

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION:

MAISLIN INDUSTRIES, U.S., INC., ET AL.
Petitioners
v. PRIMARY STEEL, INC.

CASE NO:

89-624

PLACE:

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1 transportation was performed over a period of nearly three
2 years, and roughly 1,100 shipments were transported.

3 Following the bankruptcy of Maislin and Quinn,
4 it was discovered by the rate auditors who were retained
5 by the estate of Maislin that the transportation charges
6 assessed Quinn -- assessed Primary by Quinn were in fact
7 not on file in tariffs on file with the ICC.

8 Now, the rate auditors made demand for payment
9 of undercharges, that is the difference between the filed
10 tariff rates and the unfiled rates that were assessed on
11 the carrier's freight bills. Primary refused to pay the
12 undercharges, and an action was instituted in the United
13 States District Court in the District of Missouri, Kansas
14 City specifically.

15 The district court, upon motion of Primary,
16 referred three issues to the Interstate Commerce
17 Commission for consideration. First, whether Quinn's
18 rates, applicable filed tariff rates that is, were in fact
19 applicable to the shipments transported by Primary, or by
20 Quinn on behalf of Primary; second, whether Quinn's rates
21 were reasonable pursuant to standards established under
22 the Interstate Commerce Act; and third, whether Quinn
23 would be barred from the collection of its undercharges by
24 virtue of two provisions contained in the Interstate
25 Commerce Act: first, Section 10701, which relates to

1 carrier practices, reasonable rates and so on, and
2 secondly, the so-called Tariff Requirement Act, or
3 provision of the act, which is Section 10761 of the Act.

4 In an advisory decision issued by the Interstate
5 Commerce Commission, the Commission ignored the
6 applicability issue and the rate reasonableness issue, and
7 instead decided that the carrier should be foreclosed from
8 collecting its undercharges, based solely on the language
9 of Section 10701 of the Act, which again is that provision
10 which requires carriers' rates and practices to be
11 reasonable.

12 Following the advisory decision, the district
13 court issued its decision in which it upheld the ICC
14 advisory opinion, noting also that the negotiated rate
15 proposition was an unreasonable practice and in fact
16 foreclosed the carrier from collecting its undercharges.

17 The court also held that there was no provision
18 contained in the Interstate Commerce Act which foreclosed
19 the Commission from issuing a policy statement which in
20 effect said that it would henceforth consider equitable
21 defenses to carriers' efforts to collect lawful tariff
22 charges.

23 On appeal the Eighth Circuit court of appeals
24 affirmed the district court's decision for essentially the
25 same reasons.

1 Now, the contact which gives rise to this case,
2 an agreement between a common carrier and a shipper to do
3 business at a rate other than the lawful filed tariff
4 rate, is explicitly prohibited by the Interstate Commerce
5 Act. In upholding the district court's decision, the
6 court of appeals failed to recognize the extremely narrow
7 relief offered to shippers under the Interstate Commerce
8 Act for the recovery of reparations or undercharges on
9 past motor common carrier shipments.

10 Congress has created a mechanism, a statutory
11 framework, in fact, under which shippers and motor
12 carriers will conduct their business. The essence of that
13 framework is the common carrier's tariff. All
14 transactions between shippers and motor carriers must be
15 conducted pursuant to explicit tariff provisions. The
16 carrier --

17 QUESTION: What section says that?

18 MR. AUCHINCLOSS: That's Section 10761 of the
19 Act, Your Honor.

20 Carriers cannot perform a service. They cannot
21 perform transportation unless there are explicit
22 provisions in the tariff which underlie that service or
23 that transportation. All dealings conducted pursuant to
24 the tariff, of course, are subject to scrutiny, either by
25 the ICC or by other shippers or carriers who would have an

1 interest in what the common carrier's holding out may be.
2 Failure to adhere to the filed tariff can result in civil
3 penalties or criminal penalties.

4 That is why we say in our reply brief in this
5 instance that in fact the unfiled illegal rate is the
6 antithesis of the statutory rate policy promulgated by the
7 Congress.

8 QUESTION: Mr. Auchincloss, suppose the railroad
9 or the trucker had filed the rates like he said he would.

10 MR. AUCHINCLOSS: Yes, sir.

11 QUESTION: It would have applied to everybody,
12 wouldn't it?

13 MR. AUCHINCLOSS: That is correct.

14 QUESTION: Not just this one transaction.

15 MR. AUCHINCLOSS: That is correct. Those rates
16 are available for anybody who would utilize the services
17 of a common carrier. That is precisely what the Act
18 intends. The Act intends equality of treatment between
19 shippers, and it is intended to avoid discrimination by
20 permitting carriers and shippers to engage in these secret
21 rate agreements which foreclose from public view
22 examination of the rate arrangements under which a
23 shipper's transportation is performed.

24 QUESTION: Mr. Auchincloss, it -- it used to be
25 true, did it not, that even if the rate was unreasonably

1 high when it was paid, the shipper could not get any money
2 back, if he paid the filed rate?

3 MR. AUCHINCLOSS: That is correct.

4 QUESTION: But that is no longer true.

5 MR. AUCHINCLOSS: That is correct.

6 QUESTION: And that was true at the time we
7 decided the T.I.M.E. case.

8 MR. AUCHINCLOSS: That is correct. Well, prior
9 to T.I.M.E., and T.I.M.E. held that shippers had no
10 recourse for transportation rates that were applicable to
11 past transportation.

12 QUESTION: But they now do.

13 MR. AUCHINCLOSS: But they now do. In 1965 --

14 QUESTION: So -- so it really isn't true that -
15 - anymore at least, that the filed rate is the governing
16 rate. What -- the most you can say is that it is the
17 governing rate in one direction.

18 MR. AUCHINCLOSS: Well, it's the governing rate
19 until the Interstate Commerce Commission, upon referral
20 from a district court in the instance of a motor carrier
21 or a motor common carrier, determines that the carrier's
22 rate was either not applicable or was unreasonable. There
23 are explicit provisions in the Act now which are the
24 result of the 1965 legislation, which provide a mechanism
25 by which shippers can ask the Commission whether or not a

1 carrier's rates applicable to its past shipments were
2 reasonable or not.

3 QUESTION: But in light of that change in the
4 Act, might it not be reasonable to reconsider whether our
5 decision in the T.I.M.E. case should come out the same
6 way?

7 MR. AUCHINCLOSS: Well, the provisions in the
8 Act which Congress formulated provide shippers with a very
9 narrow remedy for the relief that you suggest, as for
10 relief in a prospective fashion, or whether or not it's an
11 attack upon an existing rate. I mean, there are other
12 provisions in the Act which provide specifically how that
13 mechanism should operate to give shippers relief. There
14 are provisions that relate specifically to --
15 investigation and suspension proceedings, complaint
16 proceedings. And in this instance, upon referral from a
17 district court, whether or not a carrier's rates are
18 reasonable or unreasonable.

19 QUESTION: But if they are held to be
20 unreasonable in such -- on such a referral, everybody who
21 has been charged that rate has some remedy. Is that it?

22 MR. AUCHINCLOSS: Everybody who has been charged
23 that rate would certainly have a cause of action. That is
24 correct. There is a rule of rate-making, contained in
25 Section 10701(c), I believe it is, of the Act, which

1 provides specific standards by which the Commission must
2 evaluate the reasonableness of carriers' rates, whether
3 prospective or future application, or whether in the
4 instance of past transportation performed on behalf of a
5 shipper, precisely what rates, or what levels of rates are
6 reasonable for that transportation.

7 QUESTION: Suppose we hold, as you wish in this
8 case, that the shipper has to pay the tariff rate, even
9 though it is unreasonable. So the shipper goes ahead and
10 pays it. Can the shipper then bring a suit for
11 reparations for the excessively high rate that he has been
12 --

13 MR. AUCHINCLOSS: Well, I don't know whether you
14 are talking in a hypothetical sense, Your Honor, whether
15 or not --

16 QUESTION: Well, no, I'm not talking
17 hypothetically. Because if that is the result of what we
18 do today, that you just require two suits, initially,
19 since the carrier cannot raise the issue, the shipper has
20 to pay the money. But then, of course, the shipper can
21 raise the issue, so he can --

22 MR. AUCHINCLOSS: Well, in that connection I
23 should say that in the Interstate Commerce Commission
24 proceeding evidence was submitted on referral from the
25 district court addressing the reasonableness of the

1 carrier's rates. In fact extensive cost evidence was
2 submitted which established, according to the expert
3 retained by the Quinn estate, that the rates were within a
4 so-called zone of reasonableness. Given that, those rates
5 are in fact just and reasonable under the standards of the
6 Act. An operating ratio based on a revenue cost basis was
7 produced which indicated that the composite revenue
8 expense experience for that transportation produced an
9 operating ratio of 96.3 percent. So in this particular
10 case, the shipper has had that determination.

11 QUESTION: So you would not necessarily say that
12 we would come out the way you want us to come out if this
13 were a case in which it was an unreasonable rate? You
14 would not be making the same arguments you are making?

15 MR. AUCHINCLOSS: That is correct. That is
16 correct. Well, again, that opportunity was before the
17 Commission. I mean, the Commission had ample opportunity,
18 and the shipper had two occasions to object to the
19 Commission's failure to reach a determination on rate
20 reasonableness. First it could have taken exception to
21 the Commission decision, which in fact didn't address the
22 matter of rate reasonableness. It let that opportunity
23 pass. When the district court took the advisory decision
24 and in effect made it its own, it took no exception at the
25 district court level to that same absence of rate

1 determination. So in fact, as I have already indicated,
2 there were three issues presented to the district court.

3 QUESTION: So do we take this case on the
4 assumption that the rate was reasonable, but that the
5 decision just rests on whether it was an unreasonable
6 billing practice?

7 MR. AUCHINCLOSS: That -- that's precisely the
8 case.

9 QUESTION: That's how we take the case.

10 MR. AUCHINCLOSS: That's exactly it. And in
11 fact, a reference to the record in the case indicates
12 quite clearly. There is testimony presented by a cost
13 expert, and of course, the shipper presented his own cost
14 expert, who developed evidence trying to show that the
15 carrier's rate was not reasonable.

16 QUESTION: But you do concede that had the
17 challenge been to the reasonableness of the rate and had
18 that been sustained, then that is a valid defense?

19 MR. AUCHINCLOSS: Oh, we wouldn't be here today.
20 I mean, if the Commission had made a determination that
21 the carrier's rate was not reasonable, there would be no
22 cause of action. In fact, the Commission has primary
23 jurisdiction to consider the issue of rate reasonableness.
24 And we concede that. There is absolutely no question
25 about that.

1 QUESTION: What was the basis of the
2 Commission's determination that this was an unreasonable
3 practice?

4 MR. AUCHINCLOSS: Well, the Commission has taken
5 Section 10701(a) of the Act, which requires that carrier
6 rates, classifications, rules and practices be reasonable.
7 It has tied that together with its alleged primary
8 jurisdiction. And the district court bought this and the
9 court of appeals bought it, and on the basis of that
10 simply say that we can negate the application of a filed
11 rate by virtue of our rate reasonableness and practice
12 reasonableness jurisdiction, and in effect not hold that
13 carrier to collection of its legal charges.

14 QUESTION: But what was the reasoning of the
15 ICC?

16 MR. AUCHINCLOSS: Well, the reasoning is
17 essentially that, that it has jurisdiction under 10701 to
18 determine whether carrier practices are reasonable.

19 QUESTION: Yeah, but they based it on the fact
20 that they -- there was an agreement.

21 MR. AUCHINCLOSS: Well, there was an agreement,
22 but it was never reduced to tariff form.

23 QUESTION: All right, there was an agreement,
24 and the shipper paid the lower rate relying on it. And
25 the carrier failed to file a new tariff.

1 MR. AUCHINCLOSS: Well, that is correct, but --
2 QUESTION: And they say that that is an
3 unreasonable practice then. That's what they say.
4 MR. AUCHINCLOSS: That's what they say, but --
5 QUESTION: But what's wrong with that?
6 MR. AUCHINCLOSS: Well, this Court has held on
7 at least two occasions, certainly in T.I.M.E. and Montana-
8 Dakota, that rate reasonableness or practice
9 reasonableness is not a justiciable legal right. It is
10 simply a criterion for application in an administrative
11 proceeding to determine a lawful rate. The Court --
12 QUESTION: I just -- that, frankly, sounds like
13 jargon to me.
14 MR. AUCHINCLOSS: Well, it is the Court's
15 reasoning, Your Honor.
16 (Laughter.)
17 QUESTION: Well, it may have -- I -- perhaps --
18 the Court has been known to reason in jargon.
19 (Laughter.)
20 QUESTION: But can you explain it in any more
21 comprehensible language?
22 (Laughter.)
23 QUESTION: Try hard, Mr. Auchincloss. You're
24 not really trying.
25 (Laughter.)

1 MR. AUCHINCLOSS: Thank you, Your Honor.

2 Well, you have to look at the framework, again,
3 of the Interstate Commerce Act. 10761 is intended to keep
4 the dealings of carriers and shippers open to the public.
5 The Commission says the carrier engaged in an unreasonable
6 practice by failing to bill its tariff rate, and therefore
7 the shipper's entitled to this relief. We contend that
8 Congress has made no such provision.

9 Maxwell, of course, and the cases that have come
10 down since Maxwell, are quite clear on the point that the
11 shipper -- his legal right is measured by the applicable
12 lawful tariff. Now, he has a mechanism under the
13 Interstate Commerce Act, and particularly in this instance
14 if it was past transportation, past transportation
15 charges, to allege in a carrier suit for undercharges that
16 the carrier's rate was unreasonable.

17 And when confronted with that the district court
18 has to refer that issue to the ICC. And if a rate
19 reasonableness determination is reached, then, of course,
20 the matter is resolved. And again, as Justice O'Connor -
21 -

22 QUESTION: The ICC used 10701 for this. It says
23 a rate must be reasonable.

24 MR. AUCHINCLOSS: Well, again, that is not an
25 explicit command to do anything other than look at the

1 overall practices conducted by carriers in terms of their
2 tariffs. I say -- this is certainly recited in our reply
3 brief, all of the practices of carriers must in one way or
4 another be attached to its tariff. It is a fact that a
5 carrier cannot engage in a practice that does not have
6 some relation to its tariff. This is an agreement outside
7 of the tariff. It has nothing at all to do with whether
8 or not --

9 QUESTION: Who could -- well, why can't the ICC
10 take a new look at the thing?

11 MR. AUCHINCLOSS: Well, it has in this instance,
12 obviously.

13 QUESTION: Yeah, but why can't it?

14 MR. AUCHINCLOSS: Well, again, we say this is
15 not what Congress intended. 10761 requires strict
16 adherence to the filed tariff. It is the mechanism by
17 which all of this business is transacted. And looking at
18 a billing practice, and I suppose there are many practices
19 carriers might engage in that conceivably have some
20 bearing on its general holding out, but not something so
21 central as whether or not a general provision like rate
22 reasonableness can negate the application of a very
23 specific requirement that tariffs maintain rates which are
24 available for the public generally.

25 QUESTION: May I ask you a question about the

1 facts of the case? This is -- the cargo that was carried
2 here was steel.

3 MR. AUCHINCLOSS: That is right.

4 QUESTION: Did the -- this particular carry --
5 carrier carry steel for other shippers?

6 MR. AUCHINCLOSS: That's correct.

7 QUESTION: And at what rate were the other
8 shippers charged?

9 MR. AUCHINCLOSS: Well, presumably, and it's --
10 it's really not in the record, but --

11 QUESTION: Well, if it's not in the record then
12 you really can't answer.

13 MR. AUCHINCLOSS: Well, the holding out of the
14 carrier was its filed tariff on file with the Interstate
15 Commerce Commission.

16 QUESTION: Was it holding out other than the
17 fact that it had a filed tariff?

18 MR. AUCHINCLOSS: No, it did not.

19 QUESTION: So that we really don't know what
20 rate they charged others.

21 MR. AUCHINCLOSS: Well, I would say this, that
22 there was evidence, or there is evidence presented in the
23 Commission proceeding that dealt with the carrier's
24 billing practices generally, and there were allegations
25 made in the Commission proceeding that the carrier was

1 engaged in some kind of nefarious conduct which sought to
2 avoid application of the filed rate requirement.

3 However, that evidence indicated that the
4 carrier's billing accuracy was over 95 -- or over 99
5 percent, and in fact most of the transactions presumably,
6 on the basis of that. And at the time of its bankruptcy
7 the carrier was doing business with something like 23,000
8 shippers. So --

9 QUESTION: Yes, but they didn't all ship steel.

10 MR. AUCHINCLOSS: No, absolutely not. And --

11 QUESTION: But there were others that shipped
12 steel?

13 MR. AUCHINCLOSS: Yes, I am sure there were.

14 QUESTION: You're sure there were? Does the
15 record tell us?

16 MR. AUCHINCLOSS: Well, the carrier had rates
17 applicable --

18 QUESTION: Because if there weren't there
19 wouldn't be really the danger of discrimination that is -
20 - lies at the heart of the filed rate doctrine.

21 MR. AUCHINCLOSS: Well, of course, there is not
22 specific evidence in the record to answer your specific
23 question.

24 QUESTION: So there is no evidence to show that
25 the departure from the filed rate was discriminatory.

1 MR. AUCHINCLOSS: Not specifically as it relates
2 to other specific shippers, that's correct. I should say
3 also that the matter of the filed rate contained, and the
4 requirement contained in 10761 of the Act has some very
5 specific exceptions which Congress has also put into the
6 Interstate Commerce Act. Those relate specifically to the
7 conduct of carriers pursuant to tariffs or at arrangements
8 other than tariffs. And the most important of these is
9 the requirement that -- or the authority extended to the
10 Commission to authorize contract carriers to conduct
11 business at schedules that are not on file with the
12 Interstate Commerce Commission.

13 There are two explicit provisions in Section
14 10761 and 10762 which relate to the matter of relieving
15 contract carriers from that requirement. So that specific
16 exemption, we believe, stands in stark contrast to what
17 the Commission is authorizing by virtue of its alleged
18 authority under Section 10701 of the Act.

19 There are other provisions which relate
20 specifically to transportation by household goods carriers
21 who are authorized to perform their transportation at free
22 -- or at binding estimates which need not relate to the
23 tariff. They are simply concocted by whatever method the
24 carrier might devise in order to arrive at its reasonable
25 charges.

1 QUESTION: In this case is there evidence that
2 the parties purported to be negotiating a new tariff? Or
3 was it just an agreement to discount off the existing
4 tariff?

5 MR. AUCHINCLOSS: Well, it was -- there were
6 communications between the carrier and the shipper in
7 which they agreed that the transportation charge would be
8 whatever it was. That was reduced to some handwritten
9 letter form, which passed between the two, and simply
10 recited what the rates would be by destinations from the
11 Connecticut origin.

12 QUESTION: Suppose it were clear from the course
13 of dealing that the parties purported to be agreeing on a
14 new tariff that the carrier would then file, and then the
15 carrier just neglects to file?

16 MR. AUCHINCLOSS: Well, that situation could
17 arise, quite obviously, and it didn't in this situation.
18 But in instances in which the carrier alleges he is going
19 to file his tariff and he doesn't, and it is later
20 discovered that this situation has developed, the carrier,
21 or the shipper has recourse, again pursuant to the
22 provisions in the Act which permit determinations of
23 whether or not that carrier's rate is reasonable or not.

24 QUESTION: Did -- didn't this carrier promise to
25 file the tariff that he negotiated with the shipper?

1 MR. AUCHINCLOSS: No, there was no explicit
2 promise to do anything. In fact, there is testimony from
3 two of the officials of the shipper who simply indicate
4 they had no knowledge of tariffs.

5 QUESTION: There was no finding in any -- either
6 the agency or the lower courts on this point?

7 MR. AUCHINCLOSS: Not directly, no. I mean --

8 QUESTION: Well, when you say not directly, what
9 do you mean?

10 MR. AUCHINCLOSS: Well, I mean that they engaged
11 in this transaction and discussion to arrive at rates, but
12 the carrier never said, and it was never reduced to any
13 written form or other form, that I will file that in a
14 tariff I have on file with the Interstate Commerce
15 Commission. And the shipper, again, alleged that he had
16 no knowledge of tariffs. So the question apparently
17 didn't arise in their dealings as to exactly how this
18 conduct would proceed.

19 QUESTION: But I take it from the answer you
20 gave to me it wouldn't make any difference in your view of
21 the case in any event?

22 MR. AUCHINCLOSS: That is correct. The filed
23 rate is required to be applied, and it's available to all
24 shippers who would utilize the service of that carrier.
25 And, of course, it should have been in this instance. And

1 the only relief available to the shipper is a
2 determination that the filed rate in fact was not just and
3 reasonable.

4 QUESTION: Mr. Auchincloss, what was the
5 unreasonable practice found by the Commission
6 specifically? Was it the charging of rates below the
7 tariff rate, or was it the quoting of rates below the
8 tariff rate and then the attempt to collect the tariff
9 rate?

10 MR. AUCHINCLOSS: Well, the court of appeals
11 terms it a billing practice. The carrier's practice of
12 billing rates that were not contained in its tariff was an
13 unreasonable practice.

14 QUESTION: I see.

15 MR. AUCHINCLOSS: And this --

16 QUESTION: The unreasonableness is not trying to
17 get the full tariff rate, even though you agreed to less.
18 The unreasonableness was agreeing to less in the first
19 place.

20 MR. AUCHINCLOSS: That is correct. That is
21 correct. Right. Well, essentially, again, it comes in
22 the form of -- they latch onto this word practice
23 contained in 10701 of the Act.

24 QUESTION: What did they -- what did the
25 Commission call it?

1 MR. AUCHINCLOSS: The Commission calls it a
2 billing practice, the carrier's billing and collection
3 practices.

4 QUESTION: Well, but I would think they -- what
5 -- the issue is whether they could collect the tariff.

6 MR. AUCHINCLOSS: That is correct.

7 QUESTION: I mean collect what they should have.

8 MR. AUCHINCLOSS: Well, collect what they should
9 have under the filed tariff.

10 QUESTION: Well, attempting to try to collect
11 what they hadn't agreed to, what -- again, what is the
12 unreasonable practice? Trying to collect something they
13 had agreed not to, or what?

14 MR. AUCHINCLOSS: Well, the Commission says the
15 -- yes, the Commission says that the billing practice
16 which the carrier engaged in, which resulted in the non-
17 application of the filed rate, resulted in the carrier
18 charging something less, and the carrier should be
19 foreclosed from collecting its undercharges. That is the
20 difference between the lower quoted rate and the higher
21 filed rate.

22 QUESTION: Well, what does the Commission
23 suggest would keep whatever suggests to the carrier that
24 it adhere to its tariffs?

25 MR. AUCHINCLOSS: Well, the Commission makes no

1 suggestion along those lines at all. In fact, the
2 Commission has been opposed to -- the current Commission
3 at least -- has been opposed to the file tariff system in
4 its entirety. They have made statements on the Hill that
5 they think this is a process that doesn't serve the pro-
6 competitive aspects of the Motor Carrier Act of 1980. In
7 fact, however, we say, as this Court said in Square D, if
8 that is a matter that must be reviewed, then it should be
9 reviewed by Congress. Congress, in enacting the 1980
10 legislation, made it clear that explicit instructions were
11 being in effect issued to the Commission to follow a
12 certain course of conduct. One of those very explicit
13 requirements was if you do business with a motor common
14 carrier, or for that matter a railroad --

15 QUESTION: So it doesn't make any difference to
16 the -- I guess it doesn't make any difference to the
17 Commission whether the -- whether the carrier had ever
18 intended to live up to its tariff or not. All it had to
19 do was to quote a lower rate and that's the end of it.

20 MR. AUCHINCLOSS: Well, that is one of the evils
21 of this case. That is correct. That is precisely the
22 point. What would stop shippers in the future from
23 engaging in precisely that kind of conduct with carriers
24 who were willing to do it? You can do your business as a
25 common carrier on the strength of a telephone call

1 quotation of a rate or a letter quotation of a rate,
2 disregarding what's contained in the tariff, and then
3 subsequently alleging that well, we had a negotiated rate,
4 so it really doesn't matter what my tariff provided.

5 QUESTION: I take it that -- that in the
6 Commission's view, departing from the tariff would --
7 could never -- could never result in any kind of a penalty
8 of any kind?

9 MR. AUCHINCLOSS: Well, the Commission says that
10 it is not overturning or modifying to any significant
11 degree the carrier's requirement -- the common carrier's
12 requirement that he file tariffs with the Commission and
13 he observes those. But, of course, that is a statement in
14 the breach. It is not a statement in the application.
15 Because in fact we have here --

16 QUESTION: Did you say that departing from the
17 filed rate is a -- could be a crime?

18 MR. AUCHINCLOSS: Yes, it is. It is a penalty -
19 -

20 QUESTION: In a civil penalty?

21 MR. AUCHINCLOSS: It could be civil, if there is
22 intentional misapplication of the tariff.

23 QUESTION: Well, it can't be -- it can't be -- I
24 guess saying it's an unreasonable practice doesn't --
25 wouldn't prevent the imposition of a penalty from

1 departing from the tariff.

2 MR. AUCHINCLOSS: Well, the Commission has
3 powers to determine what practices generally may result in
4 violations of explicit provisions of the Act, but they
5 must be explicit provisions. Civil penalties and criminal
6 penalties attach to failure of a carrier to apply its
7 filed tariff. And if there is a rebate situation
8 involved, that's a criminal proposition.

9 QUESTION: I suppose the Commission could say
10 well, you have been unreasonable, and you not only can't
11 collect this difference between the tariff and what you
12 charged, but we are also going to penalize you for
13 departing from the tariff.

14 MR. AUCHINCLOSS: The Commission could, if it
15 would. Yes.

16 QUESTION: But you don't think that's much --
17 these days, much of a incentive to comply with the tariff?

18 MR. AUCHINCLOSS: Well, the Commission has not
19 been enforcing those provisions in the Interstate Commerce
20 Act, Your Honor. The Commission could have stopped this
21 whole process early on, after the enactment of the Motor
22 Carrier Act of 1980, if the Commission had simply made
23 examples of those carriers and shippers who were engaged
24 in this kind of conduct. It could have cited them,
25 brought them to court, and corrected the problem. But it

1 never occurred.

2 I would like to reserve the balance of my time
3 for rebuttal.

4 QUESTION: Very well, Mr. Auchincloss.

5 Mr. Merrill.

6 ORAL ARGUMENT OF THOMAS W. MERRILL

7 ON BEHALF OF THE RESPONDENT

8 MR. MERRILL: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 The facts and legal issues presented by this
11 case are typical of hundreds of proceedings which are now
12 pending in the lower courts involving insolvent motor
13 carriers. These cases share a -- common pattern or
14 sequence of events, which consists of the following.
15 First, a shipper negotiates a rate with a motor carrier,
16 an event which happens hundreds and even thousands of
17 times today -- every day, under the competitive regime
18 established by the Motor Carrier Act of 1980.

19 Second, the carrier fails to file that rate in a
20 tariff, as it is required to do by the Interstate Commerce
21 Act. Third -- and as the shipper relies on the carrier to
22 do.

23 QUESTION: Mr. Merrill, Mr. Auchincloss said
24 there was no evidence in this case that the -- there was
25 ever any agreement on the part of the shipper and the

1 carrier that the carrier would file the tariff, file the
2 new rate.

3 MR. MERRILL: There was no evidence of an
4 agreement, but there -- the Commission specifically found
5 that Primary, the shipper, relied on Quinn, the carrier,
6 to implement the proper -- implement properly the quoted
7 rates. That's at page 43a of the petitioners' --

8 QUESTION: So the Commission found that the
9 shipper relied on the carrier.

10 MR. MERRILL: The Commission's finding was that
11 the shipper relied on the carrier to do everything that
12 the law requires to properly implement the negotiated
13 rate, yes.

14 QUESTION: Doesn't every shipper do that? I
15 mean, is that a special finding for this case? I assume
16 every shipper assumes that the carrier is going to comply
17 with the law.

18 MR. MERRILL: It probably is true that most
19 every shipper assumes that the carrier will comply with
20 the law. I think --

21 QUESTION: If that alone were a justification
22 for departing from the tariff, from the filed rate, it
23 would always be a justification for a departure.

24 MR. MERRILL: What -- I think the important
25 point here about the Commission's reliance element is that

1 there can be no evidence that the shipper had knowledge
2 that the carrier in fact was not intending to file the
3 rate in the tariff. That type of evidence would suggest
4 that the shipper, as well as the carrier, was in violation
5 of the law, and particularly had violated the Elkins Act.
6 But there is no requirement in the statute that imposes a
7 duty on the shipper to make inquiry of the carrier about
8 whether it is complying with the law.

9 And so the Commission has carefully tailored its
10 negotiated rates policy to conform with the various
11 statutory requirements. And that's the main purpose of
12 the element that the shipper must have been able to
13 reasonably rely on the carrier doing whatever the law
14 requires to lawfully implement its rate.

15 QUESTION: Mr. Merrill, do we take this case on
16 the assumption that the tariff rate was a reasonable rate?

17 MR. MERRILL: Justice O'Connor, the Commission
18 did not reach the rate reasonableness issue. It said
19 nothing about it.

20 QUESTION: In our addressing the legal issue, do
21 we need to assume that it was a reasonable rate?

22 MR. MERRILL: I don't think the legal analysis
23 should turn on whether the rate was either assumed to be
24 reasonable or assumed to be unreasonable. The Commission
25 found --

1 QUESTION: Well, I am answering my question,
2 then. I want you to assume it was a reasonable rate.

3 MR. MERRILL: Yes.

4 QUESTION: And then tell me whether the statute
5 1070 -- 10761(a) requires the carrier to collect the filed
6 tariff.

7 MR. MERRILL: The statute does require that,
8 Justice O'Connor.

9 QUESTION: And are there criminal penalties and
10 civil penalties potentially for not doing that?

11 MR. MERRILL: Yes, there are. The carrier is
12 subject to potential criminal liability for knowingly
13 charging a rate less than the tariff rate, or soliciting a
14 rate less than the tariff rate.

15 QUESTION: Well, then how can the Commission
16 say, under those circumstances, that not collecting the
17 tariff is an unreasonable billing practice?

18 MR. MERRILL: I think what the Commission has
19 done here is not --

20 QUESTION: It just -- it seems very hard to
21 understand.

22 MR. MERRILL: The Commission is not forgiving
23 carriers of their obligation to file rates and tariffs.
24 The Commission has no intention of doing that whatsoever,
25 and it has stated that quite explicitly in both of its

1 negotiated rates opinions. What the Commission is doing
2 here is finding that the carrier has committed an
3 unreasonable practice by, among other things, violating
4 its statutory duties.

5 The petitioners have suggested, or tried to
6 obscure the fact of who is really at fault here,
7 suggesting that somehow the shipper is somehow to blame
8 for this. But it's -- under the statute it's the carrier
9 that has the duty to file its agreed-upon rates and
10 tariffs. It's the carrier that has the duty to charge and
11 collect the tariff rate, which it did not do for years
12 here. It was billing the shipper at the negotiated rate,
13 not at the tariff rate.

14 And so it is the carrier that has committed
15 statutory violations. And what the Commission has said is
16 that in terms of -- of administratively determining the
17 appropriate remedies for violations of those sections of
18 the Act and for committing unreasonable practices --

19 QUESTION: We are going to compel you to
20 continue to violate it --

21 MR. MERRILL: No, we are going --

22 QUESTION: -- is what they have said in effect.

23 MR. MERRILL: We are going to declare it an
24 unreasonable practice for the carrier to obtain a
25 windfall, essentially, based on its own violation of the

1 statute.

2 QUESTION: But in answering Justice O'Connor,
3 you -- you -- you spoke as though the only obligation of
4 the carrier is to file the tariff rate. It is not.

5 MR. MERRILL: No, there is --

6 QUESTION: It -- it is his obligation to charge
7 the tariff rate.

8 MR. MERRILL: It's -- it's stated in -- the
9 first sentence of 7061(a) says the carrier must file, and
10 7062(a) says the same thing, and then the second section
11 of Section 7061(a) says the carrier must only charge and
12 collect the rate at tariff.

13 QUESTION: Well, then let's charge and collect
14 that. And -- and what the Commission said --

15 MR. MERRILL: And the carrier violated that
16 provision.

17 QUESTION: What the Commission said, as Justice
18 O'Connor pointed out, is that complying with that is an
19 unreasonable billing practice.

20 MR. MERRILL: No, the Commission has not said
21 that simply not collecting the tariff rate is an
22 unreasonable billing practice. What the Commission has
23 said is that when these four elements are identified --
24 negotiation of the rate; reliance by the shipper on the
25 carrier's compliance with all statutory requirements;

1 nevertheless the carrier goes ahead and charges and
2 collects the negotiated rate, not the tariff rate, over a
3 long period of time typically; and finally, many years
4 later, typically when the carrier is bankrupt, comes back
5 and attempts to collect the much higher tariff rate --
6 that that course of conduct, taken together, is an
7 unreasonable practice.

8 And when the facts are found by the Commission
9 that will support a finding that there is an unreasonable
10 practice, the Commission will advise the courts that the
11 unreasonable practice should preclude the carrier from
12 collecting its full tariff charges. And --

13 QUESTION: Even though the undercharging may
14 have put it into bankruptcy.

15 MR. MERRILL: It's possible that the carrier,
16 through its own improvidence -- went into bankruptcy.
17 There may be no --

18 QUESTION: I would think creditors. I think
19 creditors have some stake in this, don't they?

20 MR. MERRILL: Yes, but I don't think there is
21 any conflict between the bankruptcy laws and the
22 Commission's negotiated rates policy. The Commission's -
23 - the policy doesn't apply just to bankrupt carriers.

24 QUESTION: Well, they -- I would suppose, if --
25 if -- if the -- if the carrier had an obligation to

1 collect a rate that it didn't collect, that it -- somebody
2 owes it something.

3 MR. MERRILL: That's correct, but the carrier is
4 --

5 QUESTION: And the creditors ought to insist
6 that the trustee bring a lawsuit, which he did.

7 MR. MERRILL: The carrier has no right to
8 collect a tariff rate that is found to be unreasonable.
9 The petitioners this morning, or this afternoon, have
10 conceded that if the Commission enters a finding that the
11 rate was unreasonable, the Commission's find even
12 unreasonableness supersedes.

13 QUESTION: I know, but we judge this case as
14 though the rate was reasonable.

15 MR. MERRILL: And similarly the Commission has
16 found in negotiated rates that if the carrier has
17 committed an unreasonable practice, which is defined by
18 these elements that I have summarized, that the finding of
19 an unreasonable practice should supersede the filed tariff
20 rate and prevent full collection.

21 So, essentially, the carrier or its trustee in
22 bankruptcy is -- is asserting the right to collect an
23 unreasonable charge, and there is no right that creditors
24 of the bankrupt have to obtain the benefit of -- of an
25 illegal charge.

1 Again, let me stress that the, the statutory
2 violations which admittedly have occurred here are duties
3 which the statute imposes on the carrier. They are not
4 imposed on the shipper. The carrier is essentially before
5 this Court seek -- seeking to obtain a windfall produced
6 by its own statutory violations. The shipper has engaged
7 in no affirmative misconduct in these cases whatsoever,
8 and in fact typically has no way to get these charges
9 back, because they were passed on, to the extent that they
10 were passed on to their -- the shipper's customers years
11 ago, and those transactions have long since been closed.

12 The only real difficulty with the Commission's -
13 - the only two legal issues, I think, that need to be
14 resolved in order to rule -- to uphold the Commission's
15 policy are two. Petitioners have conceded that if this
16 were an unreasonable rates case that the Commission's
17 order finding an unreasonable rate would supersede the
18 tariff rate.

19 So one issue that has to be decided is whether
20 or not there is any difference under the statute between
21 unreasonable rates and unreasonable practices, whether the
22 statute draws a line between those two things, such that a
23 finding of unreasonable practices does not supersede a
24 tariff filing, whereas a finding of unreasonable rates
25 would.

1 And the second issue is whether or not the
2 Commission has primary jurisdiction to consider
3 unreasonable practice claims that are referred to it by
4 the courts. And I think the answer to both of those
5 questions is that -- is that the Commission's decision is
6 fully justified.

7 The provision that carriers must engage in
8 reasonable practices is found in the very same sections of
9 the statute that say that the carrier must engage in --
10 must charge reasonable rates, Section 10701(a) and Section
11 10704. So the same statutory provisions govern both
12 cases.

13 In addition, this court has held on many
14 occasions that when a claim of unreasonable practices is
15 raised in the course of a judicial action, that that claim
16 implicates the administrative discretion of the ICC and
17 must be referred to the ICC for determination. It can't
18 be decided by courts. So in terms of the primary
19 jurisdiction jurisprudence, the court has drawn no
20 distinction between unreasonable rates and unreasonable
21 practices.

22 And for those reasons we think that the
23 petitioners' suggestion that somehow, merely because the
24 Commission is relying on its practices jurisprudence here
25 rather than -- or practices authority rather than its

1 rates authority, that a different result ought to
2 maintain.

3 I think it is also important that what is
4 involved here is the Commission's essentially attempting
5 to reconcile two different provisions of the statute. You
6 have Section 10761(a), which the petitioners rely on,
7 which requires the carrier to file its rates and tariffs
8 and collect only the tariff rates, but you also have the
9 duty to engage, to maintain reasonable practices.

10 Commission -- the petitioners' theory
11 essentially is that the one section, the tariff filing
12 section, completely -- completely trumps the unreasonable
13 rates practice, because neither the courts nor the
14 Commission would have any authority whatsoever to grant
15 relief to shippers in this type of circumstance presented
16 by this case. They would be no way that they could obtain
17 any type of damages or reparations for unreasonable
18 practices that are in fact statutory violations. But the
19 Commission's determination here has essentially attempted
20 to accommodate or reconcile these two statutory
21 provisions.

22 QUESTION: Mr. Merrill, can I ask about this,
23 what the unreasonable practice is again? As I understand
24 it, it would not have been an unreasonable practice if
25 they had been agreeing to the lower rate, but charging the

1 higher rate, the tariff rate, all along.

2 MR. MERRILL: I think that is correct.

3 QUESTION: And it would not have been an
4 unreasonable practice if they had been agreeing to the
5 lower rate, and charging the lower rate all along, and
6 then continued to charge the lower rate the last time
7 around. That also would not have been an unreasonable
8 practice.

9 MR. MERRILL: You may have no collection action
10 --

11 QUESTION: You said it was essential to the
12 whole thing that there had been the prior practice of both
13 agreeing to and actually billing the lower rate.

14 MR. MERRILL: I don't think the attempt to
15 collect the rates adds anything to the unreasonableness.
16 It simply is the occasion on which the Commission becomes
17 aware that these unreasonable practices has been going on.

18 QUESTION: So the unreasonable practice, then,
19 is not trying to collect the higher rate, it's just what?

20 MR. MERRILL: It's the --

21 QUESTION: Agreeing to the lower rate.

22 MR. MERRILL: Agreeing to the lower rate. The
23 shipper's reliance on the carrier to conform that rate to
24 the law, i.e., file it in a tariff. And finally --

25 QUESTION: But that is not a billing practice.

1 MR. MERRILL: That's a solicitation practice.
2 And finally the carrier's persisting in charging and
3 collecting the negotiated rate as opposed to the tariff
4 rate. These are cases typically that have gone on for
5 some -- some period of time.

6 QUESTION: Part of the element is the failure to
7 file, is part of the unreasonableness.

8 MR. MERRILL: The failure to file is a key part,
9 yes. I mean, the statute in two places --

10 QUESTION: You didn't mention it.

11 MR. MERRILL: -- I have already mentioned them,
12 10761(a) and 10762, imposes on the carrier the duty to
13 file the rates for its transportation services in tariffs.
14 And the carrier has violated that duty in this case.

15 QUESTION: Well, but you could say that in any
16 case where the carrier agrees to a lower rate, doesn't
17 file a tariff for that lower rate, and then bills the
18 lower rate. You could say there has been an unlawful
19 billing practice. But I had thought that our case law
20 prevents that. I had thought that what the statute means
21 is you have to bill the tariff rate.

22 MR. MERRILL: Well, the Commission's not --
23 again, I mean, the petitioners try to suggest that the
24 Commission has repealed the filed tariff doctrine. The
25 Commission has no intention of doing that whatsoever, and

1 I -- the Commission -- for example, the Commission's
2 policy doesn't apply to cases of isolated misquotation.
3 The Commission's policy only applies to the circumstances
4 identified in this decision.

5 QUESTION: (Inaudible) reason to depart from the
6 tariff.

7 MR. MERRILL: No. A misquotation would be where
8 there is an agreement to abide by the tariff, and some
9 mistake occurs. That is like in the facts in the Maxwell
10 case, where Mr. Maxwell basically was of the same state of
11 mind as the railroad. They both wanted him to be able to
12 go, wherever it was, St. Louis to Salt Lake City and back
13 at a certain rate, and the railroad just got the wrong
14 line on the tariff.

15 QUESTION: I suppose the Commission's approach
16 would cover the situation where the -- where the shipper
17 wants a lower rate and -- than he knows in the carrier's
18 tariff. And the carrier says well, you're a great
19 customer, okay, you're going to get the lower rate, but
20 please don't tell anybody. And he goes ahead and charges
21 it for two or three years, and then he goes bankrupt.

22 MR. MERRILL: No, the Commission's policy would
23 not apply in a case --

24 QUESTION: Well, why not?

25 MR. MERRILL: Well, because the statute, Section

1 11902 of the Interstate Commerce Act, which is part of the
2 Elkins Act, imposes treble damage liability on shippers
3 for knowingly accepting a rebate from the tariff rate. So
4 if the -- the Commission, I think, was trying to navigate
5 around that. Quite clearly the Commission did not want to
6 vindicate shippers who have engaged in what is a clear
7 statutory violation. But that's the only point in the
8 statute where --

9 QUESTION: So the -- the shipper has to be
10 innocent, is that it?

11 MR. MERRILL: That is correct. The shipper has
12 -- the shipper may not have knowledge of the carrier's
13 derelictions of its statutory duty. The negotiated rates
14 policy only applies in those cases where the shipper is
15 innocent, has not informed itself and otherwise has no
16 notice --

17 QUESTION: Was there a finding to that effect
18 here?

19 MR. MERRILL: Yes, I think the Commission again
20 found that -- that the -- I can't recall the precise
21 language at this moment, but on page 42a and 43a of the
22 Commission's decision in this case there is discussion of
23 the states of mind of both the carrier and the shipper.
24 And -- and it's -- it's clear also from the evidence that
25 was submitted in the record that the shipper -- the

1 shipper was not vigilant in this case. The shipper did
2 not hire a tariff watching agency or something like that
3 to double check on the carrier to make sure it was not
4 breaching its statutory obligations. But there is no
5 suggestion in the evidence that the shipper had actual
6 knowledge or notice of the -- of the carrier's misdeeds.

7 QUESTION: Mr. Merrill, may I ask you a question
8 about the Commission's policy? It is not directly
9 involved in this case, but if there were negotiated rates,
10 two different negotiated rates for competing types of
11 shipments that should normally be covered by the filed
12 tariff, but they were not the same, would the policy
13 apply?

14 MR. MERRILL: In other words you have --

15 QUESTION: You have discrimination between
16 negotiated rates.

17 MR. MERRILL: One tariff, and one shipper
18 negotiates, the other one doesn't?

19 QUESTION: No, no, no. The one carrier
20 negotiates with two different shippers, and tells them
21 both that he will file the negotiated rate. But the two
22 shippers get different negotiated rates.

23 MR. MERRILL: I see. What you have just
24 described is really an everyday happening in the motor
25 carrier industry today. The negotiation of rates --

1 QUESTION: See, that triggers a concern that
2 isn't necessarily shown by the record of this case, the
3 possibility of discrimination, which has always been
4 something that --

5 MR. MERRILL: Yes. The Act still prohibits
6 discrimination. There's no question about that. And --
7 discrimination, however, has -- is defined more narrowly
8 today than it was back in the heyday of the filed rate
9 doctrine and the Court's early decisions. A shipper has
10 to show competitive injury in order to establish
11 discrimination, and the carrier can defeat a claim of
12 discrimination by showing that there is some relevant
13 difference in the transportation characteristics of the
14 two movements, like the costs are different, for example.

15 But if those elements are satisfied, if a
16 shipper can show competitive injury, that there is a
17 disparity in rates, that the same carrier controlled both
18 rates, and the carrier can't show a difference in costs or
19 other relevant transportation characteristics, yes,
20 discrimination is a possibility.

21 But what is really going on in the motor carrier
22 industry, and the Commission's decision reflects this, is
23 that at least when you are dealing with something like we
24 are in this case, which is a full truckload shipment of a
25 particular commodity, steel in this case, which is carried

1 on flatbed trucks, that it is common throughout the
2 industry for -- for carriers to call up shippers and to
3 dicker over rates, and for the parties to reach an
4 agreement about a particular rate that will apply. And
5 this is true for companies like Primary; it is true for
6 Primary's competitors.

7 QUESTION: Is it common practice not to adhere
8 to the filed tariffs?

9 MR. MERRILL: No, no. We don't think it's a
10 common practice not to --

11 QUESTION: Well, what did you just say?

12 MR. MERRILL: It's a common practice to
13 negotiate a rate, with the expectation --

14 QUESTION: Yes, but this is a tariff rate.

15 MR. MERRILL: With the expectation that the
16 negotiated rate will then be filed in the tariff. That is
17 correct. Now, these are what are called commodity rates.
18 You have to remember --

19 QUESTION: Well, then -- then it is common
20 practice not to -- common practice to agree to charge a
21 rate that is not on file with the Commission.

22 MR. MERRILL: No. There is an agreement on a
23 rate, with the understanding that then, before the
24 movement occurs --

25 QUESTION: Well, there was no such understanding

1 in this case. And you say that it's irrelevant to -- to
2 this case.

3 MR. MERRILL: There was no specific proof of an
4 agreement to file a tariff in this case.

5 QUESTION: Well, and you say it is irrelevant
6 whether there was or not.

7 MR. MERRILL: Well, the Commission's policy is
8 that what is relevant is whether or not the shipper relied
9 on the carrier to do what was necessary to comply with its
10 -- the law, which includes filing the tariff rate. But
11 there was no specific --

12 QUESTION: All shippers do. I mean, all
13 shippers do. I -- anybody I deal with, I assume that they
14 are going to comply with the law. Can't you always say
15 that, unless there is some indication where they
16 specifically agree now, I am telling you I am not going to
17 file this rate, I suppose. But normally, if they say
18 nothing about it, the Commission would say the same thing
19 it did here, wouldn't it? That the --

20 MR. MERRILL: I think -- I agree with you,
21 Justice Scalia, that people who do business normally
22 assume that the people they are doing business with will
23 comply with the law. They think that they are not
24 conspiring to violate the antitrust laws, that they are
25 paying their taxes and so forth.

1 And essentially, under the Commission's policy,
2 unless there is some indication that the shipper is
3 conniving with the carrier to discriminate against its
4 competitors by getting some off tariff rate, and there is
5 no expectation by either party that it is going to be
6 filed, the policy will apply. But you'd have to say -- if
7 there is some showing of that, then the policy does not
8 apply.

9 QUESTION: Mr. Merrill, could I ask this. You
10 said earlier that there are hundreds of cases involving
11 this problem. Do you have any idea what percentage of
12 those hundreds of cases involve rates that are reasonable
13 rates, or as to which there is no claim that the rates --
14 that the tariffed rates were unreasonable?

15 MR. MERRILL: I have no idea, Justice Scalia. I
16 think the typical --

17 QUESTION: Well, that might make a big
18 difference. I mean, we're not talking here about whether
19 the Commission might achieve this by finding the rate to
20 have been unreasonable.

21 MR. MERRILL: The Commission has not entertained
22 very many cases on the merits since 1980 alleging
23 unreasonable motor carrier rates. They have been quite
24 scarce.

25 QUESTION: (Inaudible) the concept.

1 MR. MERRILL: What?

2 QUESTION: They don't have to.

3 QUESTION: It doesn't like the concept.

4 MR. MERRILL: Well, the shippers don't like the
5 concept either, because the shippers can go out and get
6 different quotations and tariff rates from different
7 carriers. I mean, competition in the marketplace has
8 really eliminated a lot of the need for supervision of
9 unreasonable rates and discriminatory rates, which is what
10 Congress basically had in mind when it passed the 1980
11 Act.

12 Let me -- let me specifically make mention of
13 the Court's case law which is relied on here, and in
14 particular the so-called filed rate doctrine, and point
15 out first of all that the filed rate doctrine is not a
16 term which appears in the statute. Nor is it a term, as
17 far as I am aware, which appears in any of this Court's
18 cases construing the Interstate Commerce Act. That term
19 can be found in some gas cases, but does not appear in the
20 Court's decisions under the Interstate Commerce Act. And
21 I think it is important that the Court act with some
22 precision in defining exactly what is meant by that term
23 in deciding this particular case.

24 The older cases that are cited, Maxwell, Fink,
25 Mug and so forth, are all cases that were adjudicated in

1 court. There was no reference to the ICC. The ICC was
2 not a party in those cases. And basically the holdings of
3 those cases are that a court is not permitted to deviate
4 from the filed tariff rate and inquire whether the rate is
5 reasonable or whether equitable circumstances might create
6 a valid defense to collection of the tariff rate.

7 But the same time that those cases make that --
8 state that rather inflexible rule, the cases also
9 recognize that the rule does not apply to the Interstate
10 Commerce Commission. Maxwell itself says that the rule -
11 - the strict rule applies unless the Commission finds that
12 the rate is unreasonable. And there are --

13 QUESTION: Do you know of any instance where the
14 Commission has gotten after some carrier for negotiating a
15 rate lower than the tariff rate, and in short just plain
16 violate the statute?

17 MR. MERRILL: The Commission, I don't know the
18 names of the cases, but I asked and I was told that the
19 Commission has had enforcement proceedings within the
20 recent -- 1988 and 1989, against carriers --

21 QUESTION: Because if you say this is this --
22 this practice is just common everyday occurrence around,
23 and the Commission isn't doing anything about it, it
24 sounds like the whole business of requiring carriers to
25 comply with the statutory requirement of charging the same

1 to everybody is just hash.

2 MR. MERRILL: Well, I don't think it's that bad,
3 Justice White. The Commission -- the Commission does not
4 want to -- the Commission wants to encourage carriers to
5 file these rates and tariffs. I mean, the Commission has
6 nothing against the tariff filing requirement.

7 QUESTION: How are they doing that? How are
8 they doing that?

9 MR. MERRILL: Well, one way -- well, first of
10 all, this proceeding is largely retrospective in
11 orientation. The Commission was confronted with a
12 problem. The problem was this avalanche of lawsuits filed
13 in bankruptcy proceedings with carriers seeking to recover
14 much -- much higher rates than had been agreed to with
15 shippers. And the Commission basically in these
16 proceedings, these negotiated rates proceedings, is trying
17 to figure out what is the best thing to do about that
18 problem. And I think by telling the carrier that you
19 can't gain a windfall, you can't somehow, after the fact
20 obtain a huge increase in the rate that the shipper never
21 agreed to, in fact helps to serve to dissuade carriers
22 from engaging in this unreasonable practice. I don't
23 think there is any tension or inconsistency between a
24 deterrence-type rationale and what the Commission is doing
25 in this particular case.

1 The Commission has not gone by special
2 proceeding beyond this to focus on whether or not some
3 other measures might be appropriate to try and encourage
4 carriers to tow the line. But at least insofar as what
5 they have done here, I don't see any -- any inconsistency
6 between what they have done and those larger objectives.

7 QUESTION: It's like estoppel?

8 MR. MERRILL: It's -- I hate to use that word,
9 because these old cases from this Court say that no
10 estoppel is permitted --

11 QUESTION: Exactly.

12 MR. MERRILL: -- but it's a Commission --

13 (Laughter.)

14 QUESTION: it's a Commission finding of an
15 unreasonable practice which supersedes the filed rate
16 requirement.

17 Let me briefly mention the second legal issue.
18 I have said the first legal issue really was whether or
19 not the -- a different rule should apply for unreasonable
20 practices and unreasonable rates, and turn briefly to the
21 primary jurisdiction issue, since it is featured in the
22 petitioners' briefs and is an argument that can generate
23 some confusion. The question here is whether, although,
24 of course, the Commission has primary jurisdiction to
25 consider an unreasonable rate referral from the Court, it

1 has no primary jurisdiction to consider an unreasonable
2 practices referral. And I don't -- we don't think that
3 there is any basis for this either in the T.I.M.E.
4 decision or anywhere else.

5 Essentially the argument is that the
6 unreasonable practice involved here falls into a crack in
7 the law. The petitioners admit that if this were an
8 unreasonable rate claim it would be expressly governed by
9 the statute that Congress passed to overrule the T.I.M.E.
10 decision. And they admit that if this were an
11 unreasonable practice of the sort that was involved in the
12 Hewitt-Robins case, which was decided three years after
13 T.I.M.E., it would also be subject to the Commission's
14 primary jurisdiction. But they say that this case falls
15 into a crack between those two broad areas of the law, and
16 therefore is not subject to primary jurisdiction.

17 The -- the key assumption that they are making
18 is that the rationale of the T.I.M.E. decision lives on,
19 even though T.I.M.E. was overturned by Congress. And that
20 under the rationale of the T.I.M.E. decision there would
21 be no basis to refer this issue to the Commission, because
22 the rationale of the T.I.M.E. decision was that the
23 Commission can't accept a case on referral where it
24 doesn't have independent jurisdiction to grant relief on
25 its own.

1 And the short answer to that is that that
2 particular rationale was expressly repudiated by this
3 Court in the Hewitt-Robins case, which was decided three
4 years after T.I.M.E. At page 89 of Hewitt-Robins the
5 Court said this, and I quote, "The practice of the
6 Commission in making such determination in the first
7 place, even though it has no power to award reparations in
8 a given case, has long been exercised and is supported by
9 a long line of cases."

10 In short, this Court itself repudiated the
11 rationale that the petitioners are relying upon shortly
12 after the T.I.M.E. -- case came down. And for that reason
13 alone, Commissioner's argument has no merit and should be
14 rejected.

15 If the Court has no further questions, I thank
16 the Court.

17 QUESTION: Thank you, Mr. Merrill.

18 Mr. Auchincloss, do you have rebuttal? You have
19 two minutes remaining.

20 REBUTTAL ARGUMENT OF THOMAS M. AUCHINCLOSS, JR.

21 ON BEHALF OF THE PETITIONERS

22 MR. AUCHINCLOSS: I do, Your Honor.

23 I think it is well to look at the Hewitt-Robins
24 case in light of the government's argument. In fact,
25 Hewitt-Robins involved a practice, the practice of

1 routing. The carrier routed interstate shipments, or
2 intrastate shipments over an interstate route, and thereby
3 applied a higher rate than was applicable under its
4 interstate, or intrastate route, the result being, and
5 this is what this Court held, that that common law right
6 to a reasonable route exists and was not extinguished by
7 the enactment of the Interstate Commerce Act.

8 That's the kind of practice the Commission has
9 traditionally looked at, and that is the kind of practice
10 the Court has looked at in terms of what is a lawful
11 proposition versus an unlawful proposition. We contend
12 here, of course, that in fact the secret rate agreement is
13 an unlawful proposition. The Commission and the courts
14 have always wrestled with practices that revolve around
15 tariff provisions, not around secret agreements. The
16 government says that the culprit in this is the carrier,
17 because the carrier failed to follow through on its duty
18 to file a tariff.

19 Well, in fact the law charges shippers with
20 knowledge of tariff provisions as well, and Primary was no
21 small shipper. The record indicates it shipped 43 million
22 pounds via this carrier over a nearly three-year period.

23 So in fact the conduct that we are talking about
24 was not unreasonable in terms of the carrier's practice
25 solely. It was the shipper who neglected to even ask the

1 carrier whether or not it had a tariff applicable to this
2 movement, notwithstanding its allegations it knew nothing
3 about the law. The law requires this, but I know nothing
4 about it. It made shipments to United States Steel, one
5 of the largest producers in the country, obviously, and
6 notwithstanding that United States Steel undoubtedly
7 audits its freight bills, Primary says it didn't have to.
8 So this whole process --

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Auchincloss.

11 The case is submitted.

12 (Whereupon, at 1:56 p.m., the case in the above-
13 entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of
The United States in the Matter of:

Maislin Industries, U.S., Inc., et al. Petitioners v. Primary Steel, Inc.

Case No. 89-624

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

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