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Maislin Industries, U.S., Inc. v. Primary Steel, Inc.: What Happened to Deference ?

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MAISLIN INDUSTRIES, U.S., INC. V PRIMARY STEEL, INC.: WHAT HAPPENED TO DEFERENCE?

A BASIC PRINCIPLE of administrative law is that considerable deference should be accorded to an agency's construction of the statutory scheme it is entrusted to administer.[1] In *Maislin Industries, U.S., Inc. v Primary Steel, Inc.*,[2] the Supreme Court may have limited the scope of this deference. The facts of *Maislin* typify a growing trend in the motor carrier industry Under the Interstate Commerce Act (the "Act"),[3] motor common carriers must file their rates with the Interstate Commerce Commission (the "ICC"),[4] and both carriers and shippers must adhere to these rates,[5] unless the rate or the practice employed by the carrier is unreasonable.[6] Current practice is that "carriers and shippers negotiate rates lower than those on file with the ICC and the shippers are billed for and remit payment at the negotiated rate."[7] In some of these cases, the negotiated rate is not filed with the ICC. If the carrier then files for bankruptcy, the bankruptcy trustee may bill the shipper for the filed rate rather than the negotiated rate, arguing that the statute compels the collection of the filed rate.[8]

Maislin Industries, U.S., Inc. ("Maislin") brought such an action against Primary Steel, Inc. ("Primary") to recover freight tariff undercharges made by Quinn Freight Lines ("Quinn"), a subsidiary of Maislin, to Primary over a three year period.[9] Contrary to the agreement between the parties, Quinn never filed the lower negotiated rates with the ICC. In 1983 Maislin filed for bankruptcy, and an audit of its accounts revealed the reduced rates charged to Primary Primary refused to pay the higher filed

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1. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).
2. 110 S. Ct. 2759 (1990).
3. 49 U.S.C. § 10101 (1988).
4. *Id.* § 10762(a)(1).
5. *Id.* § 10761(a).
6. *Id.* §§ 10701(a), 10704(a)(1).
7. *Maislin*, 110 S. Ct. at 2763.
8. *Id.*
9. *Id.* at 2764.

rate, and Maislin's bankruptcy estate brought suit.[10]

The District Court found the dispute to be within the primary jurisdiction of the ICC, and thus, referred the case to the ICC.[11] The ICC found that it would be unreasonable to require Primary to pay the filed rate.[12] The District Court determined that the ICC's finding was supported by substantial evidence and granted summary judgment in favor of Primary.[13] The Eighth Circuit affirmed the decision of the District Court, holding the ICC's decision a reasonable accommodation of the conflicting policies that were committed to its administration by the Act.[14] The Supreme Court reversed, finding the ICC's decision directly contradictory to previous Supreme Court decisions interpreting the Act.[15] Justice Stevens, joined by Chief Justice Rehnquist, filed a lengthy dissent arguing that the ICC's interpretation of the Act was reasonable, and that the Court failed to defer to the ICC's reasonable interpretation of its governing statute.[16]

This comment will argue that the ICC's decision is a reasonable interpretation of the Interstate Commerce Act. As such, the Supreme Court should have deferred to the ICC's decision under the applicable guidelines for evaluating agency interpretations of their governing statutes.[17] By not deferring to the ICC's interpretation in this case, the Supreme Court may be trying to send Congress a message that the Court is unwilling to let agencies clean up poorly drafted legislation. In *Maislin*, however, the Court's decision produces an absurd and harsh result for the interested parties.

I. BACKGROUND

A. The Filed Rate Doctrine

The Interstate Commerce Act requires carriers to "publish and file with the Commission tariffs containing the rates for trans-

10. *Id.* at 2764-65 & n.7.

11. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 705 F Supp. 1401, 1402 (W.D. Mo. 1988).

12. *Id.*

13. *Id.* at 1403.

14. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 879 F.2d 400, 406 (8th Cir. 1989).

15. *Maislin*, 110 S. Ct. at 2768, 2770.

16. *Id.* at 2779 (Stevens, J., dissenting).

17. *See supra* text accompanying note 1.

portation it may provide "[18] The Act also prohibits carriers from charging a rate other than the filed rate.[19] The Supreme Court repeatedly has insisted on a literal interpretation of these sections of the Act, and has not permitted either a shipper's ignorance or the carrier's misquotation of the filed rate to serve as a defense to the collection of the filed rate.[20] This "filed rate doctrine" was deemed necessary to prevent unjust discrimination in the carrier business.[21]

The Act also provides, however, that "[a] rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier must be reasonable."[22] The ICC is to determine whether a rate or practice is unreasonable, and to prescribe a substituted rate or practice in the event of a finding of unreasonableness.[23] Therefore, a rate found unreasonable by the ICC is not enforceable and is an exception to the filed rate doctrine.[24]

B. The *Negotiated Rates* Policy

Recent legislative enactments have caused the ICC to reexamine the filed rate doctrine. The Motor Carrier Act of 1980

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18. 49 U.S.C. § 10762(a)(1) (1988).

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> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that effects the vale of that transportation or service, or another device.

Id. § 10761(a).

20. *See, e.g.*, Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915) (carrier's misquotation of filed rate not an excuse for paying less than filed rate); Texas & Pacific Ry. Co. v. Mugg, 202 U.S. 242, 245 (1906) (equitable defenses to the collection of the filed rate forbidden).

21. *See Maxwell*, 237 U.S. at 97 ("This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."). By requiring strict adherence to the tariff, Congress intended to avoid intentional misquotation of filed rates as a means of offering secret discounts to particular shippers. Western Transp. Co. v. Wilson & Co., 682 F.2d 1227, 1230-31 (7th Cir. 1982).

22. 49 U.S.C. § 10701(a).

23. *Id.* § 10704(a)(1).

24. *See Maxwell*, 237 U.S. at 97 (Filed rate applies "unless it is found by the Commission to be unreasonable.").

("MCA")[25] relaxed the regulatory requirements and ICC oversight of motor carriers and thus allowed greater pricing freedom and increased competition among carriers. The MCA also loosened entry controls[26] which allowed carriers to increase rates without ICC interference.[27] These relaxed entry controls also allowed carriers to operate as both common carriers and contract carriers.[28] A contract carrier transports the shipper's property under an exclusive agreement,[29] and the ICC has exempted contract carriers from the requirements of filing their rates with the ICC and charging only the filed rates.[30] In addition to the MCA, the ICC has relaxed its regulations, allowing decreased rates to go into effect in as short a time as one day after the filing of a tariff.[31]

In partial response to the changes embodied in the MCA, the ICC abandoned its strict policy of adhering to the filed rate doctrine in virtually all cases. The first decision limiting the application of the filed rate doctrine came in a rail carrier case, *Buckeye Cellulose Corp. v Louisville & Nashville Railroad Co.*[32] In *Buckeye*, the ICC modified its interpretation of the filed rate doctrine and determined that it was permitted to consider a shipper's equitable defenses in a rail carrier's undercharge collection suit.[33] The Court of Appeals for the Eleventh Circuit affirmed this determination in *Seaboard System Railroad v United States.*[34] The *Seaboard* court agreed that "changed circumstances" warranted reexamination of the ICC's previous policy of refusing to consider equitable defenses.[35] The court recognized that the Act "still embodies the policies of nondiscrimination and uniformity The primary authority to give effect to those policies, though, is reposed

25. Motor Carriers Act, Pub. L. No. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 U.S.C.).

26. *See id.* § 5, 94 Stat. at 794-96 (codified at 49 U.S.C. § 10922 (1988)).

27. *See id.* § 11, 94 Stat. at 801-02 (codified at 49 U.S.C. § 10708 (1988)).

28. *See id.* § 10(b)(1), 94 Stat. at 800 (codified at 49 U.S.C. § 10930(a) (1988)).

29. *See* 49 U.S.C. § 10102(14) (1988).

30. *See id.* §§ 10761(b), 10762(a)(1).

31. *See* Short Notice Effectiveness for Independently Filed Motor Carrier & Freight Forwarder Rates, 1 I.C.C.2d 146, 160 (1984), *aff'd sub nom.* Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985) [hereinafter Short Notice Effectiveness].

32. 1 I.C.C.2d 767 (1985), *aff'd sub nom.* Seaboard Sys. R.R. v. United States, 794 F.2d 635 (11th Cir. 1986).

33. *Id.* at 773.

34. 794 F.2d 635 (11th Cir. 1986).

35. *Id.* at 638.

in the ICC."[36]

Shortly after *Buckeye*, the ICC considered the continuing application of the filed rate doctrine in the motor carrier context. In *Negotiated Rates I*,[37] the ICC addressed complaints by shippers that motor carriers were quoting lower rates not filed with the ICC and then billing the shippers at the filed rates.[38] The ICC found that its prior policy of strictly applying the filed rate doctrine was "inappropriate and unnecessary to deter discrimination today "[39] The ICC noted that thousands of motor carrier rates are negotiated daily, making it extremely difficult for shippers to determine if the agreed upon rate is actually on file.[40] The ICC asserted that it had the authority under section 10701 to determine whether collecting the difference between the negotiated and filed rate would constitute an unreasonable practice and thus be prohibited by the Act.[41] The ICC then set forth its approach to such undercharge claims:

> We would, at a court's request, determine, based on all relevant circumstances, whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect. The referring court would retain final authority to set the remedy, if any, and review our determination.[42]

The ICC concluded that it was not abolishing the requirement to file a tariff rate according to section 10761 of the Act. The ICC explained that it was merely asserting its authority to determine the reasonableness of tariff rates under section 10701.[43]

The ICC clarified its authority to declare tariff practices unreasonable in 1989 [44] In *Negotiated Rates II*, the ICC explained that its policy was not a relaxation of section 10761 but a separate

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36. *Id.* (citing Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304 (1976)).

37. National Indus. Transp. League — Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) [hereinafter *Negotiated Rates* I].

38. *See id.* at 99.

39. *Id.* at 106.

40. *Id.* at 105.

41. *Id.* at 103.

42. *Id.* at 107.

43. *Id.* at 108.

44. National Indus. Transp. League — Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) [hereinafter *Negotiated Rates* II].

determination under section 10701 [45] Nevertheless, the ICC asserted that it has the authority to reinterpret the Act based on new developments.[46] Rather than creating an exception to the filed rate doctrine, the ICC determined an unreasonable practice to be "(1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates."[47] Appellate courts have disagreed on whether the above *Negotiated Rates* policy is consistent with the Act.[48] The Supreme Court granted certiorari in *Maislin* to resolve this conflict.

II. THE SUPREME COURT'S DECISION IN *Maislin*

A. The Majority Opinion

After tracing the history and statutory background of the filed rate doctrine, the majority, in an opinion written by Justice Brennan, set out the ICC's *Negotiated Rates* policy and responded to three arguments urging application of the ICC's newer policy Primary first argued that the ICC's *Negotiated Rates* policy was entitled to deference by the courts.[49] They contended that

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45. *Id.* at 631.

46. *Id.*

> Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Id. (quoting American Trucking Ass'ns v. Atchison Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967)).

47. *Id.* at 628 & n.11.

48. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2765 & n.8.

49. *Id.* at 2768. In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court, in an opinion by Justice Stevens, considered the appropriate standard of review of an agency's construction of the statute that it administers, holding that a court must consider two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations

section 10701 does not specifically address the types of practice that are to be considered "unreasonable" under the Act. Primary argued that the Court should therefore have accepted the ICC's construction of the Act defining a carrier's attempt at collecting the filed rate after the parties have negotiated a lower rate as an unreasonable practice. Since the ICC's construction was rational and consistent with the statute, the Court should have deferred to its construction.[50] The majority was quick to dismiss this argument, noting that the Supreme Court has consistently held that the Act forbids the collection of rates lower than the filed rate.[51] The majority emphasized that once the Supreme Court has determined the meaning of a statute, subsequent agency interpretations of that statute must be judged against the Court's previous determination. The majority found that the ICC's deviation from the filed rate doctrine through its interpretation of the "unreasonable practice" clause in section 10701 was inconsistent with prior Court decisions, Congressional intent, and the statutory scheme as a whole.[52]

The second argument in support of the *Negotiated Rates* policy was that the policy prevents a carrier from receiving a windfall from its failure to comply with the Act.[53] Under the filed rate doctrine, failure to file a negotiated rate in compliance with the Act would permit the carrier to collect the higher, filed rate. In response to this argument, the majority maintained that despite its harsh results, a strict adherence to the filed rate is necessary for the enforcement of the Act.[54] While the majority admitted that the ICC has the power to craft remedies for violations of the Act,[55] it nevertheless held that the *Negotiated Rates* policy "ren-

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are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 842-44 (footnotes omitted).

50. *Maislin*, 110 S. Ct. at 2768 (citing *Chevron*, 467 U.S. at 843).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 2769 (citing Regular Common Carrier Conference v. United States, 793 F.2d 376, 379 (D.C. Cir. 1986)("Without [these provisions] it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates ")).

55. *Id.* (citing ICC v. American Trucking Ass'ns, 467 U.S. 354, 364-65 (1984)).

ders nugatory the requirements of §§ 10761 and 10762 and conflicts directly with the core purposes of the Act."[56]

Third, Primary argued that the MCA substantially deregulated the motor carrier industry, making strict adherence to the filed rate doctrine unnecessary to accomplish the goal of preventing discrimination.[57] Under the Motor Carrier Act, carriers have the authority to increase rates with little or no interference from the ICC.[58] The Motor Carrier Act also allows motor carriers to operate as both common carriers and contract carriers,[59] with contract carriers being exempt from the requirements of sections 10761 and 10762.[60] In addition to this deregulation of the motor carrier industry, the ICC has used its rulemaking power to relax its own regulations and has allowed decreased rates to go into effect in as little as one day after the filing of a tariff.[61] From this policy of deregulation, Primary argued that the increase in competition made compliance with the filed rate doctrine unnecessary While the majority accepted the notion that the ICC has the power to adopt new polices when faced with changing circumstances,[62] the majority rejected this argument and held that the *Negotiated Rates* doctrine directly contradicted the ICC's governing statute by rendering sections 10761 and 10762 ineffective.[63] The majority reasoned that since Congress did not disturb sections 10761 and 10762 in the Motor Carrier Act, these sections must still be defined according to their long-standing judicial interpretation.[64] Finally, the majority reasoned that if strict adherence to sections 10761 and 10762 was no longer justified in light

56. *Id.*

57. *Id* at 2769-70.

58. *See* Pub. L. 96-296 § 11, 94 Stat. 793, 801-02 (codified at 49 U.S.C. § 10708 (1988)).

59. *See id.* § 10(b)(1), 94 Stat. at 800 (codified at 49 U.S.C. § 10930(a) (1988)).

60. *See* 49 U.S.C. §§ 10761(b), 10762(a)(1) (1988).

61. *See* Short Notice Effectiveness, 1 I.C.C.2d 146, 160 (1984), *aff'd sub nom.* Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985).

62. Maislin Indus., U.S., Inc. v. Primary Indus., Inc., 110 S. Ct. 2759, 2770 (1990) (citing American Trucking Ass'ns v. Atchison Topeka & Santa Fe Ry. Co. 387 U.S. 397, 416 (1967)).

63. *Id.*

64. *Id.* The majority went on to compare this case with Square D Co. v. Niagara Frontier Traffic Bureau, Inc., 476 U.S. 409 (1986), where the Court determined that "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme and Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980." *Id.* at 420.

of the Motor Carrier Act, it was up to Congress to eliminate these sections.[65]

B. The Dissenting Opinion

Justice Stevens, joined by Chief Justice Rehnquist, filed a lengthy and persuasive dissent. Justice Stevens first questioned the logic of the majority by pointing out that while the majority found an interplay between sections 10761(a) and 10762(a)(1), which would be "rendered nugatory" if carriers were not allowed to collect the filed rate instead of a lower negotiated rate, the majority recognized that these sections are susceptible to exceptions, such as an unreasonable rate.[66] Thus, the majority could only argue that the *Negotiated Rates* policy was impermissible.[67] Specifically, Justice Stevens found an interplay between the "[e]xcept as provided" language in the first clause of section 10761(a),[68] and the language of section 10701(a) giving the ICC the power to determine the reasonableness of a carrier's practices.[69] Justice Stevens also maintained that the filed rate doctrine would continue to provide recovery of undercharges is some cases, and that failure to comply with sections 10761 and 10762 could still lead to criminal prosecution.[70] Since these sections would not be "rendered nugatory" under the *Negotiated Rates* policy, Justice Stevens concluded that the *Negotiated Rates* policy did not conflict with any particular section of the Act.

Justice Stevens next attacked the majority's contention that the ICC's construction of the Act was inconsistent with the regulatory scheme as a whole. While the filed rate doctrine was once deemed necessary to support the ICC's policy of anti-discrimination, the Motor Carrier Act of 1980 represented a movement toward deregulation and rendered the application of the filed rate doctrine an anachronism overnight.[71] With this shift, Congress

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65. *Maislin*, 110 S. Ct. at 2771.

66. *Id.* at 2774 (Stevens, J., dissenting). The majority also refused to hold that the unreasonableness of a practice can never bar collection of a filed rate. *Id.* (Stevens, J., dissenting).

67. *Id.* (Steven, J., dissenting).

68. 49 U.S.C. § 10761(a) (1988). For a full quotation of section 10761(a), see *supra* note 19.

69. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct 2759, 2774-75 (1988) (Stevens, J., dissenting).

70. *Id.* (Stevens, J., dissenting).

71. *Id.* at 2777 (Stevens, J., dissenting).

changed the core purposes of the Act in order to promote competitive and efficient transportation services.[72] Thus, Justice Stevens found that " 'no public object is served by forcing carriers to adhere to published price schedules regardless of circumstances.' "[73] Hence, Justice Stevens argued, a strict adherence to the filed rate doctrine would produce absurd results and serve no social purpose. Moreover, the majority did not give appropriate deference to the ICC's *Negotiated Rates* policy.[74]

Justice Stevens also found fault in the majority's failure to discuss *Chevron*, or any other case involving deference to agency discretion, especially since four Courts of Appeals had invoked *Chevron* in upholding the ICC's *Negotiated Rates* policy.[75] This error was compounded by the majority's reliance on cases that upheld longstanding Supreme Court interpretations of statutes having nothing to do with the question presented in *Maislin*.[76]

Lastly, Justice Stevens agreed with the ICC that an unreasonable practice would exist if a carrier were allowed to collect an undercharge on the particular facts of *Maislin*.[77] Stevens argued that, "[t]he only consequence of today's misguided decision is to produce a bonanza for the bankruptcy bar."[78]

C. The Concurring Opinion

In his concurring opinion, Justice Scalia addressed some of Justice Stevens' arguments. Justice Scalia first asserted that the filed rate doctrine is based on the text of the statute, rather than the regulatory scheme as a whole.[79] Justice Scalia read the statute as an explicit prohibition on the collection of a rate other than the

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72. *See* 49 U.S.C. § 10101(a)(2).

73. *Maislin*, 110 S.Ct. at 2778 (Stevens, J., dissenting) (quoting Orscheln Bros. Truck Lines v. Zenith Elec. Corp., 899 F.2d 642, 645 (7th Cir.), *cert. granted and judgment vacated*, 111 S. Ct. 334 (1990)).

74. *Id.* at 2779 (Stevens, J., dissenting).

75. *Id.* at 2779 & n.14 (Stevens, J., dissenting).

76. *Id.* at 2779 (Stevens, J., dissenting). Specifically, the majority incorrectly relied on Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986). In *Square D*, the Court adhered to a longstanding construction of the Clayton Act despite statutory amendment when no question of agency interpretation was presented. *Id.* at 420. In addition, the majority relied on California v. Federal Energy Regulatory Comm'n, 110 S. Ct. 2024 (1990), where the agency interpretation conformed with longstanding Supreme Court precedent. 110 S. Ct. at 2029-30.

77. *Maislin*, 110 S. Ct. at 2780 (Stevens, J., dissenting).

78. *Id.* (Stevens, J., dissenting).

79. *Id.* at 2771 (Scalia, J., concurring).

filed rate.[80]

Justice Scalia also rejected the asserted interrelationship between sections 10761(a) and 10701 found by Justice Stevens stemming from the "[e]xcept as provided" language in section 10761(a). Justice Scalia contended that this clause modified the first sentence only and could not be imported into the second sentence to recite an exception to the obligation to charge only the filed rate.[81] Justice Scalia argued that the exception to the filed rate doctrine for unreasonable rates does not come from the "[e]xcept as provided" language of Section 10761(a), but rather from the need to reconcile the provisions in section 10761(a) with section 10701(a). Justice Scalia argued that while charging an unreasonable rate undoubtedly violated the prohibition against unreasonable rates, charging the filed rate when a different rate had been promised did not unavoidably conflict with the prohibition against unreasonable practices.[82] Thus, the unreasonable rate exception came directly from the statute, while the *Negotiated Rates* policy did not.

Justice Scalia then contended that the Motor Carrier Act represents an intent by Congress to deregulate, but "within the framework of the existing statutory scheme."[83] Justice Scalia believed that even if Congress's goal of deregulation was not achieved within the framework of the promulgated statute, neither the ICC nor the courts should disturb Congress' chosen scheme.[84]

III. ANALYSIS

The majority opinion in *Maislin* ignores the usual standard of deference given to an agency's interpretation of the statute it administers as set out in *Chevron U.S.A., Inc. v National Resources Defense Council, Inc.*[85] Instead, the majority chose to interpret

80. *Id.* (Scalia, J., concurring).

81. *Id.* at 2771-72 (Scalia, J., concurring). In a footnote, Justice Stevens admitted that Scalia's interpretation was a possible reading of section 10761(a), but obviously not the only one, nor one which the ICC must accept. *Id.* at 2774 n.6 (Stevens, J., dissenting).

82. *Id.* at 2772 (Scalia, J., concurring).

83. *Id.* (Scalia, J., concurring) (emphasis omitted).

84. *Id.* (Scalia, J., concurring).

85. 469 U.S. 837 (1984). Professor Douglas Leslie's comments on the Supreme Court's deference to agency interpretations in the labor law context seem applicable to this case:

> Had the members of the Supreme Court liked the Board's result in this case, we probably would have found in the Court's opinion references to the Board's expertise and comments about the Board's role as the primary inter-

the statute itself, without taking into account the recent changes in the motor carrier industry and the legislation affecting motor carriers. The majority utilized an overly rigid reading of the Interstate Commerce Act that produces harsh results, effectively sending Congress, and not the agencies, a message. The majority may be telling Congress to legislate more wisely, as the Court will no longer use its powers of interpretation to harmonize statutory sections that are in conflict with each other or with the goals of the statutory scheme. Furthermore, the Court will not allow an agency to rehabilitate Congress' poorly drafted legislation either.

In *Chevron*, the Supreme Court noted the importance of deferring to an agency's reasonable interpretation of its governing statute.[86] The Court also announced the standard of review for an agency's interpretation of its governing statute: where Congress has not spoken directly to the question at issue, the court will uphold an agency's interpretation if it is based on a permissible construction of the statute.[87] The Court ruled that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[88] This legislative delegation may be implicit rather than explicit, but in either case a court must defer to an agency's reasonable interpretation of the statute.[89]

Justice Stevens, who authored *Chevron*, and at least four Courts of Appeals who have considered the matter, agreed that *Chevron* should control the issues presented in this case.[90] Since *Maislin* reviews an administrative agency decision, *Chevron* is the appropriate standard for reviewing that decision, so long as Congress has given the agency authority to interpret its governing statute. In *Maislin*, the ICC based its decision not to apply the filed rate doctrine on the wording of sections 10701 and 10704 of the Act. Section 10701 declares that practices by carriers must be reasonable.[91] Section 10704(a)(1) gives the ICC the power to de-

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preter of the statute. Not liking the result in this case, the Court doesn't include such language.

D. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 448 (2d ed. 1985).

86. 469 U.S. at 844.

87. *Id.* at 843.

88. *Id.* at 843-44.

89. *Id.* at 844.

90. *Maislin*, 110 S. Ct. at 2779 & n.14 (Stevens, J., dissenting).

91. 49 U.S.C. § 10701(a) (1988).

termine if a practice is "unreasonable."[92] Yet, nowhere in the Act is a reasonable or unreasonable practice defined. Thus, Congress has plainly left a gap for the agency to fill, and the agency's determination should be upheld unless "arbitrary, capricious, or manifestly contrary to the statute."[93] At the very least, the fact that Congress has not defined these terms creates an implicit delegation to the agency, in which case the agency's interpretation should be upheld as long as it is reasonable.[94]

The ICC's *Negotiated Rates* policy is a reasonable interpretation of the conflicting sections of the Interstate Commerce Act in light of the increased competitive pressures, statutory changes, and relaxed regulatory climate in the motor carrier industry In the years before the Motor Carrier Act, carriers did not enjoy the freedom and flexibility to negotiate particularized rate agreements with shippers. Carriers essentially charged the same rate for all freight shipped a similar distance. Consequently, it was not hard for shippers to discover the filed rate.[95] Thus, during the era before the Motor Carrier Act, shippers had no defense to paying the filed rate. In modern practice, thousands of carriers operate with broad authority and increased pricing freedom. These carriers must offer competitive prices on extremely short notice. Hundreds of motor carrier rates are negotiated daily,[96] and may go into effect in as little as one day after being filed. In this atmosphere, shippers have a difficult time determining whether the negotiated rate is actually on file.

In light of these changing circumstances, the ICC changed its policy from the filed rate doctrine to the one set out in *Negotiated Rates I.* There is no doubt an agency may change its rules and practices when faced with new developments.[97] The *Negotiated Rates* policy puts the burden of any failures in filing the negotiated rate on the carrier. The carrier is in a better position to bear this burden since it is the party that files the rates and can precisely determine the filed rate for a specific day However, the filed rate doctrine puts this burden on the shippers, who are at a disadvantage to discover the filed rates, and thus frustrates the

92. 49 U.S.C. § 10704(a)(1).
93. *Chevron*, 467 U.S. at 844.
94. *Id.*
95. *See Negotiated Rates* I, 3 I.C.C.2d 99, 104 (1986).
96. *See id.* at 105.
97. *See* American Trucking Ass'ns v. Atchison Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967).

competitive and efficient goals of today's Interstate Commerce Act. The *Negotiated Rates* policy is therefore a reasonable way to harmonize conflicting provisions of the Act with changing developments in the motor carrier trade. It should have been accepted by the Court, under *Chevron*, as an appropriate agency interpretation given the gap created by Congress's use of the words "reasonable" and "unreasonable" to modify the word "practice" in sections 10701(a) and 10704(a)(1).

Both the majority and concurrence are inconsistent in holding that the ICC's interpretation of the term "reasonable" is not a reasonable interpretation of the Interstate Commerce Act. Moreover, both opinions agree that there are limits to the filed rate doctrine, such as the reasonableness of the filed rate. In that sense, they admit that, in at least one case, section 10701 can be used to override the requirements of the filed rate doctrine. It is difficult to understand why an unreasonable rate can override this policy while an unreasonable practice cannot. Surely Congress intended there to be some meaning to the Act's prohibition against unreasonable practices. By not defining the phrase "unreasonable practices," Congress entrusted the ICC with this function even if the given meaning occasionally conflicts with other sections of the Act.

The real problem in *Maislin* may be that both the Court and the agency were trying to deal with "shoddy" legislation. The Motor Carrier Act of 1980 relaxed the Interstate Commerce Act's regulatory requirements to create a competitive environment through new pricing freedom. But Congress left sections 10761(a) and 10762(a)(1) fully intact. These sections frustrate the purpose and spirit of the Motor Carrier Act by requiring only the filed rates to be charged, thus creating an inflexible regulatory environment. The ICC attempted to read the harshness of these sections out of the Act in order to achieve the purposes of the Motor Carrier Act. The Court, however, insists that Congress clean up its own mess, and until it does the Court will interpret the Act according to its language and structure.[98] The Court will interpret the Act in this manner even if the filed rates doctrine creates an inflexible regulatory environment which is inconsistent with the purposes of the Motor Carrier Act.[99]

While this approach by the Court may have some merit, it

98. *Maislin*, 110 S. Ct. at 2768.
99. *Id.* at 2772 (Scalia, J., concurring).

produces harsh results in the short term and may ignore the complexities of the modern administrative system. Congress does need to be reminded to monitor the quality of its legislation. In addition, responsible legislators should not leave conflicting sections in a statute that hinder the goals of its regulatory policy Congress must be responsible for cleaning up its own mistakes and cannot continually rely on agencies to do the job. However, the cost of sending Congress the particular message of *Maislin* may be too great. Shippers are now faced with the high costs of discovering the filed rates, which have dramatically increased in number because of the ease of filing tariffs and the possibility that the filed rate may become effective in as little as a day The plight of shippers who have already relied on a negotiated rate that was lower than the filed rate is even more desperate. Shippers are defenseless in an undercharge action brought by carriers who may have agreed to file a negotiated rate and then failed to do so. *Maislin* rewards carriers and to some extent the bankruptcy bar, for their failure to file the appropriate rate with the ICC.

Lastly, the Court ignored the necessity of congressional delegation to administrative agencies. Congress has neither the time nor the expertise to enact all the legislation that effective government requires. Agencies such as the ICC are empowered by Congress to fill in gaps and reconcile ambiguities within their governing statutes. Therefore, courts should defer to agency interpretations when agencies function within their appropriate role. Only then will the administrative system be able to operate efficiently

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