STATEMENT OF
JOSEPH CANNY
DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS
U.S. DEPARTMENT OF TRANSPORTATION
BEFORE THE SURFACE TRANSPORTATION SUBCOMMITTEE
OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING SHIPPER UNDERCHARGES
JULY 19, 1990

Introduction

Good morning, Mr. Chairman, and Members of the Committee. Thank you for inviting me here today to discuss the Department of Transportation's views regarding the "shipper undercharge" issue. Ten years after the substantial reforms of the Motor Carrier Act of 1980, much has been learned and much has been gained. One thing we have learned in the past year is that, had we achieved more complete economic deregulation of the trucking industry in 1980, this hearing would not be necessary in 1990.

Statement of the Problem

Partial deregulation has encouraged shippers and carriers to negotiate rates, in many cases in the form of discounts from tariff rates on file with the Interstate Commerce Commission (ICC). The negotiation of prices between buyer and seller is a common business practice for most industries, and we see no good reason, from a public policy perspective, why it should not be permitted in the trucking industry as well.

For the past several years, shippers have been besieged by undercharge claims and related court collection cases. These matters have arisen primarily from motor carrier bankruptcies and financial reorganization proceedings.

In a typical case, the motor carrier has negotiated a rate with the shipper, agreed to it either in writing or orally, and then filed the rate with the ICC either incorrectly or not at all. Such a negotiated discount rate is only legal if it is filed with the ICC. Common carrier truckers must still file all their tariffs with the ICC, although contract carriers have been exempt from this requirement since 1983, and, of course, all domestic air cargo shipments have been exempt from any such requirements since 1979.

If the discounting carrier subsequently goes out of business, the shipper may be sued by a collection agent. Trustees for some bankrupt carriers, attempting to maximize the assets to be distributed to the stockholders and creditors, have sold the carriers' old accounts receivable to auditors and collection agencies, who compare the freight charges paid with the actual tariffs on file at the ICC and in effect on the date of the shipment. If the charge on the bill is a discounted rate not on file, the auditor sends a bill to the shipper for the balance due, the "undercharge." Shipper representatives have estimated that about $100-200 million in undercharges are at stake.

Efforts to Solve the Problem

Should a shipper fail to pay these undercharges, the trustee or auditor may take the shipper to court to collect the difference between the filed rate and what was actually paid. In some cases, the courts have asked the ICC for its advice on what is the lawful rate. Applying its Negotiated Rates Policy the Commission would find that a carrier had engaged in an unreasonable practice if the facts showed that the shipper and carrier had negotiated a rate, the shipper reasonably relied on that rate, the negotiated rate was billed and payment at that rate was accepted, and the carrier willfully or otherwise failed to file the negotiated rate.

The Supreme Court, in its June 21, 1990 decision in Maislin Industries v. Primary Steel, overturned the Commission's Negotiated Rates Policy. It found that the underlying purpose of the Interstate Commerce Act requires that a motor common carrier publish its rates in a tariff filed with the Commission. The Court has consistently held that this statutory requirement, referred to as the "filed rate doctrine," forbids equitable defenses to the collection of the filed tariff. Moreover, it found that the Commission had not established that the failure to file the negotiated rate was an unreasonable practice which justified a deviation from the filed rate doctrine. Finally, the Court noted that the Motor Carrier Act of 1980 did not alter this statutory requirement. It observed that "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme...and did not see fit to change it..." Therefore, a legislative change is necessary to eliminate this archaic and obsolete requirement.

Last year a proposed legislative solution to the undercharge problem was agreed to by certain shipper and motor carrier groups. It was proposed that courts would refer undercharge cases to the ICC for its assessment as to the reasonableness of the practices at issue. This was acceptable to shippers and carriers because of the Negotiated Rates Policy that was in effect at the time. It is our understanding that these groups have revisited the issue and have proposed changes to that proposal in order to address the Supreme Court's ruling. As we understand it, this proposal would allow the ICC to review such cases and find that a failure to file a negotiated rate is an unreasonable practice and thus would constitute a defense to the filed rate doctrine. However, it would not address the cause of the problem.

Causes of the Problem

"Truck deregulation" has been extremely successful in providing benefits to shippers, as well as to the overall economy. Consequently, it is not surprising that it has been one of the more popular economic reforms of recent decades. Nevertheless, we should bear in mind that what actually occurred in 1980 was not total "deregulation."

For example, while entry into the trucking industry was made somewhat easier by the MCA, motor common carriers must still acquire certificates from the ICC in order to operate. In addition, although there is now increased rate competition in response to market forces, collective ratemaking still exists. Moreover, motor common carriers must still file their rates at the ICC, even when those rates are independently set. These are just a few of the more significant statutory requirements that continue to apply to interstate trucking.

Many of the reforms that this Committee examined in 1980 remain on the agenda in 1990. The "shipper undercharge" issue relates in a very direct way to one of these key issues: the requirement that interstate motor common carriers file their tariffs at the ICC. In addition, these carriers must also -- as the Supreme Court recently reiterated in *Maislin* -- adhere to the exact letter of their tariffs even where the shipper and carrier have agreed to a different rate. However, if the tariff filing requirement and the requirement to adhere to the tariffs as filed were to be abolished, the shipper undercharge problem would disappear.

Imagine for a moment that auto prices had to be filed at a federal agency by dealerships across the nation. Negotiations take place between you and the salesman; the manager approves a discount price, and a deal is struck -- except that two or three years later, the dealership comes to collect the difference between the price you paid and the filed price. And to top it all off, the courts agree that you have to pay.

Is this the way to do business in any industry? We see no reason why the trucking industry should be treated any differently from most other industries with respect to the validity of business contracts.

Proper Context for Solving the Problem

We would prefer to deal with the shipper undercharge problem in the context of additional deregulation of the motor carrier industry, as set forth in the ICC sunset bill which, because it eliminates tariff filing, would also solve the undercharge problem. However, we recognize that shippers face an immediate problem because of the Supreme Court's ruling.

We have had only a few days to review the proposal recently agreed to by the American Trucking Association and the NIT League. This legislation appears to be a workable solution to the accumulated undercharge cases in light of the Court's decision in *Maislin*. However, we cannot support this approach unless it includes a long term solution to the underlying problem.

On a technical level, based on our preliminary review, we believe that several modifications are needed. First, the Supreme Court in *Maislin* did not reach the issue of whether an unreasonable practice justifies a departure from the filed rate doctrine. The ATA/NITL proposal does not specifically address this issue, but states that in certain situations the Commission may find an unreasonable practice. Therefore, we suggest that proposed section 11705(b)(4)(a) specifically state that an unreasonable practice in these types of situations justifies a departure from the filed rate doctrine. We suggest the following language:

> If the Commission determines that collection of the additional amount is an unreasonable practice, the originally billed and collected charge shall be the lawful rate even though it was not filed with the Commission as required under sections 10761 and 10762.

Second, the proposal creates another hurdle for shippers. It requires the Commission to determine that a grant of relief would not "authorize an intentional violation of antirebating provisions of this subtitle nor result in unreasonable discrimination." It is our understanding that the reference to the antirebating sections are to the provisions of the Elkins Act which are contained in 49 U.S.C. §§ 11901, 11902, 11903, and 11914. We do not believe this requirement is either necessary or desirable in today's business environment. If the requirement is retained, the specific statutory sections should be listed to eliminate any doubt as to what antirebating provisions are included.

However, more fundamentally, we question the validity of this provision, which we believe could make it difficult for shippers to obtain relief. Would the shipper have to present specific evidence showing that it had no knowledge that the negotiated rate was not filed with the Commission; would the shipper have to establish that the motor carrier did not knowingly charge less than the filed rate; and would the shipper have to affirmatively show that no other similarly situated shipper received transportation at a higher rate? As you can see, this requirement could expand what has been a relatively straightforward ICC proceeding on whether there was a negotiated rate into an extended unreasonable discrimination and antirebating proceeding.

Third, we do not believe that the section 4(b) 18-month limitation period on the relief provided by this proposal is warranted. The injustice of a carrier agreeing and accepting payment of a rate lower than the filed tariff rate, then subsequently filing a claim for payment of an undercharge, does not disappear after eighteen months.

We do not believe the filed rate doctrine is compatible with either a modern, efficient transportation system or the way shippers must conduct their business in a competitive global economy. Perhaps it was a reasonable way to operate in the early part of twentieth century, but with thousands of competitors and millions of rates and complicated tariffs, there is no practical way for even sophisticated shippers to protect themselves from the undercharge problem, as long as the filed tariff doctrine is given the judicial weight it was accorded in Maislin. Shippers will once again be ensnared in the regulatory web of the filed rate doctrine, necessitating Congressional action once again. Therefore, this relief should continue until Congress addresses the broader solution of motor carrier deregulation.

We believe the compromise approach constitutes a band aid, where major surgery is needed.

Thus, we urge you to modernize the tariff filing requirement, in the light of today's fast-paced international economy. One option that falls short of total deregulation would be to eliminate the requirement that motor common carriers file their tariffs with the Commission. Rates that result from negotiations between a shipper and a common carrier could be specifically exempt from tariff filing requirements. However, the tariff filing requirement should not be eliminated for motor common carrier rates that are collectively set pursuant to section 10706. As long as rate bureaus continue to have antitrust immunity, the collectively set rates should be filed with the ICC and subject to their scrutiny. However, it should be made clear that carriers and shippers have the right to negotiate whatever rates are mutually agreeable.

Conclusion

We believe the shipper undercharge problem should be addressed, in the interest of sound public policy, good business practice, and fairness to shippers and carriers. However, the general approach of both H.R. 3243 and the new proposal constitutes only a stopgap solution. The Administration would prefer a permanent solution: the elimination of tariff filing requirements for independently-set rates.

If you determine a legislative solution involving changes to the tariff filing requirement is warranted, we would be happy to work with you in drafting the appropriate language.