Motor Carrier Deregulation: A Decade of Legal and Economic Conflict

RENE SACASAS
NICHOLAS A. GLASKOWSKY, JR.*

I. INTRODUCTION

For decades prior to World War I, Europe and the Near East flourished in a strongly regulated political environment. They lived in the delicately balanced world of empire. Nations were interrelated through real as well as symbolic marriages of trade and royalty. Although their regulated existence was not trouble free, the players knew the rules. Minor states understood their position as economic and political balance weights which the major powers used to maintain their status and power. The major powers accepted the need for peaceful coexistence and alliance.

Between 1914 and 1918 this intricate structure was destroyed. The regulatory patterns were no longer in place. The players, both old and new, had to learn a new set of steps. Subsequently, Europe experienced economic depression, political and social dislocation, and ultimately another cathartic military experience which can be argued completed the unfinished work of deregulation left by World War I.

Not unlike the Europe of 1914, the motor carrier industry in the United States prior to July 1, 1980, existed in a highly regulated environment characterized by intricate rules and ritualized protection. The passage of the Motor Carrier Act of 1980[1] shattered the peace and forced all participants, large and small, to learn a new unchoreographed dance.

The consequences of this deregulation are still being assessed. This article examines four selected legal/economic issues which are offered as representative of the friction between established statutory and case law and the current public policy of deregulation and its economic conse-

* Rene Sacasas is Assistant Professor of Business Law at The University of Miami (Florida). Dr. Glaskowsky is Professor of Management and Logistics at the University of Miami (Florida).

1. P.L. No. 96-296, 94 Stat. 793 (1980).

quences. The four chosen areas reviewed are: 1) freight undercharges and the "filed tariff doctrine;" 2) pension funds, ERISA/MPPAA and deregulation; 3) federal preemption and the States' power to regulate motor carriers; and, 4) selected antitrust issues.[2]

II. "UNDERCHARGES" AND THE FILED TARIFF DOCTRINE

Just as marketers of products are aware of the restrictions placed upon their pricing methods by the Robinson-Patman Act, motor carriers and the shippers that use them have long recognized pricing regulations applicable to this service industry. One of these regulations, fixed in the Interstate Commerce Act, places pricing limitations on motor carriers to ensure that they do not favor one customer over another.[3] To promote compliance, the courts announced the "filed tariff doctrine." In 1915, Justice Brandeis explained the doctrine as follows:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travellers are charged with notice of it, and they as well as the carrier must abide by it . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.[4]

The intent of the filed tariff doctrine was the prevention of large suppliers and shippers from negotiating "under the table" tariffs which were lower than filed tariffs, thereby undercutting competition from the smaller suppliers who also had to use the highways of interstate commerce to get their goods to market. The filed tariff doctrine, however, not only protects the shipper against the carrier overcharging, it also safeguards the carrier by permitting any carrier who has charged a lower rate than the tariff filed with the Interstate Commerce Commission [ICC] to sue the shipper to recover the undercharge.[5]

This is not a "soft" rule. Since codified and interpreted, the courts

---

2. Other areas could have been chosen. However, the authors selected these four particular issues and representative cases because of their timeliness and systemic effects upon the total industry, including carriers, shippers, regulators and the courts.

3. The Act requires motor carriers to file their rates with the Interstate Commerce Commission [ICC] in the form of a tariff (49 U.S.C. Sec. 10762(a)(1) (Supp. 1989)); prohibits motor carriers from transporting goods at rates other than their tariff rates (49 U.S.C. Sec. 10761(a) (Supp. 1989)); and requires them to treat like customers alike (49 U.S.C. Sec. 10741. The Act and the courts recognize exceptions, i.e. motor common carriers may charge reduced rates for transportation of recyclable materials without filing those rates in the carrier's tariff. 49 U.S.C. Sec. 10733; West Coast Truck Lines, Inc. v. Arcata Community Recycling Center, Inc., 846 F.2d 1239 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 147 (1988).

4. Louisville & Nashville, R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915).

5. *See*, 28 U.S.C. Sec. 1337 (1976).

have been scrupulous in its application. Recently, the doctrine has been given additional bite. In 1982, with motor carrier deregulation in place and its concomitant undercharge problems emerging, the Supreme Court ruled that carriers have ". . . not only the right but also the duty to recover proper charges for services performed."[6] This right to recover the undercharge is not subject to the common law contract defenses of estoppel or mistake.[7] Courts have consistently refused to enforce contracts between carriers and shippers which reduce the amount legally payable or release the shipper from liability to pay the required charges.[8]

Prior to deregulation, the filing of interstate tariffs with the ICC was a routine process except in those few cases where a shipper protested the rate as being too high. A collectively set tariff was filed with the Commission by a Motor Carrier Rate Bureau on behalf of a number of motor carriers subscribing to the tariff, or a carrier filed its own with the ICC, and that was that; unless challenged, a rare event, the tariff went into effect.

Following deregulation, thousands of motor carriers issued their own tariffs, often tailored to the needs of a particular shipper customer or group of customers. This outcome was one of the primary objectives of deregulation, namely, the achievement of real price competition in the motor carrier industry. Even under deregulation, however, motor common carriers holding ICC certificates are required to file their interstate tariffs with the Commission. Such filing makes a tariff effective. Failure to file a tariff results in the carrier being required to charge the previously filed tariff rates despite what was contracted for by the parties. Given the rate wars resulting from deregulation, and the pricing concessions made by many motor carriers desperate to generate cash flow, it was inevitable that many new tariffs—including many not filed with the ICC—would reflect lower rates than earlier tariffs.[9]

It should also be noted that in addition to unlawful rates charged under unfiled tariffs, there are other moss-covered and not uncommon unlawful industry practices that result in undercharges. These include (1) simply granting a discount off the filed rate (either directly or, for example, as a kickback disguised as a claim payment), (2) not charging for

6. Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336, 343 (1982).

7. As to estoppel, *see* West Coast Truck Lines, Inc. v. Arcata Community Recycling Center, Inc., *infra* note 3, citing U.S. Western Pacific R.R. Co., 353 U.S. 59, 76 n.20 (1956); Louisville & Nashville R.R. v. Central Iron & Coal Co., 265 U.S. 59, 65 (1924). As to mistake, *see* Western Transportation Co. v. Wilson and Co., Inc., 682 F.2d 1227, 1229 (7th Cir. 1982).

8. *See, e.g.*, Western Transportation, 682 F.2d 1227.

9. It is conservatively estimated that there are currently $30 million in undercharge claims facing shippers. An interesting article aimed at the practitioner outlines a shipper's defense approach to an undercharge claim. *Undercharges Addressed by Logistics Managers*, 30 TRANSP. & DISTR. 40 (August 1989).

the full weight of the shipment, and (3) deliberate misdescription of the freight to produce a lower—and unlawful—rate. All three are hard to catch and even harder to prove. And, all three involve collusion between the carrier and the shipper, collusion whose evidence tends to vanish in the mists of time. Few bankruptcy trustees will ever see money for creditors from these sources.

The deregulation rate wars produced two results relevant to the undercharge issue. First, they were the primary cause of several thousand motor carrier bankruptcies in the 1980's, thus turning loose a horde of bankruptcy trustees looking for assets. Second, the evidence is clear that in rate war situations, an earlier (filed) tariff is likely to be supplanted by a subsequent (unfiled) tariff containing lower rates. This meant that if the filed tariff doctrine remained in force, hefty payments were due from unwary shippers who had dealt with now bankrupt carriers.

Practically, a review of the federal case law reveals that these undercharges fall into the following patterns: (1) when the carrier miscalculates the amount due under the filed tariff rate applied to the shipper; or (2) when the carrier, inadvertently or by design, fails to file the tariff containing a lower rate with the ICC as required by statute. The latter omission, as previously stated, is extremely dangerous to the shipper because if the tariff applied is not properly and timely filed with the ICC, the filed tariff doctrine requires that the applicable tariff used to calculate any undercharges must be the last tariff properly filed by the carrier.

In the early 1980's, just subsequent to the formal deregulation of the motor carrier industry, the Seventh Circuit faced the task of enforcing the filed tariff doctrine in the new deregulated environment. Shippers and carriers watched as the Western Transportation Company, a bankrupt trucker, initiated the attack. This carrier, while marshalling its assets to satisfy its creditors, discovered a series of executed shipping contracts wherein it had failed to charge the shippers the correct filed tariff rates at the time of shipment—a case falling within the first pattern of cases noted above. Consequently, Western filed a series of lawsuits using the filed tariff doctrine as the vehicle for its complaint and seeking payment for the undercharged freight transported.[10]

In *Western Transportation Company v. Wilson and Company, Inc.*,[11] the carrier had agreed with the shipper to transport meat under a tariff applicable ". . . only when the shipment is loaded into or onto the truck by the shipper and unloaded therefrom by the consignee."[12] The facts ac-

10. *See also* Western Transportation Co. v. Webster City Iron & Metal Co., 657 F.2d 116 (7th Cir. 1981) and Western Transportation Co. v. E.I. DuPont de Nemours and Co., 682 F.2d 1233 (7th Cir. 1982).

11. 682 F.2d 1227 (7th Cir. 1982).

12. *Id.* at 1230.

cepted by the court reflected that the shipper complied with this requirement. Unfortunately for the shipper, however, this filed tariff also required that the bills of lading contain a notation that the consignor and consignee were to load and unload the shipment. Western discovered that several shipments failed to have the required notation on the bills of lading and properly sued the shipper, as required by the filed tariff doctrine and the fiduciary duty owed by Western to its creditors, for the difference between what it charged under this tariff and what it would have charged under the different tariff that would have been applicable.

The trial court adopted the shipper's argument that the notation requirement rendered the filed tariff ambiguous. The filed tariff doctrine was, therefore, not applicable and the document was subject to the rules of interpretation and reformation like any other contract. After taking evidence as to the intention of the parties, the lower court concluded that the tariff was drafted with the intent to have the shipper pay the contracted lower rate and dismissed Western's complaint.

While sympathizing with the defendant/shipper that the filed tariff doctrine is ". . . a harsh rule"[13] and admitting that Western's recovery of these undercharges would result in unjust enrichment by compensating the carrier for services it did not provide to the shipper, the 7th Circuit reversed the trial court and strictly applied the filed tariff doctrine. The Court disputed the trial court's finding of ambiguity in the filed tariff, reasoning that if "the duty to load and unload and the duty to say you will load and unload were contradictory, the tariff—construed, as every document must be construed, as a whole—would be ambiguous. They are not, and it is not."[14]

Recognizing its own rule announced in *National Van Lines, Inc. v. U.S.*,[15] that ". . . a tariff should be interpreted to avoid unjust, absurd, or improbable results . . ." and that ". . . the practical application of tariffs by interested persons should also be considered in determining the meaning of the tariffs . . .,"[16] the Court held that those announced principles only applied if the tariff is ambiguous. If the tariff is found to be unambiguous, as in the present case, the parties are bound to its terms and the common law aids to contract construction are irrelevant. Interpretation, the Court reasoned, is permitted only when the tariff is ambiguous, so that a literal reading is impossible.

This Court, despite strictly applying the filed tariff doctrine, bridled against the inflexible standard that motor carriers are forbidden to receive different compensation from the rate fixed in an unambiguous applicable

13. *Id.* at 1229.
14. *Id.* at 1230.
15. 355 F.2d 326 (7th Cir. 1966).
16. *Id.* at 332-33.

filed tariff, especially in light of the new deregulated environment. Its discomfort was manifested by the Court outlining in its opinion a method for the defendant to circumvent its decision. The Court instructed the defendant to use a method this shipper had successfully used in the past and which proved to be a frequently used technique during the 1980's. It told the shipper to request a stay from the trial court and apply to the ICC to have the offensive tariff notation provision declared unreasonable, a right reserved to the ICC under statute. The ICC had done this in the past and, apparently, was viewed as a friendlier forum in the newly deregulated environment.[17] This declaration by the ICC, if made, would preclude the carrier's collection of the undercharges.[18] Clearly, however, this Circuit Court and the party litigants found the filed tariff doctrine still alive and dangerous.

In early 1989, the Fifth Circuit dealt with the second prototypical undercharge claim under the filed tariff doctrine: a failure to file with the ICC the tariff rate contracted for with the shipper as required by statute. In the *Matter of Caravan Refrigerated Cargo, Inc.*,[19] the Court reviewed what it described as an "archetypal negotiated rate case."[20] A shipper had a long-standing agreement with Caravan, a refrigerated transport carrier, that Caravan would "meet or beat" any motor carrier rate quoted by a competing carrier. During their relationship, the shipper and Caravan negotiated rates to assure competitiveness. Caravan billed the shipper for the contracted rates and the shipper paid. The rates charged, however, were not the same rates which Caravan had filed with the ICC. The rates properly filed with the Commission were higher than the contracted rates. The shipper contended that it was unaware of the variance and relied upon Caravan's rate quotations. Caravan filed for bankruptcy and its trustee filed an action to recover the difference between the negotiated rates and the filed tariff rates.

Unlike the defendant in *Western Transportation*, this shipper at-

---

17. *See*, Iowa Beef Processors, Inc. v. Western Transportation Company, I.C.C. Docket No. 32521F (Sept. 14, 1981). Interestingly, in this case, the Commission also found the tariff to be unambiguous but ruled it unreasonable.

In a case decided on August 7, 1989, Carriers Traffic Service, Inc. v. Boise Cascade Corp., 881 F.2d 475, (7th Cir. 1989), the Court upheld several lower court rulings which affirmed the ICC's decisions disallowing undercharges in shipper "load and count notation" cases (same as Western). The Court, however, made it clear that the decision was to be construed narrowly and did not upset the precedent set by Western because the case before the bar was based upon a traditional court review of agency action (i.e. reasonableness of agency action) rather than an initial court determination of the reasonableness of the tariff rates as was the case in Western.

18. The Court instructed that under 49 U.S.C. Sec. 10704(a) (Supp. 1989), a tariff provision is required to be reasonable. If not, it violates the statute and the I.C.C., under 49 U.S.C. Sec. 11701 (Supp. 1989), can compel compliance, i.e. vitiate the offensive clause.

19. 864 F.2d 388 (5th Cir. 1989), *reh'g denied en banc*, 869 F.2d 1487 (5th Cir. 1989).

20. *Id.* at 388.

tempted to have the case referred to the ICC for a determination of the reasonableness of the filed rates, arguing the "primary jurisdiction doctrine."[21] The district court refused to refer the case to the ICC[22] and, further, did not accept the shipper's argument, filed in opposition to Caravan's motion for summary judgment, that if the matter was not referred to the ICC for determination the trial court should rule that the tariff rate was unreasonable.

In another strong reaffirmation of the filed tariff doctrine, the Fifth Circuit deftly disposed of the shipper's arguments for referral. While recognizing the primary jurisdiction doctrine, the Court agreed with the District Court that the facts of this case did not raise any ". . . technical or complex issues . . . that require the expert administration of the Commission . . ."[23] The Court so ruled because the shipper's "unreasonableness" argument was bottomed solely on the charge that having to pay the filed rate because Caravan ". . . failed to get its paperwork done"[24] would be unfair. Accordingly, the Court reasoned that under the facts and arguments presented the filed tariff doctrine gave clear guidance and there was no need for referral.

Second, the Court refused to accept the shipper's contention that the Motor Carrier Act of 1980 abrogated the filed tariff doctrine. The Court reasoned that despite the intent of the Act (i.e., economic deregulation of the motor carrier industry) Congress had examined the area thoroughly when the legislation was being enacted and did nothing to eliminate or

---

21. *See*, City of New Orleans v. Southern Scrap Material Co., 704 F.2d 755, 758 (5th Cir. 1983) and ICC v. Atlantic Coast Line Ry., 383 U.S. 576, 579 (1966) wherein the doctrine that ". . . a district court trying a case under the Interstate Commerce Act must, if presented with such an issue, stay its proceedings and refer the case to the Commission" was presented. Further, the 5th Circuit had previously ruled that when the reasonableness of the rate is at issue, ". . . there must be a preliminary resort to the Commission." Southern Pacific Transportation Co. v. City of San Antonio, 748 F.2d 266, 272 (5th Cir. 1984) (quoting Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922)).

22. The primary jurisdiction doctrine is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are ". . . within the special competence of an administrative body." United States v. Western Pacific R.R., 352 U.S. 59, 63 (1956). This doctrine has its origins in the famous case of Texas & Pacific R.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), where the Supreme Court adopted the view that shippers seeking reparation predicated upon the unreasonableness of the established rate must primarily invoke redress through the ICC. It has come to mean that the ICC has jurisdiction over matters of fact and administrative matters, however, if words are used in their ordinary sense, introduction of evidence is unnecessary and the courts need not refer the matter to the ICC. *See*, Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co., 778 F.2d 1365 (9th Cir. 1985) where the Court also refused to refer a tariff question to the ICC; and Puerto Rico Maritime Shipping Authority v. Valley Freight Systems, Inc., 856 F.2d 546 (3rd Cir. 1988) where the filed tariff doctrine was enforced and the Court did not refer.

23. Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388, 389-90 (5th Cir. 1989).

24. *Id.* at 390.

limit this long-standing doctrine. The Congress, the Court reasoned, by its inaction apparently intended to leave the filed tariff doctrine intact.[25]

Further, in an apparent blow to the persuasiveness of ICC opinions before the Circuit Court, the 5th Circuit refused to apply the Commission's advisory opinion allowing equitable defenses in disputes regarding reasonableness of rates.[26] Although the ICC might soften and permit an erosion of the filed tariff doctrine, the 5th Circuit would have none of it. If the doctrine was to be nullified, the Court sent the message that it would have to be Congress that would have to do it.

Finally, the Court distinguished a recent 11th Circuit opinion, *Seaboard System R.R. v. U.S.*,[27] which had recognized the Commission's authority to find that misquotation of rates constitutes unreasonable practice under the statute. The Court explained that in *Seaboard* the Commission had determined that the tariff sought to be enforced was not ". . . plain to the ordinary user."[28] Since the shipper in this case had not claimed nor offered any evidence that rates filed by Caravan were not plain to the ordinary user, the *Seaboard* precedent was inapplicable and there was, therefore, no discord between the circuits.

In mid-July, 1989 the Eighth Circuit fired a salvo on behalf of the shippers in a ruling diametrically opposed to that made by the Fifth Circuit in Caravan. In *Maislin Industries v. Primary Steel, Inc.*,[29] the Eighth Circuit faced the issue of whether the filed tariff doctrine obligated Primary Steel, Inc. to pay Maislin Industries an amount greater than that which the parties negotiated. The district court had affirmed a ruling of the Interstate Commerce Commission finding it unreasonable under 49 U.S.C. Sec. 10701(a) for Maislin to recover tariff charges higher than those agreed to by the parties. On appeal, Maislin challenged the district court's referral of the issue to the ICC and its subsequent affirmance of the ICC decision.

First, the Circuit Court upheld the district court's reliance on the primary jurisdiction doctrine in referring the questions of whether Maislin's freight rates and charges were unreasonable and whether Maislin's practice of assessing and rebilling Primary Steel for tariff rates higher than

25. The Court cited, by analogy, the Supreme Court's refusal to overturn doctrine established prior to the Motor Carrier Act which Congress did not expressly abrogate. *Id.* at 391 citing Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986) and Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922).

26. *Id.* at 391 citing National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177, 3 I.C.C.2d 99 (1986).

27. 794 F.2d 635 (11th Cir. 1986). Seaboard held that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." *Id.* at 638.

28. *Id.* at 637.

29. 879 F.2d 400 (8th Cir. 1989).

those originally negotiated by the parties constituted an unreasonable practice in violation of 49 U.S.C. Sec. 10701(a) to the ICC.

Upon receiving the referral, the ICC relied upon its earlier decision in *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*,[30] and held that it could inquire into whether the imposition of undercharges would be an unreasonable practice under 49 U.S.C. Sec. 10701(a). The ICC then found that Maislin had quoted a rate other than a tariff rate to Primary Steel, that an agreement had been reached between the parties, and that Primary Steel had, in fact, reasonably relied on the rate quotation. The ICC concluded that Maislin would commit an unreasonable practice in requiring Primary Steel to pay undercharges for the difference between the negotiated rates and the tariff rates. The district court left the ICC's findings intact and the Eighth Circuit, unlike the Fifth, agreed.

Further and of greatest significance, the Circuit Court ruled that the district court properly rejected the applicability of the filed tariff doctrine because of the ICC policy change announced in *Negotiated Rates*.[31] *Negotiated Rates* permits the ICC, upon a court's request, to determine whether collection of undercharges would constitute an unreasonable practice under 49 U.S.C. Sec. 10701. The district court observed that the ICC had not abolished the requirement that mandates carriers to charge the tariff rate. Rather, the ICC changed its policy on enforcing the "unreasonable practice" provision of section 10701(a), by allowing the consideration of equitable defenses. The district court held that nothing prohibits the ICC from changing its policy and that this change in policy was justified and consistent with its practices under the Interstate Commerce Act. Again, the Circuit Court agreed. The split between the Eighth and Fifth Circuits was irreparable.

It is offered that the reported federal circuit court cases since 1980 reflect that the filed tariff doctrine has collided head on with the observable result of motor carrier deregulation: the shakeout of several thousand motor carriers since 1980, many of them bankrupt. The review of these federal circuit court decisions reveals that although the courts have taken cognizance of the impact of deregulation, there is disagreement among the circuits as to whether to soften the long-standing and "harsh" filed tariff doctrine. The classic conflict between the Eighth and Fifth Circuits appears inevitably headed for the Supreme Court.

With respect to the role of the Interstate Commerce Commission, the reviewed cases suggest that absent a proven need for Commission expertise, federal court referral to the ICC of issues involving undercharges,

---

30. *Supra* note 26.
31. *Id.*

at least in the Fifth Circuit, will not be automatic.[32] The federal courts recognize that the ICC has jurisdiction to declare a tariff unreasonable. However, several court decisions reflect a position that referral for this determination need not be made if the alleged offending provision(s) of the tariff are unambiguous and the court is comfortable with interpreting the provision in light of the applicable statute and in accordance with the normal judicial interpretive process. Again, what will come in the future as the Supreme Court rules on these issues is unclear.

Recently, the Commission, on a referred case from a Tennessee state circuit court, ruled that a negotiated rate agreed upon by both parties would be enforced notwithstanding a different filed tariff rate and declared the filed tariff rate unreasonable solely by virtue of its inconsistency with the negotiated rate.[33] This decision further evidences the continuation of the aggressive strategy pursued by the ICC throughout the 1980's of declaring filed tariff rates unreasonable in light of different negotiated rates, thereby eroding the efficacy of the filed tariff doctrine before the ICC. This course of action appears to be the Commission's method of implementing what it perceives to be the Congress' intent with respect to deregulation of rates without actually legislatively abrogating the doctrine.[34] Its success will be assessed when the Supreme Court speaks.

In requiem, the fond hopes of thousands of shippers that undercharges caused by carrier carelessness, neglect or malevolence with respect to filing tariffs in the hurly-burly of the modern deregulated environment, and without any significant element of tariff ambiguity, would be found by the federal courts to be justifiable exceptions to the filed tariff doctrine, have yet to be totally realized. The moral for shippers with respect to the undercharge issue is, simply, be sure your carrier has filed its tariffs with the ICC. If the carrier has failed to file, race to the ICC and argue that the filed tariff is unreasonable in light of the negotiated tariff rate

---

32. Recently, however, it has been reported that a U.S. Bankruptcy Court in St. Paul, Minnesota, ruled that 29 undercharge cases involving Murphy Motor Freight, Inc. should be referred to the ICC for a ruling on the reasonableness of the rates involved. Schultz, 219 TRAFFIC WORLD 14 (August 28, 1989).

33. Sunshine Mills Inc. v. Rebel Motor Freight Inc., MCC 30140 (July 31, 1989). In another Tennessee case referred to the ICC regarding Rebel Motor Freight Inc., the Commission again held that it would be an unreasonable practice for shippers to pay additional undercharges in negotiated rate cases. Ideal Chemical and Supply Co. v. Rebel Motor Freight Inc., MCC 30139 (Aug. 21, 1989). *See also* B&B Beverage Co. v. Eazor Special Services, Inc., MCC 30137 (Aug. 21, 1989).

34. It has been reported that Rep. Glenn Anderson (D. Calif.) has stated his intent to introduce legislation which will require all undercharge cases be considered by the ICC before they can be sent to bankruptcy court. This solution is allegedly being pursued because it appears unclear whether judicial action will produce uniform results. Schultz, 219 TRAFFIC WORLD 14 (Aug. 28, 1989).

and then pray that the Supreme Court agrees with Eighth Circuit's decision in *Maislin*.

III. Pension Funds, ERISA/MPPAA and Deregulation

One of the announced public policy goals of motor carrier deregulation was to encourage or even force weak carriers—presumably the more poorly managed ones—to exit the industry. This would lead, the deregulators argued, to a "lean and mean" motor carrier industry with lower prices and less excess capacity. Unfortunately, this admirable economic policy has been short-circuited by the statutory rules enforcing another overriding public policy: the government's interest in assuring its citizens that they will collect their pensions.

A complete statement and analysis of the legislative and case law history of the United States pension rules cannot be made within the scope of this, or perhaps, any article. A short recapitulation, however, is necessary to understand the terrain encountered by the motor carrier industry as it struggled with deregulation subsequent to 1980.

In 1974, Congress passed the Employee Retirement Investment Security Act [ERISA].[35] This legislation, enacted as a comprehensive federal regulation of pension plans, addressed four key areas of need: (a) the lack of adequate vesting provisions in many existing plans;[36] (b) the inadequacy of the funding cycle used by many plans;[37] (c) the lack of comprehensive regulation of the duties and responsibilities of plan trustees including disclosure to employee/participants;[38] and, (d) the loss of employee benefits which resulted from plan terminations.[39]

Arguably, the provision of ERISA which has had the most serious impact upon the motor carrier industry is the termination insurance program [Title IV] which protects the loss of employee benefits from plan terminations. This program is operated by the Pension Benefit Guaranty

35. 29 U.S.C. Sec. 1001 *et seq.*.

36. Before ERISA, for example, employees with long careers within a company could lose their pension benefits if their employment was terminated before retirement. Title I of ERISA established minimum vesting standards to ensure that after a certain period of time an employee's pension rights would not be conditioned upon their remaining with the company. Peick v. Pension Benefit Guaranty Corporation, 724 F.2d 1247, 1251 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), citing 29 U.S.C. Sec. 1053(a) (1976). In Peick, a case involving the Teamster's Pension Fund, the 7th Circuit upheld the constitutionality of the MPPAA.

37. ERISA required minimum funding through amendments to the Internal Revenue Code. 724 F.2d at 1251.

38. ERISA imposes fiduciary duties upon plan trustees and requires the disclosure of greater information to the employee/participants. *Id.* at 1251.

39. In response to this growing problem, ERISA [Title IV] established a system of termination insurance to protect the employee's rights when a plan failed or terminated with insufficient funds. *Id.* at 1251.

Corporation [PBGC], a governmental entity.[40]

Upon enactment of ERISA, the PBGC insured all nonforfeitable benefits that had been earned by employees in single employer plans. Any single employer that wanted to terminate its plan had to notify the PBGC. If the plan lacked sufficient assets to pay its nonforfeitable benefits, the PBGC assumed the obligation. Any monies expended by PBGC were recoverable from the terminating employer. This indemnification provision, however, allowed the PBGC to recover no more than thirty per cent of the employer's net worth.[41]

Multiemployer plans were handled differently. These enormous, often union-sponsored, pension plans to which almost all major motor carriers contributed on behalf of their employees under collective bargaining agreements, were not unqualifiedly insured. Congress decided to wait and set 1978 as the target for implementing unqualified insurance on these plans. According to ERISA, from 1974 to 1978, employers withdrawing from these on-going multiemployer plans incurred a contingent liability. Their liability was contingent upon the plan terminating within five years after their withdrawal, and upon the PBGC's deciding to insure, if necessary, the plan's benefits. If the plan continued for five years after their withdrawal or PBGC decided not to insure or did not incur any liability, the withdrawing employer was freed of responsibility. ERISA did not, in general, require a withdrawing employer to provide PBGC any security for this potential liability.[42]

In response to concerns voiced by experts and its own members regarding the financial viability of multiemployer pension plans under the rules set forth in ERISA and after extensive hearings and review, Congress enacted the Multiemployer Pension Plan Amendments Act [MPPAA] in 1980.[43] The MPPAA made several important changes to ERISA. Critical to our discussion was the change in the rules controlling an employer's withdrawal from on-going multiemployer pension plans. No longer were employers only subject to a contingent liability. Under MPPAA, an employer who withdraws, totally or partially from a plan, must immediately begin to pay a fixed and certain debt owed to the plan. The amounts due for partial or complete withdrawals are calculated by differ-

40. *Id.* at 1251 citing 29 U.S.C. 1306 (1976). The PBGC receives no direct federal appropriations but rather relies on premium payments from participants in the system.

41. 724 F.2d at 1251-52, citing 29 U.S.C. Sec. 1341(a)(b) and (c), Sec. 1341(b)(2).

42. An exception was recognized for "substantial" employers—those that had contributed at least ten percent of all contributions received by the plan over a period of time. These employers were required to escrow an amount equal to their termination liability or post a bond. 724 F.2d at 1252, citing 29 U.S.C. Sec. 1301(a)(2), 1363(b), 1363(c)(1), 1363(c)(2).

43. 29 U.S.C. Sec. 1381 *et seq.*

ent formulas.[44] In essence, MPPAA requires any motor carrier who withdraws from a multiemployer pension plan, for any reason, to pay a withdrawal penalty. For a substantial number of carriers, the calculated penalty for withdrawal is sizable, frequently exceeding the carrier's net worth.[45] Although constitutionally attacked on several grounds, MPPAA was upheld.[46]

Recognizing the trucking industry's unique position in the multiemployer plan area, Congress created, within the MPPAA, an exemption on the industry's behalf. This "trucking exemption," allegedly, softened the statutory definition of complete withdrawal and, therefore, permitted the industry greater flexibility in withdrawing from on-going plans.[47] The one catch is that for the exemption to apply, the plan must be one in which:

> . . . *substantially all* [emphasis added] of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household moving industry, or the public warehousing industry.[48]

It is within this definitional nether world that one motor carrier fought for its life. In *Central States Pension Fund v. Bellmont Trucking Co.*,[49] a case of first impression, the motor carrier argued, in part, that the MPPAA trucking exemption applied in their case because the plan they exited was

44. The details of "withdrawal liability" computations are very complex. *See*, 724 F.2d at 1255-56 for a thorough discussion of its intricacies.

45. Donohue, "Statement of the American Trucking Associations, Inc. on Oversight—Motor Carrier Act of 1980," before the United States Senate Committee on Commerce, Science and Transportation, pp. 31-34 (Sept. 9, 1985).

46. *See*, e.g., Peick v. Pension Benefit Guaranty Corp., *supra* note 36; Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Parenthetically, the retroactive application provisions of MPPAA were statutorily amended by the Deficit Reduction Act of 1984, 98 Stat. 494, 899 (1984), thereby relieving any employer from withdrawal liability if it had withdrawn from the plan or had executed a binding agreement to withdraw from the plan prior to the effective date of MPPAA in 1980. Few carriers were effected.

47. Under 29 U.S.C. Sec. 1383(a) a complete withdrawal occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." The trucking industry exemption alters this definition by mandating that a complete withdrawal occurs only if:

> (A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and
> (B) either—
> (i) the corporation [PBGC] determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or
> (ii) the employer fails to furnish a bond issued by a corporate surety that is an acceptable surety . . ., or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

29 U.S.C. 1383(d)(3). *See also* PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) wherein the Supreme Court describes withdrawal liability.

48. 29 U.S.C. Sec. 1383(d)(2).

49. 610 F. Supp. 1505 (N.D. Ind. 1985).

more than 60% made up by the required carrier entities. Accordingly, Bellmont contended it was exempted from complete withdrawal charges. The District Court disagreed with Bellmont's analysis of the exemption and its definitional requirements. It held that the trucking industry exemption to withdrawal liability was not available to a motor carrier where only 60% of the contributions to the plan the carrier was seeking to exit came from employers primarily engaged in the required business classifications. The District Court construed the phrase "substantially all" to mean at least 85%, a figure discussed in the legislative history of MPPAA but not included in the statute. Accordingly, the motor carrier was assessed full withdrawal liability with the District Court further admonishing the carrier that it had misconceived the purpose of withdrawal liability.[50] The 7th Circuit affirmed.[51] Apparently, this purported safe haven denied sanctuary.

Other tacks have been taken by motor carriers in attempts to maneuver around the stringent requirements of ERISA and MPPAA.[52] In a case decided earlier this year, the employer/carrier had an unlikely accomplice in its attempt—Teamster's Local 50. In *Central States Pension Fund v. Gerber Truck Service, Inc.*,[53] Gerber, a non-union motor carrier, and the Teamsters' local agreed that if the carrier/employer signed the Teamsters' national collective bargaining agreement, the union would only require Gerber to make pension payments on behalf of three union employees which had come into Gerber's employ as a result of Gerber's merger with a now defunct union carrier. The union agreed to this side deal in order to save three jobs for their members, two of which were close to retirement age. Gerber agreed, apparently out of kindness.

Although the facts in this case were somewhat compelling, the Court had no difficulty ruling in favor of the pension funds and against the carrier. The 7th Circuit held that once the carrier signed the collective bargaining agreement, it was bound to all its terms regardless of its separate understanding with the local, this separate agreement having no binding authority over the pension funds. Accordingly, the carrier was obligated to fund pension benefits for *all* covered employees, union and non-union

50. *Id.* at 1513 citing Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1505 (D.C. Cir. 1984).

51. 788 F.2d 428 (7th Cir. 1986).

52. *See*, e.g., T.I.M.E.—DC v. Management-Labor Welfare & Pension Funds, 756 F.2d 939 (2nd Cir. 1985) [carrier transferred employees to a different locale and became liable to make contributions on their behalf to a new pension plan were not released from making withdrawal payments due old pension fund]; Byrnes v. DeBolt Transfer, Inc., 741 F.2d 620 (3rd Cir. 1984) [carrier not permitted to require 1,000 hours of work in twelve month period as threshold for ERISA coverage]. *See generally*, T.I.M.E.—DC, Inc. v. N.Y. State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 621 (N.D.N.Y. 1984).

53. 870 F.2d 1148 (7th Cir. 1989).

alike, in compliance with the collective bargaining agreement. The agreements between the carrier and the local, the Court ruled, did not foreclose the applicability of ERISA.[54] This opinion certainly gives support to the old saying that "no good deed ever goes unpunished."

It is offered that in an industry where unionization and multiemployer pension plans were the rule prior to deregulation, the pension funding regulations found in ERISA and MPPAA trapped and froze in place at least three hundred (300) weak motor carriers. The problem faced by these carriers is that they cannot be sold, merged, acquired or voluntarily liquidated unless their employee pension fund liabilities are funded. Given free entry to the industry by competitors, only a handful of these carriers are candidates for acquisition by other carriers financially strong enough to assume their pension obligations.

Not surprisingly, as the statistics attest,[55] these carriers, faced with the unflinching public policy represented by ERISA/MPPAA, have run their assets into the ground and, ultimately, have gone or will soon go bankrupt, thereby leaving creditors, employees and pension funds without recourse. In the interim, they continue to limp along, an embarrassment to the deregulators, an extreme hazard to the multiemployer pension system and its employee/participants, and a danger to the public who share the roads with their ever increasingly unsafe equipment and economic impediments to the stronger more competitive carriers.

Without question, the "ERISA/MPPAA problem" is one of the most painful aspects of deregulation. The problem, however, is finite. Ultimately, the affected carriers will die. Meanwhile, they will continue twisting and turning, ever so slowly, in the wind.

IV. Federal Preemption, State Powers and Deregulation

The last decade has seen the deregulation of interstate transportation as well as increased Congressional incursion into the States' regulation of intrastate transportation.[56] The airline, railroad and bus transportation industries all were touched by Congress' preemption activity.[57] Unlike the other major pieces of deregulation legislation, however, the Motor Carrier Act of 1980 permitted the States to retain jurisdiction over intrastate trans-

---

54. *Id.* at 1149.

55. *See* Dempsey, "The Empirical Results of Deregulation: A Decade Later, and the Band Played On," 17 TRANSP. L.J. 31, 75-81 (1988).

56. An outstanding survey of federal preemption of intrastate jurisdiction over transportation is contained in "Symposium: Intrastate Regulation," 14 TRANSP. L.J. 179-247 (1986).

57. *See generally*, the Airline Deregulation Act of 1978, the Staggers Rail Act of 1980 and the Bus Regulatory Reform Act of 1982.

portation,[58] a policy that has strong roots in both case and statutory law.[59] What Congress left alone, however, the ICC has not.

Only five states have elected to deregulate their motor carrier industries since the passage of the Motor Carrier Act of 1980.[60] In fact, since the mid-1980's, the States' deregulatory ardor has faded as evidence builds to prove that deregulation has not been all that it was promised to be.[61] Notwithstanding the States' reluctance to deregulate, the ICC, pursuing its objective to implement what it perceives to be Congress' mandate to fully deregulate the motor carrier industry, has undertaken a strategy which has, at its core, the emasculation of the States' authority to regulate intrastate transportation in any meaningful manner. Unlike the slow corrosive policy pursued in the undercharge/filed tariff doctrine issue discussed above, the ICC has gone on the direct attack against the States in this area, arguing that the case law and statutory authority clearly supports their position of preemption. In cases decided early in 1989, the 8th and 5th Circuits ruled on the ICC's recent offensive against the States' power to regulate intrastate transportation.[62]

Middlewest Motor Freight Bureau v. ICC,[63] presented the issues neatly. Matlack, Inc. is a motor carrier operating under an ICC certificate to transport general commodities under contracts with manufacturers and distributors of chemicals and related products. Chemtech Industries, Inc. maintains facilities at Kansas City, St. Louis and Springfield, Missouri. It was Chemtech's practice to receive products from out-of-state origins

58. 49 U.S.C. Sec. 10521(b) (1980) expressly reserves to the States the regulation of common carriers' intrastate rates, even if these rates affect interstate commerce.

59. For example, since Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299 (1851), rules or regulations which are grounded on the state's police power over safety and are purely local in nature and do not unduly burden interstate commerce, are permitted even though they may in some manner regulate interstate trade. For an interesting recent treatment, see Specialized Carriers & Rigging Assoc. v. Comm. of Virginia, 795 F.2d 1152 (4th Cir. 1986). Further, although the ICC has jurisdiction under 49 U.S.C. 10521(a)(1)(A) over ". . . transportation by motor carrier . . . to the extent that passengers, property, or both, are transported by motor carrier between a place in a State and a place in another State" as well as regulatory authority over motor carrier transportation of property ". . . between a place in a State and another place in the same State through another State" 49 U.S.C. Sec. 10521(a)(1)(B), its authority to regulate interstate commerce does not, with some exceptions, ". . . affect the power of a State to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. Sec. 10521(b)(1).

60. Florida [1980], Arizona [1981], Maine [1982], Wisconsin [1983] and Alaska [1984].

61. An excellent study and discussion of intrastate deregulation, its problems and future, is found in Dempsey, *supra* note 55.

62. The Southern Motor Carrier Rate Conference (SMCRC) case, *infra* note 100, in which the practice of collective intrastate ratemaking was challenged by the Department of Justice will be treated in the following section discussing antitrust issues. Although this case raises issues of federal supremacy, its thrust is antitrust.

63. 867 F.2d 458 (8th Cir. 1989).

and convert large inbound quantities into smaller outbound quantities at its Missouri locations. Shipments were then made to customers throughout Missouri, with seventy to eighty percent subject to supply contracts consummated in advance of the products being shipped to Missouri. Missouri claimed the movements within Missouri were intrastate transportation requiring state approval and issued citations to the carrier. The carrier filed for a declaratory order with the Commission to determine whether its ICC certificate covered these shipments as part of a continuous interstate transportation service. The ICC decided they were protected, preempting the state action and the appeal was filed.[64]

The Court was presented with two arguments by the petitioners: (1) that the ICC lacked jurisdiction to decide whether the transportation was interstate or intrastate; and (2) assuming jurisdiction, the ICC's decision was arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence on the record as a whole.

The Court quickly dealt with the issue of jurisdiction. It decided the issue as follows:

> The question is whether the transportation from the distribution point in Missouri to customers in Missouri is part of a continuous interstate operation originating outside of Missouri and is thus covered by the ICC certificate, or whether the second leg of transportation is separate and wholly intrastate. We hold the issue is clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation.[65]

To resolve the second issue, the Court, relying upon the accepted legal principle that it must honor the agency's interpretation of its statute so long as that interpretation is a reasonable one,[66] reviewed the ICC's application of the well established test set out in *Texas & N.O.R.R. v. Sabine Tram Co.*[67] The *Sabine* test states that the determination of whether transportation between two points within a State is part of a larger interstate transportation service depends on the essential character of the shipment,[68] a critical element of which is the "original and persisting in-

---

64. *Id.* at 459.

65. *Id.* at 460. As authority, the Court relied upon Service Storage & Transfer Co. v. Virginia, 359 U.S. 171 (1959), wherein the Supreme Court held that the ICC has primary jurisdiction to interpret federal motor carrier licenses and that an interpretation of the certificate should first be litigated before the ICC. The Court further cited Jones Motor Co. v. Pennsylvania Public Utilities Commission, 361 U.S. 11 (1959) and Merchants Fast Motor Lines, Inc. v. ICC, 528 F.2d 1042 (5th Cir. 1976).

66. *See* Chevron U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837 (1984) wherein the standard for review is set out and further states that where Congressional intent is absent the Court should ". . . not simply impose its own construction on the statute" but rather should determine whether the agency's construction is reasonable.

67. 227 U.S. 111 (1913).

68. *Id.* at 122.

tention of the shippers."[69]

The ICC had determined in its decision that the shipped chemicals had not "come to rest" in St. Louis and were, therefore, not subject to State control. The Commission founded its opinion on evidence that the shipper's activity in Missouri did not interrupt the continuity of the original movement in interstate commerce because: (1) the shipments moved from outside of Missouri to the St. Louis distribution terminal and from there to their ultimate destination within 30 days; (2) since almost all of the shipments involved supply contracts entered into prior to shipment, Chemtech knew the final destination from the moment the shipment left its origin; and, (3) no manufacturing or processing took place at St. Louis. Accordingly, the ICC found that the evidence supported the finding that the shipper's intent was to ship to customers and that any movements from St. Louis to other points in Missouri were still interstate commerce.

The Court agreed. It dismissed the petitioners argument that the facts of this case were governed by *Atlantic Coast Line R.R. v. Standard Oil Co.*[70] The ICC had distinguished this case arguing that in *Atlantic* the Supreme Court found no intent at the time of initial movement that the product be shipped beyond the storage facilities. The Court accepted the ICC's findings as reasonable that Chemtech intended that its product continue movement through St. Louis for delivery to known customers.[71]

Based on these findings, the Court affirmed the actions of the ICC. The Commission had beaten back the first challenge to its broadening of the definition of interstate transportation.

One month later, the 5th Circuit was asked, in *Texas v. United States*,[72] to rule on basically the same issue: whether the ICC had jurisdiction to preclude a state court enforcement action regarding shipments that the ICC had determined to be interstate, rather than intrastate, in nature. Again, the ICC argued in favor of an expansive definition of interstate transportation.

This case involved a classic "hub and spoke" distribution system[73] operated by E&B Carpet Mills. E&B shipped carpet from Georgia to its warehouse in Arlington, Texas. E&B then wanted to ship these goods from Arlington to its customers located within Texas at the lower interstate rates. The Texas intrastate carriers objected. Prior to this action being

---

69. Middlewest Motor Freight Bureau, 867 F.2d at 460 citing Baltimore & O.S.W.R.R. v. Settle, 260 U.S. 166, 174 (1922) and Sabine Tram, 227 U.S. 111, 124.

70. 275 U.S. 257 (1927).

71. 867 F.2d at 461.

72. 866 F.2d 1546 (5th Cir. 1989), *reh. denied* en banc 874 F.2d 812 (5th Cir. 1989).

73. Cases involving "hub and spoke" distribution systems have been litigated for the last half century. *See, e.g.*, Atlantic Coast R.R. v. Standard Oil of Kentucky, 275 U.S. 257 (1927); Public Service Commission v. Wykoff, 344 U.S. 237 (1952).

filed, Armstrong World Industries, E&B's parent, went to the ICC and, not surprisingly considering the ICC's posture, obtained a declaratory judgment construing these shipments to be interstate in character.[74] Texas initiated state court proceedings against E&B and filed this action to have the Circuit Court ". . . mitigate on jurisdictional grounds any preclusive effect that the ICC ruling might otherwise have, or to have the ICC order reversed or vacated despite the absence of any jurisdictional infirmity."[75]

Although the parties disputed both the applicable standard of review and whether E&B had the requisite "fixed and persisting intent" to convert the Arlington-to-customer trips into interstate commerce, the Court determined that the legal rules governing this issue were clear. It found that the Commission had been reasonable in its determination of the shipper's "fixed and persisting intent." The Court, following the ICC's lead, gave great weight to two factors. First was whether the shipper made use of a transit privilege, such as the storage-in-transit provision in the carrier's tariff, designating the shipment as a unified, interstate journey. The second factor was whether the shipper commingled interstate and intrastate goods at the hub.[76]

The 5th Circuit analyzed the case in almost the identical manner as the 8th Circuit in *Middlewest*. At the end of a comprehensive opinion, the Court succinctly concluded as follows:

> Whether commerce is interstate, and subject to ICC regulation, or intrastate, and subject to Texas regulation, depends on the "fixed and persisting intent" of the shipper. A carrier or shipper involved in a . . . hub-and-spoke distribution system may be uncertain about the characterization of a certain movement, or a state may subject a carrier to regulatory proceedings with regard to transportation that the carrier believes to be interstate. If so, the shipper or carrier . . . may ask the ICC to determine the character of the contested transportation . . . . The ICC has primary jurisdiction to decide that question. If the ICC does so, the resulting order is final and reviewable. Upon review, we will defer to the ICC's judgment unless it is arbitrary or capricious . . . . In this case, the ICC has applied the "fixed and persistent intent" rule reasonably in deciding that when the shipper involved transports goods across state lines to a hub warehouse pursuant to a storage in-transit privilege, the later hub-to-customer transport was still interstate in character, even though it did not again cross state lines.[77]

The ICC, however, did not receive a clean sweep. In a powerful dissent, Judge Higginbotham argued forcefully against what he perceived to be the ICC ". . . simply expand[ing] its jurisdiction in order to undo the

---

74. 866 F.2d at 1548.

75. *Id.*

76. A shipper's control over a hub warehouse does not cancel the effect of the transit privilege as long as the shipper has no opportunity to commingle local and interstate freight. *Id.* at 1563 citing the ICC.

77. 866 F.2d at 1561.

effects of state regulation when it disagrees with state policy."[78]

Judge Higginbotham contended that the majority ended its inquiry into the ICC's decision too quickly. He asserted that it was the Court's duty to ". . . determine not only whether the ICC has advanced a general theory that is reasonable, but also whether the specific interpretation relied upon in this case is likewise reasonable."[79]

Reviewing the facts, the Judge found that according to the ICC, all of the carpet shipped to the Arlington hub, and later transported to Texas destinations, moved pursuant to the transit privilege. However, it was not clear that the Arlington-to-customer trips were interstate in character under the second prong of the ICC's test, which ". . . requires that the shipper not commingle interstate and intrastate commerce at the hub warehouse."[80]

Judge Higginbotham maintained that the facts demonstrated that Armstrong's "fixed and persisting" intent to ship its carpet in interstate commerce beyond the Arlington warehouse dissolved for the majority of the carpet sent to the warehouse because the carpet, which Armstrong at some point intended to transport in intrastate commerce, was commingled with the carpet which was alleged to continue in interstate commerce.[81]

Further, the Judge stated that he could not accept ". . . the ICC's apparent distinction between an intent that expires and an intent that persists but is thwarted."[82] He argued:

> The ICC cites no cases to justify this distinction. It makes no sense in light of existing case law. It contradicts the ICC's general theory of the law. Would Armstrong's intent also be "thwarted" if an unexpected buyer—for example, a supplier, who operates his own fleet of trucks and so needs no transportation services, left without adequate stock after a labor strike at another carpet company—offered to purchase carpet at the warehouse at a price higher than other Armstrong customers would pay? The absence of a competitive buyer interested in Armstrong's "delivered rate" program would be a "circumstance beyond Armstrong's control." The ICC's test effectively eliminates the requirement that a shipper's intent be "fixed and persisting." [83]

Accordingly, Judge Higginbotham contended that the dissolution or thwarting of Armstrong's intent at the warehouse distinguished this case from *Middlewest* and made these shipments intrastate in character. He argued that since the Eighth Circuit did not mention any local sales at the warehouse, any shipments via intrastate carrier, or any concept of

78. *Id.* at 1569.
79. *Id.* at 1566.
80. *Id.*
81. *Id.* at 1566-67.
82. *Id.* at 1567.
83. *Id.*

"thwarted intent," the ICC's reasonable general interpretation was sufficient to decide that fact pattern but not this case.

Finally, Judge Higginbotham eloquently presented the following argument for reversal of the ICC's ruling:

> If Texas is wrongfully regulating transportation, by exceeding its jurisdiction or by violating constitutional rights, the subjects of that regulation have a remedy before the ICC or in the federal courts. No such wrongful regulation has even been alleged in this case. On the other hand, if Texas is simply regulating intrastate commerce in a manner not approved by the ICC, the ICC lacks the power to expand its jurisdiction to interfere with Texas' regulation. Any contrary interpretation of the Motor Carrier Act would contravene the clear intent of Congress. Congress did not give the ICC a regulatory power as broad as Congress' own power under the commerce clause. Instead, Congress explicitly preserved the power of states to regulate goods in intrastate commerce . . . . If Texas were to harass carriers after the ICC declared the proposed program to the interstate, that harassment would presumably be unlawful. But again, no unlawful harassment has been alleged here. Armstrong complains only that Texas exercises its power too vigorously. The statutory division of power enacted by Congress permits and even invites the states to govern vigorously.[84]

On the question of federal supremacy with respect to motor carriers since deregulation, it is offered that the courts have approved a significant extension of federal (ICC) power. In the Missouri case, the court's decision was a retail extension of the ICC's power to extend the reach of its interstate rate authority into territory previously reserved to the States. In the Texas case, the court approved a wholesale extension, albeit by a 2-1 decision in which Judge Higginbotham's ringing dissent is arguably more logical and reasonable than the views of the majority.

It appears that the courts follow the lead of the ICC when a case at issue leads to the lower rates contemplated by the Motor Carrier Act of 1980. Lower rates in the motor carrier marketplace are what Congress wants, and both the ICC and the courts seem to be disposed to push reason to the brink in order to grant that wish.

V. Antitrust Issues: Predatory Pricing and Collective Ratemaking

Since the Act to Regulate Commerce of 1887, Congress has pursued a public economic policy in favor of competitive enterprise. The antitrust laws[85] reflected a congressional theory that competition was more likely to exist in an economic structure characterized by many competing firms

84. *Id.* at 1567-68.

85. Sherman Act, 26 Stat. 209 (1890), 15 U.S.C.A. Secs. 1-7; Clayton Act, 38 Stat. 730 (1914), 15 U.S.C.A. §§ 12-27 as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936).

than in concentrated industries dominated by a few large firms.[86] Accordingly, the antitrust laws were designed to control the exercise of private economic power by preventing monopoly and protecting competition.[87]

Recently, however, these long accepted antitrust concepts have been under attack by commentators and courts advocating the use of modern micro-economic theory in antitrust enforcement. These new approaches to antitrust analysis, commonly referred to as "Chicago School" theories, view economic efficiency, rather than the traditional prevention of industrial concentration, as the primary goal of antitrust enforcement. It can be argued, that the Chicago School economic theories have provided the intellectual framework for many of the antitrust enforcement policies implemented by both the ICC and the Department of Justice in the 1980's.

Against this contemporary antitrust backdrop, place the motor carrier industry in 1980. Historically, the industry had been immunized, as a matter of public policy, from certain antitrust violations. Problems found in other industries, such as predatory pricing, for example, were relatively unheard of because of regulation. Motor carriers were protected from violations resulting from collective ratemaking by the Reed-Bulwinkle Act of 1948.[88] All this changed in 1980. The Motor Carrier Act of 1980 sharply curtailed this protection and these exemptions. The Act, the legislative mandate for deregulation of the industry, significantly reduced regulatory restrictions on entry, gave motor carriers greater pricing flexibility and set limitations on collective ratemaking activities.[89] Motor carriers were rudely shoved into the modern world of competitive pricing, antitrust law and micro-economic theory.

---

86. As Judge Learned Hand stated in United States v. Aluminum Company of America, Inc., 148 F.2d 416 (2nd Cir. 1945):

> Many people believe that possession of an unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.

87. *See* Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).

88. 62 Stat. 473; the current version of the exemption is codified at 49 U.S.C. Sec. 10706(b)(2).

89. Under the exemption, as amended, the ratemaking conferences must disclose the names of their members [49 U.S.C. Sec. 10706(b)(3)(A)]; the organization must limit discussion and voting to allowed subjects and parties [Sec. 10706(b)(3)(B)(i)]; ". . . the organization may not file a protest or complaint with the Commission against any tariff item published by or for the account of any motor carrier . . ." [Sec. 10706(b)(3)(B)(iii)]; the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item . . ." [Sec. 10706(b)(3)(B)(iv)]; ". . . upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organiza-

Deregulation resulted in a startling increase in competition within the industry. Thousands of new motor common carriers entered the business. Pricing became more competitive, freight prices dropped and numerous discount arrangements never before used in the industry became common. Hundreds of firms went bankrupt in this rigorous new environment.

Soon after 1980, several carriers, who had suffered acute adverse effects from deregulation, sought protection from the Commission. They bitterly complained to the ICC that the industry was experiencing serious antitrust violations. These carriers alleged that the major motor carriers were using illegal predatory and destructive rate cutting thereby causing these smaller carriers' financial collapse. The ICC was unmoved by their reasoning. After hearing the carriers' arguments, the Commission, adhering to the basic principles of deregulation theory, held:

> There is little likelihood of this type of strategy in the motor carrier industry. For such a strategy to succeed, sufficient entry barriers must be present to prevent competitors from reentering the market once the predator attempts to raise its price to monopolistic levels. However, as regulatory barriers are reduced, predation by motor carriers becomes uneconomic, since entry costs are so low that a predator could never long enjoy its monopoly price.[90]

Notwithstanding the ICC's expressed position, many carriers continued to protest. In 1983, the Commission again requested and received comprehensive public comment in reference to claims that discounting and competitive pricing occurring in the business were predatory and constituted attempts by the major motor carriers to monopolize the industry. These further hearings did not change the Commission's opinion. The ICC again ruled that the empirical evidence demonstrated that the new competitive environment benefitted the public, that this type of price competition was exactly what Congress desired when it passed the Motor Carrier Act of 1980, and that the pricing activity occurring in the marketplace did not constitute illegal predatory tactics under the antitrust laws of the United States.[91]

The ICC, buttressed by testimony from both the Department of Justice and the Federal Trade Commission, concluded that its original assessment was correct. It determined that the motor carrier industry did not have the structural characteristics necessary to make predatory pric-

tion . . ." [Sec. 10706(b)(3)(B)(v)]; and the organization shall make a final disposition of rate proposals within 120 days. [Sec. 10706(b)(3)(B)(vii)].

For an outstanding treatment of antitrust issues as they pertain to the transportation industry, see DEMPSEY & THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION, Chap. 4 (1986).

90. Lawfulness of Volume Discount Rates by Motor Common Carriers of Property, 365 I.C.C. 711, 714 (1982).

91. Pricing Practices of Motor Carriers of Property Since the Motor Carrier Act of 1980: Ex Parte No. MC-166, 1983 Fed. Car. Cas. (CCH) Par. 37,064 (ICC 1983).

ing a viable strategy because since ". . . the motor carrier industry has few non-regulatory barriers to entry a predation strategy—should it ever be attempted—is unlikely to harm either competition or shippers, as no monopoly can result."[92] Market efficiency, apparently, was in and the well established public antitrust policy against economic concentration was out. The message was clear: there was to be neither sympathy nor relief at the ICC for the motor carriers struggling with deregulation.

The ICC's position came as no surprise. Many observers of the motor carrier industry, including many economists, have characterized the industry as being atomistic in character, having no significant operating economies of scale, having a large number of competitors (under conditions of free entry), having very low financial barriers to entry, using (relatively) low technology as to both equipment and labor skills required, and being one of the beneficiaries of the huge public capital investment that has been made to create the nation's highway network.[93]

The characteristics just mentioned do properly describe the truckload (TL) segment of the industry. However, the less-than-truckload (LTL) carriers are quite another story. The LTL for-hire carrier segment of the industry is *not* atomistic in any sense of the word. A small and still shrinking group of increasingly large firms dominates this traffic nationally. LTL operations *do* have significant operating economies of scale. The established large national LTL carriers are the beneficiaries of an almost insurmountable financial barrier to entry: their large and widespread terminal networks. And, the LTL carriers do employ increasingly sophisticated information processing technology. The only significant similarities between the TL and LTL segments of the industry are that they both operate trucks, carry freight and use the highway network.[94]

Surprisingly, many who favored deregulation of the motor carrier industry gave short shrift to the economic and operating differences between TL and LTL carriers. In particular, little attention was given to the very significant differences between TL and LTL carriers with respect to barriers to entry and economies of scale. These major differences were certainly no secret; they have long been taught by any competent instructor in every basic course in transportation. That such significant differences could be ignored, or not understood, by some who proffered testimony favoring deregulation in Congressional and state legislative committee hearings, as well as the ICC's hearings on predatory pricing, is startling.[95]

---

92. *Id.* at 47,175.

93. Glaskowsky, Effects of Deregulation on Motor Carriers, pp. 9-11 (ENO Foundation for Transportation, Inc. 1986).

94. *Id.*

95. *Id.*

Although many motor carriers perished and others remained angry in the aftermath of the ICC's neglect, one carrier wants to get even. In 1987, Lifschultz Fast Freight, Inc., an LTL motor common carrier headquartered in New York City and with a majority of its freight business located on the east coast, bypassed the ICC and filed an independent private action in U.S. District Court alleging that Consolidated Freightways Corp., Yellow Freight System, Inc. and Roadway Express, Inc., commonly referred to as the "Big 3" in the LTL business, had engaged in predatory pricing with the intent to drive Lifschultz out of business in violation of the Sherman and Clayton Acts.[96]

The success of this action, currently in an extensive discovery phase, hinges on several factors: (1) whether it can be proven that the "Big 3" truly have the economic power and concentration to do what Lifschultz alleges; (2) whether Lifschultz can prove that the "Big 3" maintain high freight prices in the western United States, where they supposedly enjoy a significant competitive advantage, and then use these alleged "excess profits" to finance their charging below cost freight rates in the eastern United States where they face many smaller and, according to Lifschultz, more efficient competitors; and (3) whether this pricing technique, if proved, violates the antitrust laws or is merely an acceptable manifestation of the deregulated competition sought by Congress.

Motor carriers await the outcome of *Lifschultz* with anxiety. Will the courts stop the industry's apparent inexorable movement toward interstate LTL oligopoly by enforcing the original precepts of antitrust policy against economic concentration or side with the voices of deregulation who argue in favor of this "new-wave" antitrust enforcement policy based upon efficiency? The answer is several years away.

On another deregulatory tack and paralleling the ICC's activity regarding predatory pricing, the Department of Justice filed an action in 1982 against two motor carrier rate bureaus[97] alleging that the rate bu-

96. Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corporation of Delaware, Yellow Freight System, Inc., and Roadway Express, Inc., Civil Action No. 6:87-477-17, U.S. District Court, South Carolina, Greenville Division. It is alleged that the "Big 3" charge higher prices in the West and predatory low prices in the East in order to drive out the competitors in the East and, therefore, monopolize the industry. In its argument, Lifschultz advances the well-known and, arguably strict, Areeda and Turner standard for evaluating allegations of predatory pricing:

> Recognizing that marginal cost data are typically unavailable, we conclude that:
> (a) A price at or above reasonably anticipated average variable cost should be conclusively presumed lawful.
> (b) A price below reasonably anticipated average variable cost should be conclusively presumed unlawful.

Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARVARD L. REV. 697 (1975).

97. Rate bureaus are regional organizations composed of motor common carriers. They provide a forum for their member motor carriers to discuss rate proposals; publish tariffs and

reaus' collective ratemaking[98] violated the federal antitrust laws.[99] This attack, if successful, would have completed the gutting of the motor carrier industry's collective ratemaking antitrust exemption which was begun by the Motor Carrier Act of 1980. This critical issue was decided by the Supreme Court in 1985 in the now well reviewed case of *Southern Motor Carriers Rate Conference, Inc. v. United States.*[100]

The Southern Motor Carriers Rate Conference [SMCRC] and North Carolina Motor Carriers Association [NCMCA] are rate bureaus composed of motor common carriers operating in North Carolina, Georgia, Tennessee, and Mississippi. As part of their activities, they submit, on behalf of their members, joint rate proposals to the Public Service Commission in each State. This collective ratemaking was authorized, but not compelled, by the respective States.[101] The United States contended that the collective ratemaking violated the federal antitrust laws and filed an action to enjoin it. SMCRC and NCMCA maintained that their conduct was immune from the federal antitrust laws by virtue of the "state action" doctrine announced in *Parker v. Brown.*[102]

The Fifth Circuit, relying primarily upon *Goldfarb v. Virginia State Bar,*[103] agreed with the Department of Justice. In its opinion, the Court reasoned that the Supreme Court's announced *Midcal*[104] test to determine enforceability of the *Parker* doctrine was inapplicable in suits involving private parties and even if, *arguendo*, the test applied, the rate bureaus argument would fail because the *Midcal* test requires that the private action not merely be authorized but compelled by the State. The rate bureaus appealed.

---

supplements containing the rates on which the carriers agree; and provide counsel, staff experts and facilities for the preparation of cost studies, other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions.

98. The rate bureaus were accused of colluding to keep freight prices high despite the public policy of deregulation.

99. The United States alleged that the two rate bureaus violated Sec. 1 of the Sherman Act by conspiring with their members to fix rates for the intrastate transportation of general commodities. 471 U.S. 48, 53 (1985).

100. 471 U.S. 48 (1985).

101. For example, Congress has recognized the advantages of collective ratemaking and, accordingly, under the Interstate Commerce Act, motor common carriers are permitted, but not compelled, to engage in collective interstate ratemaking. 49 U.S.C. §§ 10706(b)(2) and 10706(d)(2)(C).

102. 317 U.S. 341 (1943). Simply, the *Parker* doctrine holds that the Sherman Act was not intended to prohibit the States from imposing restraints on competition.

103. 421 U.S. 773 (1975) held that a State Bar, acting alone, could not immunize its anticompetitive conduct from the federal antitrust laws.

104. This test, announced in California Retail Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), has two prongs: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as a state policy, and (2) the State must supervise actively any private anticompetitive conduct.

The Supreme Court disagreed with the Department of Justice's and the Fifth Circuit's restricted view of the *Midcal* test. Justice Powell, writing for the majority, stated that *Midcal* should not be given a narrow reading but rather:

> . . . the two-pronged test set forth in *Midcal* should be used to determine whether the private rate bureaus' collective ratemaking activities are protected from the federal antitrust laws. The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant.[105]

Accordingly, the Court held that the "private v. state official" argument was not dispositive and that the *Midcal* test should be used to determine whether the private rate bureaus' collective ratemaking activities were protected under the federal antitrust laws.

Applying the *Midcal* test, the Court found that the facts demonstrated that the actions of the rate bureaus could be attributed to the required "clearly articulated state policy," within the meaning of the *Midcal* test's first prong, even in the absence of compulsion,[106] because North Carolina, Georgia, and Tennessee statutes expressly permitted collective ratemaking. Finally, because the Government had conceded that there was adequate state supervision of the parties' activities, the Court held that both prongs of the *Midcal* test were satisfied and that the rate bureaus' collective ratemaking activities, ". . . although not compelled by the States, are immune from antitrust liability under the doctrine of *Parker v. Brown*."[107] The motor carrier industry had successfully dodged another one of the deregulators' bullets.

VI. Postscript and a Look Forward

The authors have examined four areas of legal and economic effects of deregulation on the motor carrier community: undercharges and the "filed tariff doctrine," ERISA/MPPAA and deregulation, federal supremacy and the antitrust issues of predatory pricing and collective ratemaking.

The undercharge issue is a consequence of the severe price competition in the post-deregulation Darwinian motor carrier marketplace. It illustrates, painfully for many shippers, the rule that one cannot contract in violation of the law, however pure one's intent might be. Appeals to the

---

105. 471 U.S. at 58-59.

106. The Court held that:

> The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties. As long as the State clearly articulates its intent to adopt a permissive policy, the first prong of the *Midcal* test is satisfied.

471 U.S. at 60.

107. *Id.* at 66.

ICC (and its primary jurisdiction over the reasonableness of tariffs) have given some shippers relief, but others have felt the court-applied sting of the filed tariff doctrine. Ultimately, the Supreme Court will sort out the conflict. The undercharge problem was not anticipated even though all concerned predicted that many motor carrier bankruptcies would occur as a result of deregulation.

The ERISA/MPPAA issue is a classic case of conflict between two clearly enunciated public policies enacted into law: the Congressional mandate that workers are to receive their pensions versus the Congressional wish to have weak (presumably inefficient) motor carriers exit the industry. The conflict is direct and hard-nosed. There is no room for evasion or equivocation, and mandate has triumphed over wish. The result, as one would expect, is messy. Carriers that should exit the industry, that want to exit the industry, that others would like to see exit the industry, cannot exit the industry. Instead, their assets must waste away (assets that might have paid *some* percentage of pensions due). As many of our parents, about to administer a spanking to us, were wont to say, "this hurts me more than it does you." We didn't believe it then, and we wouldn't believe it now. ERISA/MPPAA has a noble purpose, and it will have many noble results, but few in the motor carrier industry would believe it.

The incursion of ICC rate jurisdiction ever deeper into heretofore forbidden state territory reflects two legal trends. The first is the gradual overall extension of federal supremacy which was so sharply accelerated in the 1930's and continues to this day. The second is the direct result of ICC—and court—interpretation of Congressional intent as expressed in the Motor Carrier Act of 1980 and the hearings and debate leading to passage of that legislation. The authors suspect that both the ICC's and the court's decisions in the Missouri and Texas cases reflect the philosophy of deregulation favoring low(er) rates rather than the facts in each case, particularly the Texas decision. The authors agree with Judge Higginbotham's well-reasoned dissent, ". . . [the ICC] is simply extending its jurisdiction in order to undo the effects of state regulation when it [the ICC] disagrees with state policy."[108] The Supreme Court is yet to be heard from on this issue, and the authors hesitate to speculate on what its decision might be.

Finally, there are the antitrust questions. The ICC says the competitive structure of the motor carrier industry makes price-fixing conspiracy among motor carriers unfeasible. Now comes Lifschultz alleging that the "Big 3" have done just that, and that they have the clout to do so. If this

108. Texas v. United States, *supra* note 78.

Sacasas and Glaskowsky: Motor Carrier Deregulation: A Decade of Legal and Economic Confli

case ever gets to trial it will air the issue. The authors do not speculate on the outcome.

However, the SMCRC antitrust case has been decided by the Supreme Court. The Antitrust Division of the Department of Justice has historically held a very jaundiced view of relief or immunity from antitrust law, whether federally granted or a result of state action. The Department of Justice fought hard, winning its case in the lower courts, but ultimately succumbed to the Supreme Court's opinion that the States still have some rights.

Clearly, deregulation of the motor carrier industry has had a number of interrelated legal and economic conflicts and effects. Some, such as the extension of federal supremacy and the emergence of antitrust issues, were expected. Others should have been anticipated, such as ERISA/MPPAA, but were not. And others were unexpected, or at least unanticipated, such as the undercharge problem. Not surprisingly, the motor carrier deregulation knots tied by Congress must be untied by the courts.