National Indus. Transp. League—Petition for a Declaratory Order on Negotiated Motor Common Carrier Rates, No. MC-C-30090, slip op. at 3 (ICC April 14, 1988) [hereinafter NITL Petition of 4/14/88] ("I continue to believe . . . that many of these problems are largely of the Commission's own making, and consequently easily remedied by modifications to what has been the majority's approach to date in MC-177 case handling.") (Commissioner Lamboley concurring). See also Steinfeld, supra note 134. The "courts quickly recognize[d] who . . . [was] to blame for this entire undercharge mess—the ICC." Id.

137. By this time, the only groups who continued to benefit from undercharge suits were the freight rate audit houses and their attorneys. See Quinn, Time to Slay the Undercharge Monster, TRAFFIC MGMT., July 1989, at 11. The audit houses typically keep from 50% to 75% of the money collected from shippers on a bankrupt carrier's behalf. Hoffman, supra note 99, at 50. In one case, the court noted that the carrier's estate would wind up with only 21% of any amount collected after the attorneys took 30% of the total and after the audit house took 70% of the balance. In re Rose Freight Lines, Inc., No. BKY 4-87-2990, slip op. at 2-3 (Bankr. D. Minn. Aug. 10, 1989). Such results have led observers to conclude that "[i]t's a racket." Bankrupt Truckers Pushing Phoney "Undercharge" Claims, PURCHASING, May 12, 1988, at 25.

138. See, e.g., NITL Petition of 4/14/88, supra note 136, at 2. The "NITL believe[d] that some of the uncertainty relating to [Negotiated Rates I] (resulting in some courts' refusal to refer these cases) arises from the Commission's characterizing its decisions as non-binding and advisory." Id.

139. This NITL negotiated rates proposal requested that the ICC issue a generic declaration that: "[i]t is an unreasonable practice, and thus a violation of the [ICA], for a motor common carrier to conduct business on the basis of a negotiated and
1989, the Commission instead reopened and clarified *Negotiated Rates I*, breaking new ground, nevertheless, in several respects.\textsuperscript{141}

In *Negotiated Rates II*, the ICC explicitly assumed primary jurisdiction over undercharge suits and announced that it would, for the first time, allow shippers to bring such disputes directly to the ICC, rather than requiring shippers to wait for a court referral.\textsuperscript{142} In addition, the ICC put some teeth into its decision by declaring that, pursuant to its primary jurisdiction, its determinations were "binding and dispositive" and reviewable only to ascertain whether they were arbitrary or capricious.\textsuperscript{143}

Shipping interests were generally encouraged by the ICC's action and anticipated that it would bolster the position of shippers defending undercharge claims.\textsuperscript{144} Carriers' and auditors' groups concluded that the decision changed nothing, noting that the courts, and not the ICC, have the final say in such matters.\textsuperscript{145} While the ICC's clarification of its primary jurisdiction was a step forward, the ICC's assertion that it would begin to resolve these disputes without court referral, while at the same time retaining its system of case-by-case review,\textsuperscript{146} proved shortsighted and unworkable.

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agreed-to-rate while failing to publish the rate in an effective tariff on file with the [ICC]." *Negotiated Rates II*, supra note 14, at 623.

The NITL reasoned that "the need for such an order is critical because the collection activities by motor common carriers (or their agents) have increased." NITL Proposal of 4/14/88, supra note 136, at 1. The NITL hoped courts would then use the proposed declaration to deny undercharge claims which met the standards announced by the ICC.

140. The ICC decided to hold the NITL petition in abeyance until it could assess the impact of the measures it did adopt. *Negotiated Rates II*, supra note 14, at 624.

141. Id. at 623.

142. Id. at 626-27. The ICC also clarified its definition of "equitable defenses," stating that the label was a misnomer since § 10701 conferred upon the ICC the legal authority to allow shippers' defenses to the filed rate doctrine where the reasonableness of practices was an issue. Id. at 628.

143. Id. at 624. Nevertheless, one commentator aptly stated that *Negotiated Rates II* "does not diminish the controversy—if that was [the ICC's] goal they missed it by a mile." Wastler, supra, note 16, at 35 (quoting an auditor's attorney). Indeed, ICC Chairman Gradison had unsuccessfully urged the majority "to take the one final step which could be taken administratively to help alleviate the negotiated rates difficulties which continue to plague shippers" and adopt the NITL proposal. *Negotiated Rates II*, supra note 14, at 638 (Chairman Gradison dissenting). "[T]he Commission can, and must, move decisively to counteract the blatant abuse of a regulatory system by a small but persistent group of motor common carriers." Id. at 638-39.

144. One NITL official noted that the organization was "very, very pleased. . . . This will help tremendously all the shippers out there that are receiving balance-due bills." Wastler, supra note 16, at 35.

145. One freight rate audit house executive observed that "[i]t's a nothing finding by a group that clearly cannot make up its mind on what its jurisdiction is." Id.

146. The ICC claimed that in order to cope with the expected onslaught of undercharge cases, it had "directed [its] staff to develop a flexible docket management

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4. Negotiated Rates III

In December of 1989, less than six months after the ICC issued *Negotiated Rates II*, the Commission made a partial about-face by announcing that it would be “unable to participate in most civil actions for undercharges” brought to the ICC by defendant-shippers for an initial determination.\(^{147}\) The ICC explained that in light of the split between the Fifth and Eighth Circuits, and due to budgetary restraints and the fact that the ICC’s small staff of attorneys could barely fulfill its normal functions, the ICC would generally not participate in the numerous shipper requests for ICC assistance.\(^{148}\) Thus whether by lack of resolve, foresight, or resources, by the end of 1989 it had become clear that the ICC would be unable to lead the motor carrier industry out of the negotiated rates quagmire.

5. Proposed Legislation

In the fall of 1989, the NITL, the SNFCC,\(^{149}\) and others\(^{150}\) developed and presented to Congress legislation which would go a long way toward resolving the controversy.\(^{151}\) The proposed bill would partially codify the negotiated rates doctrine,\(^{152}\) decrease the statute
of limitations on undercharge claims from three years to eighteen months, and allow carriers to continue to offer discounts while protecting shippers from inadvertent filing errors. The law, if enacted, would apply to future and pending undercharge litigation.

II. STATEMENT OF THE CASE

In the spring of 1990, however, the attention of the transportation industry remained focused on the courts. The circuits had clearly delineated the two sides to the debate. On one side was the Fifth Circuit, the first circuit to address the issue and the only circuit to hold in favor of a carrier. On the other side was the Eighth Circuit, the second circuit to address the issue and the first to hold for the shipper. The Eighth Circuit concluded that the filed rate doctrine did not obligate the shipper to pay the motor common carrier higher rates than those at which the parties had done business.

A. The Facts

Defendant Primary Steel, Inc. (Primary) ships steel products to its already unable to administer the flood of undercharge cases, the referral requirement is the bill's potentially fatal flaw. On this point, the bill states:

Where tariff rates or charges are sought to be collected in addition to those originally billed and collected by [an ICC-regulated] common carrier, . . . a person may assert that the collection of such tariff rates or charges or imposition of rules, classifications, or practices, would be an unreasonable practice in violation of section 10701 or otherwise a violation of this subtitle and such issue shall be determined by the Commission. In instances where a civil suit is brought under section 11706(a) of this subtitle, such issues shall be referred to and be determined by the Commission under its primary jurisdiction.

H.R. 3243, supra note 151, at 2.

153. Id. at 2–3. For claims accruing within the first year of enactment, the limitation would be 24 months. Id. at 2. The same limitations would apply to overcharge suits. Id. at 3.

154. On this point, the bill states:

Subject to Commission review, motor carriers subject to the [ICC's] jurisdiction . . . and shippers may resolve, by mutual consent, overcharge and undercharge claims resulting from billing errors or incorrect tariff provisions arising from the inadvertent failure to properly and timely file and maintain agreed upon rates, rules, or classifications in compliance with sections 10761 and 10762 of this title, or under circumstances where application of the filed tariff would be an unreasonable practice . . . . Nothing in this section shall relieve the motor carrier of the duty to file rates, rules, and classifications as required in sections 10761 and 10762.

Id. at 3–4.

155. Id. at 5.


customers via motor carriers. In 1979, a representative from plaintiff Maislin Industries, Inc. (Maislin) solicited some of Primary's steel traffic. During rate negotiations, Maislin's representative stated that Maislin could ship at rates competitive with or lower than those Primary was paying its present carrier, and Primary began shipping with Maislin later that year.

The parties negotiated rates throughout the course of their relationship. In 1982 Primary told Maislin that Primary would end their association unless Maislin lowered its rates, and the parties agreed to lower rates. Maislin's rate director approved all negotiated rate changes, and, for many of the shipments in controversy, Maislin's agent prepared, signed, and distributed to Primary rate sheets reflecting the lower rates.

Primary had no reason to suspect the negotiated rates were improper or unlawful. Maislin carried and billed at those rates. Primary made payment at those rates, understood that they were approved by the appropriate Maislin personnel, and expected Maislin to do what was necessary to legalize them.

For reasons unknown, Maislin failed to file the negotiated rates with the ICC. From January 1981 until November 1983, Maislin carried for Primary 1,081 shipments at negotiated rates lower than those on file with the ICC. The difference between the filed rates and the negotiated rates amounted to almost $188,000. Maislin went bankrupt in 1983.

158. Primary Steel, Inc. v. Maislin Indus., No. MC-C-10961, slip op. at 1–2 (ICC Jan. 12, 1988) [hereinafter ICC Maislin Order].
159. At that time, the soliciting carrier was actually Quinn Freight Lines, Inc. Id. at 2. Quinn became a division of Maislin in 1981. Id. at 3. This comment will make no further distinction between Maislin and the Quinn subsidiary.

160. Id. at 2.
161. Id. at 3.
162. Id.
163. Id. at 9.
164. Id. at 3.
165. Id. at 3 & n.7.
166. Id. at 9.
167. Id. at 3.
168. Id. at 2.
169. Id.
170. Maislin filed for Chapter 11 bankruptcy on July 11, 1983. In re Maislin Indus., 50 Bankr. 943, 945 (Bankr. E.D. Mich. 1985). Shortly thereafter, Carrier Credit & Collection, Inc. (CCC) was appointed to represent Maislin in its bankruptcy proceedings and proceeded to audit Maislin's pre-bankruptcy freight bills to ascertain whether Maislin's customers had paid the rates on file with the ICC. Id.

As collection agencies go, CCC has a particularly poor reputation among shippers, who object to CCC's detached production line modus operandi. See Hoffman, supra note 117, at 50 (shippers describe CCC's "inhospitable approach").
B. The District Court Proceedings I

In 1985, Maislin brought suit against Primary in the United States Federal District Court for the Western District of Missouri to recover the undercharges. Primary countered that the ICC had primary jurisdiction and moved that the proceedings be stayed to allow the ICC to make its determination in the matter. The district court agreed that the doctrine of primary jurisdiction compelled it to refer to the ICC the substantive issues: whether the rates were reasonable and whether their collection would be an unreasonable practice.

C. The ICC’s Analysis

The Commission concluded that collection of the undercharges would be an unreasonable practice. This required two findings: (1) that Maislin or a Maislin agent upon whom Primary could reasonably rely quoted and negotiated a rate with Primary other than the filed rate, and (2) that Primary’s reliance upon the quoted and negotiated rate was reasonable.

The ICC relied upon its decisions in Buckeye and Negotiated Rates I to reason that its primary jurisdiction over the reasonableness of a carrier’s practices allowed it to consider all the circumstances of this dispute to determine whether Maislin’s billing practices were unreasonable. By applying its “Negotiated Rates policy,” the ICC found that negotiated rates existed, and that Primary reasonably relied on Maislin’s representations that they had been filed. The ICC proceeded to allow Primary’s equitable defenses and concluded

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173. ICC Maislin Order, supra note 158, at 1.
174. Id. at 10.
175. Id. at 5. “The decisions in Seaboard, Negotiated Rates, and Buckeye confirm that sections 10701(a) and 10704 give us [this] authority.” Id. Specifically, these circumstances were simply that an authorized agent of Maislin quoted “a series of rates for a continuing period of time” upon which Primary reasonably relied. Id. at 10.
176. Id. at 8–10. That policy was “intended to temper the harsh effects of the filed rate doctrine when it could be shown that the shipper and carrier negotiated and agreed on a rate that was not published in a tariff.” Id. at 8.
177. Id. at 5–8.
178. Id. at 8–9. As to Maislin’s intent, the ICC stated that “[t]he most that can be said in this regard is that [Maislin] actively negotiated to obtain Primary’s business and that it lowered its rates to meet the competition . . . While [Maislin] may not have taken appropriate steps to legalize the quoted rates, [there is no evidence of] unlawful conduct.” Id. at 9.
that it would be an unreasonable practice for Maislin to collect the undercharges.179

D. The District Court Proceedings II

Almost three years after its referral to the ICC, the case was returned to the district court. The district court reaffirmed its prior decision that ICC had primary jurisdiction over Maislin's practices.180 The court also adopted the ICC's findings of fact,181 found the ICC's decision was "supported by substantial evidence,"182 accorded the decision "substantial deference,"183 and granted Primary's motion for summary judgment.184

E. The Eighth Circuit Court of Appeals Analysis

The issue before the Eighth Circuit Court of Appeals was simply framed: whether the filed rate doctrine obligated Primary to pay Maislin higher rates than those they had negotiated and at which they had done business but which Maislin had failed to file.185 The court upheld the ruling of the ICC and affirmed the judgment of the district court, holding: (1) whether Maislin's billing practices were reasonable was an issue within the ICC's primary jurisdiction,186 (2) the ICC may alter its previous policy interpretations, and (3) courts must accept the new interpretations if they are reasonable.187

I. The ICC's Primary Jurisdiction

The ICC's primary jurisdiction in negotiated rates undercharge cases was an issue of first impression in the Eighth Circuit.188 The

179. Id. at 10.
182. Id. at 1407.
183. Id. at 1402. The court stated that it would not set aside such an ICC determination "unless it exceeds the ICC's statutory authority or is unsupported by substantial evidence." Id. "[T]he reviewing court is not to substitute its conclusions for those of the Commission." Id. (quoting Erickson Transport Corp. v. ICC, 728 F.2d 1057, 1062-63 (8th Cir. 1984)).
186. Id. at 404.
187. Id. at 406.
188. Id. at 403.
court partially relied on *Buckeye*,\(^{189}\) where the Eleventh Circuit held that it was within the ICC's primary jurisdiction to consider the reasonableness of a carrier's practices in disputes where the unreasonable collection of undercharges is alleged.\(^{190}\) The Eighth Circuit Court of Appeals concluded: "We are satisfied that the reasonableness of Maislin's billing practices is a matter properly within the ICC's primary jurisdiction."\(^{191}\) The court based its decision on the primary jurisdiction doctrine's traditional rationales: that the ICC should determine issues of national transportation policy;\(^{192}\) that the ICC should interpret questions involving "the reasonableness of a challenged practice;"\(^{193}\) that the ICC should resolve issues which require its "special expertise;" and that it should do all these things in order to promote uniform regulation.\(^{194}\)

2. Equitable Defenses to the Filed Rate Doctrine

On the issue of the traditional rule against equitable defenses to the filed rate doctrine, the court concluded that "the district [courts are] required to enforce the tariff provisions of [the filed rate doctrine], unless the ICC, upon referral by the district court, determines that a carrier's billing practices were unreasonable and that to enforce the tariff requirement would be unlawful."\(^{195}\)

The court did not abrogate the filed rate doctrine altogether, however, because Primary's argument involved the statute-based defense of section 10701(a) rather than a purely equitable argument. The court simply followed the ICC's harmonization of two facially conflicting provisions of the ICA.\(^{196}\) The court concluded that this "approach . . . does not abolish the filed rate doctrine, but merely allows the ICC to consider all of the circumstances, including equitable de-

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\(^{190}\) "Finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." *Maislin*, 879 F.2d at 403 (quoting *Seaboard*, 794 F.2d at 638).

\(^{191}\) Id.

\(^{192}\) Id. (citing United States v. Western Pac. R.R., 352 U.S. 59, 65 (1956)).

\(^{193}\) Id. (quoting Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304-06 (1976)).

\(^{194}\) Id. (quoting Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R., 685 F.2d 255, 259 (8th Cir. 1982)).

\(^{195}\) Id. at 405.

\(^{196}\) The court stated:

Section 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the [ICA] elevating this section over section 10701, which requires that tariff rates be reasonable. When conflicts between two provisions arise, "it is not for . . . [courts] to place enforcement of one doctrine above the other." Instead, the proper authority to harmonize these competing provisions is the ICC.

fenses, to determine if strict adherence to the filed rate doctrine would constitute an unreasonable practice."\textsuperscript{197}

3. **ICC Policy Interpretations**

The court rejected the argument that the ICC had acted outside the scope of its regulatory authority, stating that "the ICC may . . . alter its past [interpretations of the ICA] and we must accept that change if the new interpretation is reasonable."\textsuperscript{198} The court reasoned that the ICC had acted within its power here because the ICC needed to reassess its statutory interpretations in light of the changes wrought by the Motor Carrier Act of 1980. The court concluded that "the ICC decision represents a reasonable accommodation of conflicting policies that were committed to its administration by the [ICA]," and affirmed the ICC's recommendation and the district court's judgment in all respects.\textsuperscript{199}

**F. The Fifth Circuit Court of Appeals Position**

Five months before the Eighth Circuit's decision in *Maislin*, the Fifth Circuit Court of Appeals addressed the unfiled negotiated rates controversy in *In re Caravan Refrigerated Cargo, Inc.*\textsuperscript{200} In an opinion directly opposite the Eighth Circuit's, the Fifth Circuit held that "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission."\textsuperscript{201}

\textsuperscript{197.} Id.\textsuperscript{198.} Id. at 406. The court stated:

[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

Id. (quoting American Trucking Ass'n v. Atchison, T. & S.F. Ry., 387 U.S. 397, 416 (1967)).\textsuperscript{199.} Id. at 406.\textsuperscript{200.} 864 F.2d 388 (5th Cir. 1989). Before the court was an "archetypal 'negotiated rate case' involving . . . [t]he well-worn choreography for these cases." Id.\textsuperscript{201.} Id. at 392. The court reasoned that "[t]he rule is necessary to protect the filed tariff doctrine and its underlying policy of ensuring reasonable and non-discriminatory rates." Id. The court also quoted Judge (now Justice) Scalia's argument in *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986), as support for the Fifth Circuit's decision:

Th[e] requirement [that shippers and carriers adhere to filed rates] is utterly central to the [Interstate Commerce] Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory, see 49 U.S.C. §§ 10701 & 10741(b), and virtu-
The court rejected the shipper's argument that the ICC had primary jurisdiction.202 The court refused to defer to the ICC, and declined to follow the ICC's recommendation in Negotiated Rates I that equitable defenses should be allowed.203 As to the shipper's unreas- onableness defense, the court stated that precedent compelled it to strictly enforce the filed rate.204 This precedent was the United States Supreme Court's formulation of the filed rate doctrine in Louisville & Nashville R.R. v. Maxwell.205 Curiously, however, the Fifth Circuit omitted the doctrine's exception, "unless [the rate] is found by the Commission to be unreasonable."206 This deletion, coupled with the court's seemingly flippant approach to the case in general,207 diminished the credibility of the Fifth Circuit's reasoning.

III. Analysis

The Eighth Circuit Court of Appeals' statement of the law in Maislin was accurate, its interpretation correct, and its holding proper. It should be upheld on review by the United States Supreme Court.208 The remainder of this comment will discuss why the filed rate doctrine is an inappropriate regulatory device in the interstate trucking industry, why the industry should never have been so rigidly regulated in the first place, and why the risk of discrimination is of slight concern today. The analysis will also elaborate on the Eighth Circuit's interpretation of the filed rate doctrine, the rule against equita-

ally impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, see 49 U.S.C. §§ 10708(a)(1) & 11701(a).

Id. at n.5.

202. Id. at 389-90. The court correctly cited the law. In rejecting the shipper's argument for referral, the court reasoned: "Here . . . the facts do not raise technical or complex issues, regarding appropriate rates, that require the expert administration of the Commission and thereby invoke the primary jurisdiction doctrine. . . . In reality, this dispute concerns only the applicability of [the filed rate doctrine]." Id. at 389-90.

203. Id. at 391. The court stated: "The Commission's advisory opinion in [Negotiated Rates I] is inapposite to this case. The Commission's expression of its decision to allow equitable defenses . . . has, of course, no binding effect upon this court." Id.

204. Id. at 391-92. The court explained: "Any other decision would constitute legislation on our part; it would create an exception that swallows the [filed rate] doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact." Id. at 392.


207. The court used the following headings: "A Great Deal While It Lasted," "Where's the Beef?" and "Additional Beefs." Id. at 389, 393.

208. In a brief filed at the Court's request, the Solicitor General supported the Eighth Circuit Court of Appeals' decision and urged the Supreme Court to grant certiorari. Brief for the Federal Respondent at 5, 13, Maislin Indus. v. Primary Steel, Inc., 879 F.2d 400 (8th Cir. 1989), cert. granted, 110 S. Ct. 834 (1990).
ble defenses, the ICC's primary jurisdiction; and the ICC's harmonization of the ICA's provisions. The comment concludes with a description of the negotiated rates doctrine as a blueprint for the future.

A. The Filed Rate Doctrine Today

The filed rate doctrine is inappropriate and irrelevant in today's highly competitive and diversified interstate motor carrier industry. Its unsuitability is evidenced by the ultimate collapse of the tariff filing system in the regulatory scheme created by Congress under the Motor Carrier Act of 1980.209

The doctrine was conceived as a mechanical regulatory tool and has been used most appropriately and most successfully in the regulation of public utilities.210 The mechanical regulation of the various modes of interstate common carrier211 transportation by means of the filed rate doctrine has historically been justified on the grounds that the industry as a whole was quasi-public and was thus appropriately classified as a public utility.212 This was the case in the latter


Tariff filing requirements need to be made optional or eliminated altogether.

We have a serious problem with negotiated rates. We cannot police the millions of transactions that take place in a given year, nor should we. It's impossible to fathom going back and investigating charges against parties for mutually-agreed upon transactions which took place as long as five years ago. The filed rate doctrine requires parties to function in the world of paper and the delays that paper transfer cause on the one hand, and yet meet the demands of just-in-time inventories on the other. The two worlds can only be reconciled when the Commission is able to allow parties to successfully and instantly negotiate using 1980's technology. We need your help, and total motor carrier deregulation is the solution.

210. See Robinson, supra note 56, at 215. "Leaving its 'reasonableness' aside, a rate once filed and published establishes a most-neatly-to-be-administered bit of mechanism for combating discrimination. It serves as a common denominator among customers, and as a yardstick wherewith regulations and litigation measure off the utility's treatment of them." Id. The "current device for securing [equality of treatment by public utilities] is . . . a throwback to . . . 'strict law.' Therein the chief end of law was certainty; rules were wholly inelastic and inflexible, and formalism reigned. . . . The [filed rate doctrine] . . . represents a choice of what is rated the lesser evil." Id. at 214. The mechanical application of the "filed rate means to achieve certainty at the expense of principles which, in other branches of the law, leave one upon whose actions others rely to bear the reasonable costs of his own errors." Id. at 241.


212. " 'Common carrier status has a quasi-public character, which arises out of the
part of the nineteenth century. The monopolistic and destructively competitive railroads\textsuperscript{213} squarely fit the public utility definition.\textsuperscript{214}

Conversely, the trucking industry was never an appropriate candidate for regulation within the public utility model and should not have been so regulated.\textsuperscript{215} Congress brought interstate trucking under federal control for all the wrong reasons.\textsuperscript{216} Congress disregarded the fact that the trucking industry lacks the characteristics of either a public utility or a natural monopoly, and would be improperly regulated as such.\textsuperscript{217} By bringing the trucking industry under the control of the ICA and the ICC in 1935, Congress transformed a

undertaking ‘to carry for all people indifferently.’” Florida Power & Light Co. v. Federal Energy Regulatory Comm’n, 660 F.2d 668, 674 (5th Cir. 1981) (quoting National Assoc. of Regulatory Utility Comm’rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976)).

\textsuperscript{213} See supra note 35 and accompanying text.

\textsuperscript{214} A public utility is:

A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination. It is always a virtual monopoly. A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service.

BLACK’S LAW DICTIONARY 1108 (5th ed. 1979)(emphasis added).

\textsuperscript{215} “The experience of trucking regulation ... provides a striking example of the economic and social harm which results when classical regulation is imposed on a competitive industry,” Hardaway, supra note 88, at 127.

Compare the public utility definition, supra note 214, with the characteristics of the trucking industry in which competition is natural and “there are no great economies of scale; entry is easy.” Adams, Can Regulation Curb Corporate Power?, in PUBLIC UTILITY REGULATION 13, 17 (1975). “Unrestricted competition in trucking would be stable and efficient, because fixed costs ... are low, or nonexistent. [C]osts ... are not sunk costs to any significant degree. Trucks may be freely and costlessly transferred, [absent] regulation, from one market to another, and so the industry as a whole can respond quickly to unforeseen changes in demand.” W. SHARKEY, THE THEORY OF NATURAL MONOPOLY 28 (1982). Indeed, there were over 39,000 ICC-regulated motor carriers in 1988. Negotiated Rates II, supra note 14, at 632.

\textsuperscript{216} “The only reason the trucking industry was ever brought under regulation of the ICC through the Motor Carrier Act of 1935 was the insistence of the railroads. The railroads argued that the trucking industry was affording it ‘excessive, destructive,’ ... competition.” Adams, supra note 215, at 17. The purpose of the MCA of 1935 was to protect the profit levels of the railroads and to protect traditional rate structures of agricultural and bulk commodities, usually shipped by railroad, at the expense of manufactured goods which were increasingly being transported by truck. W. SHARKEY, supra note 215, at 26–27.

\textsuperscript{217} “A natural monopoly is one resulting where one firm of efficient size can produce all or more than market can take at remunerative price.” BLACK’S LAW DICTIONARY 908 (5th ed. 1979).

“[T]he early railroads, telephone, telegraph, gas, and electric companies, and to some extent, television and radio [were natural monopolies]. ... Regulation seeks to substitute what is lacking in the marketplace by insisting that such natural monopolies produce at a lower price and high volume than they otherwise might.” Demp-
naturally competitive industry into one that quickly became anticompetitive and monopolistic.

The original purpose of the ICA—to protect the shipping public from the abuses of common carriers—was forgotten. Instead, until the mid-1970s the ICC was the protector of the vested interests of motor carriers. The ICC did so by sheltering the industry from the rigors of competition and by sanctioning its monopolistic practices. Thus perhaps it should not be surprising that the motor carrier industry has continued to disregard the rights of the shipping public by attempting to reforge the filed rate doctrine to the disadvantage of shippers. If the carrier interests are allowed to continue to do so, the primary purpose of the ICA will be turned on its head and its contravention will be complete.

sey, supra note 29, at 336 n.2. (quoting Dempsey, Erosion of the Regulating Process in Transportation—The Winds of Change, 47 I.C.C. PRAC. J. 303, 311–12 & n.31 (1980)).

[T]rucking was regulated with a backward look at railroads instead of a forward projection toward maximizing motor carrier opportunities and efficiencies... The policy to ignore obvious differences between the modes as to competitive opportunities and financial risks was never explained. The decision was made to conform an entirely new industry to the model of one that was mature but sluggish and, in many respects, failing. This lack of foresight was common to both Congress and the ICC.

Jacobs, supra note 87, at 135.

218. See supra note 40 and accompanying text.
219. See Adams, supra note 215, at 17:

[I]n... naturally competitive industries, there really is no excuse for the government’s playing a role, because the government will only be a protective device for vested interest. It will be a mask for privilege, a shield for monopoly. It will not be an agency for the public interest. An outstanding and admittedly extreme example of this proposition is the trucking industry.

See also Bachmann, Johnson & Schneider, The 1980 Motor Carrier Act Ten Years Later: Do Trucking Company CEOs Love It or Hate It?, 57 TRANSP. PRAC. J. 163 (1990) (they hate it).

220. See W. Sharkey, supra note 215, at 27. “Ultimately, the ICC was perceived by economists as an agency whose primary function was to protect all carriers in the transportation industry from the rigors of competition.” Id. “Congress created a centrally planned transportation sector at the heart of an intentionally unplanned economy. The result was to be an artificial allocation of transportation resources.” Jacobs, supra note 87, at 95.

221. With the Sherman Antitrust Act, in effect since 1890, Congress declared “[e]very contract, combination... or conspiracy in restraint of trade or commerce among the several States... to be illegal.” 15 U.S.C.S. § 1 (Law. Co-op. West Supp. 1989). With the Reed-Bulwinkle Act in 1948, supra note 90, however, Congress excluded interstate motor carriers from this fundamental prohibition by giving them the authority to collectively discuss and establish rates without the threat of antitrust prosecution. “[T]he focus of the ICC’s attention was to protect regulated carriers from unauthorized operations... [T]he ICC operat[ed] as an agency to enforce a cartel among its regulated carriers.” Franzen, supra note 45, at 630. Hence, the monopolistic, non-market-influenced, anticompetitive, wasteful pre-1980 interstate motor carrier industry emerged.
B. The Rule Against Unreasonable Discrimination

Issues of discrimination are no longer relevant in today's highly competitive interstate trucking industry.\textsuperscript{222} The main function of the filed rate doctrine was to prevent carriers from engaging in practices that were unreasonably preferential or discriminatory to shippers.\textsuperscript{223} The filed rate doctrine operated to bar such discrimination by preventing a carrier from offering a discrimination by intentionally misquoting rates.\textsuperscript{224} Today, carriers are unlikely to so discriminate in a regulatory climate\textsuperscript{225} where shippers have a wide variety of ship-
ping alternatives.\textsuperscript{226}

The ultimate purpose of the ICA's antidiscrimination provisions remains: to protect the shipping public from motor carrier abuses.\textsuperscript{227} In the wake of regulatory reform, a strict policy barring all discrimination among shippers is incompatible with Congress’ stated goal of fostering competition,\textsuperscript{228} particularly where the former policy would disadvantage shippers. Thus, the use of the ICA's antidiscrimination provisions as the basis for a policy allowing motor carriers to abuse shippers by subverting of the reasons behind the traditionally strict application of the filed rate doctrine is inappropriate.\textsuperscript{229}

C. Uniformity Through Deference to the ICC

Where the purpose of the doctrine of primary jurisdiction is to ensure uniformity of regulation by ensuring uniformity of enforce-

\textsuperscript{226} See Negotiated Rates II, \textit{supra} note 14, at 631-32: [T]here has been nothing in the records of the [unfiled negotiated rates] cases we have reviewed to suggest that it was the intent of the parties to establish secret, discriminatory rates. Rather, the carriers simply negotiated these rates to attract business, not with any intent to prefer one of their shippers to the disadvantage of others. Indeed, the effort was to promote and sell the carrier's service generally, not to attract [sic] a particular customer.

\textsuperscript{227} See Brown Transport Corp. v. McLean Trucking, 367 I.C.C. 943, 948 (1984) (anti-discrimination provisions contained in ICA section 10741 intended for the sole protection of shippers). The ICC stated that it did not believe that its policy would "lead to unreasonable discrimination. Shippers in today's marketplace are protected from unreasonable discrimination by vigorous competition. As a result of changes in the law and our interpretation of it, the range of activities considered discriminatory is much narrower than it formerly was." Negotiated Rates II, \textit{supra} note 14, at 632.

\textsuperscript{228} See infra note 236.

\textsuperscript{229} "Conduct likely to lead to injury must not be allowed to justify itself by a claimed righteous public policy which is of doubtful relevance." Griffin Grocery Co. v. Pennsylvania R.R., 93 Ga. App. 546, 549, 92 S.E.2d 254, 256 (1956) (seller not held to filed rate doctrine in non-undercharge case).
ment among the courts, the negotiated rates controversy presents a classic situation in which reference and deference to the ICC should be required. The split among the circuits adequately bears this out. The regulatory disparity is even more greatly magnified at the lower court level. At one end of the spectrum are courts which have held for the carrier by blindly adhering to outmoded notions of discrimination. At the other end are courts which not only hold for the shipper, but hit the carrier with the shipper's attorney's fees as well, declaring that the carrier "exercised bad faith in bringing and maintaining [an] action" for undercharges against the shipper.

D. Harmonization of the ICA's Provisions

What the ICC did in Negotiated Rates I and Negotiated Rates II was to harmonize two facially conflicting provisions of the ICA: the reasonableness requirement and the filed rate doctrine. The ICC had the authority to do so for three main reasons. First, it remains within the ICC's congressional mandate to interpret the ICA and to appropriately respond to "current marketplace developments and

230. See supra notes 71–73 and accompanying text.

231. The ICC recognized that "while each individual case affects primarily the parties to that case, each case is also part of what now is clearly a growing pattern and nationwide problem of large scope, and, cumulatively, may affect litigation in other cases." Negotiated Rates II, supra note 14, at 635.

232. See, e.g., Orscheln Bros. Truck Lines v. Zenith Elec. Corp., 708 F. Supp. 845, (N.D. Ill. 1988), aff'd in part and rev'd in part, 899 F.2d 642 (7th Cir. 1990). The court offered the self-serving argument that the ICC's decision in Negotiated Rates I "is fundamentally flawed in that it can foster discrimination both by removing the incentive of shippers to ascertain whether the negotiated rate has been filed and also by inducing carriers to be less vigilant in filing the rate with the Commission." Id. at 858. The court apparently considered the filed rate doctrine to be an end in itself. Such reasoning is flawed in at least two ways. First, it loses sight of the primary purpose of the rule against discrimination, which is to protect shippers. Second, it neglects to link the purpose and function of the filed rate doctrine with the current regulatory scheme as a whole. But see Goodman, supra note 134, at 313 (advocating continued strict adherence to the rule against discrimination and the filed rate doctrine as the "last assurance[s] of rate equality"). Goodman forgets that rate equality was not a goal of the 1980 Act. For a discussion of the goals of the 1980 Act, see infra note 236.

233. West Coast Truck Lines, Inc. v. Lily-Tulip, Inc., No. CV 87-0929-RMT(Px), slip op. at 1 (C.D. Cal. June 28, 1989). "Considering the time and labor required, novelty and difficulty of questions involved, skill needed to perform the legal services required herein, and customary hourly fee, $51,305.00 is a reasonable amount of attorneys fees." Id. at 1–2.


problems." Second, nowhere in the ICA is the filed rate doctrine elevated over the reasonableness requirement. The two provisions are "co-equal." Third, the Supreme Court has not barred the ICC from considering equitable defenses to the filed rate doctrine where a rate or practice "is found by the Commission to be unreasonable."

Thus, the ICC declared that "[o]ur unreasonable practice findings are legal, rather than purely equitable determinations." As the

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236. Negotiated Rates II, supra note 14, at 629. See also H.R. Rep. No. 296, 96th Cong., 2d Sess. 12, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 2283, 2294: It is clearly the Committee's intent that the [Interstate Commerce] Commission must recognize the importance of competition and efficiency in motor carrier operations as the most desirable means for achieving national transportation goals and objectives . . . . [C]ompetition and efficiency will normally be reinforcing concepts. However, the Committee recognizes that there may be situations where the Commission will be required to balance these concepts in order to determine what is in the public interest . . . . [T]he Act is intended to . . . provide[e] the Commission with sufficient flexibility to promote the public interest. (emphasis added). But see Dempsey, supra note 95, at 46: "Congress did not grant the ICC unlimited authority in the Motor Carrier Act of 1980 to bring about a radical transformation in the economic environment of the motor carrier industry." (footnote omitted).

237. The ICC stated that its "determinations involve a harmonization of two different provisions of the same statute. Section 10761 is only part of an overall regulatory scheme; it should not be elevated over the unreasonable practices provision of § 10701." Negotiated Rates II, supra note 14, at 627. Moreover, "[t]he fact that the Commission may not have exercised its unreasonable practice authority in the negotiated rates area in this manner until recently does not mean that the agency lacks such authority or cannot use it in this manner." Id. at 629.

238. Id. at 628.

239. Louisville & N. R.R. v. Maxwell, 237 U.S. 94, 97 (1915). This phrase is the general exception to the filed rate doctrine. For the text of the entire quote, see supra text accompanying note 58. In its analysis of the controversy, the Fifth Circuit omitted this phrase—while including the surrounding text—when it quoted Maxwell. In re Caravan Refrigerated Cargo, Inc., 864 F.2d 388, 390 (5th Cir. 1989). See supra note 206 and accompanying text.

The ICC noted that "Maxwell . . . never said that the Commission could not determine whether a carrier's solicitation, publication and billing practices are unreasonable. . . . Maxwell . . . 'dealt [only] with the courts' authority to grant equitable defenses to undercharge actions.' " Negotiated Rates II, supra note 14, at 628 (quoting Seaboard System R.R. v. United States, 794 F.2d 635, 638 (11th Cir. 1986) (word in brackets in original)).

240. Id. Thus, the ICC is not allowing shippers to defend these actions with purely or even substantially equitable defenses:

We recognize that [Negotiated Rates I] . . . and some of our subsequent decisions spoke in terms of "equitable defenses" to claims for underrcharges. While our unreasonable practice rulings are "equitable" in the sense that they are intended to result in decisions that are fair to the parties, they are based upon the legal requirements of § 10701 and may be more appropriately viewed as the basis for a counterclaim or as mooting the original action for underrcharges.

Id. at 628 n.11.
Eighth Circuit declared in *Maislin*, "the ICC decision represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act."241

IV. THE NEGOTIATED RATES DOCTRINE

The changed regulatory structure and the profound effect these changes have wrought in the interstate trucking industry have necessitated a rational reinterpretation, or harmonization, of the provisions242 and goals243 of the current ICA. The "negotiated rates doctrine"244 has emerged as a new basis for avoiding the strict application of the filed rate doctrine in motor carrier negotiated rates undercharge cases.

The doctrine states: A motor common carrier which (1) negotiates with a shipper a rate that the carrier represents as, and the shipper reasonably believes is or will become the lawfully filed rate, (2) fails, for whatever reason, to file the lower negotiated rate with the ICC, (3) bills and accepts payment from the shipper at the negotiated rate, and (4) later demands payment of the difference between the filed rate and the negotiated rate, has engaged in an unreasonable practice in violation of the Interstate Commerce Act and is estopped from collecting any undercharges thus arising.

The negotiated rates doctrine is designed to achieve uniformity of regulation by imposing a greater degree of certainty in negotiated rates dealings between shippers and motor carriers. It is derived from NITL proposals,245 ICC policy statements,246 and legislative

243. The ICC noted, "there must be a balance drawn among the sometimes competing congressional goals of fairness, competition, nondiscrimination, and uniformity." Negotiated Rates II, supra note 14, at 627.
244. The label "negotiated rates doctrine" was used as a general term in an unattributed item in a transportation industry publication to refer to the decisions of the ICC in Negotiated Rates I and II. See ICC Just Says No To Undercharge Cases, TRAFFIC WORLD, December 25, 1989, at 13. To the author's knowledge, the author is the first to attach the label to a concrete and succinct formulation of the law as it now stands. The elements of the doctrine are derived from a variety of sources. See infra notes 245–53 and accompanying text. Compare with Goodman, supra note 134, at 310 (discussing "The Commission's New Unfiled Rate Doctrine").
245. The negotiated rates doctrine adopts, clarifies, and builds upon the two NITL proposals. Like the NITL proposals, the negotiated rates doctrine has been designed to create a rebuttable presumption in favor of the application of the negotiated rate. Negotiated Rates I, supra note 15, at 102 n.8. In its petition that led to Negotiated Rates I, the NITL proposed that the ICC declare negotiated rates to be the maximum lawful rates where the carrier failed to file those rates and where the shipper acted with a good faith belief that those rates had been filed. Id. at 99–100. For the full text of the first NITL proposal, see supra note 130. In its petition that led to Negotiated Rates II, the NITL requested the ICC to issue a declaratory order
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initiatives. These are all grounded in the common law principles of promissory and equitable estoppel, negligence, mis-stating that it is an unreasonable practice per se for a carrier to conduct business at but fail to file a negotiated rate. Negotiated Rates II, supra note 14, at 623.

246. The course of conduct prohibited by the negotiated rates doctrine is substantially derived from the course of conduct described as unreasonable by the ICC in Negotiated Rates II. Compare the four elements of the negotiated rates doctrine with Negotiated Rates II, supra note 14, at 628 n.11:

Rather than creating an exception or defense to the filed rate doctrine, what the Commission is finding to be an unreasonable practice is a course of conduct consisting of: (1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates.

Implied but not explicitly stated in the negotiated rates doctrine is the concept articulated by the ICC in its first declaration on the subject, in Negotiated Rates I, where the ICC stated that it has the authority to "decide if the collection of undercharges would be an unreasonable practice." Negotiated Rates I, supra note 15, at 100.

247. For the text of the current proposal before Congress, H.R. 3243, see supra notes 152 & 154. Note that the bill only partially endorses the negotiated rates doctrine—it still requires case-by-case referral to the ICC. Since the ICC is already unable to administer the flood of undercharge cases, the referral requirement is the bill's potentially fatal flaw.

248. Compare the principles enunciated infra notes 249-252 with Robinson, supra note 56, at 241: "[T]he typical mechanical applications of the... filed rate [doctrine seek] to achieve certainty at the expense of principles which, in other branches of the law, leave one upon whose actions others rely to bear the reasonable costs of his own errors."

249. Promissory estoppel is:

That which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise.

BLACK'S LAW DICTIONARY 1093 (5th ed. 1979). See also id. at 494:

Estoppel... operates to put party entitled to its benefits in same position as if thing represented were true. Under law of "estoppel" where one of two innocent persons must suffer, he whose act occasioned loss must bear it. Elements or essentials of estoppel include change of position of parties so that party against whom estoppel is invoked has received a profit or benefit or party invoking estoppel has changed his position to his detriment. (citations omitted).

The negotiated rates doctrine incorporates these elements to the extent that it would prevent carriers from denying liability for failing to file a negotiated rate when it was reasonably apparent to the shipper that the carrier would do so. The doctrine would bind the carrier to statements or actions which reasonably induced the shipper to refrain from verifying the rate on file with the ICC. It would put the shipper in the same position as if the negotiated rate had been filed; i.e. liability would be imposed only for the negotiated rather than the filed rate. See also Note, supra note 55, at 506-507. The "six interrelated elements which have been used to decide whether the [FERC's] filed rate doctrine should be waived" are good cause, notice, the validity of private contracts, reliance, equity, and public policy. Id. Such principles should
representation,251 and unjust enrichment.252 It is the combination of these common law violations which results in a reasonable practice finding in negotiated rates cases. Most significantly, therefore, the negotiated rates doctrine is based upon—and derives its authority from—the ICA's requirement that a carrier's practices be reasonable.253

be taken into account when analyzing negotiated rates disputes, and have been integrated into the negotiated rates doctrine. But see supra note 66 and accompanying text.

250. Negligence is "[t]he omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do." BLACK'S LAW DICTIONARY 930 (5th ed. 1979). According to this definition, a carrier's failure to file a negotiated rate can usually be termed as negligent. The negotiated rates doctrine would hold carriers liable for, or at least preclude them from profiting from, their own negligence. But see supra note 68 and accompanying text.

251. Misrepresentation is "[a]ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accord with the facts. . . . That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists." BLACK'S LAW DICTIONARY 903 (5th ed. 1979). Here again, the negotiated rates doctrine would prevent carriers from abusing the filed rate doctrine and profiting from their own misrepresentations. But see supra note 69 and accompanying text.

252. The doctrine of unjust enrichment states:

[O]ne person should not be permitted unjustly to enrich himself at expense of another. . . . Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. Thus one who has conferred a benefit upon another solely because of a basic mistake of fact induced by a nondisclosure is entitled to restitution on above doctrine.

BLACK'S LAW DICTIONARY 1377 (5th ed. 1979) (citation omitted). To allow a carrier to recover undercharges resulting from the carrier's failure to file negotiated rates would unjustly enrich the carrier. The negotiated rates doctrine would operate to preclude such unjust enrichment.

253. Of course, this is the most important and overriding basis for the negotiated rates doctrine—it is based on the ICA itself. See 49 U.S.C.S. § 10701(a) (Law. Co-op. 1979 & Supp. 1989) (text of statute quoted supra note 13). For a discussion of the reasonableness requirements, see supra notes 28–50, 234–41 and accompanying text. For a discussion of the distinction between legal and lawful rates, see supra note 63. See also Tift v. Southern R.R., 138 F. 753 (C.C. Ga. 1905), aff'd, 148 F. 1021 (5th Cir. 1906), aff'd, 206 U.S. 428 (1906):

The administration of justice, said Webster, "is the chiefest concern of a man upon earth." Within the scope of that function of government there is, perhaps, no single topic of greater magnitude or moment than controversies which arise in trade and commerce. Said Sir Walter Raleigh, "Whosoever commands the trade of the world commands the riches of the world, and consequently the world itself." In a material sense, and in our astonishing civilization, nothing is more important than the transportation of commodities sold or interchanged, and in transportation the stability and reasonable character of the rates charged therefor is scarcely less important than transportation itself. The three grand departments of government, legislative, executive, and judicial, are with steady and swerveless purpose enacting or enforcing laws to safeguard the rights of the general public, and as well that portion engaged in the business of transportation. The shippers are appeal-
CONCLUSION

Unfiled negotiated rates will continue to be a reality in the trucking industry. For every balance-due bill that has already been sent, there are many more waiting to be discovered as additional trucking companies go bankrupt or otherwise cease to do business with a shipper. Due to the extent of the problem, the ICC will remain incapable of addressing these disputes on a case-by-case basis. The courts need more than mere ICC guidelines in order to resolve, and to head-off, these disputes. Congress needs to take a stronger stand. A solution is the negotiated rates doctrine.

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