

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SECURITY SERVICES, INC., Petitioners v. K MART
CORPORATION

CASE NO: No. 93-284

PLACE: Washington, D.C.

DATE: Monday, February 28, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SECURITY SERVICES, INC. :

4 Petitioners :

5 v. : No. 93-284

6 K MART CORPORATION :

7 - - - - -X

8 Washington, D.C.

9 Monday, February 28, 1994

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:01 p.m.

13 APPEARANCES:

14 PAUL O. TAYLOR, ESQ., St. Paul, Minnesota; on behalf of
15 the Petitioner.

16 WILLIAM J. AUGELLO, ESQ., Northport, New York; on behalf
17 of the Respondent.

18 JOHN F. MANNING, ESQ., Assistant to the Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Respondent.

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

2 (1:01 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-284, Security Services, Inc. v. The K
5 Mart Corporation. Mr. Taylor.

6 ORAL ARGUMENT OF PAUL O. TAYLOR

7 ON BEHALF OF THE PETITIONER

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

10 My client, Security Services, is a motor common
11 carrier. It filed a tariff, a tariff called 501-B,
12 submitted it to the ICC, the ICC accepted this tariff, it
13 put their stamp on it, "Received," they put it on their
14 shelf, and it was there for the public to use. The tariff
15 was never rejected, it wasn't cancelled, it wasn't
16 suspended, it wasn't set aside, it was never challenged
17 until my client exercised its statutory rights under
18 section 10761(a) to collect the filed tariff rates.

19 The district --

20 QUESTION: Well, it was never enforced during
21 the time that the actual carrier had it, whatever its
22 validity.

23 MR. TAYLOR: I don't agree, Mr. Chief Justice,
24 that it wasn't enforced. The fact was that it was on file
25 and gave notice to the public as to what the rate is.

3

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1 This Court in Berwind, Berwind-White Coal Mining v.
2 Chicago and Erie Railroad in 1914 said that a tariff,
3 while arguably lacking some of the formalistic
4 requirements that the act requires and that the Interstate
5 Commerce Commission might require, is enforceable if it is
6 received with no objection as to form and if it is
7 adequate to give notice to the public of the rate.

8 This tariff disclosed a rate, the rates were not
9 stated in cents per mile, but they were determinative on
10 getting the mileage. The tariff said you go to this
11 mileage guide for purposes of getting a mile and applying
12 this rate. It contained everything essential to rate a
13 shipment.

14 QUESTION: But both the mileage guide itself and
15 the commission regulations, as I understand it, advised
16 whoever was going to check the tariff not to look to that
17 mileage guide after a certain date, namely, the date when
18 you were no longer listed as one of the people supporting
19 that mileage guide.

20 MR. TAYLOR: Well, Justice Scalia --

21 QUESTION: Would that not confuse the public at
22 least? The public wouldn't know whether you continued to
23 be using that mileage guide or not.

24 MR. TAYLOR: No, I don't believe the public
25 would be confused, for several reasons, if I might

1 elaborate. First of all, the ICC's claimed voiding power
2 does not come from this failure to be listed in the
3 participating carrier's tariff. The ICC's claimed voiding
4 power comes from the failure to give a power of attorney
5 to the publisher of the guide.

6 QUESTION: Well, you don't have to call it a
7 voiding power. You just have to call it putting the
8 public on notice. The public reading the regs and reading
9 the guide itself, or the things attached to the guide,
10 would believe that you were no longer using that mileage
11 guide after a certain date.

12 MR. TAYLOR: Your Honor, what the public reads
13 is a tariff, and the tariff discloses the rate. The
14 statute does not require a mileage guide, the statute
15 requires disclosure of rates, and this tariff, this 501-B
16 tariff, very plainly disclosed what the rate would be for
17 Riss.

18 QUESTION: Well, if the shipper had read the
19 guide and seen the asterisk, then he would have known that
20 the rate should not be enforced --

21 MR. TAYLOR: I don't believe that's correct.
22 What happens is, there's lots of tariffs that are allowed
23 to go into effect with defects. This Court acknowledged
24 it in Davis v. Portland Seed, said its defects are
25 inevitable, and if there's a certain defect, what do you

1 look to if you have, perhaps, tariffs that conflict, or
2 tariffs that might be partially incomplete. What you look
3 to is the intent of the framers, and what is the disclo --

4 QUESTION: Well, this wasn't a defect in a
5 calculation, it was a failure of a condition that must
6 continue for the rate to be valid, and that condition
7 failed.

8 MR. TAYLOR: I don't agree that the rate's not
9 valid, Justice Kennedy. The rate is still contained in
10 the tariff, and let us assume for the sake of argument
11 that we were not permitted to use this distance guide.
12 You still have this rate sitting out there. You can
13 calculate rates. You certainly cannot apply the tariff
14 without having a distance, but a mileage is not something
15 that is abstract, a mileage is finite. There is only one
16 shortest, practical distance from Chicago to Minneapolis
17 or from Baltimore to Boston.

18 QUESTION: If that's so, why is it so
19 complicated to have all these distances that you have to
20 have a bureau do it?

21 MR. TAYLOR: I don't think that you have to have
22 a bureau do it. As a matter of fact, during this time
23 period, the Interstate Commerce Commission was allowing
24 all sorts of methods of filing: Rand McNally road maps,
25 mileage guides that weren't on file --

1 QUESTION: Is it in fact true that it's very
2 obvious -- to Washington to Baltimore, that it's very
3 obvious there's one and only one shortest practical route?

4 MR. TAYLOR: That's true. I believe that to be
5 true.

6 QUESTION: Have you traveled it often?

7 MR. TAYLOR: I have traveled it on several
8 occasions. I'm more familiar with the distance from
9 Chicago to Minneapolis than I am from Baltimore to
10 Washington, but by the --

11 QUESTION: You don't take the position that
12 there was something unreasonable beyond the statutory
13 power on the ICC to require the filing of the mileage
14 guide, do you?

15 MR. TAYLOR: No. I don't think -- I don't
16 think --

17 QUESTION: Don't we then have to take tariff as
18 meaning what the ICC has construed it to mean to require
19 both the mileage rate and the mileage distance
20 specification?

21 MR. TAYLOR: No, Justice Souter, you take the
22 tariff as to what it discloses, and this tariff disclosed
23 the rate dependent upon mileage, the charge, the
24 derivative charge, and that said we're going to use these
25 mileages.

1 QUESTION: You had one guide, and there were
2 other guides that gave different distances between the
3 same two points, were there not? There was a choice. You
4 could have filed a map, you could have joined this guide,
5 you could have joined another guide, and they weren't
6 uniform, were they?

7 MR. TAYLOR: No. No, they weren't, Justice
8 Ginsburg. Mileage guides were not uniform, but there was
9 only one mileage guide disclosed by my client. We didn't
10 say, we're using all sorts of other different mileage
11 guides. There was one mileage guide that our holding out
12 to the public said we would use.

13 QUESTION: Well, now, what if somebody else who
14 read the ICC's rules said, I'm going to use this mileage
15 guide to start off with, but after a certain date I'm
16 going to withdraw from it, after which that will not
17 govern me. Now, couldn't a person do that?

18 MR. TAYLOR: Sure, absolutely they could.

19 QUESTION: Sure. Now, how is the public to know
20 whether you're that kind of person or whether you are your
21 kind of person --

22 MR. TAYLOR: Because, Justice Scalia --

23 QUESTION: -- who wants to continue to have the
24 mileage guide applicable?

25 MR. TAYLOR: Because the public would know from

1 the rate tariff. When you rate a shipment, and what the
2 reasonable user is going to use in using a tariff is, they
3 are going to open this tariff and they are going to see
4 this is the rates that Riss, in its own tariff, not in the
5 tariff filed by a third party agent, but in a tariff that
6 it has disclosed to the public saying these are our rates,
7 the tariff that's circulated. These are our mileage
8 rates, and this is what we are going to use.

9 QUESTION: And this is the mileage, but the
10 reader might think well, of course, they are doing that on
11 the assumption that they are following the ICC's rules,
12 which means they only mean it for so long as they continue
13 to subscribe to the mileage guide.

14 MR. TAYLOR: Well, Justice Scalia, the fact is
15 that during this time period, the ICC rules, the ICC had
16 issued a rule in 1984 when it amended the tariff
17 publishing regulations. First of all, what they did was,
18 they eliminated from that section of the notice of
19 proposed rulemaking -- it originally said, if you refer to
20 a distance guide, you have to also provide a power of
21 attorney or concurrence in that distance guide.

22 1) That was deleted. 2) The ICC issued an
23 opinion called, "Revision of Tariffs, All Carriers." When
24 they made a complete overhaul of its rules, and it said,
25 due to issues of copyright and general availability, we

1 will no longer mandate for distance guides their filing
2 with the commission or who must be parties to it.

3 This 1312.4(d) voiding power at least to the
4 extent the commission attempts to retroactively apply it
5 to Riss' tariff which continued in effect is something
6 that is basically newfound. It's not something that any
7 reasonable reader of those regulations would have
8 determined back in 1984, or in 1985 at the time Riss filed
9 the tariff which is at issue in this case.

10 QUESTION: How much were the dues involved that
11 weren't paid that led to Riss not being a party to the --

12 MR. TAYLOR: The dues I believe, Justice
13 Ginsburg -- and I'm only going from my personal knowledge
14 and not from the record -- were about \$83 during this time
15 period.

16 QUESTION: Is there anything that accounts for
17 how widespread this failure to continue to be members of
18 the guide were, because I think one figure in the record
19 was that between the years 1984 and 1988, 40 percent of
20 the common carriers weren't paying their dues.

21 MR. TAYLOR: Yes, Justice Ginsburg. That was in
22 the record in the Jasper Wyman case, a portion of which is
23 attached to amicus Overland's brief in this case. In
24 fact, during this time period, aside from 40 percent not
25 participating, there were all sorts of other methods which

1 were disclosed, and as a matter of fact, when the
2 commission was made aware of actual violations, they did
3 nothing to strike the tariffs. Only --

4 QUESTION: Was this because everybody was really
5 making deals outside the tariff?

6 MR. TAYLOR: No, I don't believe so. I believe
7 it was because the commission had basically issued this
8 decision in revision of tariffs in 1984 that said, we are
9 no longer going to require filing of distance guides, and
10 we are not going to require participation in them.

11 The commission now says, well, that means
12 copyrighting or something like that, but I think the
13 unequivocal language of that decision is -- and I can
14 quote it almost verbatim -- is due to issues of copyright
15 and general availability, we will no longer mandate for
16 distance guides their filing with the commission or
17 participation in them. At least, it's language very
18 similar to that, so I think --

19 QUESTION: You didn't at the time Riss -- the
20 prebankruptcy Riss didn't have a whole lot of interest in
21 adherence to this tariff, because in fact you were making
22 deals for a price lower than the tariff.

23 MR. TAYLOR: Well, Justice Ginsburg, I don't
24 agree with that. In the vast majority of cases, Riss
25 billed their tariff rate, and in the vast majority of

1 these bankruptcies, I know there's a lot of these cases
2 that have developed their way up through the system, this
3 Court having had several in the last 3 years. In the vast
4 majority of the cases, the carrier bills the tariff rate.

5 The other thing in this case, it's not a matter
6 of protecting the Riss, it's a matter of protecting the
7 public and their ability to challenge rates that are on
8 file.

9 There's no way, if -- the core purpose of the
10 act that this court said in Maislin was to disclose the
11 rate and allow people to challenge them as discriminatory
12 and also to provide stability in the rate by allowing the
13 Commission's -- the circuit court's application of the
14 Commission rule, basically what the Court would be saying
15 in that case would be that well, you can negotiate
16 whatever you want, and if your tariff is somewhat
17 defective, it doesn't meet the proper form, then, well,
18 okay, you cannot collect it.

19 QUESTION: I understand what your argument is
20 now in collecting from customers who paid less, but
21 suppose there had been no bankruptcy, could Riss have gone
22 after the people that it gave discount rates to, or would
23 there have been some kind of estoppel working
24 prebankruptcy?

25 MR. TAYLOR: I'm not sure I understand the

1 question, Your Honor.

2 QUESTION: All of these cases seeking more from
3 customers who were given discounted rates come up in the
4 context of a bankruptcy? Suppose there had been no
5 bankruptcy. You made a deal with customers and said,
6 forget the tariff, we are going to give you a better
7 price, because there's competition out there, and then
8 2 months later you say, sorry, we were entitled, because
9 of our filed rate, to charge you more, so we're going to
10 send you an additional bill. Would there have been some
11 kind of estoppel operating prebankruptcy?

12 MR. TAYLOR: No, I don't believe so. First of
13 all, the application of the filed rate doctrine has never
14 been dependent on somebody being in bankruptcy. It's not
15 just my client's right to collect its tariff charge, it's
16 my client's duty, whether bankrupt or not bankrupt, to
17 collect the tariff charges, so by that same token the
18 liability for the shipper exists whether or not we
19 actually make the demand for payment. They are charged
20 with knowledge of what is contained in the tariff. On top
21 of it --

22 QUESTION: And you say in addition, to answer
23 Justice Ginsburg's -- that Riss could have brought this
24 action had no bankruptcy supervened?

25 MR. TAYLOR: Not only could they have, they

1 should have, and were required to by the act to bring that
2 action. Congress has mandated the collection of --

3 QUESTION: How do you explain the fact that no
4 solvent carriers ever brought any of these actions?

5 MR. TAYLOR: Solvent carriers bring these types
6 of actions not as frequently as bankrupt carriers.

7 QUESTION: Do they bring any of them? Are there
8 any solvent carriers in this whole family of cases?

9 MR. TAYLOR: Recently?

10 QUESTION: Yes.

11 MR. TAYLOR: Solvent carriers -- yes, I have
12 several carriers who I represent who have brought actions
13 for undercharges. For example -- and I know many people
14 who are engaged in the collection business, when a client
15 comes in and says, I want to collect payment from a
16 particular shipper --

17 QUESTION: These are nonpaying shippers.

18 MR. TAYLOR: Yes, in that setting.

19 QUESTION: Are there any undercharged suits that
20 you know of brought by solvent carriers?

21 MR. TAYLOR: Not that I'm aware -- not recently.
22 In the past, yes, but not recently that I'm aware of.

23 I think what happens in a case such as this is
24 that what the Interstate Commerce Commission advocates
25 through its rules and through its newfound interpretation

1 of its regulation is that somehow that there should be a
2 punishment upon Riss for not filing this power of attorney
3 and remembering that the voiding power does not come from
4 not being listed in the tariff, the voiding power comes
5 from not providing the power of attorney.

6 But the act is there to protect the public, and
7 it's there to protect the core purpose there, being able
8 to challenge a filed rate as discriminatory, as unduly
9 preferential and perhaps unreasonable under some of the
10 other criteria in the act, and it's really the public
11 interest that's being protected.

12 QUESTION: Can I ask another question --

13 MR. TAYLOR: Yes, Justice --

14 QUESTION: -- about this general category? Are
15 there any suits brought by competitors of shippers
16 claiming they were hurt by these discriminatory rates that
17 you know of?

18 MR. TAYLOR: Not in recent years. As a matter
19 of fact, I think part of it --

20 QUESTION: That's surprising, if there's this
21 strong public interest supporting the full enforcement of
22 the tariff rate.

23 MR. TAYLOR: Well, the fact is that the
24 Interstate Commerce Commission does not reach the issue of
25 reasonableness any more. They have not yet that I'm aware

1 of actually issued a dispositive ruling ever determining
2 whether or not a rate is reasonable or -- unreasonable.

3 They basically have adopted a hands-off
4 approach, and in my opinion it would be futile for a
5 shipper to make a challenge to a rate as unduly
6 discriminatory because the Interstate Commerce Commission
7 has allowed all sorts of rates that are discriminatory and
8 it hasn't, that I'm aware of, actually issued an order
9 finding that a rate might be discriminatory.

10 QUESTION: Mr. Taylor, I assumed -- well, under
11 one of the regs of the Commerce Commission you can file a
12 rate that has an expiration date on it, can't you?

13 MR. TAYLOR: Yes.

14 QUESTION: And what happens to that rate when
15 the expiration date comes? It automatically is no longer
16 effective?

17 MR. TAYLOR: It goes away.

18 QUESTION: Now, why isn't this simply the same
19 thing? What the Commission's rule said is that if you
20 file a rate that refers to this extrinsic mileage chart,
21 your rate will automatically expire at the time that --
22 it's simply telling the public that -- it's just like
23 saying, in the regs, when you say, we will round off your
24 mileage to the nearest hundred so that if you say,
25 75 miles, that shall be deemed to be 100 miles. Anybody

1 that files a rate that says, 75 miles, will know that it
2 means 100 miles.

3 MR. TAYLOR: But in this case, Justice Scalia,
4 the Riss 501-B tariff continued to be on the shelf,
5 continued to be charged to people other than K Mart, and
6 it was there for the public to view to see and to
7 challenge if they wanted to.

8 QUESTION: Yes, but the ICC had in effect said
9 Riss' tariff shall be deemed to expire when Riss'
10 membership expires. That's what the ICC -- now, do you
11 say that the rule was unauthorized?

12 MR. TAYLOR: No, the rule is authorized. The
13 rule is proper, but the application of the rule to have an
14 effect saying this tariff that was on the shelf since
15 1984, we should pretend does not exist and should give no
16 legal effect to it, that is contrary to law. It runs
17 contrary to this Court's precedent in Maislin, it runs
18 contrary to this Court's precedent in Berwind.

19 Tariffs don't have to be perfect. They
20 frequently aren't. A part of the problem is, frankly,
21 lack of oversight by the Commission, for whatever reason.
22 Part of the problem is the Commission has shortened the
23 time period for filing tariffs. Statutorily, they can
24 shorten it to less than 30 days, so you can decrease a
25 rate, now, on 1 day notice, you can increase it on 7 days'

1 notice. That certainly doesn't give the Commission time
2 to go through it and say, hey, there's something wrong
3 with your tariff.

4 QUESTION: How is determination shown? If
5 someone looks at the guide, they just looked at the
6 mileage from X point to Y point, they wouldn't see
7 anything, but the names of the people -- how was that --
8 when Riss dropped out, when it didn't pay the \$83, how was
9 notice of that conveyed to the shipping world?

10 MR. TAYLOR: Well, it's affected through what's
11 called a participating carrier's tariff, so what you have
12 to do is, you have to start with the Riss tariff, which
13 says it's governed by the mileage guide and only by the
14 mileage guide, and then you go from the mileage guide,
15 which says this only applies for people listed in tariff
16 107, so you make a two-step removal from Riss' tariff to
17 see who's listed.

18 Then there's supplements that come out from time
19 to time that the Household Goods Tariff Bureau would
20 publish, which show through symbolization Riss's name
21 being stricken and all sorts of other carriers being
22 stricken from the tariff, but the Commission hasn't gotten
23 to the point to where they go back and cancel Riss' here.

24 QUESTION: But that would be in a different
25 booklet than the mileage guide itself, the list of people

1 who haven't paid up?

2 MR. TAYLOR: Yes, that's exactly correct. The
3 fact is -- and I think the principal point in a case such
4 as this, however, is that what is the disclosed rate?
5 What does the statute require? The statute requires us to
6 file rates, it doesn't require us to file mileages. You
7 can determine mileages without having a mileage guide. As
8 a matter of fact, the Commission's own regulations at 49
9 C.F.R. part 1048, when referring to what are called
10 commercial zones, refers to airline miles around a
11 particular city, which would require some sort of external
12 measurement, so the tariffs don't require precision. What
13 it requires disclosure of rates in such a fashion that
14 would enable somebody to challenge the rates as
15 discriminatory or unreasonable.

16 One thing this Court cited with approval in the
17 Maislin case was the regular common carrier conference
18 case by the D.C. circuit decided in 1986. In that case,
19 the Commission had put forth a rule which basically said,
20 you can put in your tariff, or actually a group of
21 carriers had published a rule which says, you can
22 negotiate whatever you want to.

23 That was in the tariff. That is basically the
24 sum and substance of what was said, and it was challenged
25 by a group of carriers which said, that doesn't meet the

1 requirement for a rate in the tariff, and the D.C. Circuit
2 said, that requirement is utterly central to the act, and
3 the Commission came back and said, well, we have all these
4 other methods of determining tariff rates.

5 And what the D.C. Circuit said is that while
6 those tariffs haven't been challenged yet, what they
7 said -- and this is from page 380, 793 Fed 2d 380 -- for
8 example, under volume discount rules, competing carriers
9 cannot determine the per unit rate, but the carrier is
10 charged with knowing the volume tendered by the shipper,
11 but they do at least know how the per unit rate is
12 determined, enabling them to protest the application of a
13 different formula to a particular shipper.

14 So if for some reason some shipper took that
15 extraordinary step and went two tariffs removed from Riss'
16 tariff and was somehow confused about the mileages, at
17 least we have a disclosed rate and a method of challenging
18 that rate and perhaps challenging the application of that
19 rate for a calculation of mileages in that case.

20 And by the circuit court's opinion, by upholding
21 the retroactive effect of 1312.4(d), they basically got
22 the filed rate doctrine. It makes the disclosed rate
23 unreliable, and this Court has said in Berwind, said it in
24 Davis v. Portland Seed, that that disclosed rate, that the
25 carriers at a certain point have to be able to place

1 repose in the tariffs that are on file.

2 QUESTION: Now, when you say, retroactive, this
3 was not retroactive so that it voided the tariff before
4 the date of the supplement to the rating bureau.

5 MR. TAYLOR: That's correct, Justice Kennedy.

6 QUESTION: So it's not -- it's retroactive only
7 in the conclusory sense that you say that the rating
8 bureau publication is irrelevant.

9 MR. TAYLOR: That's correct. From that date
10 forward, from the date after Riss was dropped from the
11 list of participating carriers, those shippers who relied
12 on that tariff, the 501-B tariff that Riss filed in its
13 own name, those shippers that relied on it, paid that
14 rate, at that point that tariff becomes retroactively
15 voided for them and basically leaves us with no tariff.

16 The additional application of the rule, while
17 not present in this case, but the record attached to
18 Overland's brief, the amicus brief filed by Overland in
19 this case, indicates that you can have the reverse effect.
20 In American trucking, all you had was a restoration to a
21 cheaper rate, but if you void -- if the Commission is
22 allowed to void carriers' rates, it may -- it doesn't in
23 this case, but it may in other cases and does in other
24 cases, result in higher rates, so the --

25 QUESTION: Well, Mr. Taylor, what happens in the

1 case of a rate which has passed its expiration date? It
2 remains on file, but it's no longer valid? What are the
3 rights of the carrier and the shipper in that case?

4 MR. TAYLOR: There is no right. Nobody can
5 claim a right to a rate that has expired. In this case,
6 the rate tariff continued on file, Mr. Chief Justice.

7 QUESTION: So in that case, the shipper and the
8 carrier could negotiate their own deal, so to speak?

9 MR. TAYLOR: No. Well, in those cases, 1) --

10 QUESTION: Well, now, you've said no rate
11 applies, so wouldn't the only alternative be for the
12 carrier and the shipper to negotiate their own deal?

13 MR. TAYLOR: Mr. Chief Justice, in the case
14 where there is no otherwise applicable rate, there would
15 be no tariff and the carrier would be subject to whatever
16 civil penalty -- the civil penalties under the act,
17 because the act does require you to maintain rates in
18 other cases.

19 QUESTION: But by hypothesis, you haven't
20 maintained rates, and you've made a deal with the shipper
21 to ship at a particular price. Is that voidable, or can
22 the carrier come back and charge more later?

23 MR. TAYLOR: The carrier can always charge, and
24 must always charge his tariff rate.

25 QUESTION: But by hypothesis we have no --

1 MR. TAYLOR: If you had no tariff rate at all,
2 in any tariff, not just the 501-B tariff, but if there was
3 no other tariff applicable that might be higher or lower,
4 now at that point you would -- I assume you would have an
5 illegal contract and nobody would be entitled to any
6 compensation.

7 QUESTION: So that the carrier would be carrying
8 for nothing, in effect.

9 MR. TAYLOR: I agree, yes.

10 QUESTION: It seems a remarkably harsh result.

11 MR. TAYLOR: I --

12 QUESTION: I'm sure that is not how it works
13 out.

14 QUESTION: Do you have a case for that
15 proposition?

16 MR. TAYLOR: No. Well, there's a split of case
17 law among the district courts.

18 Some say that a carrier is entitled to a quantum
19 meruit recovery, other cases say, well, the rates are
20 determined on the tariff, and if you have no tariff you
21 have no rate and thus there's nothing to collect, and
22 assuming if you pay the negotiated rate you might leave
23 the parties in the position as you find them, but that is
24 assuming, again, you have no rate.

25 In this case there was a disclosed rate, and the

1 operation of the court of appeals decision is such that it
2 makes that disclosed rate unreliable, and anybody who
3 looked at it, relied on it, paid it, could be penalized
4 either up or down, as a matter --

5 QUESTION: The carrier is acting unlawfully if
6 it has no filed rate.

7 MR. TAYLOR: That is correct, Justice Ginsburg.

8 QUESTION: What are the penalties, apart from
9 what the shipper would owe? What are the penalties for
10 not having an operative filed rate?

11 MR. TAYLOR: Well, there are certain civil
12 forfeiture penalties. The penalty provisions of the act
13 are outlined at section 11901 through 11904. At that
14 point, one would assume that they would be liable for
15 charging something that's discriminatory, because who
16 knows what they would be charging in that case. There's
17 criminal and civil penalties that would provide up to -- I
18 believe the criminal penalties under the act are 2 years
19 in jail and \$10,000 per violation, and it's been construed
20 that the violation is on a shipment-by-shipment basis.

21 But if I can leave with one point, and that is
22 that there's never been a requirement of tariff
23 perfection. The question is, what is the public likely to
24 see, what are their rights, and how do you justify them in
25 this case? How do we vindicate the public rights? That

1 is, upholding the disclosed rate, not allowing a
2 negotiated rate to stand.

3 That's the core purpose that this Court stressed
4 in Maislin. Maislin cited American Trucking for the
5 proposition that while the Commission can craft
6 appropriate remedies, it cannot do something that
7 undermines the core purpose of the act, and by stating,
8 because this tariff has some sort of pimple or technical
9 imperfection, it should be totally treated as void, and a
10 negotiated rate should stand, really does undermine the
11 intent of Congress.

12 Thank you very much. I'd like to reserve the
13 rest of my time for rebuttal.

14 QUESTION: Very well, Mr. Taylor.

15 Mr. Augello. Is that the correct pronunciation
16 of your name?

17 ORAL ARGUMENT OF WILLIAM J. AUGELLO

18 ON BEHALF OF THE RESPONDENT

19 MR. AUGELLO: It is, Mr. Chief Justice.

20 Mr. Chief Justice, and may it please the Court:

21 The sole issue in this Court today is whether or
22 not Riss had an effective tariff. I think the Court has
23 identified that problem, and I would like to refer you to
24 the principal source of the cancellation of the tariff.

25 Now, you will find a copy of the note in the

1 Household Goods Mileage Guide at Joint Appendix 35. That
2 note clearly says that "This mileage guide may not be
3 employed by a carrier as a governing publication for the
4 purpose of determining transportation rates based on
5 mileage or distance unless the carrier is shown as a
6 participant in the above-named tariff."

7 Riss was once a party to that carrier -- to that
8 tariff, and so its rates were complete when they initially
9 filed the Riss 501 tariff. That's the rate tariff. They
10 paid their dues until 1985, when they decided to stop.
11 It's irrelevant how much the dues were, because under the
12 filed rate doctrine the carrier's name must be in every
13 tariff that it publishes.

14 In 1985, as I said, it stopped paying. The
15 Household Goods Mileage Bureau duly cancelled Riss from
16 the tariff by filing a cancellation supplement. That
17 supplement is a tariff. The tariff is notice to the world
18 that Riss is no longer a party to this tariff.

19 QUESTION: Isn't it -- I suppose, as your
20 opposing counsel said, a separate publication? If I
21 wanted to ship goods, I know what the rate is, and I want
22 to see what the mileage is. I look at the mileage guide,
23 but to find out whether Riss is still a party to that
24 Household Goods, I have to look at yet a third book?

25 MR. AUGELLO: That's correct. That's not a

1 problem.

2 QUESTION: So you pick up the -- if you just
3 pick up the rate, you can pick up the mileage book and
4 stop there, then you don't know that Riss is no longer
5 paying its \$83 a year.

6 MR. AUGELLO: But the point is that it really is
7 irrelevant whether you pick up the tariff or not, because
8 carriers and shippers alike are charged with constructive
9 notice of every duly filed tariff, and that I think is the
10 problem that we ran into in the Overland case when the
11 Court did not duly apply that principle. They were
12 talking about, well, did the shipper really check the
13 tariff, did the shipper really check to see if the power
14 of attorney was executed? It's irrelevant.

15 QUESTION: Mr. Augello, Mr. Taylor has told us
16 that by 1985, when this tariff as you put it no longer
17 governed because the company no longer participated in it,
18 by that time, the Commission by decision had eliminated
19 the requirement that you be a participant.

20 MR. AUGELLO: That is incorrect.

21 QUESTION: Is that incorrect?

22 MR. AUGELLO: It is. In the Jasper Wyman case
23 at page 252 the Commission addressed that contention and
24 said -- first of all, I'm afraid that Mr. Taylor did not
25 quote the language in that 1984 revision of tariffs

1 regulation because -- he didn't quote it correctly. This
2 is what the Commission said -- and I'm reading now from
3 page 252 of the Jasper Wyman case. That the Commission
4 would not "mandate for distance guides who must be
5 parties, or ICC filing of the publication."

6 What the Commission was saying is, we're not
7 going to mandate that any publisher of a mileage guide
8 must file their tariff with the Commission because of
9 copyright problems, and the Commission went on to say the
10 Commission meant simply that because of the pending
11 copyright litigation involving the right to author a
12 mileage guide, it would not preclude any author from
13 filing a mileage guide with the Commission nor deny any
14 carrier's right to participate in any filed mileage guide.
15 That clarifies the situation.

16 The note at page Joint Appendix 35 acts like a
17 stop sign. It requires the tariff reader to stop, don't
18 go any further until you see whether or not the carrier is
19 listed in Household Goods Tariff Number 107 --

20 QUESTION: Assuming someone would get that book
21 and look at it, but there is no question that the word,
22 "participate" means nothing more than pay your annual dues
23 to belong to this --

24 MR. AUGELLO: No, Your Honor. Section
25 1312.27(e) of the Commission's regulations state clearly

1 that if a carrier refers to another tariff, it must
2 participate in that tariff.

3 QUESTION: I'm just asking what participate
4 means.

5 MR. AUGELLO: Means? It means be listed as a
6 participating carrier.

7 QUESTION: And one gets listed by filing the
8 power of attorney and paying annual fees?

9 MR. AUGELLO: Precisely.

10 QUESTION: There's nothing else beyond that.
11 Participation doesn't mean anything fancier than --

12 MR. AUGELLO: No. That's all it means.

13 QUESTION: Subscribe and pay your annual fee.

14 MR. AUGELLO: That's correct.

15 QUESTION: Do you know why it is that the
16 discontinuance was so widespread, so many carriers stopped
17 paying their annual fees?

18 MR. AUGELLO: Yes. I'd be happy to address
19 that, Your Honor. First of all, the estimate that you
20 read in the Overland case is completely unreliable. There
21 is absolutely no factual basis for that estimate. I
22 tracked it down and found that it came from a newspaper
23 interview of the President of the Household Goods Mileage
24 Guide who said, I estimate that approximately 40 percent
25 of the carriers that refer to my tariff are not parties to

1 it.

2 When the Household Goods Mileage people finally
3 realized what was going on -- a lot of people were using
4 their tariff without paying for it -- they filed a
5 petition with the ICC. You'll see the citation at page 20
6 of our brief, in footnote 8. It's the Household Goods
7 Carriers Bureau Petition for Cancellation of Tariffs of
8 Nonparticipating Carriers.

9 When they filed that petition, they found only
10 111 carriers that were not party to the tariff, that had
11 referred to the tariff in their own rate tariff, but
12 didn't participate.

13 QUESTION: What percentage was that?

14 MR. AUGELLO: Well, there's prob -- I think
15 there are 12,800 carriers listed in the Household Goods --
16 that's the figure that I recall from the Commission's
17 brief in the Overland case, so 111 carriers. That was a
18 complete fabrication.

19 And as I said earlier, Riss originally was a
20 party to the tariff, and so its rates were once legal.
21 They were once complete, but when you publish a mileage
22 rate, it isn't just one rate, it is a combination of a
23 mileage rate and distances.

24 The reason the Commission requires the
25 publication of distance is to prevent discrimination,

1 because if you don't do that, one carrier could say to a
2 favored shipper, between New York and Chicago we'll call
3 it 1,000 miles. For another shipper, it will be 1 mile
4 less.

5 You see, these distances do not operate on
6 actual miles, or even actual traveled miles, or even the
7 shortest distance. It's whatever the carrier decides is
8 going to be the basis for his mileage, and then he must
9 stick to it. He cannot --

10 QUESTION: If we can go back to my question, I
11 think your answer was that the percentage was in fact a
12 lot lower, but 111 is still a significant number dealing
13 with a rule of the Commission that says one must have a
14 filed rate, and to have this rate complete we need two
15 parts, the rate and the distance. Is there any
16 explanation why 111 carriers, knowing of the filed rate
17 doctrine, simply didn't pay the \$83?

18 MR. AUGELLO: Beginning in 1980, Congress
19 decided to open the doors up to trucking, and the
20 Commission's certificates, authorized carriers, suddenly
21 jumped from about 15,000 to 35,000. There were a lot of
22 owner-operators running their own trucks who never heard
23 of the ICC before, and they suddenly got saddled with
24 these tariff regulations, and you know, it was just a
25 complete breakdown of the former method of formalized

1 tariffs and everybody knew what they were doing. There
2 were a lot of people in the business who didn't know what
3 they were doing.

4 QUESTION: Well, it's the same reason
5 Mr. Taylor's client didn't charge the tariffed rate. They
6 thought the old rules were all gone.

7 MR. AUGELLO: Exactly.

8 QUESTION: Who cares about tariffs?

9 MR. AUGELLO: Exactly.

10 QUESTION: The ICC's not enforcing them any
11 more. A reasonable rate is what the market will bear,
12 and -- part of the same development, I assume, wasn't it?

13 MR. AUGELLO: That's right, but the shippers who
14 were in good faith negotiating these rates with carriers,
15 believing that the carrier was in full compliance with his
16 tariffs, are now being saddled with these billions of
17 dollars of undercharges.

18 QUESTION: Apropos of a comment you made a
19 moment ago, Mr. Augello, in your view, would it be
20 permissible, or have been, for a carrier to file a mileage
21 guide that said the distance from New York to Chicago is
22 300 miles so long as he did that with every single
23 shipper?

24 MR. AUGELLO: Yes. See, that's one of the
25 options he has. The Commission gives you three options to

1 file mileage rates, attaching that to the tariff, specify
2 what the mileage is, or refer to a guide.

3 QUESTION: And it doesn't matter how unrealistic
4 the mileage is?

5 MR. AUGELLO: I -- I don't -- no, I don't say
6 that. I'm saying he has that option of specifying what
7 the mileage is.

8 QUESTION: My question was --

9 MR. AUGELLO: How close?

10 QUESTION: 300 miles from New York to Chicago,
11 which, you know, is very optimistic.

12 (Laughter.)

13 MR. AUGELLO: I wouldn't expect anyone would do
14 that, but, you know, from a hypothetical standpoint I
15 suppose if a competitor found him doing that he'd have a
16 right to file a complaint, and --

17 QUESTION: I don't see why he couldn't file a
18 tariff that says I'm only charged for the first 300 miles
19 of the carriage, as sort of a -- if he does it to
20 everybody in a nondiscriminatory --

21 MR. AUGELLO: As long as there's no
22 discrimination.

23 QUESTION: He just in effect says, everybody
24 knows it's farther, but this is a -- you know, it's like
25 all sorts of discount deals that you run into.

1 QUESTION: I'm most of the way there by then.

2 (Laughter.)

3 MR. AUGELLO: That's a novel one, but -- I
4 suppose they could also say, you get a reduced rate if
5 your freight travels over Saturday night, like the
6 airlines.

7 But there are two components to a mileage rate,
8 the point I was trying to make.

9 QUESTION: It might save him a lot to truck in
10 Findlay, Ohio, too, I suppose.

11 MR. AUGELLO: And both components must be
12 published in a tariff. When they are not, it voids the
13 rate tariff that refers to that tariff.

14 You'll see a copy of all of the tariff pages in
15 our briefs and in our joint appendix, showing you just how
16 that works. There must be a sequence, and under this
17 Court's teachings, the filed rate doctrine must be
18 strictly enforced.

19 The point is, it must be strictly enforced
20 against carriers as well as shippers, and in this case --
21 and incidentally, this is the first case where the strict
22 application of the filed rate doctrine works against the
23 carrier's interest, but it's the carrier who violated the
24 law, and so we believe that the court below properly
25 granted summary judgment and dismissed the actions because

1 without an effective tariff there is no basis for an
2 undercharge. There's got to be the foundation of an
3 effective, lawful tariff before you can file an
4 undercharge claim.

5 QUESTION: It works in the bankrupt carrier's
6 interest. You said it worked against the carrier's
7 interest.

8 MR. AUGELLO: Yes, it does, because they're
9 trying to collect the undercharges. It doesn't matter
10 whether the carrier's bankrupt or not.

11 But in closing I just would like to --

12 QUESTION: Oh, I see, it means the absence of
13 the -- the filed rate doctrine is what -- the filed rate
14 is what the carrier is trying to enforce.

15 MR. AUGELLO: Yes, even though that filed rate
16 was not honored by him originally. He negotiated his
17 rates with the shippers, he told them that the rates are
18 on file, but then didn't adhere to the rates, but met the
19 market-driven competitive rates. That's what's happened
20 in this whole field, and then later on when his auditors
21 come in and get hired by the bankruptcy trustee, they look
22 for these defects.

23 QUESTION: You're saying he wants to have an
24 advantage from not having turned one square corner, but
25 not the disadvantage of not having turned the other.

1 QUESTION: Or to put it another way, he can have
2 his pound of flesh but not one drop of blood.

3 (Laughter.)

4 MR. AUGELLO: But I -- thank you, Your Honor.

5 QUESTION: Thank you, Mr. Augello.

6 Mr. Manning, we'll hear from you.

7 ORAL ARGUMENT OF JOHN F. MANNING

8 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE RESPONDENT

10 MR. MANNING: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 Under the Commission's longstanding and
13 consistent interpretation of the Interstate Commerce Act,
14 if a carrier wishes to meet its filed rate obligation by
15 referring to someone else's tariff, he must participate in
16 a continuing agency relationship with that other entity.

17 That interpretation, which goes back more than
18 50 years, is currently reflected in the Commission's void
19 for nonparticipation rule, which provides that if a
20 carrier allows its participation in an agency tariff to
21 lapse, the tariff becomes void as a matter of law as to
22 that carrier.

23 QUESTION: What's the reason for that
24 nonparticipation rule, Mr. Manning? Is it really just to
25 enable the person who files the other tariff to be able to

1 collect \$83, or is there some other reason for it?

2 MR. MANNING: Well, as the ICC indicated in its
3 Wonderoast decision, which is cited in our brief and which
4 appears in 8 I.C.C. 2nd, that doctrine is an
5 interpretation of the statutory requirement that appears
6 in two sections.

7 In section 10702 of title 49, it provides that
8 the carrier shall establish the rates for its
9 transportation services subject to the jurisdiction of the
10 Interstate Commerce Commission under the relevant
11 subchapter, and section 10762 of title 49 provides that
12 the carrier shall file a tariff containing those rates,
13 and so in effect the ICC has interpreted the statute in a
14 way that places the responsibility on the carrier to set
15 its own rates.

16 Now, the practical reason, I think, for the
17 policy is that these tariffs are very complicated and
18 expensive to put together, and a lot of tariffs are put
19 together by so-called rate bureaus which compile this
20 information and set up the system of rules and practices
21 and so forth that govern the transportation subject to the
22 jurisdiction of the act, and if there were not a
23 participation requirement in the ICC's rules, then
24 everyone would literally free ride on these agency tariffs
25 simply by filing a tariff that referred to the agency

1 tariff.

2 That's why the ICC's rules are quite explicit in
3 saying that when a carrier who is a party to a tariff, and
4 that includes its own tariff, refers to a separate tariff,
5 and when its rates are governed by that separate tariff,
6 it must be a participant in that separate tariff as well,
7 and that requirement is contained in section 1312.27(e),
8 and I just want to pause for a moment and address
9 petitioner's claim that the decision in this case is
10 actually inconsistent with the ICC's regulations, when in
11 fact it is not.

12 The HGB Mileage Guide, the tariff from which
13 petitioners -- I'm sorry, from which Riss' participation
14 was cancelled, is governed by a provision contained in
15 section 1312.30, which is in on pages 9a and 10a of the
16 appendix to our brief, and on page 10a, subsection 4
17 provides that except as provided in the specified
18 subsection, which refers to Government publications, only
19 distance guides officially on file with the Commission may
20 be referred to. Now, that's another way of saying, as the
21 Commission explained in its Jasper Wyman decision, that a
22 distance guide is in fact a tariff.

23 Now, if you then turn to page 8a and look at
24 section 1312.27(e), the provision I've just cited, it says
25 that a carrier participating in a tariff which refers

1 to -- in tariffs which refer to and are governed by
2 separate tariffs, they shall also participate in those
3 governing separate tariffs, and that means that when a
4 carrier refers to a mileage guide, and when its rates are
5 governed by that mileage guide, it must also participate
6 in that mileage guide.

7 Now, there's one other provision I want to refer
8 you to, and that's the heart of this case, and that's
9 1312.4(d), which is cited on page 3a of our appendix, and
10 that provision says that a carrier -- and this -- I'm
11 starting at the third line down, after the word "however,"
12 a carrier may not participate in a tariff issued in the
13 name of another carrier or an agent unless a power of
14 attorney or concurrence has been executed. Absent
15 effective concurrences, or powers of attorney, tariffs are
16 void as a matter of law.

17 Now, we believe and the Commission has so held
18 in the Jasper Wyman decision as well as other decisions,
19 that if you read those three provisions together, they
20 require the conclusion that a carrier must participate,
21 must maintain an agency relationship with the publishers
22 of a mileage guide in order to be able to refer to that
23 mileage guide as part of its filed rate.

24 Now, Riss did not do that in this case, as
25 petitioners concede, and for that reason, although Riss

1 did have a filed tariff, its tariff number 501-B was on
2 file, it did not have a filed rate, because a shipper who
3 consulted Riss' tariff 501-B would be referred to the
4 mileage guide to determine the critical quantity term in
5 the tariff, and examining the mileage guide, the carrier
6 would see that the mileage guide in a notice that's in
7 bold letters on page 2 of that tariff --

8 QUESTION: Mr. Manning --

9 MR. MANNING: I'm sorry.

10 QUESTION: -- the last sentence of 1312.4 on
11 page 3a of the appendix of your brief says, "Should a
12 challenge to a tariff be made on this basis, carriers will
13 be required to submit the necessary proof. What sort of a
14 challenge would be made by a carrier on that basis?"

15 MR. MANNING: Well, that refers to -- I think
16 that that sentence refers to the kind of proceeding that
17 Mr. Augello described in which HGB might come in and say,
18 there are 111 carriers who refer to our mileage guide, but
19 they haven't maintained their powers of attorney, they
20 haven't paid their participation fees, and what the
21 Commission has done in those cases, and there are two
22 recent cases that involve this, both of which are cited in
23 Mr. Augello's brief, what the Commission will do is, it
24 will issue an order to the carriers either to reinstate
25 their participation in the Mileage Guide tariff, or to

1 cancel any reference to that participation.

2 QUESTION: But the sentence says carriers shall
3 submit the necessary proof. That suggests to me that it's
4 a carrier -- that a -- would be challenging it.

5 MR. MANNING: No, no, I think that means that if
6 someone challenges the tariff on the ground that a carrier
7 has not --

8 QUESTION: I see.

9 MR. MANNING: -- maintained, then the carrier
10 has to show that it has participated.

11 QUESTION: Okay.

12 MR. MANNING: And that raises an important
13 point, which --

14 QUESTION: Mr. Manning, the Chief Justice's
15 question brings up something that has -- seems to me to
16 underlie this whole matter. You've done a very good job
17 of telling us why a component of the rate has not been
18 filed, but the question is, what should the consequence of
19 that be, and the ICC says the cornerstone of this whole
20 thing is the filed rate.

21 Then there's an absence, an incomplete aspect of
22 this tariff, and instead of saying, carrier, you make that
23 tariff complete, you pay your \$83, it says, well, then,
24 all bets are off, and we have no filed rate, when the
25 filed rate is supposed to be so important. It's your

1 solution to say, we get rid of the filed rate, instead of,
2 if you are true to that the filed that is fundamental to
3 this whole regime, like it or not, to say, measure up. Do
4 what's necessary to have a filed rate.

5 MR. MANNING: Well, the ICC does believe that
6 the filed rate and the filed rate doctrine are central to
7 the whole scheme of regulating the transportation
8 industry, and the ICC does -- has in recent years taken an
9 aggressive stance in enforcing the requirement of
10 participations. In fiscal year 1983, I am advised by the
11 Commission, the Commission entered 24 consent decrees with
12 carriers who had let their participations in mileage
13 guides and other tariffs lapse, and had sought and
14 obtained one injunction, and the proceeding that
15 Mr. Augello referred to, which is in 9 I.C.C. 2nd., was a
16 proceeding in which HGB came to -- the Household Goods
17 Carriers Bureau came to the ICC and said, we are aware
18 that this certain number of carriers have not participated
19 in our mileage guide but are referring to it, and the ICC
20 issued an order pursuant to its broad remedial powers
21 saying that these carriers either had to make their
22 participation current or strike any reference to the HGB
23 Mileage Guide from their tariffs.

24 Now, the consequence of that obviously is that
25 if they do not have a filed rate, any filed rate that

1 covers transportation, it is unlawful for them to
2 undertake transportation that's covered by the act.

3 QUESTION: This is really a new belief in the
4 centrality of filed rates by the Commission after our last
5 few decisions. It's fair to say that during the period at
6 issue here, the Commission didn't believe in the
7 centrality of filed rates.

8 MR. MANNING: Well, I think -- I mean, I think
9 that a lot of the problems that have arisen in this case
10 and that are percolating up through the system do come
11 from the era prior to Maislin in which the Commission was
12 taking a less aggressive stance about the centrality of
13 the filed rate and had a more tolerant view of negotiated
14 rates.

15 QUESTION: But you're saying now, at least, post
16 Maislin, the Commission is proceeding logically and
17 consistently.

18 MR. MANNING: Post Maislin the Commission is
19 enforcing this requirement, yes, it is.

20 Before I close I'd like to make one final point,
21 and that is the retroactivity point.

22 QUESTION: Well, may I ask why --

23 MR. MANNING: Oh, of course.

24 QUESTION: -- in this very situation the
25 Commission didn't say, if it is indeed saying the filed

1 rate is it, didn't say, when such -- when we detect such a
2 thing, then we require the carrier to join, pay all the
3 back dues, and slap a penalty on them. Wouldn't that be
4 the most effective way, if what we were genuinely
5 concerned about was maintaining the filed rate, instead of
6 saying, well, they didn't comply, therefore we allow the
7 secret rates to operate?

8 MR. MANNING: Well, that might be -- that might
9 be an appropriate exercise of the Commission's remedial
10 discretion. That would obviously be a matter for the
11 Commission to decide in the first instance. I would
12 simply point out that this case arises from a private
13 lawsuit filed by Security Services, Incorporated against
14 the K Mart Corporation, and it was not a proceeding before
15 the Commission.

16 QUESTION: Yes, but you are supporting the
17 result that says, you missed your \$83 so all bets are off
18 and the privately negotiated rate is what sticks.

19 MR. MANNING: That is correct. Whatever
20 remedial action the Commission may take in the future
21 concerning the enforcement of the filed rate, the fact
22 remains that in this case there was no filed rate, and in
23 order for petitioner to sustain its undercharge claim it
24 must affirmatively point to and rely on the existence of a
25 filed rate.

1 QUESTION: Well, of course, I suppose it was
2 much too late to give a remedy looking to the future,
3 because the carrier was bankrupt, or out of business.

4 MR. MANNING: Well, that's true, the carrier is
5 not providing any --

6 QUESTION: -- do something that enabled them --

7 MR. MANNING: The carrier is not providing any
8 additional services.

9 QUESTION: This is looking at a situation when
10 that -- it's much too late to order that particularly.

11 I'm curious to know about the significance of
12 this case. I had the impression from that other opinion
13 we're talking about 40 percent of this package of
14 litigation. Do you agree with the estimate it's only 111
15 carriers out of 12,000?

16 MR. MANNING: Well, that's the only number that
17 is -- that the Commission has encountered in any official
18 way. I'm not sure where the --

19 QUESTION: So this is really kind of a fly speck
20 in the whole picture.

21 MR. MANNING: Well, if -- I mean, based on the
22 number of violations that have been brought to the
23 Commission's attention by HGB, which has every incentive
24 to police the nonpayment of dues by those who refer to is
25 mileage guide, I would think that the problem is not

1 particularly significant as a percentage of the total
2 participants.

3 If there are no further questions --

4 QUESTION: Were you going to attempt to address
5 the retroactivity?

6 MR. MANNING: Oh, I'd be happy to.

7 The Government's position is that this is not a
8 retroactive invalidation of the rule -- I'm sorry, of the
9 tariff. This is, as the Chief Justice pointed out,
10 precisely the same thing as if the carrier's own tariff
11 had expired or been cancelled.

12 The Commission's consistent view has been that
13 if a carrier cancels its own tariff, even if it's
14 accidental, that cancellation is effective without the
15 Commission's taking any form of action to validate or
16 formalize the cancellation, and here, the participation of
17 Riss in HGB Mileage Guide 100 tariff was cancelled by
18 operation of its agent, the Household Goods Carriers
19 Bureau.

20 That cancellation was duly published in a tariff
21 filed by HGB pursuant to Commission rules. Under
22 Commission rules, and that's specifically rule 1312.10(a),
23 if a power of attorney is cancelled, if a participation is
24 cancelled, that cancellation is not effective until it is
25 published in a tariff, and so in other words, the

1 cancellation only becomes effective when the public gets
2 notice of it, and in that respect it is very much like the
3 expiration or cancellation of the carrier's own tariff.

4 QUESTION: May I ask one other question?

5 MR. MANNING: Yes.

6 QUESTION: We were directed to the attention of
7 page 35 of the Joint Appendix, and treating that as though
8 it were a third document as part of all the tariffs.

9 Do you agree that that is a tariff, that notice
10 has the same presumptive effect in the sense that shippers
11 are presumed to know about that notice just as they're
12 presumed to know about everything in the filed tariff?

13 MR. MANNING: Oh, yes. Yes, Your Honor. I
14 mean, that is part of the HGB Mileage Guide 100 tariff,
15 and the shipper is on constructive notice of what's
16 contained in that notice, but we would say that even if
17 that notice were not part of the tariff, this would be the
18 same case, because the Commission's rules clearly state
19 that a tariff must list all of the participants in that
20 tariff, either in the tariff or in a separate
21 participating carrier's tariff, and that's 1312.13(c), and
22 the tariff 1312.17, which pertains to amendments -- that's
23 subsection (b)(2) -- also says that if a carrier's
24 participation in a tariff is cancelled, that cancellation
25 must be noted in the tariff.

1 QUESTION: Thank you, Mr. Manning. Mr. Taylor,
2 you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF PAUL O. TAYLOR

4 ON BEHALF OF THE PETITIONER

5 MR. TAYLOR: Thank you, Your Honor.

6 The voiding power that the Commission claims
7 doesn't come from failure to be listed in the tariff, it
8 comes from the failure to provide a private power of
9 attorney, failure to provide it to the publisher of the
10 distance guide, and the Commissioner has said those
11 documents are no longer used by us.

12 That's where the voiding power comes from, so at
13 the time -- now, they say, well, it only comes -- the
14 Government says, well, it only comes about when you cancel
15 your participation. Well, that's simply not the case.
16 They claim it comes --

17 QUESTION: Well, the Government -- it only comes
18 about effectively when notice is given to the public.

19 MR. TAYLOR: Well, that is not, however, what
20 the regulation says. The reg --

21 QUESTION: Is that the way it works in practice?
22 I mean, do you know of any instance in which the rule has
23 been evoked with respect to any carriage prior to the time
24 of the filing so that the public could find out?

25 MR. TAYLOR: Justice Souter, you can't possibly

1 know, because the powers of attorney are never filed.
2 When we don't know -- this power of attorney that Riss had
3 has disappeared. There was a search made for it, and it's
4 disappeared. We don't know when it actually was
5 cancelled.

6 We don't know -- this is a carrier that is in
7 bankruptcy proceedings. We don't know if in fact they
8 never did pay their fee, but one thing we know is that
9 this tariff, the 501-B, continued on the shelf. When a
10 tariff is cancelled, the ICC physically removes it from
11 the shelf. This tariff remained on the shelf.

12 With regard to --

13 QUESTION: Do you agree or disagree that the
14 publication of the Household Goods 100 is a tariff?

15 MR. TAYLOR: It is a tariff. Indeed, it is.

16 With respect to the proceeding to cancel the 111
17 tariffs, the Commission hasn't said that's a show cause
18 proceeding to state, why shouldn't we cancel them? Well,
19 if they are void as a matter of law, there really is no
20 reason to cancel them. You just take them off the shelf.
21 They have allowed the opportunity to remedy that
22 situation, recognizing that the tariffs that refer to it
23 are still on the shelf, still relied on by the parties.

24 In addition, this 111 is just a starting number.
25 There is record in the Jasper Wyman proceeding that was

1 attached to Overland's brief that said on page -- their
2 appendix page 8 of the amicus brief, affidavit by Don
3 Norman, "As an example, a study of filings for the months
4 of April and May 1991" -- a 2-month period -- with the
5 Commission, shows that more than 230 carriers filed
6 tariffs that contained rates which referenced the
7 Household Goods Mileage Guide as a methodology for
8 determining miles applicable to those rates. These
9 publications have been accepted and passed to the tariff
10 files without criticism or rejection by the ICC. They
11 simply did not enforce it.

12 QUESTION: Well, wait -- wait. It just said that
13 that many referred to. Did it say that many carriers who
14 were not participating?

15 MR. TAYLOR: That continues on. They were not
16 participants.

17 QUESTION: 230 out of 12,000.

18 MR. TAYLOR: Yes, even though they did not --
19 that's 230, Justice Stevens in a 2-month period. That's
20 what that is. The Commission during this time period was
21 simply not enforcing this regulation.

22 The other issue that we have to deal with is,
23 assume that --

24 QUESTION: All of the relevant events in this
25 case come up pre-Maislin.

1 MR. TAYLOR: Yes. Yes, they do. Well, the
2 actual shipping transactions came up pre-Maislin. The
3 question you deal with, now you have -- assuming their
4 argument is right, and you can't use the mileage guide,
5 does that mean you have an incomplete tariff? There's
6 nothing in the law that says you have to have miles, a
7 booklet of miles in order to determine mileages.

8 The same way Mr. Augello talked about being able
9 to manipulate mileages, you can manipulate weight. You
10 have rates that are in cubic feet. You can manipulate
11 that. There's all sorts of things that you can manipulate
12 that would be illegal, but a mile is something that's
13 finite.

14 This Court said, in a case called Hewitt Robbins
15 v. Eastern Freightways in 1962, that a shipper is entitled
16 to receive the rate over the cheapest route available.
17 There's nothing that says tariffs have to be perfect. If
18 we can't use the mileage guide, if you determine somehow
19 that this reference was illegal, you still have this
20 tariff that continued to be on the shelf that people
21 continued to rely on. By treating that tariff as void, by
22 putting blinders on and saying, that tariff was there and
23 accepted, nobody ever challenged is nonexistent, well
24 then, of course, you're doing what Maislin says you
25 shouldn't do. You're allowing a negotiated rate to

1 supersede a tariff that may have some imperfections, but a
2 tariff that disclosed a rate that the public relied on.

3 Thank you very much.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Taylor.

5 The case is submitted.

6 (Whereupon, at 2:00 p.m., the case in the above-
7 entitled matter was submitted.)

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:

SECURITY SERVICES, INC., Petitioners v. K MART CORPORATION
No. 93-284

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BY *Ann Marie Federico*

(REPORTER)

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