SUPREME COURT OF THE UNITED STATES

No. 93–284

SECURITY SERVICES, INC., PETITIONER *v.* KMART CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May 16, 1994]

JUSTICE THOMAS, dissenting.

The Court today concludes that the Interstate Commerce Commission has the authority to promulgate regulations under which a carrier's duly filed and effective tariff automatically becomes "void" without "any agency action at all," *ante*, at 10, if the carrier at some time after filing fails to comply with certain requirements of the Commission's regulations. Because I find nothing in the Interstate Commerce Act that expressly or impliedly gives the Commission such authority, I respectfully dissent.

The Interstate Commerce Act (Act), 49 U. S. C. §10101 *et seq.*, requires motor common carriers such as petitioner to publish and file with the Interstate Commerce Commission (Commission or ICC) tariffs containing their rates for transportation or other service under the Commission's jurisdiction, §10762(a)(1), and forbids them to "charge or receive a different compensation for that transportation or service than the rate specified in the tariff." §10761(a). In other words, common carriers must charge the filed rate and only the filed rate. This "filed rate doctrine" admits of few exceptions. As we have often stated, "`[d]eviation from [the filed rate] is

not permitted upon any pretext. . . . 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.'" *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.,* 497 U. S. 116, 127 (1990) (quoting *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94, 97 (1915)).

That much is not in dispute. Cf. *ante*, at 3–4; *post*, at 1–2. This case turns, not on an application of the filed rate doctrine *per se*, but on the extent of the Commission's authority to determine what rates and tariffs are "filed" or, in the terms of the statute, "in effect." 49 U. S. C. §10761(a). ICC regulations permit a carrier to file a tariff that incorporates another entity's tariff by reference, provided that the carrier "participates" in that entity's tariff—that is, provided that the carrier maintains an effective concurrence or power of attorney with the publisher of the referenced tariff. See 49 CFR §§1312.27(e), 1312.30(c)(4), 1312.4(d) (1993). The regulatory provision at issue here, the so-called "void-for-nonparticipation rule," provides that "[a]bsent effective concurrences or powers of attorney, tariffs are *void as a matter of law*." §1312.4(d) (emphasis added).

Taking advantage of the ability to participate in other entities' tariffs, petitioner filed a tariff with the Commission that specified rates per mile for the carriage of various goods and provided that distances would be calculated using a filed tariff (often referred to as a distance guide) of the Household Goods Carriers' Bureau (HGCB). See App. 27. The Commission accepted the tariff for filing, and it became effective. At some point between the effective date of petitioner's tariff and the shipments at issue here, however, petitioner allowed its participation in the HGCB distance guide to lapse. After transporting goods for respondent under a contract that provided for a rate lower than the filed

rate, petitioner sought to recover the difference between the filed rate and the contract rate in an action for undercharges. See 49 U. S. C. §11706(a). The Third Circuit held the filed rate unenforceable because petitioner had failed to maintain its participation in the distance guide, its tariff was void under 49 CFR §1312.4(d) (1993). See 996 F. 2d 1516, 1524 (1993). Petitioner challenges the Commission's authority to promulgate §1312.4(d)'s void-for-nonparticipation rule.

We considered a similar challenge to the Commission's statutory authority in *ICC* v. *American Trucking Assns., Inc.,* 467 U. S. 354 (1984). At issue there was the Commission's power to reject an effective tariff that had been submitted in substantial violation of a rate-bureau agreement. In determining whether that remedy was within the Commission's authority, we asked two questions: first, whether the Act expressly authorized the agency action in question, see *id.*, at 361–364; and second, if it did not, whether the remedy nevertheless was "direct[ly] adjunct to the Commission's explicit statutory power"—that is, whether it "further[ed] a specific statutory mandate" and was "directly and closely tied to that mandate." *Id.,* at 365, 367 (internal quotation marks omitted). To ascertain whether the void-for-nonparticipation rule is within the Commission's power, we should ask the same questions.

The Court dispenses with the inquiry outlined in *American Trucking*, however, in the belief that the decision applies only to cases involving "retroactiv[e]" action by the Commission. *Ante*, at 9. It is true that in *American Trucking*, the Commission's rejection remedy operated retroactively by voiding the tariff *ab initio*. Thus, unlike the Commission's action in this case, the remedy affected the charges for transportation completed before the rejection took

place. The Court, however, misapprehends the scope of our holding. Far from establishing a special test for retroactive Commission actions, *American Trucking* merely applied established principles delimiting the Commission's implied or adjunct powers. Although the retroactive effect of the proposed remedy was relevant to our assessment of the Commission's authority, it did not alter our method of analyzing the statutory challenge to the Commission's power.

Indeed, the decisions upon which we relied in *American Trucking* make clear that the methodology we pursued in that case is not limited to situations involving retroactive agency action. See *American Trucking, supra,* at 365–366 (discussing *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631 (1978), and *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500 (1976)). Those cases involved "the Commission's efforts to place reasonable conditions on the acceptance of proposed tariffs" as an alternative to suspension of the tariffs pending investigation. 467 U. S., at 365. In *Chesapeake & Ohio*, the Court considered whether conditions imposed on immediate acceptance of a tariff, although not expressly authorized by the Act, were impliedly authorized because they were "directly related to" the Commission's specific statutory mandate to review, and to suspend if necessary, tariff rates when filed. 426 U. S., at 514. Similarly, we held in *Trans Alaska* that, "as in *[Chesapeake & Ohio]*, . . . [the] conditions [imposed were] a `. . . direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation,' in that they allow[ed] the Commission, in exercising its suspension power, to pursue `a more measured course' and to `offe[r] an alternative tailored far more precisely to the particular circumstances' of these cases." 436 U. S., at 655 (quoting *Chesapeake & Ohio, supra*, at 514). In both cases, although the actions had only prospective effect, we determined whether they

came within the Commission's implied powers by applying essentially the same test that we subsequently applied in *American Trucking* to determine whether the action was within the Commission's implied powers. See 467 U. S., at 367.

Proceeding with the analysis outlined above, I necessarily begin with the terms of the statute. The Act expressly gives the Commission an "impressive array of prescriptive powers, overcharge assessments, damages remedies, and civil and criminal fines" to enable it to enforce the filing and substantive requirements of the Act. *American Trucking*, 467 U. S., at 379 (O'CONNOR, J., dissenting). See also *id.*, at 359–360. Nowhere, however, does the Act give the Commission authority to render a duly filed and effective tariff void upon non-compliance with a statutory or regulatory requirement.

It might be thought that the most likely source of authority to promulgate the void-for-nonparticipation rule is 49 U. S. C. §10762(e), which authorizes the Commission to "reject" tariffs. *American Trucking*, however, forecloses reliance on that section. Although §10762(e) does not by its terms apply only to proposed tariffs, we concluded in *American Trucking* that "unbridled discretion to reject effective tariffs at any time would undermine restraints placed by Congress on the Commission's power to suspend a proposed tariff." *Id.*, at 363.[1] We therefore held that

[1] The Commission may, pending investigation, suspend a "*proposed* rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect." 49 U. S. C. §10708(b) (emphasis added). To do so,

§10762(e) does not apply "to tariffs that have gone into effect." *American Trucking, supra*, at 362. The critical point for our analysis of the Commission's express authority under the Act was not that the proposed remedy was retroactive, but that it voided an effective tariff. Our holding was premised on recognition that once a tariff becomes effective, the Commission's power to nullify it is limited by the Act.[2] Section 10704(b), for example, "which deals with the Commission's authority to cancel *effective* tariffs," requires a full Commission hearing before action is taken. *Id.*, at 363 (emphasis added). The void-for-

---

the Commission must notify the carrier and file a notice of suspension with the proposed tariff. If the Commission fails to act by the end of the suspension period, the tariff goes into effect. *Ibid.*

[2]The D. C. Circuit has linked this conclusion to the concept of retroactivity. See *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356, 360 (CADC 1993) ("That a tariff was effective or in effect is what makes rejection retroactive"), cert. pending, No. 93–883. Cf. JUSTICE GINSBURG's dissent, *post*, at 5–6. I agree with the Court that the void-for-nonparticipation rule operates only prospectively, see *ante*, at 9, because the rule does not affect any transportation provided prior to the lapse in participation that triggers application of the rule. Nevertheless, because *American Trucking* focused, not on retroactivity, but on the Commission's nullification of an *effective* tariff, the D. C. Circuit properly concluded that the decisive factor for *American Trucking*'s statutory analysis was the rejection of a tariff after its effective date. In other words, the D. C. Circuit was correct in stating in the disjunctive that "[t]he Commission is restricted [by *American Trucking*'s holding] whenever it attempts to invalidate (*or* alter the past effects of) a tariff after the application period has ended." *Overland Express, supra,* at 360 (emphasis added).

nonparticipation rule, which nullifies effective tariffs, provides none of the same procedural protections. Quite the contrary, it obviates the need for “any agency action at all.” *Ante*, at 10.

Perhaps realizing that the Act's provisions relating to the suspension or rejection of tariffs provide no authority for the void-for-nonparticipation rule, the Commission relies instead on §10762(a)(1), which allows the Commission to “prescribe other information” to be included in tariffs. See *Wonderoast, Inc.*, 8 I. C. C. 2d 272, 275 (1992). That section, however, says nothing about enforcement of the requirements the Commission imposes, and thus does not—at least expressly—expand the scope of the Commission's enforcement mechanisms. Reading it to do so would pose the same problem that led us to construe §10762(e) narrowly in *American Trucking*. An unlimited power to reject effective tariffs would render the “temporal and procedural constraints” of other sections of the Act “nugatory” and would permit the Commission to void a tariff “at any time and without any procedural safeguards.” *American Trucking, supra*, at 363.

The absence of explicit authority in the Act does not end our inquiry, because Congress did not limit the Commission to the powers expressly granted by the Act. See 49 U. S. C. §10321(a) (“Enumeration of a power of the Commission in this subtitle [§§10101–11917] does not exclude another power the Commission may have in carrying out this subtitle”). See also *American Trucking, supra*, at 364–365 (“The Commission's authority under the [Act] is not bounded by the powers expressly enumerated in the Act”) (citing §10321(a)). Thus, we have recognized that in addition to its express powers, the Commission has implied authority to take actions that are “direct[ly] adjunct to [its] explicit statutory

power." *Id.*, at 365 (internal quotation marks omitted). The Third Circuit, which applied the *American Trucking* analysis of the express and implied authority of the Commission, concluded that the void-for-nonparticipation rule is impliedly authorized by the Act because it is directly adjunct to the Commission's statutory power under §10762(a)(1) to determine what information shall be included in tariffs. See 996 F. 2d, at 1525–1526. The court failed, however, to consider the relationship of the rule to the Act as a whole. Viewed in isolation, any remedy designed to enforce a regulation promulgated under the Act might be said to be "adjunct" to the relevant provision of the Act, but *Maislin* makes clear that the Act must be considered in its entirety. "[A]lthough . . . the Commission may have discretion to craft appropriate remedies for violations of the statute"—and, possibly, violations of its regulations—the remedy may not "effectively rende[r] nugatory the requirements of §§10761 and 10762" and thereby "conflic[t] directly with the core purposes of the Act." *Maislin*, 497 U. S., at 133.

Viewed in this light, it is clear that far from being "directly adjunct" to a statutory power of the Commission, the void-for-nonparticipation rule is directly contrary to the Act's commands and, indeed, to the essence of the filed rate doctrine. The rule nullifies an effective tariff—that is, one that has been filed and gone into effect, §10762(a)(2), and has not been suspended or set aside by the Commission or canceled by the carrier— without "any agency action at all," *ante*, at 10, and allows to stand a rate negotiated between a carrier and a shipper but never filed. Like the policy contested in *Maislin*, the void-for-nonparticipation rule thus "undermines the basic structure of the Act" by sanctioning adherence to an unfiled rate. 497 U. S., at 132.[3]

---

[3]When the Commission displaces or finds inapplicable

The ability of both carrier and shipper to rely on the tariff on file with the Commission is central to the Act's filed rate provisions. See *American Trucking*, 467 U. S., at 363–364, n. 7. Therefore, we have consistently held that "[u]nless and until suspended or set aside, [the rate in the published tariff] is made, for all purposes, the legal rate, as between carrier and shipper." *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922). See also *Maislin, supra,* at 126. This remains the case even if the filed tariff does not conform with technical filing requirements, see, *e. g., Berwind-White Coal Mining Co.* v. *Chicago & Erie R. Co.*, 235 U. S. 371 (1914), or violates a clear prohibition in the statute. See *Davis* v. *Portland Seed Co.*, 264 U. S. 403 (1924) (enforcing tariff rate that unlawfully assessed a higher charge for a shorter shipment than a longer shipment along the same route). As long as a tariff is "received and placed on file by the Commission without any objection whatever . . . [and] as a matter of fact [is] adequate to give notice," that tariff controls. *Berwind-*

---

a particular filed rate under other sections of the Act expressly authorizing it to do so, that rate is generally replaced either by a reasonable rate prescribed by the Commission, see 49 U. S. C. §10704(b), or by a different *filed* rate. See *Maislin*, 497 U. S., at 129, n. 11 ("None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice have required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff"); *American Trucking*, 467 U. S., at 358. As JUSTICE GINSBURG explains, see *post*, at 3–4, by sanctioning a rate negotiated by the parties, the Commission, now with the Court's approval, condones precisely the "secret" rates and the potential for price discrimination that the Act was intended to prohibit. See 49 U. S. C. §10101(a)(1)(D).

White, supra, at 375.

There can be no doubt that petitioner's tariff was sufficiently complete "as a matter of fact" to give notice of the applicable charge. *Ibid.* Petitioner's tariff was filed with (and accepted by) the Commission and became effective well before the transportation at issue. It has never been suspended or set aside by the Commission or cancelled by petitioner. At all times it stated that distances would be determined by reference to the HGCB distance guide—an effective, duly filed tariff. See App. 27. Neither respondent nor the Commission suggests any confusion or ambiguity as to what charge would be due under petitioner's tariff, but for the challenged void-for-nonparticipation rule. As JUSTICE GINSBURG explains, see *post*, at 4–5, petitioner and respondent could calculate the appropriate charge (if either desired) just as easily after petitioner's participation lapsed as they could on the date petitioner's tariff was filed. Under our prior filed rate cases, nothing more is required for the filed tariff to be enforced.

The Court's refusal to apply *American Trucking*'s two-step method of statutory analysis leads to a remarkable result: the Court upholds an agency regulation challenged as beyond the agency's statutory authority without ever considering whether any provision of the statute explicitly authorizes the regulation and, if not, whether the regulation is sufficiently related to an express statutory authority to be within the agency's implied powers. Indeed, much of the Court's analysis simply begs the question whether the Commission had authority to promulgate the void-for-nonparticipation rule.[4] In the Court's

---

[4]In considering the case closed after rejecting the contention that the void-for-nonparticipation rule is impermissibly retroactive under *American Trucking*,

view, petitioner cannot appeal to our precedents governing the enforcement of filed tariffs because "under the regulations, distance tariffs are incomplete once the carrier's participation in the [HGCB] Mileage Guide has been canceled." *Ante*, at 11. Similarly, the Court concludes that *Maislin* requires that petitioner's tariff not be enforced because petitioner "had no rates on file because its tariff lacked an essential element." *Ante*, at 9. In both instances, the Court assumes that the void-for-nonparticipation rule is valid, and that petitioner's tariff is therefore void. But *whether* the Commission may deem the tariff incomplete as a matter of law through 49 CFR §1312.4(d) (1993) is precisely the question we are asked to answer.[5]

In failing even to consider the Commission's authority to promulgate the void-for-nonparticipation rule, and thereby to void effective tariffs, the Court

---

the Court also ignores petitioner's broader argument. Although petitioner does assert that the void-for-nonparticipation rule is "retroactive," see Brief for Petitioner 7–16, it also contends more generally that the rule is not within the Commission's authority. See *id*., at 17–24. Specifically, petitioner argues that the Act's "carefully integrated and complete system of procedures, remedies and penalties" does not "giv[e] the ICC the broad nullification power set forth in 49 C. F. R. §1312.4(d)." *Id.*, at 17, 20.

[5]The Court's suggestion that the carrier "cannot have it both ways," *ante*, at 9—that is, that it cannot rely rigidly on the filed rate doctrine in some cases to enforce the effective rates on file with the Commission and at the same time not suffer the harsh consequences of the doctrine when its rate on file is ineffective—presents the same problem. The Court assumes that there is no filed rate to bind any party in the absence of current participation in the HGCB distance guide.

also fails to consider any limit the Act might place on that authority. Under the Court's holding, it would appear that the Commission could provide that tariffs will become void, without "any agency action at all," *ante*, at 10, because of any number of technical or substantive defects, all in the name of enforcing the provisions of the Act and ICC regulations. In each instance, noncompliance would enable a carrier and preferred shippers to negotiate more favorable rates with the assurance that the rate on file could not be enforced. Until the Commission examines the carrier's tariff carefully and sets it aside (actions ostensibly made unnecessary by the void-for-nonparticipation rule), the unfiled rates, rather than the filed-but-void tariff, will govern the relationship between the parties.

The unfortunate lesson for the Commission is that its Court-sanctioned voiding power provides the key to unraveling the Act's filed rate requirements.[6] If the Court is correct, the Commission's mistake in *Maislin* was its choice of remedies, not its objective. In *Maislin*, the Commission attempted to justify its policy of refusing to enforce a filed tariff rate where the parties had negotiated a different rate "as a remedy for the carrier's failure to comply with §10762's directive to file the negotiated rate with the ICC." 497 U. S., at 131. We rejected that rationale because "§10761 *requires* the carrier to collect the filed rate." *Ibid.* Under the reasoning the Court applies today, however, it appears that the Commission merely chose the wrong remedy: it should have promulgated a rule declaring a filed tariff "void as a matter of law" upon negotiation of a different rate, thereby

---

[6]It is also worth noting that the Court's rationale should apply equally to other agencies operating under filed rate regimes, such as, for example, the Federal Communications Commission. See 47 U. S. C. §203 (1988 ed. and Supp. IV).

rendering the filed rate unenforceable. Section 10761 and the filed rate doctrine would not stand in the way, in the Court's view, because the carrier would have no effective rate on file. See *ante*, at 7–12. In my view, the Court's reasoning will permit the Commission to turn the filed rate doctrine on its head.

For the foregoing reasons, I respectfully dissent.