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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PETER C. REITER, ET AL., Petitioners v.

LANGDON M. COOPER, ETC., ET AL.

CASE NO: 91-1496

PLACE: Washington, D.C.

DATE: Tuesday, December 1, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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PETER C. REITER, ET AL., :
Petitioners :
v. : No. 91-1496
LANGDON M. COOPER, ETC., ET AL. :
- - - - - X

Washington, D.C.
Tuesday, December 1, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:06 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
the Petitioners.
MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States and ICC, as amici curiae
supporting Petitioners.
JOSEPH L. STEINFELD, JR., ESQ., Washington, D.C.; on
behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 91-1496, Peter C. Reiter v. Langdon M. Cooper.
5 Mr. Phillips.

6 ORAL ARGUMENT OF CARTER G. PHILLIPS

7 ON BEHALF OF THE PETITIONERS

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

10 The Court is required in this case to reconcile
11 two core commands of the Interstate Commerce Act. The
12 first is that the carrier shall charge and collect only
13 the filed tariff rate, and the second is that the carrier
14 shall not charge or collect a rate that is unreasonable.
15 In this case petitioners, who previously paid all that the
16 carrier charged in order to ship goods, have been ordered
17 in effect to pay what they claim to be unreasonably high
18 rates. Petitioners, on behalf of the entire shipping --

19 QUESTION: Which was the filed rate.

20 MR. PHILLIPS: I'm sorry, Your Honor?

21 QUESTION: Which was the filed rate.

22 MR. PHILLIPS: That was the filed rate, yes,
23 Your Honor, the one that petitioners take the position and
24 argue in defense that it was unreasonably high.
25 Petitioners on behalf of the entire shipping industry,

1 which faces claims similar to this one in amounts in
2 excess of billions of dollars, urge the Court to reject
3 the categorical approach proposed by the respondents and
4 adopted by the court of appeals in much the same way that
5 the Court rejected an all or nothing solution to this same
6 problem 2 years ago in the Maislin decision.

7 Instead what the Court should do is to resolve,
8 is to have these issues resolved on a case-by-case basis
9 with the issue of the rate reasonableness decided by the
10 Interstate Commerce Commission subject to judicial review
11 of the Commission's exercise of primary jurisdiction.

12 QUESTION: Is it your position that even if the
13 carrier filed, charged, sent a bill for the filed rate and
14 the shipper said the rate is unreasonable, should that
15 defense await a ruling by the --

16 MR. PHILLIPS: No, no, Justice White, that
17 defense should not await a ruling. In that situation --

18 QUESTION: Why not?

19 MR. PHILLIPS: Section 10743, a separate
20 provision, separate from the filed rate doctrine which is
21 embodied in section 10761(a), specifically provides that
22 the carrier has a right to insist upon payment at the time
23 of the movement of the goods. And that is the source of
24 the pay first rule which is essentially a rule that the
25 Court has acknowledged in passing on a number of old

1 cases, but that rule has a separate statutory basis. It's
2 not inherent in the filed rate doctrine, and therefore our
3 position is that if you insist on the payment, and even if
4 the payment is too high in your judgment, you are obliged
5 to follow that because Congress made a specific
6 determination that that's the proper course to follow.

7 In contrast, Justice White, in this case where
8 the payments were made in full and then additional sums
9 were requested that the --

10 QUESTION: A negotiated rate was paid?

11 MR. PHILLIPS: A negotiated rate was paid and
12 then a subsequent request was made. Nothing in the
13 statute specifically deals with that particular situation,
14 and when you're in a no-man's land then it seems to us a
15 different set of rules ought to apply.

16 QUESTION: But it was a rate, it was a
17 negotiated rate that the carrier had no business charging?

18 MR. PHILLIPS: That's true. The carrier was,
19 acted unlawfully in charging that rate at the time. He
20 should have filed those rates.

21 QUESTION: Didn't the shipper also?

22 MR. PHILLIPS: No, if you -- the provision,
23 section 19761 and 10762 both provide that it is the
24 carrier's duty to comply with the law. Certainly the
25 shipper has an interest, and after Maislin has an interest

1 that is quite significant in insuring that the tariffs are
2 in fact filed, but the duty itself clearly resides with
3 the carrier under these circumstances.

4 QUESTION: Well, Mr. Phillips, I guess the
5 shipper would have access to the public information to
6 know whether the rate had been filed or not.

7 MR. PHILLIPS: It is true in a theoretical sense
8 that the shipper has access, but I think it is as a
9 practical matter quite unreasonable to expect the shipper
10 to be able consistently to monitor changing tariff rates
11 that can be implemented on 24-hours notice, when if you
12 were to just look at the Carolina tariffs they are six
13 volumes long, they reference additional tariffs that are
14 themselves three and four volumes long. We're talking
15 about tariff filings that are in the nature of thousands
16 of pages, Justice O'Connor.

17 QUESTION: May I ask whether your client was
18 time-barred from seeking reparations at the time that the
19 respondents here first tried to collect the alleged
20 undercharges? Is there a time barr in effect?

21 MR. PHILLIPS: As to some portions they would
22 have been, some of the earlier shipments I think would
23 have been barred. Later shipments would not have been
24 barred. So we're not in the more, I think more typical
25 situation where the trustee has brought the suit for

1 undercharges at a period in time when the shippers are not
2 permitted to seek reparations.

3 QUESTION: And does the time barr affect the
4 ability under your position to go back to the ICC for the
5 reasonableness determination?

6 MR. PHILLIPS: Absolutely, Justice O'Connor,
7 that is this Court's decision in United States v. Western
8 Pacific where the Court held that where the United States
9 refused to pay and was sued for undercharges and the
10 carriers, the carrier in that case, just as the
11 respondents in this case, said the way to do this is to
12 pay the filed rate and seek reparations. And the Court
13 said that's, you can't do that because reparations are
14 time-barred. And in language that I think is strikingly
15 appropriate for this particular case the Court said to
16 hold otherwise would require the Court to condone a
17 situation where the carrier is permitted to obtain
18 unreasonable rates with impunity.

19 That is precisely the situation that we have
20 here because everyone conceded at the court of appeals
21 level that if these rates turn out to be unreasonable they
22 are essentially lost because the carrier is insolvent and
23 it's going to be impossible to recoup monies. Under those
24 circumstances what you have is a situation where the
25 shipper's significant right under the statute not to be

1 charged unreasonable rates is essentially vitiated in
2 favor of an unbending absolute rule under the filed rate
3 doctrine, which this Court has never held to be applicable
4 in that particular way.

5 QUESTION: Could the bankruptcy court collect
6 the full amount of the filed rate and just hold it until
7 such time as you have had a reasonable opportunity to go
8 to the ICC?

9 MR. PHILLIPS: The bankruptcy court, I think
10 there's no question the bankruptcy court would have that
11 authority. The problem with that particular approach is,
12 first of all there's nothing in the court of appeals'
13 opinion that would authorize that because the court of
14 appeals has categorically denied us the opportunity to
15 stay the payment and there is nothing in any of the
16 bankruptcy court or the Fourth Circuit's analysis that
17 even envisions that kind of a procedure. So it's not
18 really in the case.

19 But second of all, in, given the magnitude of
20 the undercharges that are at issue here it seems quite
21 extraordinary to think about billions of dollars being
22 placed in the registry when there is no serious reason to
23 wonder whether in fact these charges are reasonable. In
24 fact the more likely scenario is that these charges are
25 quite unreasonable, having not been reviewed as they have

1 increased over the period of time.

2 And therefore it seems to us the more
3 appropriate course is if a carrier has reason to believe
4 that a shipper will be unable to pay the filed rate if
5 ultimately determined to be reasonable, then it seems to
6 me the shipper, or, excuse me, the carrier can come
7 forward in either the bankruptcy court or before the ICC
8 and seek to have some protection put in place.

9 QUESTION: Well, just before you leave that
10 point, it's not at all clear to me that a district court
11 or bankruptcy court can alter the priority of creditors by
12 an equitable subordination of liens that are otherwise
13 equal. I mean, where, where do you get that authority?

14 MR. PHILLIPS: Well, the question is whether you
15 put it into the bankruptcy estate in the first instance.
16 I agree with you, once it gets into the bankrupt estate
17 it's clear that you can't modify how the creditors
18 receive --

19 QUESTION: Well, but if bankruptcy courts could
20 do this they could have escrows all the time which would
21 basically alter the provision the Congress has for the
22 priority of creditors and for their equal right to share
23 in proceeds.

24 MR. PHILLIPS: But I think --

25 QUESTION: And I don't see where this authority

1 comes from.

2 MR. PHILLIPS: Well, it doesn't -- I mean, to be
3 honest with you I'm happy to abandon the position that
4 there's authority to do it. I would have been inclined to
5 assume that as an equitable matter the bankruptcy court
6 could, given that we don't know the legality, the
7 underlying legality, and it's necessary to have the issue
8 resolved by the Interstate Commerce Commission in the
9 exercise of its primary jurisdiction.

10 QUESTION: Well, you don't argue this in your
11 brief and there's no citation in the brief to support the
12 bankruptcy court's authority to do this, is there?

13 MR. PHILLIPS: No. No, Your Honor, there is
14 none.

15 QUESTION: Thank you.

16 QUESTION: Mr. Phillips, as I recall your brief
17 you ask that the, what should happen is the bankruptcy
18 court should refer this matter to the ICC?

19 MR. PHILLIPS: Any one of the courts would have
20 been fine, but yes, Your Honor, since it was tried
21 initially before the bankruptcy court we thought the
22 matter should have been referred to the ICC.

23 QUESTION: What authority does it have to refer
24 it? I mean, I have heard of, you know, where the doctrine
25 of primary jurisdiction applies I have heard of courts

1 staying proceedings until one of the parties had an
2 opportunity to make use of an available proceeding before
3 the ICC or the FCC or another agency, but I have never
4 heard of a power in the court to direct an agency to make
5 some determination.

6 MR. PHILLIPS: It may well be that we are simply
7 employing a short-hand means of accomplishing precisely
8 what you're describing, Justice Scalia. It's not so much
9 that we care that the matter be specifically referred by
10 any court to the ICC, but that we have an opportunity as
11 shippers to have the rate reasonableness determined
12 initially by the ICC.

13 QUESTION: Well, is there a proceeding before
14 the ICC that would enable you to do that? I mean, is
15 there a mechanism --

16 MR. PHILLIPS: Oh, yes, I mean the Interstate
17 Commerce --

18 QUESTION: -- whereby if the court stays its
19 hand you can get this issue before the ICC?

20 MR. PHILLIPS: The Interstate Commerce
21 Commission has a policy statement, order 177 and 208, both
22 of which say that they will entertain these kinds of
23 claims and resolve the question of rate reasonableness,
24 and in fact in the Oneida case that was recently decided
25 by the Interstate Commerce Commission that is precisely

1 what they did do. They undertook to decide the rate
2 reasonableness issue and went forward. So there are,
3 there is a mechanism, to be sure.

4 Let me just add one last idea, or at least one
5 set of concepts to the mix in this case. One significant
6 line of decisions from this Court that it seems to me
7 supports the underlying decision of the ICC to provide
8 this relief is the Interstate Commerce Commission v.
9 American Trucking Associations case, where this Court has
10 upheld extraordinary remedies in situations where they
11 were directly aimed at a particular problem that the
12 statute otherwise does not remedy, and that is precisely
13 what this case is about. Because the court of appeals,
14 however, has taken a contrary view its judgment should be
15 reversed.

16 I'd like to reserve the balance of my time, Mr.
17 Chief Justice.

18 QUESTION: Very well, Mr. Phillips.

19 Mr. Dreeben.

20 ORAL ARGUMENT OF MICHAEL R. DREEBEN
21 UNITED STATES AND ICC, AS AMICI CURIAE
22 SUPPORTING PETITIONERS

23 MR. DREEBEN: Thank you, Mr. Chief Justice, and
24 may it please the Court:

25 The question in this case is whether a court

1 should refer to the ICC a shipper's defense that the filed
2 rate is unreasonable in an undercharge action brought by
3 an insolvent carrier. The answer to that question is yes,
4 for three reasons.

5 First, referral is required to protect the ICC's
6 primary jurisdiction over the reasonableness of rates.
7 Second, referral is necessary to give the shipper an
8 effective remedy against having to pay unreasonable rates
9 charged under a carrier's tariff.

10 QUESTION: Well, what if the carrier had an
11 effective remedy to recover reparations? Would you say
12 that it would be necessary for the court to hold its hand?

13 MR. DREEBEN: No, Justice White, we don't say
14 that it would be necessary for the court to hold its hand
15 if the shipper did have an effective remedy in
16 reparations.

17 QUESTION: So you would not apply, you would not
18 apply, you would not apply primary jurisdiction where the
19 carrier, where the shipper paid a negotiated rate that was
20 lower than the filed rate and the carrier then sued for
21 the balance?

22 MR. DREEBEN: Well, that is this case, of
23 course.

24 QUESTION: I know it is.

25 MR. DREEBEN: But the reason why reparations is

1 inadequate in this case is because the carrier is
2 insolvent.

3 QUESTION: I understand. I understand. But
4 absent, if the carrier -- if the shipper had a opportunity
5 for reparations you would not apply the primary
6 jurisdiction rule?

7 MR. DREEBEN: We don't think that this case
8 presents the Court with the requirement of ruling on it.

9 QUESTION: I know, I know, but what's the United
10 States' position on that?

11 MR. DREEBEN: The United States' position is
12 that there isn't any need to bring the primary
13 jurisdiction doctrine into play through a referral
14 procedure when reparations are truly available, and that
15 is --

16 QUESTION: So you do, you do not agree with the
17 shipper here in that regard?

18 MR. DREEBEN: Well, I don't think that the
19 shipper here is taking any position that's different from
20 that. The whole reason why this issue is before the Court
21 today is that there is a rash of collection actions
22 throughout the motor carrier industry in which bankrupt
23 carriers or their trustees are culling through old tariffs
24 and seeking to collect monies that are substantially in
25 excess of what were charged at the time, and they are

1 doing so in a way that gives the shippers no opportunity
2 to challenge the reasonableness of those rates in a way
3 that would be effective.

4 QUESTION: You're saying, Mr. Dreeben, that then
5 your view of the situation contemplates at least the
6 possibility that the role would be different in bankruptcy
7 than outside of bankruptcy?

8 MR. DREEBEN: Justice, Chief Justice Rehnquist,
9 we don't think the rule has to be different depending on
10 the fact of bankruptcy or not. The key question is
11 whether there is an adequate remedy in reparations that
12 would allow the statutory mechanism to work. That
13 principle is exemplified in this Court's decision in
14 United States v. Western Pacific where the Court held that
15 when the United States' reparation action was time-barred
16 it was permitted to raise the defense of rate
17 unreasonableness in a collection action.

18 That underlying principle was also expressed in
19 this Court's decision in Crancer v. Lowden where the Court
20 found that there was no abuse of discretion by a district
21 court in going forward with a collection action when the
22 shipper did have an adequate remedy in reparations.

23 QUESTION: Mr. Dreeben, at the outset of your
24 presentation you referred to referral to the ICC is
25 necessary for three reasons, and you repeated the

1 referral. What do you mean by referral to the ICC?

2 MR. DREEBEN: We mean, Justice Scalia, the same
3 thing that Mr. Phillips described, and this Court has used
4 the same sort of short-hand. As you stated, the court
5 that's hearing the action in which an issue arises that
6 can only be decided by the agency, it will stay its
7 proceedings and it will allow the parties to file a
8 complaint before the administrative agency in order to
9 raise the issue.

10 QUESTION: But it's up to the parties to take
11 the initiative to go before the agency, and up to the
12 agency to accept that proceeding or not?

13 MR. DREEBEN: Well, I wouldn't rule out the
14 possibility of a court sua sponte concluding that the
15 issue, that the case raised an issue that it could not
16 decide and that an agency had to decide, and staying its
17 proceedings to give the parties an opportunity to do so.
18 That really hasn't been a problem in this case or in the
19 pattern of cases in this industry. Shippers have been
20 seeking to bring the issue before the Interstate Commerce
21 Commission and the Interstate Commerce Commission has
22 issued a policy statement that expresses its willingness
23 to hear on complaint precisely this kind of claim.

24 QUESTION: But all we're really talking about is
25 a stay of proceedings which the bankruptcy court

1 undoubtedly has the power to achieve, and the issue is
2 simply whether it's appropriate in this situation or not.

3 MR. DREEBEN: That is exactly what the issue is.
4 Now, the Court --

5 QUESTION: In a situation like this in which
6 bankruptcy is the context in which the issue arises, is
7 there any issue of discretion in your view on the part of
8 the bankruptcy court once it determines that there is a
9 genuine issue about the reasonableness of the rates?

10 MR. DREEBEN: No.

11 QUESTION: Would it be an abuse of discretion to
12 fail to stay in other words if there is no question about
13 the genuineness of the issue of reasonableness?

14 MR. DREEBEN: Yes. It would be an abuse of
15 discretion in every case, and the reason is that it would
16 defeat the operation of the Interstate Commerce Act. What
17 we have here are two statutory provisions that are
18 applicable to the same transaction. On the one hand the
19 carrier is required to charge its tariff rate, and the
20 applicable rate in this case is the tariff rate, not the
21 negotiated rate. The other relevant statutory provision
22 is the requirement that the tariff rate be a reasonable
23 rate. If it is not a reasonable rate it is not
24 enforceable.

25 What the carrier's trustees are trying to do in

1 this case is to have it both ways. They want to enforce
2 the tariff filing requirement extremely strictly. They
3 want to do so at the expense of the requirement that the
4 tariff be reasonable, but --

5 QUESTION: Is there any question about there
6 being a genuine claim of reasonableness here? Could that
7 be disputed?

8 MR. DREEBEN: The issue wasn't resolved at any,
9 in the lower courts at all, and we think that the case
10 should be returned to the lower courts for them to address
11 it. In general --

12 QUESTION: I guess you said that in your brief,
13 actually, didn't you?

14 MR. DREEBEN: That's correct, Justice Souter.
15 We do think that when a significant discrepancy exists
16 between the negotiated or charged rate that was paid at
17 the time and the tariff rate, that that may raise an
18 issue, and it also raises an issue of reasonableness when
19 the tariff rate is substantially higher than what the
20 prevailing market rate was. The ICC has recently
21 clarified that that is the key to a reasonable rate in the
22 current competitive market environment. So it shouldn't
23 be very difficult for courts to be able to determine when
24 referral is appropriate.

25 QUESTION: Mr. Dreeben, what if it comes out in

1 the proceedings before the bankruptcy court that the
2 shipper in fact was the only shipper who was getting this
3 special rate and that he and the carrier colluded and the
4 carrier said look, we're charging everybody else, all your
5 competitors, this excessive unreasonable rate, but you
6 we're going to give a fair rate to. You still think that
7 with all -- when the equities are like that you would have
8 to send it, you would have to stay your hand?

9 MR. DREEBEN: Yes, I think that the issue should
10 still go to the Interstate Commerce Commission. I don't
11 think that there's any question in that setting the
12 Interstate Commerce Commission would not reward the
13 shipper's violation of the discrimination provision of the
14 act by giving it the benefit of a ruling. But those
15 issues and the interrelation of the statute in that
16 question raises core questions for the Interstate Commerce
17 Act to balance. The Interstate Commerce Commission would
18 then be entitled to deference under this Court's Chevron
19 line of cases.

20 QUESTION: So you say the ICC might just simply
21 refuse to entertain the proceeding for equitable -- could
22 it do that?

23 MR. DREEBEN: Certainly. Certainly. I would
24 add, Justice Scalia, that there's been no experience in
25 the markets today of that kind of deliberate

1 discrimination and then a claim of unreasonableness being
2 raised. We do have a fairly unique market situation today
3 where the tariff rates that were on file for a certain
4 small percentage of carriers were far, far higher than the
5 rates that were being charged in the market, and the
6 result of this was that many of these carriers when they
7 went out of business did have the opportunity to come back
8 later under their tariffs.

9 The industry as a whole was not ignoring its
10 tariff filing requirements, however. There were about 1.2
11 million tariffs filed each year that correctly reflected
12 the rates that were being charged, and it's that body of
13 information that provides a substantial source for saying
14 that these higher tariff rates that were not modified
15 don't conform to the statutory requirement of
16 reasonableness. And that's what makes it so important to
17 get the issue before the Commission.

18 QUESTION: How do you frame the threshold test
19 for the reference to the agency? Is it the likelihood of
20 recovery or the insolvency of the carrier or the fact that
21 the carrier is in bankruptcy? What's the general rule?

22 MR. DREEBEN: The general principle we're
23 contending for today is that under the doctrine of primary
24 jurisdiction when the carrier is insolvent the
25 reasonableness defense would be worthless and meaningless

1 unless there is a stay of proceedings and an opportunity
2 for the Commission --

3 QUESTION: So it turns on the carrier's
4 solvency?

5 MR. DREEBEN: In this context, yes. Again, we
6 think that's an example of the general principle that the
7 Court applied in Western Pacific. There the carrier had
8 more years to sue for an undercharge than the shipper did
9 to sue for reparations, and the shipper, in that case the
10 United States, if it had had to pay an undercharge would
11 never have been able to challenge reasonableness before
12 the ICC. In that setting the Court said the
13 reasonableness defense must be referred to the Interstate
14 Commerce Commission.

15 The same principle we think applies when the
16 carrier's insolvency or other factors preclude the
17 opportunity of a shipper to raise the reasonableness issue
18 before the Interstate Commerce Commission.

19 QUESTION: Mr. Dreeben, this is an automatic
20 referral? I mean, no matter how outrageous the claim of
21 unreasonableness is, all the debtor has to say in the
22 bankruptcy proceeding is unreasonable rate and it
23 automatically stays everything and goes over to the ICC?
24 How long will it take in the ICC? Do you have any idea?

25 MR. DREEBEN: I'll answer your second question

1 first.

2 QUESTION: Okay.

3 MR. DREEBEN: It has taken approximately 2.5
4 years for the Interstate Commerce Commission to formulate
5 its basic standard of what it is going to use for
6 reasonableness claims. It picked a lead case, it
7 developed an opinion, and now that that opinion has been
8 issued the Commission anticipates that it will be able to
9 resolve these claims more quickly. Of course if the
10 administrative action is unreasonably delayed then there
11 are remedies under the APA to get the Commission to move
12 faster, and I suppose that a district court would have
13 discretion to say we have given the agency a chance, it
14 hasn't answered, that's the end of that.

15 Now --

16 QUESTION: And say that the shipper pay up.

17 MR. DREEBEN: That's correct, Justice White.
18 This is what we're talking about as a process of
19 accommodation of policies, not an all one way rule or all
20 the other way rule.

21 Now as to your --

22 QUESTION: Mr. Dreeben -- go ahead, you didn't
23 answer the first question.

24 MR. DREEBEN: As to your first question, Justice
25 Scalia, whether referral should be automatic no matter how

1 transparently flimsy or false the claim of
2 unreasonableness is, the answer to that is no, and I think
3 that this is just a classic example of the doctrine of
4 primary jurisdiction at work. The court has to be
5 satisfied that there is a genuine issue for the agency to
6 resolve.

7 This does not require the court to make a
8 preliminary determination of whether a rate is reasonable.
9 It just requires the court to look at the kind of showing
10 that shippers typically make. We paid this rate, we were
11 quoted this rate and rates around it by several other
12 people in the market, tariffs reflect this rate, and now
13 the carrier is seeking to charge a rate substantially in
14 excess of what it charged us at the time. That should be
15 enough for a court to stay its hand and afford the agency
16 the chance to pass on the claim. So there shouldn't
17 really be any difficulty with respect to courts
18 administering a rule that we propose.

19 Now, the court of appeals felt compelled to bar
20 the procedure that we advocate in this case because of its
21 reliance on the filed rate doctrine and on this Court's
22 recent decision in Maislin. The filed rate doctrine does
23 not have anything to do with whether a court can stay a
24 collection action and refer a case to the Commission. The
25 filed rate doctrine says that defenses such as ignorance

1 of the tariff rate or misquotation of the rate are not an
2 obstacle to application of the tariff rate. We agree.
3 The tariff rate is the applicable rate here.

4 But the filed rate doctrine has nothing to say
5 about whether reasonableness can be asserted as a defense
6 and referred to the Commission, and in fact this Court's
7 decision in Maislin --

8 QUESTION: You don't suggest, though, that if
9 the carrier has charged the filed rate that the shipper
10 can just raise the defense of unreasonableness unless
11 there's some claim that he can't get reparations?

12 MR. DREEBEN: That's absolutely correct, Justice
13 White, and again the shipper cannot use this as a way to
14 avoid payment of the filed rate at the time of shipment
15 because there is an --

16 QUESTION: Even if he thinks it's unreasonable.

17 MR. DREEBEN: Even if he thinks it's
18 unreasonable.

19 QUESTION: Even if there's a pretty good case
20 for it.

21 MR. DREEBEN: That's correct. There is an
22 independent statutory requirement that the shipper must
23 pay at the time of delivery. But the filed rate doctrine,
24 which reflects some statutory requirements, does not
25 include any requirement that a shipper must pay before

1 having reasonableness litigated when there is absolutely
2 no other opportunity to have the issue of reasonableness
3 litigated.

4 QUESTION: Well, what happens to the rule that
5 you have to pay when the service is rendered if the
6 shipper claims, well, I know that rule and the carrier is
7 charging me the filed rate, but nevertheless the time for
8 reparations has passed?

9 MR. DREEBEN: Well, if the time for
10 reparations --

11 QUESTION: What happens, what happens then?

12 MR. DREEBEN: Then it's clear under this Court's
13 decision in United States v. Western Pacific that the case
14 must be referred to the Commission.

15 QUESTION: Despite this statutory provision that
16 you've got to pay.

17 MR. DREEBEN: The statutory provision applies at
18 the time the goods are delivered.

19 QUESTION: Yes, exactly.

20 MR. DREEBEN: Now, reparations can be asserted
21 for 2 years under the statute of limitations in the
22 Interstate Commerce Act. An undercharge action can be
23 brought for 3 years. So you can have the odd situation
24 where if the carrier doesn't insist on collecting the
25 tariff rate at the time of the shipment it can wait 3

1 years, bring an undercharge action, and then any
2 reparations proceeding before the ICC is time-barred.

3 QUESTION: But if you have a negotiated rate I
4 suppose the shipper complies with the pay provision by
5 simply paying the negotiated price?

6 MR. DREEBEN: That's true, Chief Justice
7 Rehnquist, and the shipper does that because that's what
8 the carrier is billing him.

9 QUESTION: That's what they both think they are
10 talking about.

11 MR. DREEBEN: That's right. And in this case
12 there was actually representations made to the shippers
13 that the rate would be filed in the tariff, so they had a
14 reason to expect that that was the filed rate.

15 QUESTION: Thank you, Mr. Dreeben.

16 MR. DREEBEN: Thank you.

17 QUESTION: Or would have been.

18 QUESTION: Mr. Steinfeld, we'll hear from you.

19 ORAL ARGUMENT OF JOSEPH L. STEINFELD, JR.

20 ON BEHALF OF THE RESPONDENTS

21 MR. STEINFELD: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 Justice White, I believe the issue here is
24 squarely raised by this idea of the petitioner and the
25 Government saying that if the carrier had billed the filed

1 rate at the time of shipment that there would be no
2 reparations, rather there would be no stay in referral
3 proceeding. That's directly from the petitioners' brief.

4 That is a ridiculous concept because it ignores
5 the principal provision of the Interstate Commerce Act,
6 that is that filed rates are constructively deemed to
7 know, that shippers are constructively deemed to know at
8 the time of shipment what the rate is. All rights as
9 between the parties, the shipper and the carrier, are
10 defined by the filed rate.

11 It is ridiculous to assume that a negotiated
12 rate bargain has legal significance. This Court affirmed
13 that concept that it would be ridiculous to assume that in
14 the Maislin case.

15 So here we have the unusual position advanced by
16 both the Government and the petitioner that I can have an
17 illegal rate bargain and that shipper will be free from
18 the duty to pay that filed rate and can raise the defense
19 of reasonableness --

20 QUESTION: But the duty to pay the -- you're not
21 talking about a violation of the obligation to pay when
22 shipped? You're talking about a duty to pay the filed
23 rate, is that right?

24 MR. STEINFELD: Yes. The duty to pay when
25 shipped and the duty to pay the filed rate are the same,

1 Chief Justice.

2 QUESTION: Well, but surely the duty to pay when
3 shipped, if there has been a negotiated rate and both the
4 trucker and the shipper have agreed to the negotiated
5 rate, that can't, that is never going to be enforced
6 beyond the negotiated rate.

7 MR. STEINFELD: The statute in its section
8 1074 --

9 QUESTION: I mean as a practical matter.

10 MR. STEINFELD: Well, as a practical matter the
11 shipper has constructive knowledge and they best check --

12 QUESTION: As a practical matter when the
13 trucker agrees to ship for a certain amount and the
14 shipper agrees to pay a certain amount, that's what the
15 parties expect and so that's what payment will be made,
16 isn't it?

17 MR. STEINFELD: That may be what payment will be
18 made, but that has no legal significance under the law and
19 the precedent of this Court's opinions. The pay first
20 before tendering delivery of freight is not to pay what
21 was negotiated. It is to pay the filed rate. You
22 cannot --

23 QUESTION: But that's a total abstraction in the
24 real world.

25 MR. STEINFELD: Your Honor, whether it's an

1 abstraction or not, it's the law. And it was defined by
2 the Maislin Court. Any, a mis-billing has no legal
3 significance, and the pay, the prompt pay provision of
4 10743 is to promptly pay filed rate charges. It would
5 turn the statute on its head if the prompt pay provision,
6 if Congress said you must promptly pay whatever is billed.
7 Congress does not say that the billed rate has any
8 significance, Your Honor.

9 QUESTION: Well, what do you, what do you do to
10 the assertions that the filed rate can't be collected or
11 need not be collected until the ICC gets to pass on it if
12 there's no reasonable way of getting reparations?

13 MR. STEINFELD: I say that's without any
14 statutory support. That --

15 QUESTION: Well, what about, what do you do
16 about Western Pacific?

17 MR. STEINFELD: Western Pacific is a Tucker Act
18 case. I think Western Pacific supports our position for
19 the following reason.

20 QUESTION: Well, it may be a Tucker Act case,
21 but they were just trying to collect a higher rate than
22 had been charged to the United States.

23 MR. STEINFELD: Yes, but all parties conceded
24 that the United States had a unique right of set-off. In
25 other words the United States under the Tucker Act need

1 not pay filed rate charges, need not be worried about
2 paying the filed rate charges, did not have to worry
3 about --

4 QUESTION: I thought Western Pacific applied the
5 doctrine of primary jurisdiction.

6 MR. STEINFELD: Western Pacific -- the doctrine
7 of primary --

8 QUESTION: Is that right or not?

9 MR. STEINFELD: Your Honor, part of the holding
10 was indeed applying primary jurisdiction. That dealt with
11 the issue of tariff interpretation.

12 QUESTION: And among other things to have the
13 ICC decide reasonableness.

14 MR. STEINFELD: It was reasonableness as applied
15 to determine which of two applicable filed rate applied,
16 Justice White. But it was very significant in Western
17 Pacific that this Court said that --

18 QUESTION: Well, they didn't make the United
19 States pay the filed rate.

20 MR. STEINFELD: Only because, only because it
21 didn't have to under the Tucker Act. It had the right of
22 set-off. There is no case in this Court's history that
23 has allowed a shipper to with impunity refuse to pay a
24 filed rate by raising the defense of reasonableness. This
25 Court's precedent going back to Robinson and Arizona

1 Grocery said that shippers were bound to pay filed rate
2 charges. They might recover reparation, but they were
3 bound to pay filed rate charges.

4 And the problem presented by this case is that
5 the act itself has several provisions. The plain meaning
6 and structure of the act says that you must charge filed
7 rate charges at all times. The reason is, the policy is
8 to insure that rates be non-discriminatory, there be no
9 undue preference, no discrimination or undue
10 discrimination, and that rates be reasonable.

11 The reasonableness concept is not equal dignity
12 with the filed rate. It flows as one of the requirements
13 and the goals of the act. The goal of anti-discrimination
14 is different from the goal of reasonableness. They are
15 the same. How do you enforce that there be no
16 discrimination between carrier and shipper, or rather
17 between shippers for the carrier? How do you enforce that
18 rates be reasonable? The only way you can enforce that
19 rates be reasonable is that the public has knowledge of
20 them. And how is that to be accomplished? In 1887
21 Congress developed a statutory scheme that said publicity
22 of rates, once we publish our rates the world will know.

23 And at that point the question presented was
24 well, what do you do about determining the reasonableness?
25 In the past the courts could adjudicate the issue of

1 reasonableness because there was no ICC. Once the ICC was
2 created the courts were to stand back and not decide the
3 issue of reasonableness, but the courts were to enforce
4 the filed rate doctrine.

5 And so the policy of rate stabilization,
6 reasonableness, and uniformity, you had the filed rate
7 doctrine, you had the publicity of rates. Then a
8 statutory scheme was developed.

9 How do you challenge reasonableness in post-
10 shipment litigation? Well, first let's start out before
11 the shipment occurs. The rate is posted. It's not
12 effective. The ICC can set it aside, rather can stay it,
13 can, through a suspension investigation proceeding for up
14 to 7 months. During that time the carrier cannot collect
15 that rate. Once the rate goes into effect, however, the
16 statute says it must be collected.

17 This Court in Arrow, Burlington Northern, and
18 the other cases that follow, said that would be a
19 ridiculous concept if the agency, while it was
20 investigating the reasonableness of a rate, the statute
21 said 7 months, you haven't made your decision, rate goes
22 into effect. Now all of a sudden a shipper says well,
23 you're rates are under investigation, I'm not going to pay
24 that whole rate. I'll pay the part that I think is
25 reasonable. That would turn the statute on its head. The

1 statute says after 7 months the rate is to be collected.

2 Then what happens to the rights of the shipper?
3 What happens is they have a right of reparation under the
4 statute 11705(b)(3). They pay the rate, then they can
5 seek to get a refund. Hence the language in Arizona
6 Grocery, bound to pay, might recover reparations.

7 Petitioner and the Government would have it read
8 might have to pay if the rate is reasonable. There's just
9 no support for that in the statute.

10 QUESTION: Again, what if reparations are not
11 available?

12 MR. STEINFELD: Reparations are always available
13 within the statutory scheme. Let's go back to the
14 doctrine of constructive notice.

15 QUESTION: Well, maybe reparations, maybe you
16 could say, maybe you could say that the ICC could
17 decide -- what would you do, bring a suit for reparations?

18 MR. STEINFELD: That's the way -- the statutory
19 scheme is you do bring a suit for reparations.

20 QUESTION: Yes, all right. You might get a
21 judgment but it can never be collected.

22 MR. STEINFELD: Well, first of all, we don't
23 know that it can never be collected because in
24 bankruptcies there are payments. There could even be full
25 payments. Amici American Freight has paid 80 cents on the

1 dollar already.

2 QUESTION: So you think the shipper should pay
3 the filed rate, pay up and then file a claim like any
4 other?

5 MR. STEINFELD: Absolutely, because, Your Honor,
6 that's the only way to prevent discrimination. Think of
7 two shippers. The shipper, for example, as Justice Scalia
8 pointed out. You had the shippers that all paid this
9 perhaps high rate, unreasonable rate, but they paid it
10 because they followed the law. And there's this one
11 shipper that colluded.

12 And frankly in this case there's good evidence
13 that it happened in this case, in this exact case, that
14 there was collusion between the carrier and the
15 petitioner. In this case the shipper agrees to a
16 negotiated rate, comes to find out later on a trustee is
17 appointed and says oh, you shall not do that, you must
18 collect the filed rate. I want to judge the
19 reasonableness 7, 8 years later. What happens to all of
20 the other shippers that followed the law? Where are their
21 rights today? Their rights are extinguished.

22 Now we're going to reward the shipper that had
23 not only constructive knowledge but I would submit in our
24 case --

25 QUESTION: But that would be true in any action

1 for reparations out of bankruptcy. If the shipper has a
2 right to bring an action for reparations, the other
3 shippers who paid the full filed rate would be short
4 changed.

5 MR. STEINFELD: I agree, Your Honor, except that
6 they -- no, not totally, because once that reparations
7 action was brought, the date that is filed any other
8 shipper that desired to file it would have that same right
9 at that point in time. Here we're talking about a
10 situation where they're claiming because the carrier is in
11 bankruptcy, and note there is no bankruptcy exception in
12 the Interstate Commerce Act, all of a sudden rights are
13 changed.

14 The petitioner argued and the Government said
15 well, if the carrier was solvent we wouldn't have to worry
16 about this. Your Honor, who knows who is solvent
17 tomorrow. Let's say there was a reparations proceeding
18 and instead of Carolina Motor Express it was Consolidated
19 Freightways, great company. And all of a sudden during
20 this 2.5-year period that the Government is saying the ICC
21 is going to consider a reparations claim all --

22 QUESTION: The Government said the ICC took 2.5
23 years to determine what policy it, how it would treat
24 these. It didn't say it would take 2.5 years to decide
25 each individual claim.

1 MR. STEINFELD: Mr. Chief Justice, that, I
2 understand that, but let's --

3 QUESTION: Well, if you understood it then you
4 just misstated it.

5 MR. STEINFELD: Mr. Chief Justice, the point I'm
6 making is that we don't know that the day after a solvent
7 carrier, that the Government says that the reparations
8 scheme is different when you're involving a solvent
9 carrier, we don't know that that carrier is going to be
10 solvent tomorrow or the next day. And we don't know that
11 the shipper is going to be solvent to pay the filed rate
12 charges years from now. The act does not assume solvency.
13 The act gives people rights, give companies legal rights.

14 QUESTION: Yes, but none of the solvent carriers
15 brought any of these lawsuits, none of them were brought
16 until they went into bankruptcy, did they?

17 MR. STEINFELD: Well, I don't know that that is
18 exactly true. Certainly the majority --

19 QUESTION: Well, are there any cases that you
20 know of where solvent carriers are the plaintiff?

21 MR. STEINFELD: In fact I do know of one.

22 QUESTION: One.

23 MR. STEINFELD: Consolidated Freightways did
24 bring a case.

25 QUESTION: One out of millions.

1 MR. STEINFELD: Well, that is endemic of the
2 problem because --

3 QUESTION: What percentage of the total market
4 do you think was paying the filed rate during the period
5 in question here?

6 MR. STEINFELD: I would say in this case, in
7 Carolina Motor, about 97 percent of all shippers paid the
8 filed rate charges. Only 3 percent rating error was found
9 by the auditors.

10 QUESTION: And it still went bankrupt.

11 MR. STEINFELD: It still went bankrupt.

12 QUESTION: That's one carrier, you say. I'm
13 talking about the market as a whole.

14 MR. STEINFELD: In the market as a whole today?

15 QUESTION: How prevalent was this practice?

16 MR. STEINFELD: Regrettably it was prevalent,
17 but not overwhelming.

18 QUESTION: There are billions of dollars out
19 there.

20 MR. STEINFELD: The majority of shippers still
21 pay filed rate charges and carriers --

22 QUESTION: The majority pay?

23 MR. STEINFELD: I would say since this Court's
24 opinion in Maislin there has been a reform, and certainly
25 people have come back. When things go out of kilter that

1 doesn't mean the court comes back and corrects them
2 outside of the legislative scheme. You can't come back
3 and legislate and say well, the problem is out of kilter.
4 That's up for Congress to do. And Congress has considered
5 bills and they may yet consider bills in the coming
6 session to deal with the undercharge problem.

7 But the statutory scheme hasn't been changed.
8 This is a great note, that since 1887, 1908 is the last
9 major change to the statutory scheme involving
10 reparations. And we're trying to, the petitioners and the
11 Government want to carve out an exception that goes
12 against case upon case upon case in this Court. A shipper
13 is bound to pay, Mitchell Coal & Coke, International Coal
14 Mining, Arizona Grocery. How did we all know that those
15 railroad companies were not, were going to be around the
16 next time when the reparations award was to be made? The
17 statute gives you rights, legal rights to collect money.
18 It doesn't insure that there is a bank account there
19 waiting for you at the end of the rainbow.

20 In this situation if the shippers are forced to
21 pay reparations they may well get back 10 cents on the
22 dollar or 100 cents on the dollar, but they will get what
23 other people would get, like situated companies. You have
24 the tire manufacturer that sold tires to the trucking
25 company. He's sitting out there. He may have a claim.

1 He deserves to get paid as much as the shipper who is
2 conclusively presumed to know the rate and went into this
3 illegal rate bargain and now wants to say well, I didn't
4 really know the rate.

5 QUESTION: I suppose the more illegal rate
6 bargains there were for lower rates, the more likely it
7 would be that the carrier would go bankrupt.

8 MR. STEINFELD: I would say that's probably
9 true. And regrettably the marketplace was not properly
10 administered by the ICC. The ICC, as this Court found,
11 gave lip service to the filed rate doctrine during the
12 1980's. The utterly central provision of the act was
13 ignored. Rate bargains were encouraged. The negotiated
14 rate policy statement was issued by the Interstate
15 Commerce Commission, and carriers and shippers were told
16 don't worry about the law. And now we have a national
17 plague of bankruptcies.

18 QUESTION: Of course under the bankruptcy law in
19 your tire manufacturer hypothetical, if the tire
20 manufacturer had a claim he could set-off any amount that
21 was owed to the company.

22 MR. STEINFELD: You're saying if he had a --

23 QUESTION: So if you're talking about
24 equivalency, the only reason there can't be a set-off here
25 is because it's not a post-petition debt because of the

1 reasonableness doctrine hasn't been adjudicated yet.

2 MR. STEINFELD: That is exactly right, Justice
3 Kennedy. We have no right of set-off in this situation.
4 But the tire manufacturer, if he had no other claim -- my
5 position was he is a creditor because he is owed money
6 pre-petition, and in this situation the claimant would
7 have a post-petition debt for this reasonableness charge.

8 But again, constructive knowledge is a doctrine
9 that can't be ignored by this Court.

10 QUESTION: Only those companies that charged,
11 all the companies that charged low rates have gone
12 bankrupt? Is that what happened? That's a strange market
13 phenomenon.

14 MR. STEINFELD: Not all, not all companies that
15 have charged low rates.

16 QUESTION: Just the inefficient ones, I gather,
17 right?

18 MR. STEINFELD: Well, I think there's a mix --

19 QUESTION: And the efficient ones stay in
20 business and continue to charge people low rates. That's
21 basically what happens, isn't it?

22 MR. STEINFELD: I think that's what the
23 Government is urging certainly. I think that's a gross
24 simplification of what has happened in this marketplace.
25 There have been efficient carriers that have been forced

1 to compete with very inefficient carriers, and because of
2 the lack of following the filed rate doctrine and allowing
3 stability of rate making those carriers also had to adjust
4 their rates down. It would take many hours to determine
5 what indeed was the cause of all these bankruptcies in the
6 motor carrier industry.

7 But certainly the lack of -- the marketplace was
8 not supposed to react that way. In 1980 there was
9 supposed to be an increase in competition. The Interstate
10 Commerce Act was specifically written with a policy of
11 insuring against discrimination, and that was retained,
12 preventing of destruction, destructive competition. None
13 of that occurred, but we still have the same statutes.

14 QUESTION: Of course these, a lot of these
15 cases, your position is just as strong even if there is no
16 discrimination at all by the carrier.

17 MR. STEINFELD: This is true.

18 QUESTION: Because if they charged just the
19 market rate across the board your anti-discrimination
20 policy still takes over.

21 MR. STEINFELD: Well, the filed rate doctrine
22 itself cures many ills, allegedly.

23 QUESTION: It also creates many ills.

24 (Laughter.)

25 MR. STEINFELD: Well, Justice Stevens, there is

1 certainly that feeling. But that again, I would submit,
2 as this Court said in Square D, it was a great feeling in
3 Square D that the doctrine, the Keogh doctrine should be
4 abandoned, but again it's up to Congress to do it. In
5 this situation you have a Congress that knows the law,
6 wrote the law in 1980. If the law is no longer working it
7 can be changed.

8 But what wasn't changed in 1980, and for a
9 specific purpose, to insure rate stability, there was no
10 change in the law with regard to the posting and the
11 publicity of rates. And there was no change in the law
12 with regard to the reparations scheme.

13 The petitioner and the Government now, and
14 what's most interesting, Your Honors, is the Government
15 has changed its position 180 degrees in 6 years. We
16 submitted, attached to our brief is a brief filed by the
17 Interstate Commerce Commission in San Antonio, it's
18 Southern Pacific/San Antonio, where they urge the Fifth
19 Circuit, and it subsequently was affirmed in the BN case
20 by this Court, to not stay proceedings while the ICC was
21 determining the level of the rates. Why? Because they
22 said it interfered with their primary jurisdiction.

23 This Court in Portland Seed and also in Square D
24 had made the determination that while reasonableness
25 determinations were being made by the agency the rate, the

1 legal rate still controlled, and it provided no defense to
2 a shipper to avoid paying that rate. Because again
3 following the earlier precedent, a shipper is bound to
4 pay, and this is not equivocal, it's unequivocal, bound to
5 pay the legal rate, might recover reparations.

6 QUESTION: So you think, you think it's fair to
7 say that our cases hold that a negotiated rate below the
8 filed rate is an illegal rate?

9 MR. STEINFELD: Your cases hold that a
10 negotiated rate has no legal significance. The
11 negotiated --

12 QUESTION: Well, is it illegal? Is it a legal
13 rate?

14 MR. STEINFELD: It is, the negotiated rate is an
15 illegal rate. The filed rate is presumptively legal and
16 presumptively lawful. The fact that the rate is filed,
17 although not charged -- the not charging of the filed rate
18 does not imbue the filed rate with any unlawfulness.

19 QUESTION: So the shipper should pay at the time
20 the filed rate.

21 MR. STEINFELD: The shipper should pay at the
22 time the filed rate. The shippers are not without
23 ability. This Court held in Maislin that they had, and
24 it's true, that they're watching services. They execute a
25 bill of lading, and the language on the bill of lading is

1 very, very specific. It says received subject to the
2 classifications and tariffs on file with the ICC at the
3 date of shipment. So it's not just constructive
4 knowledge, it's actual knowledge. They're signing off on
5 a bill of lading that says that. It's a contract.

6 QUESTION: Yes, but as a practical matter the
7 shipper says to the trucker what do I owe you, and the
8 trucker says you owe me the negotiated rate, and he
9 delivers the goods for that.

10 MR. STEINFELD: As a practical matter that has
11 no legal significance.

12 QUESTION: No, but that, that's what in effect
13 happens, isn't it?

14 MR. STEINFELD: That's what happened -- well, in
15 this case what happened was, and this is in the record,
16 the trucker wrote the shipper a letter saying don't worry
17 about our tariffs, we will handle anything that pays 90
18 cents a mile. So as a practical matter in this case the
19 shipper and the carrier decided to charge knowingly off
20 their rates. But it doesn't matter for my argument
21 because I'm going to concede that the issue of
22 constructive knowledge covers both issues, covers both
23 situations, actual knowledge as well as not having actual
24 knowledge.

25 If the Court is going to give legal significance

1 to this illegal rate bargain by saying that it provides a
2 reparations defense out of whole cloth, one that is not
3 allowed within the statutory scheme, you have now given
4 legal significance to an unfiled rate, you have
5 sanctioned --

6 QUESTION: Well, that was not the point I was
7 trying to make with the question, Mr. Steinfeld. I
8 thought you were talking about the pay when received as if
9 it was perfectly evident to the shipper that he owed more
10 than he was actually being charged. But if that's the
11 agreement he has bargained for it would be quite natural
12 for him to expect to receive the goods when he paid the
13 price he bargained for.

14 MR. STEINFELD: Well, I think, I understand what
15 Your Honor is saying, and if you're taking a totally
16 innocent shipper that isn't aware of the higher filed rate
17 charges the position is well, he has paid, he should get
18 the goods. But the law doesn't say payment -- it says
19 payment for the transportation services is made.

20 Now what is payment for the transportation
21 services? Is that just paying anything? \$1 when it
22 should be \$1,000? No. Payment, I submit that under the
23 statute payment is payment of rates. The statute 10743
24 says payment of rates. That's the title of the statute.
25 It doesn't say payment of charges. It says payment of

1 rates. And rates are only one thing, what is on file with
2 the ICC. And that's what the bill of lading says, and
3 that is what the shipper must do.

4 The equities do not count, because that turns
5 the statutory scheme on its head. Equities can be looked
6 at from both sides of the fence.

7 QUESTION: Well, I don't, I don't know.
8 Certainly the ICC did have a policy for, until Maislin, I
9 suppose, of encouraging negotiated rates.

10 MR. STEINFELD: The ICC had that policy and
11 we --

12 QUESTION: And they were, they were regulating
13 this industry.

14 MR. STEINFELD: Allegedly.

15 QUESTION: Well, allegedly. They were. They
16 just happened to, it turns out they, it turns out that one
17 of their policies didn't square with the statute, at least
18 this Court held.

19 MR. STEINFELD: Well, this is another policy, I
20 submit, that doesn't square with the statute because the
21 Commission, as I said, have just changed their view.
22 Because negotiated rates failed. That was their answer to
23 the problem that they created. Now, that being taken away
24 from them, they now have a reasonableness philosophy which
25 they have all of a sudden decided that, contrary to their

1 position for 100 years, now all of a sudden shippers are
2 no longer bound to pay, but they might have to pay, but
3 let us decide whether they are reasonable or not. But now
4 only in a bankruptcy scenario, not in actual life.

5 Well, the carriers act ongoing, you're not going
6 to enforce the filed rate doctrine, you're going to get
7 more bankruptcies, and the problem is going to continue
8 and continue. I don't think you reward an agency's
9 malfeasance by then again finding another exception to
10 allow them off the hook. Congress is going to deal with
11 this agency.

12 QUESTION: But we're not talking about, we're
13 not talking about how we should treat the ICC. We're
14 trying to, we're talking about how to treat the shipper --

15 MR. STEINFELD: That is correct, Your Honor.

16 QUESTION: -- who has been, who perhaps
17 mistakenly relied on an ICC policy.

18 MR. STEINFELD: I, the way to treat that --

19 QUESTION: To say nothing of the carrier.

20 MR. STEINFELD: Well, the carrier is out of
21 business. The carrier's officers can go to jail. There
22 are criminal penalty provisions which can be enforced, and
23 I submit the ICC I think finally is coming around to doing
24 that. We have read in the press that there have been some
25 enforcement actions, finally. That's the way to handle

1 the people who created the malfeasance.

2 QUESTION: Post-Maislin, I hope.

3 MR. STEINFELD: Yes. Definitely post-Maislin,
4 Your Honor, Justice Scalia.

5 QUESTION: I don't know why. The statute has
6 been so clear for 100 years, I don't know why you limit it
7 to post-Maislin.

8 (Laughter.)

9 MR. STEINFELD: I can appreciate that comment as
10 well, Justice Stevens. But this meaningful opportunity
11 doctrine is an equitable principle, and you can search
12 that act from the 10101 to the end of the act and you will
13 not find anything that speaks to deciding cases
14 differently. Again, the principle of constructive notice
15 has been a part of this jurisprudence since 19 -- arguably
16 since 1915 when Mr. Maxwell wanted to go to the World's
17 Fair by way of Denver and now all of a sudden he had to
18 pay more money.

19 QUESTION: But you must admit the tariffs got a
20 little more complicated after the motor carriers were
21 regulated than before.

22 MR. STEINFELD: Again that's, I submit that's
23 the ICC's doing. I hate to come back to that part.
24 Tariffs do not have to be complicated. They can be
25 simplified, and they should be simplified.

1 QUESTION: Yeah, but they really aren't, as you
2 well know. I mean, Mr. Phillips gave you one example,
3 several hundred pages sometimes.

4 MR. STEINFELD: I do tend to dispute Mr.
5 Phillips in this case. I don't want to argue too much
6 about the facts of this case, but I was involved in this
7 audit and this is a very simple tariff. And certainly his
8 client who receives a letter saying that I'll handle
9 anything that pays 90 cents a mile, don't worry about my
10 tariffs, is hard to question that he even bothered to open
11 or crack a book to verify the rate. But watching services
12 are there and it is not that difficult.

13 And, by the way, if it is difficult the shippers
14 are not without remedy. All they have to do is call the
15 ICC up. They can file a complaint at any time with the
16 agency requesting tariffs to be stricken, modified, or
17 changed. If they don't like it, let them complain about
18 it. But what they don't like is having to pay filed rate
19 charges after the fact, which I can understand. But at
20 the same time the trustees don't like the fact that
21 they're left with clean up costs, with unpaid wage claims.
22 The thing is a mess, and we're trying to simply enforce
23 the law as it is written.

24 We're not denying the reasonableness here, by
25 the way. In Carolina Motor this is exactly true. If they

1 were truly interested in challenging the reasonableness of
2 the rates they could have done so under the Bankruptcy
3 Code 108(c), extension of the statute of limitations.
4 They had their full 2 years available to them. They could
5 get every penny that any other claimant could have gotten
6 had they chose to file a reparations case.

7 QUESTION: But then that is like Western Pacific
8 where the time for that has expired.

9 MR. STEINFELD: Now, now that the plan of
10 liquidation has been affirmed and the stay has been
11 lifted, obviously the time has occurred, has departed.
12 But, Mr. Chief Justice, Western Pacific was clearly acting
13 on its rights under the Tucker Act. Why would Congress --
14 query this. Why would Congress give the U.S. Government
15 the absolute right to raise reasonableness as a defense
16 through a set-off procedure if it didn't have to? It had
17 to because the United States Government didn't want to be
18 bound, as is often the case, to do what everybody else is
19 doing. First of all we don't have to worry about the
20 insolvency, thankfully, of the U.S. Government. So we
21 don't have to worry about the time --

22 QUESTION: Don't be too sure.

23 MR. STEINFELD: -- we take. But there are rules
24 created separately for the United States of America. And
25 in so doing -- and those are the only two cases, by the

1 way. The Court should note this, that the only two cases
2 that they rely upon are U.S. v. Western Pacific and U.S.
3 v. Pennsylvania Railroad, both Tucker Act cases. Those
4 are the only cases within the entire jurisprudence of this
5 Court that have provided rate reasonableness as a defense,
6 only because of the set-off provisions under the Tucker
7 Act. And I would submit if Congress wishes private
8 litigants to have the same rights they sure could give it
9 to them.

10 If there are any other questions. If not, thank
11 you very much. I would ask that the Court affirm the
12 decision below.

13 QUESTION: Thank you, Mr. Steinfeld.

14 Mr. Phillips, you have 3 minutes remaining.

15 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

16 ON BEHALF OF THE PETITIONERS

17 MR. PHILLIPS: Thank you, Mr. Chief Justice.

18 Just a couple of quick points. First of all I would like
19 to clarify the record in this case. Mr. Steinfeld
20 suggested that the shippers in this case were informed
21 that the rates would not be filed and therefore acted
22 essentially at their own peril. What that letter actually
23 says just prior to the reference to what rates were going
24 to be charged is, I'm not sending you the tariff because
25 it is, quote, voluminous, and you need not worry about it

1 though because we're going to go ahead and take care of
2 this in a filed tariff. So the truth is that the shippers
3 did rely. It's ultimately not terribly important to the
4 outcome of the case, but it's important to set that record
5 straight.

6 With respect to the idea that there was either
7 collusion or discrimination in this case, that's nonsense.
8 This is a shipper who -- these are brokers, small brokers.
9 They don't have any market power. They use 15 different
10 carriers. All 15 of those carriers charge precisely the
11 same rate. And in fact if you look at the carrier's
12 tariffs in this case, they have tariffs that look very
13 similar for other shippers to the rates that they charged
14 here, they just didn't bother to file those tariffs for
15 this particular shipper.

16 So what happened here is clearly just
17 malfeasance. He talks about the malfeasance of the
18 Interstate Commerce Commission in how it approached this
19 case. I find it incredibly mystifying to sit here and say
20 that we have erred because we failed to exercise
21 constructive knowledge when it's obvious that from the
22 beginning the carriers had an obligation to charge and
23 collect the filed rate. They chose not to do so. They
24 charged a different rate. And to suggest that somehow at
25 the outset of this process under section 10743 that we had

1 some duty to come back to them and say, sir, you have
2 undercharged us, you need to expect more out of us, is
3 ridiculous because --

4 QUESTION: You -- that's a little bit of an
5 overstatement. I thought you conceded long ago that if
6 the, if the carrier had an adequate opportunity to get
7 reparations that the carrier could sue you for the
8 difference between the negotiated rate and the filed rate.

9 MR. PHILLIPS: If it is absolutely clear --

10 QUESTION: Is that right?

11 MR. PHILLIPS: If it is absolutely clear that
12 there is no risk in pursuing reparations, I agree with
13 that.

14 QUESTION: Well, then you do, then you did, you
15 had to have had a duty to pay the filed rate.

16 MR. PHILLIPS: I did have -- I had a duty to pay
17 the filed rate.

18 QUESTION: Well, you couldn't rely on what the
19 carrier said, then. If the carrier could collect the
20 filed rate from you, you had a duty.

21 MR. PHILLIPS: At the time of shipment all the
22 scheme requires is, and I quote the language, Justice
23 White, only when payment for the transportation of service
24 is provided. It doesn't say the filed rate. It says the
25 payment. And we made that.

1 QUESTION: Well, I know, but nevertheless the
2 carrier could come back and collect the filed rate from
3 you.

4 MR. PHILLIPS: It may come back --

5 QUESTION: If there is an adequate reparations
6 remedy.

7 MR. PHILLIPS: And of course the one question
8 that Mr. Steinfeld asked is how will we know who is
9 solvent, when. Well, I don't know how we'll know who's
10 solvent in the future, but the one thing I know absolutely
11 is who is insolvent today, and that's Carolina Motors.

12 QUESTION: But isn't that the essential
13 injustice? I mean the essential injustice here is an
14 injustice that you concede is there in the act, that the
15 carrier who was at fault for all of this can nonetheless
16 come and collect the rate, and if he happens to go
17 insolvent the next day you're just straight out of luck.
18 Isn't that the essential injustice? And you acknowledge
19 that that is there in the statute.

20 MR. PHILLIPS: I acknowledge that it's there in
21 the statute as a timing issue at the outset when the
22 payment, when the shipment is delivered and there is a
23 requirement of payment. At that, in that circumstance
24 there is an injustice. But after that circumstance, in
25 the case that we have here, Justice Scalia, where payment

1 is made, you come back later, that injustice no longer
2 applies because the ICC has said to the contrary.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Phillips.

6 The case is submitted.

7 (Whereupon, at 11:04 a.m., the case in the
8 above-entitled matter was submitted.)

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CERTIFICATION

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

Peter C. Reiter, et al., Petitioners v. Langdon M. Cooper, etc.

et al. Case No.: 91-1496

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BY Anna Marie Federico

(REPORTER)