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 SOUTER delivered the opinion of the Court.

This case presents the question whether a motor carrier in bankruptcy may recover for undercharges based on tariff rates that are void as a matter of law under the Interstate Commerce Commission's regulations. We hold that the carrier may not rely on the filed but void tariff.

On August 20, 1984, petitioner Security Services, Inc. (then known as Riss International Corp.) filed with the Interstate Commerce Commission (ICC) a mileage (or distance) rate tariff having an effective date 30 days later. The tariff was received, accepted, and filed, and was never rejected by the ICC. Although the tariff specified rates to be charged per mile of carriage, it was not complete in itself, for it included no list of distances or map on which a shipper could rely in calculating charges for a given shipment. For the distance component of this mileage-based tariff, petitioner relied upon a Household Goods Carriers' Bureau (HGCB) Mileage Guide, its supplements, and subsequent issues. HGCB is itself not a carrier, but a publisher of distance guides for use in tariff filings. The Mileage Guide is a 565–page volume of large format, which specifies the distances in miles

between various points of origin and destination, and contains maps and supplemental rules. The Mileage Guide refers shippers to a separate HGCB tariff and its supplements, filed with the ICC, for a list of the carriers who are "participants" in the Mileage Guide. A participant is a carrier who pays HGCB a nominal fee and issues it a valid power of attorney. The first page of HGCB's Mileage Guide states that it "MAY NOT BE EMPLOYED BY A CARRIER AS A GOVERNING PUBLICATION FOR THE PURPOSE OF DETERMINING INTERSTATE TRANSPORTATION RATES BASED ON MILEAGE OR DISTANCE, UNLESS CARRIER IS SHOWN AS A PARTICIPANT IN THE ABOVE NAMED TARIFF." HGCB, Mileage Guide No. 12, p. 1 (Dec. 1982). HGCB filed a tariff supplement to its Mileage Guide, effective February 19, 1985, listing participants and canceling Riss's participation in the Mileage Guide for failure to pay the nominal participation fee to HGCB. HGCB treats a power of attorney issued to it as void if not renewed by remitting the participation fee within a reasonable time after cancellation. Riss did not renew.

On April 17, 1986, Riss contracted with respondent Kmart Corporation to transport Kmart's goods at rates specified in the contract, and from November 3, 1986, to December 29, 1989, Riss transported goods for Kmart under the contract. Riss billed, and Kmart paid, at the contract rate. In November 1989, Riss filed a Chapter 11 bankruptcy petition and while undergoing reorganization became Security Services. As debtor-in-possession, Security Services billed Kmart for undercharges (and interest) it was allegedly owed, based on the difference between the contract rate Kmart paid and the tariff rates that Riss assertedly had on file with the ICC. Security Services argued that under the Interstate Commerce Act's filed rate doctrine, Kmart was liable for the tariff rates filed with the ICC, regardless of any contract rate negotiated. Kmart refused to pay, and this suit ensued.

The District Court for the Eastern District of Pennsylvania granted summary judgment for Kmart on the ground that Security Services had no valid tariff on file with the ICC (without which it could not collect for undercharges), because HGCB had canceled its participation in the Mileage Guide. The Court of Appeals for the Third Circuit affirmed. 996 F. 2d 1516 (1993). The court reasoned that under ICC regulations Riss's tariff was void for nonparticipation in the HGCB Mileage Guide, that Riss had not filed any mileages of its own to replace its canceled participation, and that the consequently incomplete and void tariff could not support a claim for undercharges. *Id.*, at 1524. The court took the position that, although the ICC regulations operated retroactively to void a filed tariff, that retroactive application was permissible under this Court's test in *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354 (1984). 996 F. 2d, at 1524–1526. Finally, the court rejected Security Services' argument that its failure to participate formally in the HGCB Mileage Guide was a

mere technical defect excused by its substantial compliance with the rule requiring it to file its rates with the Commission. *Id.*, at 1526.

We granted certiorari, 510 U. S. ___ (1993), to resolve a Circuit conflict over the validity of the ICC void-for-nonparticipation regulation,[1] and now affirm.

A motor carrier subject to the Interstate Commerce Act must publish its rates in tariffs filed with the ICC. 49 U. S. C. §§10761(a), 10762(a)(1). The carrier "may not charge or receive a different compensation for that transportation . . . than the rate specified in the tariff . . . ." §10761(a). We have held these provisions "to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff." *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 127 (1990); accord, *Reiter* v. *Cooper*, 507 U. S. ___, ___ (1993) (slip op., at 7); *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97 (1915) ("Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed"). The purpose of the filed rate doctrine is "to ensure that rates are both reasonable and nondiscriminatory," *Maislin*, *supra*, at 119 (citing 49 U. S. C. §§10101(a), 10701(a), 10741(b) (1982 ed.)), and failure to charge or pay the filed rate may result in civil or criminal sanctions. See 49 U. S. C. §§11902–11904.

The ICC has authority to "prescribe the form and

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[1]Compare *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356 (CADC 1993); *Security Services, Inc.* v. *P-Y Transp. Inc.*, 3 F. 3d 966 (CA6 1993); *Brizendine* v. *Cotter & Co.*, 4 F. 3d 457 (CA7 1993), with the decision below, 996 F. 2d 1516 (CA3 1993); see also *Atlantis Express, Inc.* v. *Associated Wholesale Grocers, Inc.*, 989 F. 2d 281 (CA8 1993); *Freightcor Services, Inc.* v. *Vitro Packaging, Inc.*, 969 F. 2d 1563 (CA5 1992), cert. denied, 510 U. S. ___ (1993).

manner" of tariff filing, §10762(b)(1), and the information to be included in tariffs beyond any matter required by statute, §10762(a)(1). Each carrier is responsible for ensuring that it has rates on file with the ICC. §§10702, 10762. Under ICC regulations, a carrier has some choice about the form in which to state its rates, one possibility being a rate based on mileage. A mileage rate has two components: the rate per mile and distances between shipping points. 49 CFR §1312.30 (1993). A carrier may file the distance portion of the rate by listing in its own tariff the distances between all relevant points, by referring to a map attached to its tariff, or by referring to a separately filed distance guide, such as the HGCB Mileage Guide. §1312.30(c)(1). Petitioner does not dispute that distance guides are themselves tariffs. Brief for Petitioner 9, n. 4.[2] A carrier may refer to a tariff filed by another carrier or by an agent only by formally "participating" in the referenced tariff, which may be done only by issuing a power of attorney (or concurrence) to the other carrier or agent. 49 CFR §§1312.4(d); 1312.10; 1312.27(e) (1993). The Commission's void-for-nonparticipation regulation provides that "a carrier

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[2]*Amicus* Overland Express, Inc., contends that participation in mileage guides is not required, citing *Revision of Tariff Regulations, All Carriers*, 1 I. C. C. 2d 404, 425 (1984). But the ICC has interpreted its rules to require such participation, *Jasper Wyman & Son—Petition for Declaratory Order—Certain Rates and Practices of Overland Express, Inc.*, 8 I. C. C. 2d 246, 249–252 (1992) (applying void-for-nonparticipation regulation), petition for review granted, *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356 (CADC 1993), and its interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation," *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). The ICC's interpretation is neither.

may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law." §1312.4(d). Tariff agents like HGCB are required to identify carriers participating in their tariffs, by listing their names either in the tariff containing the mileage guide itself, or in a separate tariff. §§1312.13(c); 1312.25. The listings are meant to be kept reasonably current, but are effective until changed. "Revocation or amendment of the power of attorney should be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed." §1312.10(a). That is, cancellation of a power of attorney (whether by carrier or agent) is accomplished by filing or amending a tariff. §§1312.10(a); 1312.25(d); 1312.17(b). Until such filing or amendment, the carrier's reference to the agent's tariff remains effective, §1312.10(a); once the agent's tariff is filed or amended to note cancellation of the carrier's participation, the carrier's tariff is void as a matter of law (absent additional filing by the carrier). See §1312.4(d).[3] As the ICC explained, once cancellation of participation is published, as it was here, the mileage-based tariff is incomplete, and "cease[s] to satisfy the fundamental purpose of tariffs; to disclose the freight charges due

[3]The ICC has apparently had a similar rule for many decades. In Cancelation of Participation in Agency Tariffs, 4 Fed. Reg. 4440 (1939), the Commission made clear that if an agent in whose tariff a carrier participated canceled the carrier's participation for non-payment of dues or failure to follow the agent's rules, the carrier could no longer lawfully rely on the agent's tariffs and had to file its own tariffs to comply with the Act.

to the carrier." *Jasper Wyman & Son—Petition for Declaratory Order—Certain Rates and Practices of Overland Express, Inc.*, 8 I. C. C. 2d 246, 258 (1992) (applying void-for-nonparticipation regulation), petition for review granted, *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356 (CADC 1993).

Congress passed the 1980 Motor Carrier Act, 94 Stat. 793, to encourage competition in the industry. In response to this enactment and changes in the carrier market, the ICC simplified its tariff filing rules, as by eliminating the requirement that the actual powers of attorney be filed with the ICC. See 48 Fed. Reg. 31265, 31266 (1983); see also *Revision of Tariff Regulations, All Carriers*, 1 I. C. C. 2d 404, 408 (1984). The ICC's rule that "participation" is required, however, remained in force. See *id.*, at 434; see also 48 Fed. Reg., at 31266 ("The obligation to limit tariff publication to existing agency relationships remains, however, as a matter of law"). Many shippers and carriers nevertheless responded to the very changes in the market that prompted the ICC's revision of its rules by ignoring the rates the carriers had filed with the ICC and instead negotiating rates for carriage lower than the filed rates. As a further result of competitive pressures, many carriers also went bankrupt. A number of trustees and debtors-in-possession then attempted to recover as undercharges the difference between the negotiated and filed rates. Since the market changes convinced the ICC that strict adherence to the filed rate doctrine was no longer necessary under some circumstances, *Maislin*, 497 U. S., at 121, the ICC decided to follow a new policy of determining, case by case, whether it would be an "unreasonable practice" under 49 U. S. C. §10701 for a carrier (often by then bankrupt) to recover for undercharges from a shipper who had paid a negotiated, rather than filed, rate. See *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common*

Carrier Rates, 3 I. C. C. 2d 99, 104–108 (1986); 5 I. C. C. 2d 623, 628–634 (1989). In *Maislin*, we held that this ICC practice violated the core purposes of the Act, because "[b]y 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." 497 U. S., at 130 (citing 49 U. S. C. §10741). Thus, we held that any bankruptcy trustee or debtor-in-possession was entitled to recover for undercharges based on effective, filed rates.

Petitioner argues that the effect of the void-for-nonparticipation rule is to allow transactions to be governed by secretly negotiated rates, rather than the publicly filed rates mandated by the Act. Petitioner would thus have us see the ICC's recent enforcement of its void-for-nonparticipation regulation as merely an attempt to evade *Maislin* and undermine the filed rate doctrine by keeping trustees or debtors-in-possession from recovering for undercharges.

The argument is an odd one.[4] The filed rate

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[4]We have no occasion even to reach its factual predicate, which is vigorously disputed. Security Services argues that the agency failed to enforce its regulation from amendment in 1984 until 1993. Petitioner contends that the ICC routinely accepted tariffs containing methods for computing distances that were not authorized by 49 CFR §1312.30(c) (1993), and that from 1984 to 1988, approximately 40 percent of all motor carriers filing distance rate tariffs referring to HGCB mileage guides did so without formally participating in them. See *Overland Express*, 996 F. 2d, at 359. Petitioner states that the ICC took no action after discovering these failures to participate. The Government argues that the ICC does enforce its void-for-nonparticipation rule. It represents, for example, that in fiscal year 1983, the ICC "entered 24 consent decrees with carriers who had let their

requirement mandates that carriers charge the rates filed in a tariff. We held in *Maislin*, *supra*, that the requirement was not subject to discretionary enforcement when raised against a shipper who had agreed with a carrier to a negotiated rate lower than the rate on file. When the carrier's bankruptcy prompted second thoughts about the wisdom of the agreement, the carrier and its creditors obtained the benefit of the requirement. Here, as in *Jasper Wyman*, *supra*, the carrier seeks to escape its burden by recovering for undercharges even though in effect it had no rates on file because its tariff lacked an essential element. The filed-rate rule applied here to bar the carrier's recovery is the same rule that was applied to bar the shipper's defense. Nor is the rule somehow more technical or less equitable when applied against Security Services. It can hardly be gainsaid that a carrier employing distance rates without purporting to be bound by stated distances

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participations in mileage guides and other tariffs lapse, . . . sought and obtained one injunction, and . . . issued an order pursuant to its broad remedial powers" directing carriers who had let their participation in the HGCB lapse either to renew their participation or "strike any reference" to the Mileage Guide in their tariffs. Tr. of Oral Arg. 42. The Government also disputes the assertion that 40 percent of carriers referring to a HGCB guide failed to participate in the guide. The Government and Kmart claim that HGCB found only 111 such failures among the filings of some 12,800 carriers who referred to HGCB guides, and that the ICC has taken action for failure to participate. See *Household Goods Carriers' Bureau, Inc.—Petition for Cancellation of Tariffs of Non-Participating Carriers*, 9 I. C. C. 2d 378 (1993); *National Motor Freight Traffic Assn.—Petition for Cancellation of Tariffs That Refer to the National Motor Freight Classification, but are Filed by or on Behalf of Non-Participating Carriers*, 9 I. C. C. 2d 186 (1992).

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. While some may debate in other forums about the wisdom of the filed rate doctrine, it is enough to say here that the carriers cannot have it both ways.[5]

Petitioner is left to invoke the limitations on the ICC's authority to declare a rate void retroactively, and the "technical defect" rule.[6] Neither is availing.

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[5]Both JUSTICE THOMAS, *post*, at 8, and n. 3, and JUSTICE GINSBURG, *post*, at 3–4, argue that the effect of today's ruling is to validate secretly negotiated rates. Indeed, JUSTICE THOMAS goes so far as to suggest that our opinion would allow the ICC to circumvent *Maislin* merely by declaring that a filed rate is void whenever another rate is negotiated, *post*, at 12. But our opinion does nothing of the kind. The Interstate Commerce Act states that carriers may provide transportation "only if the rate for the transportation or service is contained in a tariff that is in effect" under the provisions of the Act, 49 U. S. C. §10761(a), and the Act provides for civil and criminal penalties for failure to maintain such rates, and to charge or pay them. See generally, §§11901–11904.

[6]JUSTICE THOMAS in dissent argues that we ignore petitioner's "broader argument . . . that the rule is not within the Commission's authority." See *post*, at 10, n. 4. But petitioner's question presented was whether "the Interstate Commerce Commission has discretionary authority to retroactively void an effective tariff." Brief for Petitioner i. On the same page cited by JUSTICE THOMAS for petitioner's "broader argument," petitioner in fact describes the ICC rule as "treating [tariffs] as retroactively void," *id.,* at 20, and petitioner concludes the section by arguing that the ICC has no power "to retroactively void effective tariffs." *Id.,* at 24. Petitioner's argument in that

The Court of Appeals believed, 996 F. 2d, at 1524–1526, as petitioner now argues, that the void-for-nonparticipation rule retroactively voids rates and is thus subject to the analysis we applied in *American Trucking*, 467 U. S., at 361–364, 367. See also *Overland Express*, 996 F. 2d, at 360. In *American Trucking*, we held that the Commission could retroactively void effective tariffs *ab initio* only if the action "further[s] a specific statutory mandate of the Commission" and is "directly and closely tied to that mandate." 467 U. S., at 367. But the rule is not apposite here, for the void-for-nonparticipation regulation does not apply retroactively. The ICC did not, as in *American Trucking*, void a rate for a period during which an effective rate was filed. The ICC's regulations operate to void tariffs that would otherwise apply to future transactions, by providing that the rate becomes inapplicable when the tariff reference to the Mileage Guide is canceled, (*i.e.*, from the moment at which examination of the tariff filings would show that the carrier's tariff is incomplete, 49 CFR §1312.10(a) (1993)), after which the shipper would be unable to rely on the incomplete tariff to calculate the applicable charges.[7] Transactions occurring before cancellation of the power of attorney are

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section is that the Interstate Commerce Act "prescribes the remedies available to Kmart," *id.,* at 17, not that the regulation is ultra vires. Indeed, at oral argument, counsel for petitioner stated that the ICC's void-for-nonparticipation rule "is authorized. The rule is proper, but the application of the rule . . . is contrary to law." Tr. of Oral Arg. 17.

[7]If a canceled participation is renewed before the effective cancellation date, participation may be restored on five days' notice by filing an amended tariff. 49 CFR §1312.39(a) (1993).

governed by the filed rate; transactions occurring after cancellation would have no filed mileages to which a carrier's per-mile tariff rates would apply to determine charges due. The regulation does not require any ICC "retroactive rejection" of a filed rate, or indeed any agency action at all. The regulation works like an expiration date on an otherwise valid tariff in voiding its future application, in accordance with §1312.23(a). Neither regulation works a retroactive voiding. We thus disagree with the Court of Appeals for the District of Columbia Circuit, which held that once a tariff is in effect, a regulation that voids the tariff operates retroactively. *Overland Express*, 996 F. 2d, at 360.

Here, petitioner's tariff reference to the HGCB Mileage Guide became void as a matter of law and its tariff filings incomplete on their face on February 19, 1985, when HGCB canceled its participation in the Mileage Guide by filing a supplemental tariff. The transactions with Kmart occurred after that date.

Nor does the "technical defect" rule apply here. Under our cases, neither procedural irregularity nor unreasonableness nullifies a filed rate; the shipper's remedy for irregularity or unreasonable rates is damages. See, *e.g.*, *Berwind-White Coal Mining Co.* v. *Chicago & Erie R. Co.*, 235 U. S. 371 (1914); *Davis* v. *Portland Seed Co.*, 264 U. S. 403 (1924). In *Berwind-White*, the Court held that filed tariffs falling short of full compliance in stylistic matters were still "adequate to give notice" and so could support a carrier's claim against a shipper for charges due. 235 U. S., at 375. In *Davis*, the effect of applying the carrier's tariff violated a former statutory bar to charging less for a longer distance than for a shorter one over the same route, other things being equal. The Court rejected the position that the higher rate was void and the lower rate legally applicable, so that

damages would depend upon the difference between the two, and held that the shipper's remedy was instead to be measured by its actual damages from having been charged the higher rate as compared to a reasonable one. 264 U. S., at 424–426.[8]

Unlike the shippers in the "technical defect" cases, the shipper here could not determine the carrier's rates, since under the regulations, distance tariffs are incomplete once the carrier's participation in the Mileage Guide has been canceled by the agent's filing. See 49 CFR §§1312.4(d); 1312.10(a); 1312.30 (1993). We are dealing not with a complete tariff subject to some blemish independently remediable, but with an incomplete tariff insufficient to support a reliable calculation of charges. Security Services, however, questions the distinction by arguing that a shipper is unlikely to search for the list of participating carriers and to determine from the agent's supplemental tariffs that a carrier's participation has been canceled. Rather, a shipper is likely only to follow the reference in the carrier's tariff to the HGCB Mileage Guide, and can fully calculate the applicable charges. But the likelihood or unlikelihood of a shipper's actually reading all the applicable tariffs is simply irrelevant, for carriers and shippers alike are charged with constructive notice of tariff filings, *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, 653 (1913); *Reiter* v. *Cooper*, 507 U. S., at __ (slip op., at 7), and the fact that shippers may take shortcuts through the filings cannot convert an

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[8]See also *Texas & Pacific R. Co.* v. *Cisco Oil Mill*, 204 U. S. 449 (1907) (Tariff rates filed with ICC and furnished to freight officers of railroad are legally operative despite railroad's failure to post two copies in each railroad depot); *Genstar Chemical Ltd.* v. *ICC*, 665 F. 2d 1304, 1309 (CADC 1981) ("[T]he `error' in the tariff was certainly not apparent on its face"), cert. denied, 456 U. S. 905 (1982).

incomplete tariff into a complete one. In sum, a tariff that refers to another tariff for essential information, which tariff in turn states that the carrier may not refer to it, does not provide the "adequate notice" of rates to be charged that our "technical defect" cases require.

When a carrier relies on a mileage guide filed by another carrier or agent, under ICC regulations the carrier must participate in the guide by maintaining a power of attorney; when a carrier fails to maintain its power of attorney and its participation is canceled by its former agent's filing of an appropriate tariff, the carrier's tariff is void. Trustees in bankruptcy and debtors in possession may rely on the filed rate doctrine to collect for undercharges, *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116 (1990), but they may not collect for undercharges based on filed, but void, rates. The decision of the Court of Appeals is accordingly

Affirmed.