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 GINSBURG, dissenting.

The filed rate doctrine is an integral part of the Interstate Commerce Act. See 49 U. S. C. §10761(a) (a "carrier may not charge or receive a different compensation . . . than the rate specified in [its] tariff"). At least since 1915, this Court has held that the doctrine entitles a carrier to collect the rate on file with the Interstate Commerce Commission (ICC), despite a contract, negotiated between shipper and carrier, setting a lower price. See *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97 (1915). The main rule to which we have adhered requires enforcement of the filed rate unless the Commission either rejects the tariff because of a formal or substantive defect, *before the rate takes effect*, 49 U. S. C. §10762(e), or prospectively invalidates a tariff after initiating an investigation and finding the filed rate unreasonable. §10704(b)(1). See *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside*, this rate is made, for all purposes, the legal rate, as between carrier and shipper.") (emphasis added).

Under our filed rate doctrine decisions, even defective filings, including those containing substantively unlawful rates, see *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 425 (1924), normally control. See *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354, 363–364, n. 7 (1984); *Berwind-White Coal*

Mining Co. v. *Chicago & Erie R. Co.*, 235 U. S. 371, 375 (1914). A shipper's remedy, when a filed rate imposes an unlawful charge, ordinarily is confined to actual damages. See *American Trucking*, *supra*, at 364, n. 7 (citing *Boren-Stewart Co.* v. *Atchison, T. & S. F. R. Co.*, 196 I. C. C. 120 (1933), and *Acme Peat Products, Ltd.* v. *Akron, C. & Y. R. Co.*, 277 I. C. C. 641, 644 (1950)). The ICC may not reject a tariff once accepted and in effect, *American Trucking*, *supra*, at 360–364, unless two conditions are satisfied: first, the Commission's action must "further a specific statutory mandate"; second, the action "must be directly and closely tied to that mandate," 467 U. S., at 367.[1]

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[1]*American Trucking* itself is illustrative. There, the Court upheld the ICC's authority to reject effective tariffs to deter violations of "rate bureau agreements." Under such agreements, carriers may submit collective rates to the Commission without risking antitrust liability, provided the agreements conform to specific guidelines set forth in 49 U. S. C. §10706(b)(3). Reasoning that Congress intended the Commission to "play a key role in holding carriers to the §10706(b)(3) guidelines," and that the nullification in question "is directly aimed at ensuring that motor carriers comply with the [statutory] guidelines," the Court held the ICC's action permissible. 467 U. S., at 369, 370. In so holding, the Court stressed that its "concern over the harshness" of the remedy "is lessened by the significant steps the Commission has taken to ensure that the penalty will not be imposed unfairly." *Id*., at 370.

In the 1980's, as the Court recognizes, *ante*, at 6–7, many carriers responded to competitive pressures by ignoring the tariffs they had filed with the ICC and negotiating with shippers rates for carriage lower than the filed rates. When carrier bankruptcies ensued, trustees asserted claims against shippers for the difference between the filed rates and the negotiated rates. Reacting to these claims, the Commission refused to enforce filed rates when it appeared inequitable to exact from the shipper more than the negotiated lower price. In *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116 (1990), this Court held the ICC's nonenforcement policy inconsistent with the Act, explaining:

> "[T]he filed rate doctrine . . . forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent." *Id.*, at 130 (citation omitted).

Invoking the filed rate doctrine and case law elaborating on it, petitioner Security Services seeks to recover undercharges for shipments its predecessor, Riss International, made between November 1986 and December 1989. During the period for which recovery is sought, the ICC followed the policy later declared unlawful in *Maislin*, *i.e.*, the Commission routinely refused to order collection of the filed rate where the parties had agreed upon a lower rate. Newly professing strict adherence to the filed rate doctrine, the ICC now contends it may nonetheless void a carrier's tariff, though valid when filed, and uphold, in place of the filed rate, "secret" contract rates of the kind held invalid in *Maislin*. The ICC asserts it may do so for this reason: the carrier allowed a power of attorney to the Household Goods Carriers' Bureau (HGCB) to lapse and neglected to

pay a nominal annual fee to maintain its membership participation in HGCB's Mileage Guide.[2] The Court upholds the ICC's position, describing the carrier's tariff as "lack[ing] an essential element," *ante*, at 9; "a carrier employing distance rates without purporting to be bound by stated distances," the Court reasons, "would be just as well placed to discriminate among shippers by measuring with rubber instruments as it would be by charging shippers for a stated distance at mutable rates per mile." *Ibid.;* see also *ante*, at 12 ("We are dealing . . . with an incomplete tariff insufficient to support a reliable calculation of charges.").

It is difficult to regard the Commission's approach, and the Court's approval of it, as anything other than an end-run around the filed rate doctrine so recently and firmly upheld in *Maislin*. For the distances put forward in the tariff at issue are not genuinely in doubt. On the contrary, Riss' tariff explicitly incorporated the mileage figures from HGCB's Mileage Guide. A "close inspection of [HGCB's tariff supplement] might have raised some uncertainty in a shipper's mind about the propriety of [Riss'] reference to the Guide [Riss not having paid its dues], but not any uncertainty over the rate." *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356, 361 (CADC 1993) (Silberman, J.), cert. pending, No. 93–883. As crisply stated in *Brizendine* v. *Cotter & Co.*, 4 F. 3d 457, 463–464 (CA7 1993) (Flaum, J.), cert. pending, No. 93–1129:

> "[S]urely [the carrier's] tariff provided sufficient information about its rates to give notice to its customers about the price of shipping. Any shipper who consulted [the carrier's] tariff would find the rate per mile and would know where to look—namely, to another tariff on file with the ICC—to determine the distance. . . . [T]he only way a

[2]The fee was approximately $83. Tr. of Oral Arg. 10.

> curious shipper would ever know that [the carrier] failed to submit a power of attorney to HGCB would be if it looked up [the] filed rate; saw that the tariff refers to HGCB's mileage guide; inspected the mileage guide; noticed that page two of the guide states that it applies only to participating carriers listed in a supplement; turned to the supplement; and discovered that [the carrier's] name was missing."

Were the Commission in fact set on adherence to the filed rate doctrine, carriers like Riss could employ no "rubber instruments." Riss' tariff clearly said that the carrier incorporated the distances in HGCB's guide. The Commission could hold Riss to that representation, while imposing a sanction for the HGCB membership lapse that did not negate the filed rate. As Judge Flaum stated in *Brizendine:*

> "Under the filed rate doctrine, even tariffs that contain substantively unlawful rates or violate ICC filing rules are not nullities. The shipper must pay the rate on file, and may then sue for the harm, if any, caused by the tariff's unlawfulness or irregularity. The enforceability of published rates, however defective, discourages the parties (especially shippers, who may face undercharge suits later) from bargaining for other prices." 4 F. 3d, at 463 (citations and footnote omitted).

The Court attempts to justify the Commission's application of 49 CFR §1312.4(d) (1993) as a "void-for-nonparticipation" rule by equating that rule to a tariff's expiration date. *Ante*, at 10–11. But *American Trucking* held that the Commission generally lacks authority to reject a tariff "once that tariff has gone into effect." 467 U. S., at 360; see *id*., at 363, n. 7; *Brizendine*, *supra*, at 463 (*American Trucking* "makes clear that a carrier's submitted rate becomes the legal, governing rate when the ICC accepts it."). As Judge Silberman explained in *Overland Express:*

> "A regulation that purports to make a tariff [, once effective,] `void' or `ineffective' if a carrier fails to follow a procedural rule, . . . does not [escape] *American Trucking*'s holding. The Commission is restricted whenever it attempts to invalidate (or alter the past effects of) a tariff after [the tariff's effective date]. Otherwise, shippers and carriers could not rely confidently on the rate on file with the Commission, and . . . the filed rate doctrine would be undermined." 996 F. 2d, at 359–360.

Nor does the void-for-nonparticipation rule fit within the limited exception described in *American Trucking* for actions that directly and closely "further a specific statutory mandate," 467 U. S., at 367. The Commission says that its rule advances the ICC's "mandate to determine the information that is required to be disclosed in a tariff" to "ensure that tariffs reveal the applicable rates." Brief for United States *et al.* as *Amici Curiae* 24 (citing 49 U. S. C. §§10762(a)(1) and (b)(2)).[3] But as the Seventh Circuit observed:

> "[I]t is difficult to see how failure to [maintain in effect] a power of attorney [with the HGCB] would adversely affect the uniformity of pricing. The true purpose of the participation rule may be the facilitation of the ICC's ability to monitor the shipping market. Requiring that every publisher of a tariff list all the other carriers that have also signed onto that tariff enables the ICC to see, at a glance, how many carriers' rates are being

[3]Subsection 10762(a)(1) states that "[t]he Commission may prescribe other information that motor common carriers shall include in their tariffs"; subsection (b)(2) provides that "[t]he carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff."

controlled by a single tariff. Publishing that list provides no new information that is not available by inspecting each carrier's tariff individually—it simply collects it in one convenient place." *Brizendine*, *supra*, at 464.

Even if the Commission's action here furthered a statutory mandate, voiding a tariff after its effective date would not "be directly and closely tied to that mandate" under *American Trucking*. 467 U. S., at 367. Nullification of a rate can be an extremely harsh remedy, for it "renders the tariff void *ab initio*. As a result, whatever tariff was in effect prior to the adoption of the rejected rate becomes the applicable tariff for the [relevant] period." *Id*., 467 U. S., at 358 (citation omitted); *id*., at 361.[4] Accordingly, when the Court upheld the Commission's action in *American Trucking* as "directly and closely" tailored to a specific statutory mandate, see n. 1, *supra*, it stressed that other less drastic remedies, like actual damages, would have been ineffective checks. See 467 U. S., at 369–370. Here, by contrast, there is no suggestion that relief of another kind would not do to check any cognizable injury to shippers or mileage guide publishers. See *Overland Express*, *supra*, at 362 ("[I]f shippers or mileage guide publishers were to show that they were injured, damages presumably would be adequate to remedy the injury."); see also *Brizendine*, *supra*, at 465.

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It may be that "the Court stumbled badly in *Maislin Industries*." See *ante*, at 1 (STEVENS, J., concurring).

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[4]Ironically, the Court's theory in this case—that Riss' tariff was valid and effective until its participation in the HGCB Mileage Guide lapsed, see *ante*, at 10–11—should result in application of Riss' "prior" effective tariff, *i.e.*, the *same* tariff, and not the contract rate, as the Court and the Commission assume.

But the way to correct that error, if error it was, is to overrule the unsatisfactory precedent, not to feign fidelity to it while avoiding its essential meaning.

For the reasons stated here, and more fully developed in *Brizendine* and *Overland Express*, I respectfully dissent.