

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: INTERSTATE COMMERCE COMMISSION, Petitioner  
v. TRANSCON LINES, ET AL.

CASE NO: No. 93-1318

PLACE: Washington, D.C.

DATE: Tuesday, November 1, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 INTERSTATE COMMERCE COMMISSION :

4 Petitioner :

5 v. : No. 93-1318

6 TRANSCON LINES, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 1, 1994

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 11:05 a.m.

13 APPEARANCES:

14 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,  
15 Department of Justice, Washington, D.C.; on behalf of  
16 the Petitioner.

17 LEONARD L. GUMPORT, ESQ., Los Angeles, California; on  
18 behalf of the Respondents.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 93-1318, Interstate Commerce Commission v.  
5 Transcon Lines.

6 You may proceed, Mr. Wallace.

7 ORAL ARGUMENT OF LAWRENCE G. WALLACE

8 ON BEHALF OF THE PETITIONER

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

11 Since 1920, the Interstate Commerce Act has  
12 prohibited common carriers from delivering freight on  
13 credit except pursuant to regulations adopted by the  
14 Interstate Commerce Commission governing credit  
15 transactions, and that prohibition was extended to motor  
16 carriers when they came under the ICC's jurisdiction in  
17 the Motor Carrier Act of 1935. Prior thereto, it was  
18 focused on railroads, of course.

19 The ICC first adopted credit regulations in 1920  
20 and from 1920 until 1988 those regulations contained no  
21 authorization of liquidated damages for late payment of  
22 freight charges. The only authorized remedy was to  
23 collect the prescribed rate for a timely payment plus  
24 interest for the delay.

25 In rulemakings in the late 1980's, the ICC for

1 the first time, at the behest of the American Trucking  
2 Association and other carrier interests, authorized  
3 liquidated damages for collection expense charges in the  
4 regulations, and those are set forth beginning at page 83a  
5 of the appendix to our petition, subpart g of the  
6 regulations, entitled "Collection Expense Charges."

7 In an amicus brief filed in our support by the  
8 Health & Personal Care Distribution Conference and some  
9 other shipping associations, on page 4 and 5, the course  
10 of the rulemaking proceedings is recounted and the  
11 citations are given.

12 The shipping interests were, of course,  
13 participants and quite concerned about unfairness to them  
14 that may eventuate and, because of that, the ICC included  
15 initially in the 1988 regulations and added in the revised  
16 regulations in 1989 certain conditions for the collection  
17 of these liquidated damages which, it is undisputed, were  
18 not complied with in this case.

19 Those include from, beginning with the provision  
20 that was in the original 1988 regulations and was  
21 retained, a requirement that the original bills advise  
22 shippers of the consequence of late payment. That is set  
23 forth on page 86a. It's subpart (c).

24 And the two provisions that were added in 1989  
25 to further protect shippers from the unfair practices are

1 set forth first on page 85a, and that is subpart  
2 (g)(2)(vi), that revised bills have to be issued within a  
3 90-day period after the original credit period had  
4 expired. That also admittedly was not complied with.

5 And then on page 84, subpart (iii) of (g)(2), it  
6 says that the loss of discount, or the liquidated damages,  
7 cannot be applied on an aggregated basis but can only be  
8 applied on separate and independent freight bills. There  
9 are obviously great economies of scale in aggregate  
10 collections, and there was concern that aggregate  
11 collections would be made, particularly after carriers  
12 became insolvent, and there's a specific reference in that  
13 provision to a bankruptcy trustee attempting to collect on  
14 an aggregate basis.

15 So what we are concerned with here is an effort  
16 that was made by respondent, as the trustee for this  
17 insolvent carrier, to bill shippers from several years  
18 earlier and collect additional payments, including these  
19 very heavy liquidated damage charges, an effort that was  
20 specifically foreseen by the Commission in adopting the  
21 regulations authorizing credit transactions, and --

22 QUESTION: Mr. Wallace, could you clarify for me  
23 what this -- what you've been calling the liquidated  
24 damages which the respondents call the bureau rate, when,  
25 other than in the context of liquidated damages for

1 failure to pay on time, would this bureau rate apply, and  
2 in connection with that, what rate would apply to someone  
3 who is shipping these same goods on these same routes who  
4 pays on delivery, who doesn't get credit terms? That  
5 wouldn't be the bureau rate, would it? It would be  
6 some --

7 MR. WALLACE: That is correct. It would be the  
8 same discount rate that applies to the credit  
9 transactions, plus there can be a service charge for the  
10 delayed payment in the --

11 QUESTION: But wouldn't -- I'm positing no delay  
12 in payment. Wouldn't there be something even more  
13 favorable than the discounted rate? The shipper who pays  
14 on delivery, who's not asking even for 30 days, is that  
15 also --

16 MR. WALLACE: That could be, and as far as I'm  
17 aware was, the same discount rate, although there might be  
18 some further discount for cash payment which is not  
19 reflected in anything I've read in this case. Perhaps  
20 Mr. Gumport could clarify that.

21 QUESTION: So does the bureau rate -- it  
22 certainly doesn't apply to one who pays promptly. Does it  
23 apply to anything other than this liquid -- as a  
24 liquidated damage --

25 MR. WALLACE: So far as I'm aware, it does not.



1 There's no indication that it does. It is not -- it is a  
2 source from which the real rates, the real filed rates  
3 are -- the discount rates, it's a source from which the  
4 discount rates are calculated.

5 So that it's a source -- it's a rate bureau  
6 source that determines the proportionality of what are the  
7 real rates, which are the discount rates, and the only way  
8 that this record reflects that those rates come into play  
9 at all is not as what I think are accurately regarded as  
10 rates for transportation, but as the measure of the  
11 liquidated damages for collection costs that is authorized  
12 under these regulations under the collection expense  
13 charges in little point (ii) at the top of page 84a of the  
14 appendix. That is one method of calculating liquidated  
15 damages that is authorized under this rule, if the rule is  
16 complied with.

17 Now, the rule was designed specifically to  
18 forestall precisely the problem that arose here by  
19 conditioning the availability of these liquidated damage  
20 charges on compliance with certain safeguards for the  
21 shippers.

22 QUESTION: Well, could the trustee, in an action  
23 brought by the shipper, raise this as a defense?

24 MR. WALLACE: Well, ordinarily it's -- it's the  
25 other way around that it occurs. The shippers have made

1 their payments and would not be bringing an action. It's  
2 the trustee who is trying to get additional payments from  
3 the shippers through the bankruptcy proceedings.

4 He has made claims against them, and the -- this  
5 Court's holding in Southern Pacific Transportation Company  
6 v. Commercial Metals suggests that the shippers cannot  
7 themselves raise a defense, and we have briefed the case  
8 on that assumption.

9 QUESTION: Well, I was going to ask you, do you  
10 have a position as to whether or not the defense is  
11 available in the action itself?

12 MR. WALLACE: We have briefed the case on the  
13 assumption that it would not be available to the shippers  
14 under the rationale of the Commercial Metals case, but I  
15 think in candor an argument could be made that Commercial  
16 Metals should not extend that far because what was  
17 directly involved in Commercial Metals was an effort not  
18 to pay the transportation rate itself, which --

19 QUESTION: Well, if it's an invalid rate, then  
20 under our K Mart line of -- under the K Mart case, it  
21 would seem to me that it's just a nonenforceable rate in  
22 the court, and it would seem to me that that would almost  
23 have to be the premise if you're to prevail here. I'm not  
24 quite sure why there should be a difference.

25 MR. WALLACE: Well, we do take some solace from

1 the K Mart case. I don't want to overdraw the analogy,  
2 because the Court determined there that there was no  
3 valid, filed rate. There was a rate that could be  
4 ascertained from tariff filings and the Court said that  
5 that could not prevail over a violation of the  
6 Commission's regulations, and in that way the case is very  
7 analogous to our case.

8 But Commercial Metals held, in the context of an  
9 effort by the shipper not to pay the transportation charge  
10 at all, the transportation rate, that the shipper could  
11 not raise that as a defense, that if there's to be a  
12 challenge to it because of violation of the Commission's  
13 credit regulations, and that is the only case of this  
14 Court that deals with a claim of violation of the credit  
15 regulations, that is to be enforced in the courts by the  
16 ICC.

17 The reason I think that an argument could be  
18 made by shippers that Commercial Metals doesn't extend as  
19 far as this case is because in this case what is sought to  
20 be collected is not the rate for transportation or  
21 services that the statute requires to be in a tariff as a  
22 rate filing. That rate is what would be payable in the  
23 transaction if the payment were made promptly, plus  
24 whatever interest there would be for delay in payment,  
25 precisely what the ICC's requested injunction would limit

1 the trustee to collecting here.

2 What is sought to be collected in addition are  
3 these liquidated damages called collection expense charges  
4 authorized by the regulation beginning on page 83a, which  
5 are in the tariff, but not because the statute requiring  
6 the rates for transportation or services require it to be  
7 in the tariff -- those statutes we've set forth in our  
8 brief on page 74a and 75a of the appendix to the  
9 petition -- but instead it's because the regulation itself  
10 requires that those liquidated damage rates be in the  
11 tariff.

12 They're entirely a creature of the regulation,  
13 and that is on 84a of the petition appendix under 2(i),  
14 "Shall be described in the tariff rule," and (ii) says,  
15 "Shall be applied without unlawful prejudice and/or unjust  
16 discrimination."

17 Those requirements are creatures of the  
18 regulation, just as the authorization to collect these  
19 charges at all are creatures of the regulation, and the  
20 Commission, as I started to say at the outset, is acting  
21 in an area where Congress expressly relied on the  
22 Commission's regulations to set the rule.

23 Congress proscribed altogether any credit  
24 transactions here except pursuant to regulations which the  
25 Commission may adopt, so the Commission was acting really



1 at the zenith of its regulatory powers in fulfilling a  
2 mandate that Congress expressly relied on the Commission  
3 and only the Commission to fulfill here.

4 So regardless of whether the shippers could  
5 raise a defense, what Commercial Metals looked to was an  
6 even more venerable provision of the act that dates back  
7 to the original Interstate Commerce Act in 1887, the  
8 statutory authority for the Commission to bring an  
9 enforcement action in Federal court, and the Court in  
10 Commercial Metals emphasized that that could be an  
11 injunctive action to enforce the credit regulations.

12 It should be remembered that at the time of the  
13 Commercial Metals decision in 1982, the credit regulations  
14 did not yet authorize this liquidated damages for the cost  
15 of collection, and the only defense being made by the  
16 shipper was a defense not to have to pay the filed rate  
17 for transportation itself.

18 So there might have been anticipation that the  
19 Commission would be unlikely to bring an injunctive action  
20 which would say that the carrier should not be paid at all  
21 for the transportation, even in the circumstance where the  
22 carrier did not fully comply with the credit regulations,  
23 but at least as the Court interpreted the act, that was to  
24 be left to the Commission's enforcement authority rather  
25 than an equitable defense by the shippers.

1 Well, since the conditions admittedly were not  
2 complied with for assessing the liquidated damages, it  
3 might seem obvious, in light of Commercial Metals and the  
4 Commission's enforcement authority in 49 U.S.C. 11702 that  
5 I've referred to, that the Commission's action to enjoin  
6 this belated effort of the trustee acting in perfect good  
7 faith to try to enhance the value of the estate, to enjoin  
8 this effort to collect liquidated damages when these very  
9 carefully constructed conditions had not been complied  
10 with to the obvious prejudice of the shippers whom the  
11 conditions were designed to protect, and that the trustee,  
12 standing in the shoes of Transcon, should be relegated to  
13 the historic remedy that existed from 1920 to 1988 of the  
14 transportation charge plus interest for any lateness in  
15 the payment, obviously a remedy that could not be said to  
16 be incompatible with the act.

17 The court of appeals, however, said no, that  
18 that rather obvious conclusion should not be reached  
19 because of the filed rate doctrine as it understood that  
20 doctrine to have been applied by this Court in Maislin  
21 Industries v. Primary Steel.

22 Now, we think that this was misconceived by the  
23 court of appeals from the outset, and the first thing to  
24 be said is that Maislin, in contrast to this case,  
25 involved an effort to enforce an unfiled rate, the

1 negotiated rate which was never filed, but under the  
2 Commission's then negotiated rates policy was to be  
3 enforced in preference to the actual filed rate.

4 And Maislin itself, in footnote 11 of the  
5 Maislin opinion, pointed out that the case was therefore  
6 different from prior decisions of the Court in which the  
7 question was which of two filed rates should be applied,  
8 rather than an effort to depart from the filed rate  
9 schedule altogether.

10 And we think that that footnote applies a  
11 fortiori in this case, because here it's not a choice  
12 between two filed rates for transportation, it's a choice  
13 between the filed rate for transportation, which the  
14 Commission says the trustee is entitled to, and this other  
15 charge of liquidated damages that is not a filed rate for  
16 transportation within the meaning of the statutes that  
17 require rates for transportation and services to be  
18 provided, but as I previously explained is entirely a  
19 creature of the regulations which is required to be in the  
20 tariff only because the regulations require it to be in  
21 the tariff. That is the source of the obligation.

22 Then this Court decided *Reiter v. Cooper* after  
23 the court of appeals' initial decision, which we thought  
24 made the error more manifest because *Reiter* established  
25 quite clearly the principle that Maislin did not mean that

1 the filed rate doctrine would preclude claims and defenses  
2 that are specifically accorded by the act itself, such as  
3 the Commission's express statutory authority to bring an  
4 action for an injunction to enforce its credit  
5 regulations.

6 So when we petitioned for certiorari for the  
7 first time in this case, we suggested that the judgment be  
8 vacated and the case remanded for reconsideration in light  
9 of Reiter v. Cooper, which is the course that the Court  
10 took, but on remand the court of appeals reached the same  
11 conclusion, basically holding that the ICC statutory  
12 enforcement authority should be subordinated to its view  
13 of the filed rate doctrine, which is --

14 QUESTION: Mr. Wallace, did that occur in the  
15 Ninth Circuit after reargument and fresh briefing, or when  
16 the response to Reiter --

17 MR. WALLACE: It was rebriefed, I'm told. I  
18 have to get some help from the --

19 QUESTION: -- and reargued before the same --  
20 not reargued, just rebriefed.

21 MR. WALLACE: Not reargued, just rebriefed,  
22 apparently.

23 So it seemed to us that what the Court held was  
24 merely, to the contrary of Reiter, that the express  
25 statutory provision should be subordinated to the Court's



1 view of the filed rate doctrine, which is just the  
2 opposite of the way the Court came out in Reiter.

3 And it also -- in its rationale on remand it  
4 seemed to us the Court intruded into and effectively  
5 nullified the ICC's enforcement discretion with respect to  
6 what remedy it can seek among the remedies expressly given  
7 to the Commission for the credit regulation violations,  
8 and the Ninth Circuit said other remedies will suffice.

9 But those other remedies, while they might  
10 suffice against operating characters -- carriers because  
11 of their prospective nature, would be of little  
12 assistance, if any, in the context of the trustee in  
13 bankruptcy, who is trying to dun shippers for these  
14 charges years after the shipment.

15 QUESTION: Mr. Wallace, I'm not sure I quite  
16 understand what the Government's position is regarding  
17 provisions that are in rate filings because they are  
18 required to be there by these regulations. Is it your  
19 position that somehow they do not enjoy the protections  
20 that other provisions of the rates enjoy?

21 MR. WALLACE: Well, I wouldn't say quite that  
22 they don't enjoy the protections, but it is important that  
23 they're not required by statute to be filed rates that  
24 govern, rather than any contract to the contrary, the  
25 payment for transportation and services, and --

1 QUESTION: Aren't there a number of things that  
2 might be optionally included in rates but do not have to  
3 be included in rates?

4 MR. WALLACE: We think that these are rules  
5 relating to the rates, rather than rates themselves, rules  
6 about what is to be done in the nonpayment, but part of  
7 the relevance of this in the case is that respondents are  
8 arguing in some of their amici that there would be  
9 discrimination if these rates were not evenhandedly  
10 applied to all shippers, even though long after the fact  
11 and even though there were violations of these  
12 regulations, but the prohibition --

13 QUESTION: Do you think that's because of  
14 enforcement discretion, because you could move against  
15 some and not against others?

16 MR. WALLACE: Well, I don't want to make their  
17 argument for them. What I'm trying to point out is that  
18 the prohibition against unjust discrimination that is  
19 involved here is only the prohibition in the Commission's  
20 own regulations, which the Commission is entitled to  
21 considerable deference in construing, since these charges  
22 are entirely a creature of these regulations to begin  
23 with.

24 I'd like to reserve the balance of my time, if I  
25 may.

1 QUESTION: Very well, Mr. Wallace.

2 Mr. Gumport.

3 ORAL ARGUMENT OF LEONARD L. GUMPORT

4 ON BEHALF OF THE RESPONDENTS

5 MR. GUMPORT: Mr. Chief Justice, and may it  
6 please the Court:

7 The Government concedes in its brief in this  
8 Court that the loss of discount tariff provision is  
9 lawful. The Government also concedes in its brief in this  
10 Court that the regulations still do not create a defense  
11 to payment of the filed rate assertable by shippers.

12 This is therefore a simple case, because  
13 Congress has explicitly addressed the issue in the  
14 statute. It's much easier than Maislin. The carrier,  
15 unless and until this tariff is rendered ineffective, set  
16 aside, or suspended, must, under pain of civil and  
17 criminal penalties, enforce the concededly lawful loss of  
18 discount tariff provision.

19 The Government's position to the contrary is  
20 contradicted by the express language of the statute, it's  
21 contradicted by the legislative history of the statute,  
22 it's contradicted by the decisions of this Court from the  
23 1907 Texas Abilene decision through this Court's 1994  
24 decision last term in MCI Telecommunications, and it's  
25 contradicted by the ICC's own interpretation of its credit

1 regulations.

2 QUESTION: Not if you read the filed rate as the  
3 discounted rate, and the liquidated -- what you call the  
4 bureau rate, what they call the liquidated damage  
5 provision, if you read that as simply a credit term,  
6 not -- the filed rate, the rate is the discounted rate.  
7 Then, if you don't pay up on time there's this liquidated  
8 damage provision.

9 MR. GUMPORT: Justice Ginsburg, if one could  
10 reasonably do that, that would be right, but in this case  
11 it was impossible to do that, and there's at least four  
12 reasons why it's impossible.

13 First of all, the tariff is unambiguous.  
14 There's no dispute that under the express terms of the  
15 tariff a shipper is not entitled to the discount unless it  
16 pays the tariff charge within 90 days, and only then --  
17 only then is it entitled to the discount, and when certain  
18 shipper amici tried to argue to the contrary, they had to  
19 change the language of the tariff to make that argument.

20 QUESTION: Why shouldn't the Commission's own  
21 rules be treated as a supplement to the tariff, since  
22 admittedly you can have this higher rate, bureau rate,  
23 liquidated damage rate, you can have it only by virtue of  
24 the credit provisions, so why not say, as a supplement to  
25 this tariff, we read in the ICC conditions, forgetting the



1 liquidated damages, put it in the bill, 90 days passes,  
2 send them another notice -- why shouldn't those ICC credit  
3 regulations in effect be treated as a supplement to the  
4 tariff?

5 MR. GUMPORT: There are several reasons, Your  
6 Honor. First of all, it's contrary to this Court's  
7 decision in Davis v. Portland Seed, where a carrier had  
8 filed a tariff that contained a higher rate for the  
9 shorter route than for the longer route, and the tariff  
10 was arguably unlawful on its face. It was contrary to the  
11 express provisions of the statute, and this Court said, it  
12 doesn't matter, it's the filed rate, and unless and until  
13 the ICC suspends or sets it aside --

14 QUESTION: That was for the purpose of a defense  
15 by the shipper, isn't that right --

16 MR. GUMPORT: Yes, Your --

17 QUESTION: -- not for purposes of suit by  
18 somebody else. It seems to me it just can't be that the  
19 Interstate Commerce Act means anything that you put -- you  
20 know, any provision you put in your rate filing has to be  
21 executable.

22 I mean, suppose you say, you know, any shipper  
23 who doesn't pay within 90 days, the CEO shall be shot.  
24 You're going to say, well, there it is, it's in the filed  
25 rate, the ICC didn't get around to striking it down, so we

1 have to go ahead and perform it. I mean, obviously it's  
2 unlawful and you can't perform it.

3 MR. GUMPORT: Your Honor, first of all the ICC  
4 could retroactively reject that kind of tariff, it could  
5 reject it, it could suspend it, and that is not this case.

6 QUESTION: But until it did that, you are  
7 entitled to go ahead and execute the contract, in fact  
8 obliged to, as you'd say, under --

9 MR. GUMPORT: Your Honor, let's take your  
10 hypothetical, precisely your hypothetical. If that was  
11 executed and somebody was killed under the terms of the  
12 tariff provision, there would be criminal penalties for  
13 doing that, and indeed, in Maislin, in the Maislin  
14 decision --

15 QUESTION: How can you have criminal penalties  
16 for complying with Federal law? You're telling me that  
17 you're obliged to perform that contract by the  
18 legislation --

19 MR. GUMPORT: Yes.

20 QUESTION: -- because it's there in the rate  
21 and it hasn't been set aside by the ICC?

22 MR. GUMPORT: Your Honor, it's --

23 QUESTION: Surely -- I mean, I think the law  
24 against murder is just a State law, and this is Federal  
25 law, which supersedes it.

1 (Laughter.)

2 MR. GUMPORT: Your Honor, it's a question of  
3 remedy, because in the Maislin case there was no question,  
4 and the Court pointed out in footnote 12 of its decision  
5 that if the carrier was lying to shippers about what it's  
6 real rates were, it was a crime, and nevertheless in  
7 Maislin the Court held that the ICC could not have a valid  
8 policy which created a remedy that operated to prevent the  
9 carrier from enforcing its filed rate.

10 And in this case we don't dispute that the ICC  
11 has a remedy. The ICC could criminally prosecute people  
12 who knowingly extended credit in violation of its  
13 regulations. We don't dispute that. What the --

14 QUESTION: But here there is another rate, and  
15 that does make it different.

16 MR. GUMPORT: Your Honor, let me --

17 QUESTION: Let me ask you just to clarify this  
18 point, which I think is clear, but if it's not, tell me.

19 The only reason that you can have this two-  
20 track system, the discounted rate which applies originally  
21 and the liquidated damage rate, the only reason you can  
22 have that liquidated damage rate is because of the ICC's  
23 credit regulations.

24 MR. GUMPORT: We disagree, Your Honor.

25 QUESTION: Where do you get the authority to put

1 in the two-track system, other than the credit  
2 regulations?

3 MR. GUMPORT: Your Honor, there is nothing in  
4 the regulations of the ICC that says you can't have a loss  
5 of discount tariff provision except under our credit  
6 regulations. There's nothing in those regulations that  
7 say that, nothing at all.

8 Let me return to your earlier question.

9 QUESTION: Please clarify for me, then, the  
10 extent to which you disagree with Mr. Wallace, who said  
11 this was not possible until the eighties rulemaking.  
12 Until then, you got the interest for late payment, it was  
13 only that rulemaking that brought in the credit  
14 regulations, and one way of calculating the liquidated  
15 damages was having this additional tariff. Is it true  
16 that you had these two-track systems, the discounted rate  
17 and the higher rate, before there were any credit  
18 regulations?

19 MR. GUMPORT: Your Honor, in 1985, the ICC  
20 authorized the filing of tariffs giving discounts for  
21 early payment, and in that 1985 regulatory decision they  
22 said, we're not sure you can do this, but we're now  
23 specifically authorizing you to do it. This denial of  
24 discount, I would submit, is no different, so that --

25 QUESTION: I'm sorry, I don't know that you've



1 answered my question. Did you -- were there these two-  
2 track tariff systems before the eighties rulemaking?

3 MR. GUMPORT: Your Honor, I don't know.

4 Let me return to your question as to whether  
5 there are two filed rates. There's only one filed rate.

6 The ICC, in its 1988 decision authorizing the  
7 filing of loss of discount tariff provisions, said that  
8 under the filed rate doctrine the carrier must enforce the  
9 loss of discount tariff provision.

10 In the trial court, before Judge Hill heard the  
11 issue that he disposed of by summary judgment, he  
12 specifically asked the ICC's counsel whether it agreed  
13 that the loss of discount tariff provision, which is a  
14 part of the rules tariff, whether the ICC agreed that the  
15 rules tariffs were a part of the carrier's filed rate  
16 within the meaning of Maislin, and the ICC's counsel  
17 responded, yes, I don't take issue with that.

18 The ICC also put in a declaration from a tariff  
19 expert, a Mr. Manning, on November 8, 1991, in support of  
20 its cross motion for summary judgment, and he said in his  
21 declaration that Transcon's TCON 625, which is the  
22 discount tariff, is governed by Transcon's TCON 103, which  
23 is the rules tariff, in which the loss of discount tariff  
24 provision appears.

25 So there is no dispute, and there was no dispute

1 in the trial court, and the evidence was only on one side  
2 on this issue, that this loss of discount tariff provision  
3 governs the rate. It sets the rate.

4 QUESTION: You don't consider it a liquidated  
5 damages provision. It's just a rate.

6 MR. GUMPORT: It's a rate. It doesn't matter  
7 what it's called, Your Honor, it's a rate, and even if it  
8 was unlawful --

9 QUESTION: Well, indulge me. I mean, suppose I  
10 think it makes a difference what it's called. Is it  
11 liquidated damages or is it just a different rate?

12 MR. GUMPORT: Your Honor, I think arguments  
13 could be made either way. My position would be it's a  
14 liquidated damages provision, but I think it's a rate.  
15 That's the important thing. It is a rate.

16 QUESTION: You say it's both.

17 MR. GUMPORT: Excuse me?

18 QUESTION: The credit regulations said one way  
19 of calculating liquid damages is what you have put in as  
20 the bureau rate, and you have followed that way of  
21 calculating liquidated damages, so was your answer to  
22 Justice Scalia that it's both?

23 MR. GUMPORT: My answer is, it doesn't matter,  
24 but my answer -- when put to the test of how would you  
25 characterize it, I would say it's a liquidated damages

1 provision. I would also say, it doesn't matter, because  
2 it is a rate, and the issue before this Court is the  
3 remedy, and Congress has said what the remedy should be.

4 QUESTION: I'm curious about the statute. Isn't  
5 there a statute here? I may not understand it correctly,  
6 but if I do, I thought that the -- there is a statute that  
7 governs the tariff, and it says that you can't have a  
8 tariff that allows a person credit, except "under  
9 regulations of the Commission," so the statute seems to  
10 say the only reason you could have this provision in the  
11 tariff is because you will file, follow, regulations of  
12 the Commission.

13 And now I take it what the Commission said is,  
14 you did follow regulations of the Commission when you put  
15 that in, you did follow regulations of the Commission when  
16 you accepted the freight on credit, but you did not follow  
17 the regulations of the Commission when you sought damages,  
18 because you can't seek damages aggregate, and you have to  
19 present your bill within 7 days, or something like that,  
20 under the regulations of the Commission.

21 MR. GUMPORT: But Your Honor, the question isn't  
22 whether the regulations were violated. The question is,  
23 what is the remedy for the violation of the regulations?

24 QUESTION: I know. I'm asking about the  
25 statute. It seems to me there is a difference between

1 this and the other cases, because here there is a statute  
2 that specifically governs. Now, maybe it doesn't. That's  
3 what I'm asking, though.

4 MR. GUMPORT: This statute's language says one  
5 important thing about what's to be in the regulations. It  
6 says that the regulations are to be regulations  
7 "preventing discrimination" and that --

8 QUESTION: Maybe I don't have it right. Mine  
9 says, "governing the payment for transportation and  
10 service and --

11 MR. GUMPORT: -- and preventing discrimination."

12 QUESTION: Yes, but I take it this was governing  
13 the payment for transportation.

14 MR. GUMPORT: Your Honor, there's no question  
15 that it's governing the payment, but the question is, what  
16 is the remedy, and the statutory language tells us not  
17 only that they govern payment but that they are to be  
18 regulations "preventing discrimination," and preventing  
19 discrimination is a judicially defined term.

20 It was judicially defined in this Court's Texas  
21 & Pacific Railway Company decision, v. Abilene Cotton, in  
22 1907 before these -- this statute was enacted, and in that  
23 case, which was quoted with approval in the MCI case --

24 QUESTION: You mean their regulations are  
25 unlawful because they don't deal with discrimination?



1 MR. GUMPORT: They are unlawful insofar as they  
2 are applied to create a judicial injunction preventing the  
3 carrier from performing its statutory duty to collect the  
4 filed rate, and that's because, just as in Maislin, there  
5 was a broad grant of power to the Commission to prohibit  
6 unreasonable practices.

7 Here we have a statute that uses the words,  
8 "preventing discrimination," and "preventing  
9 discrimination" are judicially defined words that mean  
10 adherence to the filed rate, so what these -- what the  
11 statute tells us is the one remedy that the ICC cannot  
12 provide for in its regulations is the remedy of directing  
13 the carrier not to adhere to its tariff rate.

14 QUESTION: And that's simply because of the  
15 term -- the statute says one of the things is preventing  
16 discrimination? You place all that weight on those two  
17 words?

18 MR. GUMPORT: I don't just place all that weight  
19 on those two words, which have been defined -- were  
20 defined by this Court before those words were put in the  
21 statute, and the definition was reaffirmed. I also place  
22 weight on the absolutely clear legislative history, which  
23 confirms that Congress meant what it said.

24 The legislative history, which was explained by  
25 this Court in the Commercial Metals case, was that the

1 credit rules of the Commission serve three basic purposes.

2 One is, they exist for the benefit of the  
3 carrier, and the ICC in its brief in this Court doesn't  
4 deny that, but here it's seeking to enforce the credit  
5 rules for the benefit of the shipper, and the credit rules  
6 are also to serve the additional two purposes of  
7 preventing discrimination, which this Court has always  
8 held, right through MCI, last term -- that there is an  
9 indissoluble unity.

10 That's -- those are the words of the Court in  
11 the Texas & Pacific case, those are the words of the Court  
12 in MCI Telecommunications, that there's an indissoluble  
13 unity between a carrier's duty to adhere to the filed rate  
14 and the statutory goal of preventing discrimination.

15 In addition, the Court also explained in  
16 Commercial Metals that the other purpose of the credit  
17 rules is to protect the working -- the capital structure  
18 of the carrier, yet here, the credit rules are to be  
19 applied to prevent the carrier from recovering funds that  
20 it needs to pay its creditors.

21 QUESTION: Well, why shouldn't the Commission  
22 have considerable discretion in interpreting its own  
23 regulation?

24 MR. GUMPORT: Because under Chevron, Your Honor,  
25 the Commission has no discretion to interpret its

1 regulations when Congress has specifically addressed the  
2 issue, and in this statute, which uses the words,  
3 "preventing discrimination," which is a judicially defined  
4 term --

5 QUESTION: That seems to -- I still think that  
6 just puts a great deal of weight, that it won't bear, on  
7 two words in a fairly long statute.

8 MR. GUMPORT: Your Honor, I can only -- I can  
9 only refer --

10 QUESTION: Well, I realize. I simply disagree  
11 with you on it, and you also rely very heavily on Maislin,  
12 but there have been two cases since then which suggest  
13 that Maislin, you know, is not the be-all and end-all in  
14 this thing.

15 MR. GUMPORT: This case is a far more compelling  
16 case than Maislin. Maislin involved a statute that was  
17 unqualified.

18 The Commission has the power to prevent  
19 unreasonable practices, and this Court said if a carrier  
20 commits an unreasonable practice the Commission can  
21 criminally prosecute the carrier, but what the Commission  
22 can't do because of the utterly central filed rate  
23 provisions which are subject to civil and criminal  
24 penalties for disobedience to, what it can't do is create  
25 basically a agency-made injunction against a carrier's

1 enforcing the filed rate.

2 QUESTION: Mr. Gumport, can I just clarify one  
3 thing? Are you contending that the credit regulations are  
4 invalid?

5 MR. GUMPORT: Invalid as applied, not on their  
6 face.

7 QUESTION: What -- are there any valid  
8 applications of the regulations?

9 MR. GUMPORT: Absolutely. The historical  
10 application of the credit rules, and the case law reflects  
11 this, is suing a carrier prospectively to not extend  
12 credit to shippers who won't pay the carrier's filed rate,  
13 because these regulations --

14 QUESTION: So the Commission's only remedy is to  
15 an injunction against future extensions --

16 MR. GUMPORT: Absolutely not, Justice Stevens.  
17 Other remedies include the right to award reparations to  
18 any shipper who can show that the bureau rate as applied  
19 is unreasonable --

20 QUESTION: Let me just -- I want to be sure I  
21 understand your position. You're not contending the  
22 regulations are invalid, merely the particular remedy is  
23 not authorized by the statute?

24 MR. GUMPORT: Absolutely. That's exactly it.

25 QUESTION: The regulations on their face do



1 command conduct that the ICC can command.

2 MR. GUMPORT: Yes, Your Honor.

3 QUESTION: And your client has not obeyed that  
4 command?

5 MR. GUMPORT: Your Honor, that's not --

6 QUESTION: Is that true?

7 MR. GUMPORT: That's not accurate, Your Honor.

8 My client is the bankruptcy estate of Transcon Lines.  
9 Transcon Lines shipped -- Transcon Lines' bankruptcy  
10 estate shipped no freight.

11 QUESTION: Let me just shorten it a little. Are  
12 you contending that you complied with the credit  
13 regulations in all respects?

14 MR. GUMPORT: I'm -- no, I am not, Your Honor.

15 QUESTION: Okay.

16 MR. GUMPORT: My position is, and I concede  
17 Transcon shipped freight before its bankruptcy. It  
18 shipped no freight after its bankruptcy. I concede that  
19 when --

20 QUESTION: What remedy is available today for  
21 the violations of the credit regulations by the carriers?

22 MR. GUMPORT: As to Transcon, there are multiple  
23 remedies. First, there is an award of reparations, and  
24 the ICC says in its brief in this Court that those can't  
25 be awarded, but it said in its 1988 decision reparations

1 can be awarded if the bureau rate is unreasonable. In  
2 addition --

3 QUESTION: No, that's if the rate is -- for  
4 violation of the credit regulations, what would the  
5 reparations be?

6 MR. GUMPORT: Well, reparations, reparations are  
7 to the extent that the rate being imposed is unlawful,  
8 reparations can be awarded. If this is an unlawful rate,  
9 let the Commission say so. It's simply not doing its job  
10 of saying what the rate should be.

11 QUESTION: Let's see about the "if." We --

12 MR. GUMPORT: Okay.

13 QUESTION: We -- it's conceded that the invoices  
14 when they were sent out did not have the credit terms.  
15 It's conceded that the 90-day notice was not sent out.  
16 Okay. Let's take those violations, Transcon now in  
17 bankruptcy court. What remedies does the ICC have for its  
18 admittedly valid credit regulations?

19 MR. GUMPORT: It can impose civil and criminal  
20 penalties on everyone who knowingly participated in those  
21 violations. It can do that, and on Transcon as well.  
22 What it can't do --

23 QUESTION: Could it impose a penalty equal to  
24 the amount you seek to collect?

25 MR. GUMPORT: Your Honor --

1 QUESTION: I mean, that's --

2 MR. GUMPORT: -- the penalties are a per-day  
3 penalty.

4 QUESTION: All right.

5 MR. GUMPORT: The penalties are a per-day  
6 penalty, and it's -- I --

7 QUESTION: Well, could it calculate a per-day  
8 penalty that would bring out that result and say, once you  
9 get to this limit, you can't collect anything more?

10 MR. GUMPORT: Your Honor, I don't know whether  
11 it could under the law. I think that -- I think one thing  
12 I would emphasize on that is, that -- it just doesn't  
13 matter from the standpoint of my case. I don't -- I don't  
14 care one way or the other.

15 QUESTION: Well, the thing that I'm puzzled  
16 about is, there's a valid regulation out there that's been  
17 violated, and the Commission says they want this remedy,  
18 and you're saying, well, there's some other remedy, but  
19 the other remedy that you describe is the functional  
20 equivalent of this one, as I understand it.

21 MR. GUMPORT: It's not, Your Honor, because  
22 under the Interstate Commerce Act so long as the rate is  
23 in effect there is a civil and criminal duty to comply,  
24 and the one remedy that they're asking for is what the  
25 statute commands they can't have. They can fine Transcon.

1 They can criminally prosecute the people who knowingly  
2 participated in this --

3 QUESTION: But the only one who's here at the  
4 moment is the trustee, so the ICC practically --  
5 practically, what can the ICC do to say, here's our credit  
6 regulations plainly violated, and we want to do something  
7 that will realistically enforce these rules?

8 MR. GUMPORT: Your Honor, I don't -- it seems to  
9 me that the ultimate sanction of the Government for people  
10 who violate its rules is to throw them in jail, and the  
11 people who used to run Transcon are all still around  
12 running another trucking company, and it would have a  
13 salutary effect on the trucking industry, if the ICC  
14 really wants to stop, make people comply with their  
15 regulations, to go out and prosecute them.

16 QUESTION: How about the trustee, because of the  
17 bill -- they were sent out with average balances instead  
18 of aggregating, instead of making a separate --

19 MR. GUMPORT: Your Honor, that's -- first of  
20 all, the regulations as interpreted by the ICC only apply  
21 to the following situation, and this is reflected in the  
22 decisions: a trustee or somebody else sends out a whole  
23 slew of bills in an envelope and says, unless you pay  
24 these right away within the 90-day time period, I'm going  
25 to deny you the discount and impose the higher bureau



1 rate.

2 There's no evidence in the record, and in fact  
3 it's the case that that was never done in the Transcon  
4 case. All that happened in Transcon was, Transcon shipped  
5 freight before it went under, it went into bankruptcy, and  
6 more than 90 days later, rate auditors were hired, and  
7 people were sued saying, you didn't pay the bills for the  
8 freight within 90 days, and therefore the -- by the  
9 unequivocal terms of Transcon's tariff, you must pay the  
10 bureau rate, which --

11 QUESTION: So the trustee gets the benefit of  
12 the sweep that Transcon did, it has this higher rate, but  
13 it's not saddled with any of the, even going to jail, that  
14 the Transcon people would have had.

15 MR. GUMPORT: Your Honor, if I was violating the  
16 credit regulations, I could go to jail, and if the rate  
17 imposed is an unlawful rate, and the Government concedes  
18 it is not an unlawful rate, the ICC could say, this is  
19 just too high. It's unlawful. You can't collect this  
20 money.

21 QUESTION: Mr. Gumport, why shouldn't it be  
22 considered impliedly part of any rate whatever the  
23 Commission's regulations demand with regard to that rate?  
24 Why shouldn't it simply be considered part of the filed  
25 rate? Even if you leave it out it's implied that, of

1 course, the other conditions required by the Commission's  
2 regulations apply?

3 MR. GUMPORT: Because that argument proves too  
4 much, Justice Scalia.

5 QUESTION: Okay.

6 MR. GUMPORT: Under that argument, the ICC could  
7 promulgate regulations just like it issued a negotiated  
8 rates policy in Maislin saying no carrier shall collect  
9 its filed rate, period, and Maislin should have come out  
10 the other way. It should have --

11 QUESTION: If Transcon had put in --

12 MR. GUMPORT: -- come out the other way.

13 QUESTION: No, no, no, that's --

14 QUESTION: -- just copied into its tariff the  
15 ICC's credit regulations, then you would lose, is that  
16 right?

17 MR. GUMPORT: I would be out of luck. I  
18 couldn't be here. What's interesting, Your Honor --

19 QUESTION: I thought it would be discriminatory  
20 as applied even in that case.

21 MR. GUMPORT: Your Honor, it would be -- that  
22 tariff would be invalidated by the court of appeals on  
23 Hobbs Act review under then-Judge Scalia's decision in  
24 Regular Common Carrier Conference v. United States in  
25 1986, where the D.C. Circuit wrote, you can't have a

1 tariff that really doesn't allow the shipper and the  
2 carrier to figure out what rate will really apply.

3 And the Commission was aware of that decision at  
4 the time it issued its decision approving these credit  
5 regulations. It didn't want, it knew that it couldn't  
6 have a tariff that had all these discretionary provisions  
7 in it. That's why it doesn't want to suspend this tariff,  
8 because there's lots of these out there. The carriers are  
9 using them.

10 This isn't the only loss of discount tariff  
11 that's like this. The Commission is in here not because  
12 it wants to stop carriers from disobeying its credit  
13 regulations, because there's lots of other --

14 QUESTION: I'm still curious about -- go back to  
15 the statute for one second. Regulations of the Commission  
16 governing payment for transportation and service and, you  
17 say, preventing discrimination.

18 MR. GUMPORT: Correct.

19 QUESTION: Well, fine. The Commission says we  
20 want notice given of these things because otherwise big  
21 shippers with big lawyers know and little shippers with  
22 little lawyers don't.

23 We want to have no aggregate, because we think  
24 otherwise the people who are customers of the trustee in  
25 bankruptcy will have to pay, the other guys won't.

1           We want to be certain, whatever the third one  
2   was, that you don't give, years later, notice, because we  
3   don't want them picking and choosing, all there to stop  
4   discrimination as well as transportation.

5           How do you respond to that?

6           MR. GUMPORT: And I'm saying they can enforce  
7   that any way they want to, except in one way, and that is  
8   to sue the carrier to prevent it from performing its  
9   statutory duty to charge and collect its filed rate unless  
10   and until --

11          QUESTION: Even the filed rate that  
12   discriminates, because it does discriminate, since it  
13   violates these regs.

14          MR. GUMPORT: Your Honor, I would disagree,  
15   because the Court has defined discrimination as being per  
16   se occurring when a carrier is disregarding its tariff  
17   rate. That is the teaching of the filed rate doctrine  
18   from Texas & Pacific Railroad v. Abilene Cotton through  
19   MCI Telecommunications.

20          The rule of this Court has always been, it is  
21   discriminatory when a carrier departs from its filed rate  
22   unless and until the ICC sets it aside, and in your  
23   hypothetical, Justice Breyer, the Commission could  
24   prosecute people for wilfully disobeying the credit  
25   regulations. It could also sue a carrier prospectively



1 saying, you've got to send out these reminder notices, you  
2 have to let people know, and it could get contempt  
3 penalties for violation of that injunction.

4 What it couldn't do is to say, you violated our  
5 credit regulations. Therefore, even though we've done  
6 nothing with your tariff, even though we concede that your  
7 tariff is lawful, even though the statutory provisions of  
8 the act say you must charge and collect your tariff  
9 provision and you shall go to jail if you disregard it, we  
10 still want an injunction against you stopping you from  
11 doing what the statute commands.

12 This is really a case about remedy. It's not  
13 about --

14 QUESTION: Suppose the credit regulations were  
15 written into the statute. You already told me if they  
16 were written into the tariff you'd be -- you'd have no  
17 case. Suppose they were written into the statute as  
18 distinguished from being regulations, would that make a  
19 difference?

20 MR. GUMPORT: It would make no difference, Your  
21 Honor, under Davis v. Portland Seed. It would make no  
22 difference. A tariff can be blatantly unlawful on its  
23 face, and unless and until the ICC suspends it, rejects  
24 it, cancels it, does something like that, the carrier must  
25 comply.

1           Now, I think, to go back to Justice Scalia's  
2   hypothetical, if I was the trustee and I found that there  
3   were some tariffs on file saying go out and kill people, I  
4   would petition the ICC to strike that tariff. That's what  
5   would happen. But I would have been duty bound to enforce  
6   it, unless and until they set it aside. I'd immediately  
7   start an enforcement proceeding.

8           But this is a case about remedy, and the one  
9   remedy that they cannot have under --

10          QUESTION: You're a hard man, Mr. Gumpert.

11          (Laughter.)

12          QUESTION: You better seek counsel before you do  
13   that.

14          MR. GUMPERT: Thank you. I can appreciate those  
15   remarks.

16          But it is a case about remedy, and the one  
17   remedy that they cannot have is an injunction to set --  
18   directing a carrier permanently to disregard a filed rate,  
19   and Mr. Chief Justice, those words, "preventing  
20   discrimination," as construed by this Court are  
21   controlling. In Maislin, there weren't those words in the  
22   statute, and the Court still found that the remedy could  
23   not be created that would force the carrier to depart from  
24   its filed rate.

25          Thank you very much.

1 QUESTION: Thank you, Mr. Gumport. Mr. Wallace,  
2 you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

4 ON BEHALF OF THE PETITIONER

5 QUESTION: Mr. Wallace, tell me why this is  
6 different from the case where -- that Justice Ginsburg  
7 asked about.

8 Even if the filed rate violated the statute, the  
9 filed rate doctrine would apply, and it would have to be  
10 set aside before it could be collected, and you're coming  
11 in and saying, ah, but if it violates a regulation, that's  
12 different.

13 MR. WALLACE: Well --

14 QUESTION: That doesn't seem to make much sense.

15 MR. WALLACE: -- that isn't the only thing that  
16 I'm saying. It's -- the suggestion that the Commission  
17 could strike this provision is really a rather impractical  
18 one. There's nothing on its face that's incompatible with  
19 the statute or the regulation.

20 This, the liquidated damages provision as it  
21 appears in the tariff could have been lawfully enforced if  
22 the conditions that were not complied with had been  
23 complied with, so there was no basis for striking it from  
24 the tariff.

25 If the tariff had also said, and these

1 liquidated damages can be assessed on an aggregated basis,  
2 not merely on an individual basis, that would have been a  
3 provision that the Commission could have struck from the  
4 tariff.

5 But what good would it have done the Commission  
6 to strike that from the tariff when under the respondent's  
7 submission the same result could be reached anyway,  
8 because the liquidated damages provision itself remains in  
9 the tariff, and that has to be enforceable regardless of  
10 violations of the safeguards that were placed in the  
11 Commission's regulation.

12 And I want to say, in response to a question  
13 raised by Justice Ginsburg, on page 33a of the petition  
14 for certiorari appendix the court of appeals discusses the  
15 meager case authority, in the first paragraph on that  
16 page, that existed about efforts to try to include  
17 liquidated damages provisions before they were authorized  
18 by regulation.

19 The Commission took the position in this  
20 litigation that those cases striking down those efforts to  
21 have them solely as a creature of tariff were correctly  
22 decided. They were -- only one of the district court  
23 decisions was reported, but that was all there was on the  
24 subject.

25 The great controversy that took place over a



1 period of 3 years in the late eighties would have been  
2 rather meaningless if carriers had been free to prescribe  
3 this for themselves in their tariff filings without  
4 authorization from the Commission. That's what the  
5 controversy in the rulemaking was about.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
7 Wallace. The case is submitted.

8 (Whereupon, at 12:04 p.m., the case in the  
9 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  
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The United States in the Matter of:*

*INTERSTATE COMMERCE COMMISSION, Petitioner v. TRANSCON LINES, ET AL.*

*CASE NO.:93-1318*

*and that these attached pages constitutes the original transcript of  
the proceedings for the records of the court.*

BY *Ann Marie Federico*

(REPORTER)