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Volume 2 | Number 1

Article 5

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1986

## **Interstate Commerce Commission v. American Trucking Associations, Inc.**

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### **Recommended Citation**

(1986) "Interstate Commerce Commission v. American Trucking Associations, Inc.," *Touro Law Review*. Vol. 2: No. 1, Article 5.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol2/iss1/5>

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## COMMENTS

### INTERSTATE COMMERCE COMMISSION V. AMERICAN TRUCKING ASSOCIATIONS, INC.

#### INTRODUCTION

This Comment will examine the Supreme Court's decision in *Interstate Commission v. American Trucking Associations, Inc.*<sup>1</sup> In this decision, issued on June 5, 1984, the Court upheld the validity of an Interstate Commerce Commission (ICC or Commission) Rule, permitting the agency to retroactively reject tariffs submitted in substantial violation of motor carrier rate bureau agreements.<sup>2</sup> Although reversing a decision of the United States Court of Appeals for the Eleventh Circuit,<sup>3</sup> the Supreme Court did agree that the agency has no specific statutory authority to reject effective tariffs. However, the Court found that the Commission does have implicit discretionary power to secure compliance with the rate bureau agreements.<sup>4</sup>

The ICC is an independent Federal agency responsible for regulating interstate surface transportation within the United States.<sup>5</sup> The ICC attempts to ensure that competitive, efficient and safe transportation services are provided to meet the needs of shippers, receivers and consumers.<sup>6</sup> These transportation services are generally provided by the nation's common carriers; namely, rail carriers, pipeline carriers, water carriers, freight forwarders and motor carriers. When these carriers conduct interstate business the Commission has regulatory jurisdiction over the carrier's activities, with some exceptions.<sup>7</sup>

Typically, motor carriers become members of the local motor carrier bureau which serves the needs of its defined territory. A carrier

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1. 104 S. Ct. 2458, *reh'g denied*, 105 S. Ct. 20 (1984).

2. *See* 46 Fed. Reg. 30092 (1981).

3. *American Trucking Ass'ns, Inc. v. United States*, 688 F.2d 1337 (11th Cir. 1982).

4. *American Trucking*, 104 S. Ct. at 2463-64.

5. 49 U.S.C. § 10521(a) (1982).

6. *Id.* § 10101.

7. *Id.* §§ 10521-10706 (1982).

within the territory has the option of conducting business either as a member of the bureau or independently of it.<sup>8</sup> Even those carriers who elect to become members have the statutory right to act independently of bureau procedures.<sup>9</sup>

The primary function of the motor carrier bureau is collective ratemaking.<sup>10</sup> This process involves members meeting and conferring on which tariffs will be submitted to the ICC for examination and approval.<sup>11</sup> The tariff sets out a schedule of rates that the carriers intend to charge for shipment of goods.<sup>12</sup> With ICC approval, the submitted tariff becomes effective and thus binding on the carriers. The binding effect of the approved rate is known as the "filed rate doctrine."<sup>13</sup>

The "filed rate doctrine" prohibits the regulated carrier from charging rates for its services other than those rates properly filed with the ICC.<sup>14</sup> The carrier is required to charge only that rate which is on file in the current tariff.<sup>15</sup> The obvious result is that carriers and shippers rely on the effective rate in carrying on their daily business activities of shipping goods and collecting revenues.<sup>16</sup>

Of course, motor carrier bureaus could not collectively confer on these rates without the imposition of antitrust liability, absent the protection of the Reed-Bulwinkle Act of 1948.<sup>17</sup> This act immunizes

8. *Id.* § 10706.

9. *Id.* § 10706(b)(3)(B)(ii).

10. See, e.g., Friedman, *Collective Ratemaking by Motor Common Carriers: Economic and Public Policy Considerations*, 10 TRANSP. L.J. 33, 40-41 (1978).

11. Each member of a bureau is authorized to have a representative on the Rate Committee. When the Committee considers rate proposals the meetings are open to all interested parties, including carriers, shippers and the ICC. This is one of the so-called "Sunshine Rules." 49 U.S.C. § 10706(b)(3)(A), (B) (1982).

12. Motor carrier rates are essentially carrier-made rates subject to the approval of the ICC. The carrier initiates a rate by publishing it in a tariff which is to be filed with the Commission between 30 and 45 days before the rate is to become effective. *Id.* § 10702. A protest to this rate may be made by any interested party. If the Commission agrees that the proposed rate is reasonable and non-discriminatory the rate will go into effect without investigation. However, when the Commission determines that the proposal may result in unlawful rates, it can suspend the tariff for up to seven months and investigate its lawfulness. 49 U.S.C. § 10708.

13. *Id.* § 10761.

14. *Id.*

15. *Id.* §§ 10761, 10762. See also *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Alouette Peat Prods.*, 253 F.2d 449 (9th Cir. 1957).

16. *American Trucking*, 104 S. Ct. at 2472 (O'Connor, J. dissenting).

17. 62 Stat. 472 (codified at 49 U.S.C. § 10706 (1981)). The Supreme Court has stressed that the antitrust laws represent our nation's fundamental economic policy, a charter of economic liberty. *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

from antitrust liability carriers under the ICC's jurisdiction who form rate bureaus and submit collectively determined shipping rates and classifications to the Commission.<sup>18</sup> In order to be exempted from antitrust liability the bureaus are required to submit a rate bureau agreement to the ICC for its approval.<sup>19</sup> The agreement sets forth the procedures by which the bureau will negotiate the collective tariffs.<sup>20</sup>

A threshold qualification to receiving approval is an ICC finding that the carrier is fit, willing and able to properly perform the proposed service and to comply with the provisions of the Interstate Commerce Act (ICA).<sup>21</sup> Furthermore, the Commission is empowered to impose conditions on the agreement in order to facilitate the National Transportation Policy.<sup>22</sup> Once approval is granted, antitrust

That policy has as its premise that private persons, not the government, own the means of production, and that decisions as to what and how much to produce, what prices to set, and where and how much to sell are decisions made in a market place free from artificial constraints, either governmentally or privately imposed. The government's only role under such a scheme is that of umpire assuring that there is no foul-play by the participants, and enforcing the rules of fair competition.

Rose, *Surface Transportation and the Antitrust Laws: Let's Give Competition a Chance*, 8 *TRANSP. L.J.* 1, 1 (1976).

18. 49 U.S.C. § 10706 (a)(2)(A) (1982).

19. *Id.*

20. 46 Fed. Reg. 30092 (1981). The ICC set forth interpretive rules governing the following areas: motor carrier's right of independent action, employee docketing, open meeting, proxy voting, final disposition of cases, standards for member carriers discussing and voting upon rates, exemptions to these standards and the effect of violations.

21. See Dempsey, *Entry Control Under the Interstate Commerce Act*, 13 *WAKE FOREST L. REV.* 729, 759 (1977).

22. The purpose of the National Transportation Policy is to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and-

(1) in regulating those modes-

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

49 U.S.C. § 10101(a) (1982).

immunity attaches and the terms of the agreement may be carried out under the conditions required by the ICC. Thus, the antitrust laws, as defined by the Clayton Act,<sup>23</sup> do not apply to the parties with respect to “making or carrying out the agreement,”<sup>24</sup> and, what would otherwise be considered conspiracy to set prices in violation of antitrust laws is not actionable.

In 1980, Congress enacted legislation establishing new requirements and standards that the motor carrier bureaus must comply with as a condition precedent to their continued antitrust immunity.<sup>25</sup> Hence, compliance with these new restrictions created the presumption that the new or amended rate bureau agreements would be granted continued exemption from antitrust laws.<sup>26</sup>

In June, 1981, the ICC published a decision in an Interpretive Ruling,<sup>27</sup> stating how the Commission intended to implement the new statutory requirements and standards provided under the Motor Carrier Act of 1980 (MCA).<sup>28</sup> A significant result of the Interpretive Ruling was the ICC’s formulation of a new remedy. This remedy enables the Commission to retroactively reject an effective tariff.<sup>29</sup>

The Commission, in anticipation of the need for “immediate administrative remedies and consistency of [its] regulation,”<sup>30</sup> stated that upon proof of “significant violations of an approved agreement”<sup>31</sup> the effective tariff would be retroactively rejected.<sup>32</sup> Such a rejection makes the carrier liable to its shippers for the difference between the rejected rate and the previous effective rate calculated over the period during which the rejected rate was applicable. In

23. 15 U.S.C. § 12 (1982).

24. 49 U.S.C. § 10706(b)(2) (1982). In effect, the Commission creates the bureau, since without immunity from the antitrust laws, the rate bureau could not operate.

25. Motor Carrier Act of 1980, Pub. L. No. 96-296, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 793.

26. *Id.* at 804.

27. 46 Fed. Reg. 30092. “A legislative rule is the product of an exercise of delegated legislative power to make laws through rules. An interpretive rule is any rule an agency issues without exercising delegated legislative power.” 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 36, 51-52 (2d ed. 1979) [hereinafter cited as DAVIS].

28. 46 Fed. Reg. 30092.

29. *Id.*

30. *Id.* at 30105.

31. *Id.*

32. *Id.* Allegations of a lesser violation would subject the tariff to suspension or investigation. *Id.*

addition, the carrier would be liable for the damages associated with violations of antitrust laws.<sup>33</sup>

Motor carriers objected to the new remedy and filed suit for review of the ICC's ruling.<sup>34</sup> The Court of Appeals for the Eleventh Circuit held that Congress had not delegated the ICC the statutory authority to retroactively reject tariffs.<sup>35</sup> The ICC petitioned the Supreme Court for review of this decision.<sup>36</sup> The Supreme Court reversed the court of appeals' decision and upheld the validity of the ICC's remedy.<sup>37</sup>

## THE SUPREME COURT'S ANALYSIS

In upholding the ICC's remedy, the Supreme Court agreed with the court of appeals' view that the Commission did not have the general statutory authority to retroactively reject tariffs.<sup>38</sup> However, the Court reasoned that since the Commission has discretionary authority to elaborate on its express powers<sup>39</sup> to achieve specific statutory goals,<sup>40</sup> it can create new administrative remedies. Such a remedy is permissible when it is fashioned to further a statutory mandate and is "directly and closely tied" to that mandate.<sup>41</sup> It was held that the ICC's remedy of retroactive rejection of a tariff had sustained both of these criteria.<sup>42</sup>

In its administrative decision, the ICC premised its authority to retroactively reject a tariff upon section 10762(e)<sup>43</sup> of the ICA.<sup>44</sup> This section authorizes the ICC to reject a tariff submitted for its approval, if the tariff violates either the general requirements for

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33. See 15 U.S.C. § 15 (1982). Anyone whose business or property has been injured due to an antitrust violation may sue and recover three-fold the damages sustained by him, as well as the cost of the suit, including reasonable attorney's fees. *Id.*

34. 104 S. Ct. at 2461.

35. 688 F.2d at 1356.

36. *American Trucking*, 104 S. Ct. at 2458.

37. *Id.* at 2468.

38. *Id.* at 2465.

39. *Id.* at 2465, 2467-68.

40. *Id.* at 2465.

41. *Id.* at 2466.

42. *Id.* at 2467-68.

43. 49 U.S.C. § 10762(e) (1982).

44. 46 Fed. Reg. 30092, at 30105, 30106. The new remedy in *American Trucking Ass'ns, Inc.*, is not concerned with whether the rate itself is unlawful. The rate itself can be lawful but the Commission will reject its effectiveness if it was submitted in significant violation of the rate bureau agreement. The Commission claimed it intended to use this new remedy "to discipline motor carriers for substantial bureau agreement violations, such as unauthorized collusion or illegal bureau pressure on independent carriers." 104 S. Ct. at 2461.

publishing and filing tariffs or if in carrying out these requirements it violates a regulation of the Commission.<sup>45</sup> Both the court of appeals and the Supreme Court rejected this liberal reading of the statute.<sup>46</sup> Both Courts reasoned that “the term ‘reject’ connotes refusal to receive at the threshold.”<sup>47</sup> They reiterated that “[r]ejection is a regulatory device properly used only *prior* to a tariff’s effective date”<sup>48</sup> and “an investigation is the only mechanism available for challenging effective tariffs.”<sup>49</sup> Moreover, the Supreme Court noted that the placement of section 10762(e) in the section of the ICA which regulates the filing process for new tariffs prior to its effective date indicates that rejection is a power to be used at the outset of the rate filing process.<sup>50</sup>

Unlike the court of appeals, the Supreme Court’s opinion further developed the analysis as to why the section 10762(e) rejection power did not explicitly authorize the ICC to reject an effective tariff by examining the procedural safeguards incorporated under sections 10762(e), 10704(b) and 10708(a).<sup>51</sup>

Under section 10762(e), the ICC can reject proposed tariffs which violated the statutory requirements for filing a new tariff and carriers have no opportunity to challenge the decision.<sup>52</sup> When the Commission determines that an effective tariff itself is unlawful, it is empowered, under section 10704(b) to cancel the tariff and prescribe a new rate.<sup>53</sup> Since rejection is peremptory, a carrier’s only recourse is to submit a new tariff.<sup>54</sup> However, before taking such action, the ICC must conduct a full hearing and any changes in the rate are

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45. 49 U.S.C. § 10762(e) (1982) which provides: “The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.” *Id.*

46. 688 F.2d at 1356; 104 S. Ct. at 2465.

47. 104 S. Ct. at 2463; 688 F.2d at 1354.

48. *Id.* at 2464; 688 F.2d at 1354 (citing *Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 543 F.2d 247, 268 (D.C. Cir. 1976) (emphasis in original)).

49. 688 F.2d at 1354 (citing *Delta Airlines, Inc.*, 543 F.2d at 268).

50. 104 S. Ct. at 2463 n.6.

51. 49 U.S.C. §§ 10762(e), 10704(b)(1), 10708(a) (1982).

52. *See id.* § 10762(e).

53. 104 S. Ct. at 2464.

54. 49 U.S.C. § 10704(b)(1).

required to be prospective.<sup>55</sup> Thus, section 10704(b) imposes procedural safeguards against the potential for abuse.<sup>56</sup>

Finally, the Court examined the Commission's suspension power as set forth in section 10708. If the Commission questions the legality of a proposed tariff it may suspend the tariff for up to seven months from the date the tariff was to go into effect.<sup>57</sup> During the suspension period the Commission must investigate the lawfulness of the proposed tariff and only after a full hearing may final action be taken.<sup>58</sup>

After noting these safeguards, the Supreme Court could not sanction the ICC's interpretation of section 10762(e), for to do so would allow the ICC unchecked authority to reject tariffs<sup>59</sup> and would disregard Congress' intent in providing such procedural safeguards.<sup>60</sup> "[T]o give the Commission unbridled discretion to reject effective tariffs at any time would undermine restraints placed by Congress on the Commission's power to suspend a proposed tariff pending investigation."<sup>61</sup> To hold otherwise would make "the temporal and procedural constraints of [section] 10708 [to] be nugatory, since the Commission could rely on its rejection powers to void a regulation at any time and without any procedural safeguards."<sup>62</sup> The Court was apparently concerned with the fact that carriers whose tariffs were retroactively rejected could not challenge the ICC's decision prior to its effective date.<sup>63</sup>

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55. Section 10704(b) also details which factors the ICC is to take into consideration when prescribing what the new rate will be. That is, the effect of the prescribed rate on the movement of traffic by the carrier, 49 U.S.C. § 10704(b)(2)(A) (1982), and the need for revenues that are sufficient under honest, economical and efficient management, to let the carrier provide transportation. *Id.* § 10704(b)(2)(B).

56. The Court remarked that "[i]t would be bizarre, to say the least, to interpret subsection 10762(e) to give the Commission peremptory authority to void effective rates retroactively, when section 10704(b) places procedural constraints on the Commission's authority to take the less drastic step of modifying effective tariffs prospectively." 104 S. Ct. at 2464.

The Court felt that the potential for abuse by the ICC was lessened by the following post rejection hearings and judicial review of rejection decisions; the Commission had reserved the discretion to withhold the sanction should the particular circumstances of a violation counsel leniency; and finally, the guidelines for antitrust immunity set out in the MCA are of such a nature that carriers would be aware of their transgressions. *Id.* at 2468.

57. 49 U.S.C. § 10708 (1982).

58. *Id.* § 10708(a)(2).

59. 104 S. Ct. at 2462.

60. *Id.*

61. *Id.* at 2464.

62. *Id.*

63. The Commission would, however, afford the affected carriers the opportunity to challenge the decision after it had taken effect. *See supra* note 44.



The Court, therefore, concluded that section 10762(e) did not expressly delegate to the ICC the statutory power to reject effective tariffs.<sup>64</sup> The Court further explained that while it would ordinarily defer to the Commission's interpretation,<sup>65</sup> a plain reading of the statute negated such deference in this case.<sup>66</sup>

At this point the Court relied upon the ICC's inherent discretionary authority to "elaborate upon its express statutory remedies when necessary to achieve specific statutory goals"<sup>67</sup> to find that the remedy was a justifiable adjunct to section 10762(e).<sup>68</sup> The majority opinion stated:

The doctrine of ICC discretion arose out of a recognition that, since drafters of complex ratemaking statutes like the ICA [Interstate Commerce Act] neither can nor do "include specific consideration of every evil sought to be corrected," the absence of express remedial authority should not force the Commission "to sit idly by and wink at practices that lead to violations of the [ICA] provisions."<sup>69</sup>

In supporting its premise of inherent discretionary power, the Court cited two of its previous decisions in which the ICC was granted the latitude to interpret its "statutory powers in a reasonable manner."<sup>70</sup> In both the *Trans Alaska Pipeline Rate Cases*<sup>71</sup> and *United States v. Chesapeake & Ohio Railway Co.*,<sup>72</sup> the Court accepted and deferred to the Commission's interpretation of its suspension powers under section 10708.<sup>73</sup>

The *Trans Alaska Pipeline Rate Cases* concerned the actions of several owners of the Alaskan Pipeline and the ICC. Opponents to the proposed rates asked the ICC for immediate suspension of the rates claiming that they were unlawful.<sup>74</sup> The Commission concluded that the rates should be suspended. It further decided that the carri-

64. 104 S. Ct. at 2465.

65. *Id.* at 2464.

66. *Id.* at 2464-65. *See also* *Petrou Fisheries, Inc. v. Interstate Commerce Comm'n*, 727 F.2d 542 (5th Cir. 1984) (holding that generally in reviewing agency's action, courts accord great deference to the ICC in areas of its technical expertise, but on the issue of pure statutory construction the courts accord little deference to the agency's decision when reviewing the agency's actions).

67. 104 S. Ct. at 2465.

68. *Id.* at 2467.

69. *Id.* (quoting *American Trucking Ass'ns, Inc. v. United States*, 374 U.S. 298, 309 (1953)).

70. 104 S. Ct. at 2465, 2467.

71. 436 U.S. 631 (1978).

72. 426 U.S. 500 (1976).

73. *See* 49 U.S.C. § 10708(a)(2), (a)(6). *See supra* text accompanying note 56.

74. 436 U.S. at 637-38.

ers would be permitted to submit interim tariffs which would be effective during the suspension period, if the carriers agreed to refund any amounts collected during the interim which might subsequently be held unlawful.<sup>75</sup>

In upholding this ruling the Court recognized that the ICC had a power ancillary to its suspension power, to establish without a judicatory hearing, maximum interim rates.<sup>76</sup> The Commission had not exceeded its statutory power but rather had performed "an intelligent and practical exercise of its suspension power . . . in accord with Congress' goal . . . to strike a fair balance between the needs of the public and the needs of regulated carriers."<sup>77</sup> Moreover, the Court reasoned that the conditions created by the ICC were a

"legitimate, reasonable and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," in that they allow the Commission, in exercising its suspension power, to pursue "a more measured course" and to "offe[r] an alternative tailored far more precisely to the particular circumstances" of these cases.<sup>78</sup>

In *Chesapeake*, the ICC had required the railroad carriers set aside a portion of the increased revenues to be utilized specifically for the purpose that the carriers advanced for the proposed rate hike.<sup>80</sup> This ruling ensured that a percentage of the increased revenues be used to improve and maintain the country's railroad lines.<sup>81</sup> On review, the Supreme Court held that the Commission was empowered to condition approval of rate increases,<sup>82</sup> reasoning that such a condition precedent was a "legitimate, reasonable and direct adjunct"<sup>83</sup> of the ICC's statutory power to suspend proposed rates, pending investigation into their lawfulness.<sup>84</sup>

75. *Id.* at 634.

76. *Id.* at 633, 654-56.

77. *Id.* at 653 (citations omitted).

78. *Id.* at 655 (quoting *Chesapeake*, 426 U.S. at 514). The Court agreed with the petitioners that the ICC did not have the explicit authority to order refunds on effective tariffs, but felt that the public need for the new service—transportation of oil—justified the Commission's conditional approval of the interim rates rather than having to suspend the tariffs and thus delay the opening of the Alaska pipeline. *Id.* at 654-56.

80. *See* 426 U.S. at 503-08.

81. The nation's railway owners had petitioned the ICC for a revenue increase, stating that money was needed for maintenance and improvement of the nation's railway system. *Id.* at 500. The percentage of increased revenues were specifically to go into either of two funds: deferred maintenance or delayed capital improvements. *Id.* at 503.

82. *See* 426 U.S. at 514.

83. *Id.*

84. The purpose of the regulatory power to suspend is "to protect the public from the irreparable harm resulting in unjustified increases in transportation costs by giving the Commission 'full opportunity . . . for investigation' before the tariff became effective." *Id.* at 513 (foot-

Based on these two decisions the Court in *American Trucking* held the remedy of retroactive rejection was a “justifiable adjunct” of the ICC’s express rejection power granted under section 10762(e) and thus was valid.<sup>85</sup> To be a “justifiable adjunct” of an express power, the exercise of discretion must first further “a specific statutory mandate of the Commission, and second, the exercise of power [must be] directly and closely tied to that mandate.”<sup>86</sup>

The *American Trucking* Court found the new remedy furthered the Commission’s primary duty of approving and supervising submitted tariffs in that it ensured that carriers would not collude on rate setting beyond the bounds permitted by the MCA.<sup>87</sup> Additionally, the Court rationalized that the remedy was directly aimed at ensuring a carrier’s compliance with its bureau agreements by creating a monetary incentive consisting of retroactive liability to keep carriers faithful to their agreements.<sup>89</sup> Meeting the criteria for proper exercise of discretionary authority the Court held that the Commission’s administrative remedy was permissible.<sup>90</sup>

## CRITIQUE

Although the Supreme Court relied primarily upon the decisions of *Trans Alaska* and *Chesapeake*, the analysis utilized in these decisions was markedly different from that used in *American Trucking*. On the one hand, the previous decisions, while holding that it is permissible for the ICC to place conditions upon the approval of proposed tariffs, reasoned in terms of whether the Commission had correctly interpreted its suspension powers. The *American Trucking* Court, on the other hand, flatly rejected the Commission’s interpretation of its rejection power. Instead, it analyzed the ICC’s ability to conditionally approve tariffs by way of the agency’s discretionary authority. This approach increases the Commission’s discretion which contradicts the intent of the legislature.

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notes omitted) (quoting Mann-Elkins Act of 1910, ch. 309, 36 Stat. 552 (1910) (emphasis in original)).

85. 104 S. Ct. at 2467.

86. *Id.* at 2466.

87. *Id.*

89. The monetary incentive the Court referred to was that of retroactive liability, which can instill a fear of ruination in the carriers. *Id.* at 2467.

90. *Id.* at 2468. The Court noted that while it may not have created such a remedy it is “within the Commission’s discretion to decide that the only feasible way to fulfill its [statutory] mandate is to condition approval of motor-carrier tariffs on compliance with the approved rate-bureau agreements.” *Id.*

Typically, a court will review one of two types of agency rulings: a legislative ruling or an interpretive ruling. "A legislative rule is the product of an exercise of delegated legislative power to make law through rules."<sup>92</sup> Thus, a legislative rule has the force of law<sup>93</sup> and it will be binding on a reviewing court once the court determines that ruling is valid.<sup>94</sup> "An interpretive rule is any rule an agency issues without exercising delegated legislative power to make law through rules."<sup>95</sup> An interpretive ruling is simply an agency's statement as to its interpretation of a statute or regulation.<sup>96</sup> Such a statement is not binding on a reviewing court. Moreover, a court does not inquire into the validity of the rule. Rather, it determines the rule's correctness.<sup>97</sup> If the court finds the agency's interpretation to be incorrect it is free to substitute its own judgment or construction of the statute for that of the agency's.<sup>98</sup>

Generally, when reviewing an agency's interpretive or legislative ruling a court will grant the agency considerable deference, because the judiciary recognizes that an agency possesses special skills in its area of technical expertise.<sup>99</sup> However, when the issue is one of pure statutory construction a court will not rely on an agency's interpretation to any great degree, since the agency possesses no special skills in statutory interpretation.<sup>100</sup> In recognizing that the ICC has no special skill in statutory construction, the Supreme Court in *Trans Alaska* and *Chesapeake* reviewed the common law, legislative history and congressional intent<sup>101</sup> behind the ICC's suspension power before deciding that the Commission, in both cases, had correctly interpreted the statutes.<sup>102</sup>

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92. 2 DAVIS, *supra* note 27, at 36.

93. *Id.* at 59.

94. *Id.* When reviewing the validity of an agency's legislative rule, a court must determine (a) whether the rule is within the agency's delegated authority; (b) whether the rule is reasonable; and (c) whether the agency employed the proper procedures when it issued the rule. *Id.*

95. *Id.* at 36.

96. See *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331-32 (D.C. Cir. 1952). "[I]nterpretative rules are statements as to what the administrative officer thinks the statute or regulation means." *Id.* at 331.

97. 2 DAVIS, *supra* note 27, at 59.

98. *Id.* at 36.

99. *Aberdeen & Rockfish R.R. Co. v. United States*, 682 F.2d 1092, 1096 (5th Cir. 1982). Courts also recognize that an agency's decision does not warrant the same deference when the issues do not fall within the agency's field of technical expertise. *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

100. *Petrou Fisheries v. Interstate Commerce Comm'n*, 727 F.2d 542, 545 (5th Cir. 1982).

101. *Trans Alaska*, 436 U.S. at 646-50; *Chesapeake*, 426 U.S. at 513-16.

102. In *Trans Alaska*, the Court found that the Commission's power to suspend includes the power to suspend initial rates, since the meaning of the word "new" in the statute could

Yet, the Court in *American Trucking* approved of the retroactive rejection remedy despite the fact that the court found the ICC's interpretation of its statutory rejection power to be incorrect.<sup>103</sup> Instead, the Court's acceptance was premised upon the Commission's discretionary power, but the language utilized stemmed from the language of the *Chesapeake* and *Trans Alaska* decisions.

Both the *Chesapeake* and the *Trans Alaska* Courts held that the measures adopted by the Commission were necessary to strike a proper balance between the interests of the public and the carriers.<sup>104</sup> In both cases the Commission was empowered to simply suspend the tariffs originally proposed by the carriers for the full statutory seven-month period. Instead, the ICC submitted alternative measures which protected the interests of the public as well as the carriers.<sup>105</sup> The Court approved of these actions as they demonstrated a more measured course and offered alternatives tailored far more precisely to the particular circumstances presented.<sup>106</sup> The Court believed that the measures adopted were "a legitimate, reasonable and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation. . ."<sup>107</sup>

The *American Trucking* Court used this language to develop its analysis of the Commission's discretionary power to retroactively reject effective tariffs. The Court held this retroactive rejection to be "akin to the remedial authorities that Congress expressly delegated the Commission,"<sup>108</sup> (that is, the power to supervise and approve tariffs submitted by the carriers). But the Court further held that before the ICC could modify express remedies the modification must first "further a specific statutory mandate of the Commission, and second, the exercise of power must be *directly and closely tied* to that mandate."<sup>109</sup>

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not be restricted to increased or changed rates. 436 U.S. at 633, 642-46. Rather, the word is to be given its literal interpretation. *Id.* at 646. Additionally, ancillary to this suspension power is the Commission's power to fix interim rates and require the carriers to refund any portion of the rates subsequently found to be unlawful. *Id.* at 633, 654-56. In *Chesapeake*, the Court found the Commission's suspension power to include the ability to condition non-suspension of rates on the requirement that carriers devote additional revenues to the need which they alleged justified the proposed rate increase. 426 U.S. at 509-15.

103. See *supra* notes 47-63 and accompanying text.

104. *Chesapeake*, 426 U.S. at 514; *Trans Alaska*, 436 U.S. at 655.

105. *Id.*; 436 U.S. at 655.

106. *Id.*; 436 U.S. at 655.

107. *Id.*; 436 U.S. at 655.

108. 104 S. Ct. at 2466.

109. *Id.* (emphasis added).

The *Chesapeake* and *Trans Alaska* decisions recognized that the Commission has powers ancillary to its express suspension powers. The *American Trucking* decision has in effect held that the ICC possesses inherent ancillary authority attached to each of its explicit powers. The Court equated this ancillary power with discretionary authority, which most administrative agencies possess. Such discretion permits an agency like the ICC to prescribe rules to carry out its required duties.<sup>110</sup>

Assuming that "discretionary authority" is the proper basis for establishing the Commission's retroactive rejection remedy, under the Administrative Procedure Act the applicable standard of review is that of arbitrary and capricious.<sup>111</sup> Although the agency's decision is entitled to a presumption of regularity, that presumption must not prevent an inquiry by the Court to determine whether the commission acted within its authority, whether it could reasonably believe there were no available alternatives and whether its decision was within the range of available choices.<sup>112</sup> If the *American Trucking* Court was satisfied that the ICC's new administrative remedy was a proper exercise of discretion, then the Court was to determine the validity of the exercise under the arbitrary and capricious standard.

The arbitrary and capricious standard requires the reviewing court to decide the exact scope of the agency's authority and discretion, and whether the decision could reasonably be said to be within that scope. Additionally, the court must decide whether the agency's actions were based upon a consideration of the relevant factors and whether there has been a clear error of judgment on the part of the agency.<sup>113</sup>

110. See 49 U.S.C. § 10321(a) (1982).

111. 5 U.S.C. § 706 (1982). To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . .

112. See generally *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

113. *Id.* See also *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). The "arbitrary and capricious" standard is a narrow one and administrative action can be deemed as such where there is no rational basis for the administrative action. *Moore v. Curtis*, 736 F.2d 1260 (8th Cir. 1984). A challenging party must demonstrate that the

Rather than reviewing the ICC's decision under the arbitrary and capricious standard, the *American Trucking Court* created an additional standard of review. Under this standard a remedy based upon discretionary authority must satisfy two criteria: "first, the power must further a specific statutory mandate of the Commission, and second, the exercise of [that] power must be directly and closely tied to that mandate."<sup>114</sup>

The Court held that the retroactive rejection power furthered the congressional intent behind the enactment of the MCA, in particular section 14.<sup>115</sup> Section 14 prescribes the requirements that rate bureau agreements must comply with if the agreement is to receive ICC approval and the accompanying antitrust immunity.<sup>116</sup> The Court stated that since the Commission is charged with the duty of enforcing the requirements of section 14<sup>117</sup> and the fear of retroactive rejection would encourage carriers to comply with their agreements, the remedy furthered the ICC's statutory mandate.<sup>118</sup>

However, the MCA is a self-enforcing statute in that its provisions encourage carrier compliance. Section 14 creates a presumption that if a bureau agreement satisfies the statutory conditions, that agreement can receive ICC approval.<sup>119</sup> Without ICC approval any collusive activities conducted by the carriers will subject them to federal antitrust liability.<sup>120</sup> Therefore, Congress was satisfied that its legislation provided adequate encouragement for carriers' compliance with the MCA requirements. If Congress intended the ICC to have the power to formulate new remedies as additional incentives to enforce the carriers' compliance, Congress could have specifically provided for this alternative. Since they did not, one may assume that Congress deemed such a provision to be unnecessary.<sup>121</sup>

Under the Court's construction the ICC's remedy creates a monetary incentive for adhering to the bureau agreements by instilling a "fear of ruination"<sup>122</sup> in the carriers. Not only will carriers, whose

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agency's action was willful and unreasoning, without consideration and in disregard of the facts or circumstances of the case. *Id.*

114. 104 S. Ct. at 2466.

115. *Id.*

116. Motor Carrier Act of 1980, Pub. L. No. 96-296, § 14, 94 Stat. 793, 803 (1980), amending 49 U.S.C. § 10706 (1979).

117. 104 S. Ct. at 2467.

118. *Id.*

119. Motor Carrier Act of 1980, Pub. L. No. 96-296, § 14(3), 94 Stat. 793, 804 (1980).

120. See *supra* notes 18-22 and accompanying text.

121. See generally Pub. L. No. 96-296, § 14, 94 Stat. 793, 804 (1980).

122. 104 S. Ct. at 2467.

tariffs were submitted in substantial violation of their agreement, be liable for antitrust violations, they will also be responsible for overcharge liability. Overcharge liability could represent a potentially ruinous amount depending upon the length of time the rate was in effect and the number of shippers serviced during that period. These amounts could “easily surpass the damages for which carriers have historically been liable under [section] 11705(b)(3). . .”<sup>123</sup> To permit such a harsh remedy would clearly be beyond the limits contemplated by Congress.

The Court justifies its implementation by conclusively stating that although the remedy is not statutorily authorized, it *does* further a statutory mandate. However, this standard is easily met. Once the remedy is associated with an agency’s duty, it is hard to imagine a situation where that duty would not be furthered by the new remedy. This standard is too flexible to curtail the potential for abuse of discretion. In order to properly check the ICC’s exercise of discretion, the focus of the court’s inquiry should be whether or not the remedy is necessary and warranted under the circumstances to further the agency’s duties.

After holding that the retroactive rejection remedy furthered a statutory mandate of the ICC—enforcing compliance with section 14 of the MCA—the Court went on to hold that the remedy was directly and closely tied to that mandate.<sup>124</sup> The Court believed that the ICC’s remedy was “a justifiable adjunct to [the Commission’s] express statutory mandate”<sup>125</sup> of ensuring compliance “with the guidelines established by Congress in the Motor Carrier Act of 1980.”<sup>126</sup> Thus, the Court found that the remedy had met both criteria of the standard for checking the agency’s exercise of discretion.

Problems exist with the Court’s finding that the second tier of the test had been met. The Court assumed that since the remedy would only be imposed for significant violations of the bureau agreement, the remedy was directly and closely tied to the ICC’s duty to enforce

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123. *Id.* 49 U.S.C. §§ 10706-10741, 11705(b) (1982) provide for carrier liability in the event that the effective rates themselves are found to be unlawful, *i.e.*, unreasonable or discriminatory. *Id.*

124. 104 S. Ct. at 2466.

125. *Id.* at 2467.

126. *Id.* at 2468. The Commission claimed that without this remedy and thus the potential for overcharge liability, shippers would not have sufficient incentive to report violations or to file antitrust suits. *Id.* at 2467; 46 Fed. Reg. 30092, 30105 (1981). Furthermore, the ICC argued that its other remedial powers (cancellation and suspension) were inadequate tools for keeping carriers faithful to their agreements and that it needed the additional monetary incentive which was incorporated in the retroactive rejection remedy. 104 S. Ct. at 2467.



the agreements.<sup>127</sup> However, rather than being directly or closely tied to this duty, the remedy has the potential of being an open-ended penalty imposed upon carriers. Shippers, to recover, do not have to suffer actual harm; that is, the rate itself does not have to be found unlawful.<sup>128</sup> Thus, while a violation may exist it does not have to be tied or related to the lawfulness or unlawfulness of the rejected rate.<sup>129</sup>

Additionally, neither the ICC nor the Court set forth guidelines as to what a “significant” violation of a bureau agreement encompasses. However, since the Court’s holding centers on the Commission’s duty to enforce section 14 of the MCA, one can assume that a significant violation would be any violation that does not adhere to the specific requirements of this section. The result of such an assumption would allow for a broad application of this harsh remedy.

In analyzing its two-pronged test, the Court in *American Trucking* had to consider the legislature’s intent motivating the enactment of section 14.<sup>130</sup> The Court pointed out that Congress enacted the MCA in response to the shift in policy that the ICC had taken since the late 1970’s.<sup>131</sup> Apparently disturbed by the increasing amount of discretion the Commission was exercising in approving and disapproving rate bureau agreements, Congress enacted the MCA, setting forth the guidelines that must be complied with in order to receive ICC approval. The Supreme Court stated that since “the MCA creates a presumption that bureau agreements meeting the requirements of [section] 14 will qualify for antitrust immunity, the Act

127. 104 S. Ct. at 2467.

128. See generally 49 U.S.C. § 10705(b)(3) (1982), which defines unlawful rates as those deemed to be unreasonable or discriminatory. Anti-discrimination provisions, “common in the transportation industry, are intended to insure that no illegal rebates, kickbacks or other practices favoring one shipper at the expense of others, [are] employed in the transportation industry.” Thoms, *Rollin’ On . . . To A Free Market, Motor Carrier Regulation: 1935-1980*, 13 TRANSP. L.J. 43, 54 (1983).

129. A shipper’s ability to recover the overcharge amount as opposed to an amount due to actual harm, as provided for under 49 U.S.C. § 10705(b)(1), elevates the retroactive rejection remedy to a penalty. See *Genstar Chem. Ltd. v. Interstate Commerce Comm’n*, 665 F.2d 1304 (D.C. Cir. 1981) (holding that the Interstate Commerce Act provides not for penalties but for compensation, which is consistent with long-standing judicial and administrative precedent).

130. Both of the cases that the Court relied upon, *Chesapeake* and *Trans Alaska*, were decided before the enactment of the Motor Carrier Act of 1980.

131. 104 S. Ct. at 2460. Section 14 of the Motor Carrier Act sets forth the guidelines carriers are to follow when forming their bureau agreements. The section discusses requirements for the rate agreements, sunshine rules for open bureau meetings, limitations on issues to be discussed at the meetings, as well as the right of independent action by member carriers. Pub. L. No. 96-296, § 14, 94 Stat. 793 (1980).

divests the Commission of much of its discretion. . . .<sup>132</sup> However, the Court went on to reason that the legislation nevertheless left the ICC with the discretionary authority to fashion remedial powers necessary to ensure carriers' strict compliance with their agreements.<sup>133</sup>

As evidenced by the legislative history of the MCA, the Court's interpretation of the Commission's discretionary authority is subject to question. As debated on the floor at the 96th Congressional session, the 1980 revisions to the ICA were prompted by the following considerations:

Under the [old] statutes, the [ICC] has substantial discretion in approving and disapproving rate bureau agreements. . . . [The new statute] is a clear example of Congress defining the limits which it believes the Commission should follow in reducing the discretion of the Commission to expand those limits.<sup>134</sup>

This clearly demonstrates the congressional concern over the Commission's practice of expanding its discretionary authority. Despite congressional intent to reduce the ICC's discretionary authority, the *American Trucking* Court affirmed the new remedy specifically through such discretion. The Court expanded the ICC's discretion under the same statute enacted to limit this authority.

The dissenting opinion in *American Trucking* further discussed the limiting intent of Congress by noting a statement made by Senator Cannon, a sponsor of the 1980 legislation.

"Legislation is desperately needed to clarify the existing regulatory uncertainty that plagues the industry and those who care about it. . . . This bill gives specific direction to the [ICC] and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated."<sup>135</sup>

Most persuasive in determining the legislative intent is the language used in the MCA itself. It becomes obvious, after reading the statute, that the legislature intended to cap and decrease the expanding hold the ICC had over the motor carriers. The Act states

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132. 104 S. Ct. at 2461. Prior to the Motor Carrier Act there were virtually no statutory conditions to the approval of agreements. Instead, the ICC was given broad discretion to approve agreements "when it [found] that the . . . agreement [would] further the National Transportation Policy." 688 F.2d at 1343. Furthermore, the Commission had broad power to require compliance with conditions it considered necessary to further that policy. *Id.* See *supra* note 20.

133. 104 S. Ct. at 2462.

134. H.R. REP. NO. 1069, 96th Cong., 1st Sess. 27, 29, reprinted in 19809 U.S. CODE CONG. & AD. NEWS 2283, 2309, 2311.

135. 104 S. Ct. at 2470 (quoting 126 Cong. Rec. 7777 (1980)).

that the reason behind its enactment was due to “part of the continuing effort by Congress to reduce unnecessary regulation by the government.”<sup>136</sup> Moreover, the congressional findings stated that “in order to reduce the uncertainty felt by the nation’s transportation system the ICC should be given explicit direction for regulation of the motor carrier industry and redefined parameters with in which it may act pursuant to congressional policy.”<sup>137</sup> It was also found that “the existing regulatory structure [had] tended . . . to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry. . . .”<sup>138</sup> Finally, Congress determined that the ICC “should not attempt to go beyond the powers vested in it.”<sup>139</sup>

Thus, the congressional intent behind the MCA was to accomplish the reduction of the ICC’s exercise of discretionary authority, unless it is otherwise indicated. In fact, a similar retroactive remedy was among the pre-1980 regulatory rules proposed by the Commission.<sup>140</sup> However, this remedy was not included in the 1980 version of the MCA.

With the restructuring of the MCA, the authority to retroactively reject effective tariffs was not bestowed upon the ICC. Had such power been granted, the *American Trucking Court* would not have been so strained to designate a statutory provision to which the remedy both “furthered” and was “directly and closely” tied. In failing to acknowledge the congressional intent to limit the Commission’s discretionary powers, the Court improperly broadened the agency’s leverage over the motor carriers.

This is not to suggest that the judiciary is to flatly deny the ICC the discretionary authority to promulgate rules. Indeed, the Commission is statutorily empowered to promulgate rules which further its duties.<sup>141</sup> Yet in doing so the Commission should not be allowed to

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136. Pub. L. No. 96-296, § 2, 94 Stat. 793 (1980).

137. *Id.* at § 3(a).

138. *Id.*

139. *Id.*

140. 44 Fed. Reg. 60122 (1979). The ICC proposed to declare any rate increase unlawful if it resulted from improperly symbolized tariff changes. This remedy, the Commission claimed, would offer retroactive protection to tariff users who had been effectively deprived of their right to protest by mis-symbolization. *Id.* at 60123. See *infra* notes 145-46 and accompanying text.

141. 49 U.S.C. § 10321(a) (1982). See also *American Trucking Ass’ns v. United States*, 688 F.2d 1337 (11th Cir. 1982) (The ICC, requiring bureaus to allow members who filed rates through the bureau to dictate whether or not they also wanted their rates circulated among

frustrate the overall purpose of the MCA. The MCA encourages the bureau's activity of collectively assessing rates by deliberately protecting them from antitrust liability.<sup>142</sup> However, the *American Trucking* Court may discourage collective ratemaking by recognizing the ICC's ability to retract rates which are in effect, creating an atmosphere of uncertainty in this particular business community. Carriers, as well as shippers, no longer are assured that an effective rate will remain just that, so that they can determine their future daily revenues and expenses.

This may only be the first step. Traditionally the judiciary has deferred to the ICC's use of discretion. However, this deference may be increasing. In another recent case involving the American Trucking Associations, the Court of Appeals for the Fifth Circuit held that in light of the deregulatory approach of the MCA and the Staggers Rail Act of 1980,<sup>143</sup> the Commission had correctly interpreted both Acts as conferring upon it the power to reverse the ICC's long-standing policy concerning rail-affiliated trucking companies. The Commission was permitted to establish a new policy of no longer requiring a showing of "special circumstances" to justify a grant of "unrestricted motor carrier operating authority" to subsidiaries of railway carriers.<sup>144</sup>

The Supreme Court recently remanded the case of *Aberdeen & Rockfish Railroad Co. v. United States*<sup>145</sup> to the Court of Appeals for the Fifth Circuit, for further proceedings consistent with the *American Trucking* holding. *Aberdeen* discussed the ICC's authority to mandate retroactive liability upon rejection of an effective but improperly symbolized tariff. Thus the Court was faced with substantially the same issue presented in *American Trucking*. This new remedy allows shippers up to three years to file a claim for overcharges based on a symbolization error of a changed rate. The court of appeals had agreed with the ICC's argument that over-

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other members prior to filing with the ICC, correctly interpreted the MCA provision providing that bureaus not interfere with a carrier's right of independent action.).

142. See *supra* notes 16-20 and accompanying text.

143. Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified as amended in scattered sections of Titles 45 and 49 of the U.S.C.). This Act concerns both deregulation and the increase of competition among the nation's railway carriers to shippers with special needs and with the relaxing of liability requirements. 49 U.S.C. §§ 10701(a), 10713(d)(2)(A), 10703(c).

144. *American Trucking Ass'ns v. Interstate Commerce Comm'n*, 722 F.2d 1243 (5th Cir. 1984).

145. *Aberdeen Rockfish R.R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), *vacated and remanded*, 104 S. Ct. 3503 (1984).

charge liability was the most appropriate means of encouraging carriers to thoroughly check all tariff revisions.<sup>146</sup>

As with the *American Trucking* Court, the Fifth Circuit believed that the Commission's new remedial measure did not stem from the ICC's section 10762(e) rejection power.<sup>147</sup> The court of appeals was in further agreement with the Supreme Court analysis in its holding that the Commission had the discretionary power to create such a remedy.

The retroactive remedy of *Aberdeen*, however, is more "narrowly tailored" to the specific circumstances than was the remedy in *American Trucking*. Two distinctions between the remedies may be drawn. First, the Commission is statutorily empowered to prescribe the form and manner of publishing, filing and keeping open for public inspection proposed tariffs.<sup>148</sup> Second, the MCA specifically requires that a newly filed tariff "plainly indentify" any proposed rate changes.<sup>149</sup> Thus the *Aberdeen* remedy concerns a defined rate violation (the mis-symbolization of a rate change) with the remedy being directly tied to the particular violation. In comparison, retroactive rejection of a tariff which is subsequently determined to have been submitted in "significant violation" of a bureau agreement, is a remedy which is applicable in relatively uncertain circumstances as the term "significant" was not defined.

## CONCLUSION

The Supreme Court's decision in *American Trucking* has opened up another avenue from which the Interstate Commerce Commission can broaden its control over the nation's common carriers. In increasing the Commission's ability to exercise its discretionary authority, the Court relied upon decisions whose holdings were not wholly consistent with the Court's analysis. This fact virtually forced the Court to create an additional standard by which the judiciary can review an agency's exercise of power. Moreover, the Court's decision contradicts the congressional intent motivating the enactment of the Motor Carrier Act of 1980. The ICC was viewed as having too much control over the carrier and Congress saw the need to cur-

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146. 688 F.2d at 1097.

147. See *supra* note 45 and accompanying text.

148. 49 U.S.C. § 10762(b)(1) (1982).

149. *Id.* § 10762(c)(3). Newly filed tariffs must flag with the proper symbol any proposed rate change, be it an increase or decrease, and must indicate its proposed effective date. Normally a new tariff will become effective in thirty days, or in the case of railway carriers, twenty days after the carrier files it. *Id.*

tail it. Yet, the Supreme Court allowed such control to continue and grow and in turn bypassed the legislative intent.

Until the courts become willing to defer to legislation, or, until Congress is able to put forth legislation which clearly outlines the Commission's discretionary power, a trend of increased deference to the Commission's expanding use of discretion will certainly grow.

