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Overcoming Motor Carrier Undercharges: A Legislative and Litigation Update[1]

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This is the session on undercharges, a legislative and litigation update. My name is Fritz Kahn. I am the moderator and I will introduce the subject.

Next will be Mr. Brian Troiano of the law firm of Rea Cross & Auchincloss of Washington, D.C., which works on the side of the debtors, the motor carriers seeking to recover overcharges. Brian has been actively involved in any number of the undercharge cases. His partner was the one that successfully presented the Maislin case before the Supreme Court of the United States.

He will be followed by George Pezold, representing the shipper point of view. George is a partner of Augello, and has literally participated in hundreds of undercharge proceedings, principally on behalf of the shipper defense groups. There is probably no one in the country who has a broader understanding of the undercharge problem from the shipper's standpoint than George. George and his partner have been very active in seeking to have remedial legislation enacted, and he will bring us up-to-date on that.

My own perspective — perhaps it is because of my background, having at one time suffered as an employee of the Interstate Commerce Commission — is to perhaps unfairly, but nevertheless quite firmly, ascribe to the Commission a contribution to the undercharge mess as we know it today.

The undercharge problem, though, is perhaps broader than just the fault of the ICC. I think it is also the product of the trucking industry today being half regulated and half unregulated, and the Motor Carrier Act of 1980 virtually removing the entry controls. We saw a phenomenal growth in the numbers of truckers — from about 17,000 in 1980 to 50,000 today.

Obviously the volume of freight available for the truckers to haul didn't rise correspondingly. So, it was a situation where an increasing number of truckers chased after a relatively steady volume of freight.

This, in turn, brought about tremendous pressure for cutting rates and discounting, and the pressures increased as the truckers ran into financial difficulties and looked at the volume of traffic to maintain cash flow. Of course, this was exactly the point where the unregulated segment of the trucking industry ran into the regulated segment of the trucking industry, namely, while the Motor Carrier Act of 1980 relaxed entry controls, it kept the rate sections almost unchanged. As was true since 1935 when truckers were first regulated, motor carrier rates had to be reasonable,

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they had to be non-discriminatory, and most importantly from the standpoint of the undercharge problem, the rates had to be published in tariffs filed with the Interstate Commerce Commission. That led to the Filed Rate Doctrine which is at the heart of the undercharge litigation.

Notwithstanding the legislative mandate that rates be published and filed with the Interstate Commerce Commission and that they be reasonable and non-discriminatory, the Interstate Commerce Commission, beginning in the early 80's, rendered a series of decisions which clearly signalled that, as far as it was concerned, motor common carrier rates could be discriminatory, they could be unreasonable, and it didn't much care if they were filed or not.

Everyone was very happy with that situation — truckers, shippers, Interstate Commerce Commission — until a large number of bankruptcies occurred in the motor carrier industry. The practice began slowly and obviously escalated. The estates of the bankrupt truckers had the paid freight bills audited and, not too surprisingly, found that there was a big difference between the rates that the trucker had assessed and the shipper had paid, and the rates that should have been collected according to the tariff publication. That is, in essence, what the undercharge problem is all about.

The ICC, having brought about this problem, in large measure, set about in its own way to try to resolve it. Initially it came out with a decision in Negotiated Rates #1, which in effect said, notwithstanding the case law, we think that the shipper who five years after the transportation occurred, is being hit with a balance due bill is being treated unfairly, inequitably. The filed rate decisions of the Supreme Court had made clear that there was no equitable defense. The filed rate had to be followed, notwithstanding any equitable defense that the shipper might have.

The ICC's decision in this negotiated rates case was such an embarrassment that even the shippers on whose behalf it had been entered sought its revision. The ICC did that in Negotiated Rates #2. It too was pretty screwy. It again disregarded the statutory requirement that the undercharge actions first had to be brought in a court of law before the ICC had jurisdiction to determine the reasonableness of a rate on a past shipment.

As I mentioned in the introduction, Brian and his firm, in representing Maislin, took the matter to the Supreme Court, and the Supreme Court said Negotiated Rates #2 is a lot of nonsense.

It turns the Filed Rate Doctrine on its head, and the whole notion that a shipper could escape payment of the tariff rate because it had been quoted another rate by the trucker just doesn't make any sense.

The very essence of the statutory requirement for the carriers to assess and shippers to pay only the tariff rate supersedes the action of the Commission. So, the Supreme Court overturned the negotiated rates decision in the Maislin case. That was in 1990. There was a footnote which proves very important in the Maislin case that said, notwithstanding the Filed Rate Doctrine, notwithstanding the obligation of the shipper to pay the tariff rate, if the shipper can prove that the rate is unreasonable before the Interstate Commerce Commission, he might be able to get some relief. So, promptly, every shipper defended an undercharge action as rate unreasonableness. Since the question of rate unreasonableness can only be decided by the Interstate

Commerce Commission, the shippers in the court cases invariably moved for a stay, moved for referral of the reasonableness issue to the Interstate Commerce Commission.

You would think that the ICC would have then gotten on with the matter and would have decided in rate reasonableness cases, but it didn't. It dreamed up every excuse imaginable for failing to coming to grips with the rate reasonableness issue.

In one line of cases, the so-called Jasper line of cases, it was to the effect that if the tariff on file with the ICC made reference to another tariff, and the trucker that published the first tariff was not a party to the second tariff, the first tariff was then null and void. It happened most frequently in the case of motor carrier mileage rates. They make reference almost invariably to a mileage guide, and most frequently of the Household Goods Carriers Bureau mileage guide.

Many truckers never bothered to give the Household Goods Carriers Bureau the power of attorney and never bothered to file a concurrence and didn't participate in the Household Goods Carriers mileage guide. ICC then said, that means the mileage rate tariff is null and void. It cranked a whole series of decisions on that point.

We now are in deadlock. Some have upheld the Commission, and three circuits, including the D.C. Circuit, overturned the Commission. I have the good fortune early next month of being before the Eleventh Circuit and trying to persuade it which way it should go.

The ICC tried another approach but couldn't get rid of the cases because of the mileage guide deficiency. It would attempt to have the estates, the trustees, the bankrupt motor carriers come in and get advance approval to press forward with their undercharge claims.

They put out a couple of decisions in Ex Parte MC-208 — Non-operating Motor Carriers and Collection of Under Charges. They even put out, as I recall, a letter whereby the trustees were supposed to come in for prior clearance by the ICC.

It took only weeks before the Third Circuit said that was nonsense — the ICC can't intrude into the activities of the Bankruptcy Courts in this fashion and it is for the Bankruptcy Courts to determine, in the first instance, whether the trustee can press forward with an undercharge claim and collect what the trustee believes are debts owing the estate.

The ICC threw up its hands and didn't even bother to try to file a petition for writ of certiorari in the Supreme Court. It just took the Third Circuit decision and folded its tent. At this point we are awaiting a decision of the ICC treating with rate reasonableness. A big fanfare of the ICC is, we are coming out with something — wait. They finally did, and it was the Georgia Pacific case. Again the ICC tried to be very accommodating and helpful to the shippers, and in my judgment has just set a lethal trap for them.

If the shippers present their undercharge cases before the ICC in the manner in which the Georgia Pacific case decided by the ICC suggests, I think they are just courting court reversal.

The ICC in the Georgia Pacific case, notwithstanding a long line of cases that hold that a measure or test of the reasonableness of a trucker's rate is a comparison to the rates that other motor common carriers assess on the transpor-

tation of the same commodities from the same origins to the same destinations. Comparable rates are a measure of the reasonableness of the rate under investigation. There are a long line of cases.

The Commission said, that isn't good enough. We will take a look at what we call a market cluster of price and service alternatives, and we will look at contract carrier rates. Of course, contract carrier rates, almost by definition, are lower. We will take a look at what it would cost the shipper to perform the transportation itself. How will we do that? We will take into account anything and everything in figuring out what this market rate cluster might be.

That's not all, though. Again, there is a long line of reported decisions that hold very clearly — this is even the ICC saying it — that compensativeness is another element in determining the reasonableness of a rate. Yet, the Commission in the Georgia Pacific case said costs are irrelevant. Georgia Pacific is in court, but I think a final decision appropriate for court review has not yet been rendered by the Commission.

The ICC reaffirmed the earlier Georgia Pacific decision that we are going to stick by our guns, as crazy as it may be.

As a matter of fact, in the very many undercharges cases pending before the ICC, and undercharge cases that have been referred by the Courts, the ICC has been putting out orders. The xerox machine has been running. They have been running identically worded orders being served by the Commission in almost every one of these pending cases, saying, we will, for the record, put in additional evidence in accordance with Georgia Pacific. As I say, in my judgment, that is just setting a trap for the unwary shipper. If I haven't made it sufficiently clear, let me conclude by saying the undercharge mess may not have been created by the ICC, but in my view the ICC has done very little to clean it up.

With that, I'll turn it over to Brian who will present the undercharge situation from the motor carrier standpoint.

Brian T. Troiano, Esq.
Rea Cross & Auchincloss

That was an excellent background on the undercharge dilemma and how we got where we are today. The undercharge controversy has existed for about the last ten years, and one would think after this long period of time all the issues would be resolved and there would be nothing left to fight about. However, what has happened, every time one issue is resolved, two more issues arise. Thus, we continue to see new developments in the legislative, the administrative, and the judicial arenas. 1993 has been no exception.

So far this year, we have seen a frustrated ICC try to take control of undercharge litigation by requiring trustees to obtain the Commission's prior approval before pursuing their court claims, only to be told by a federal Court of Appeals that it had no authority to do so. We have seen the Supreme Court issue another undercharge decision less than three years after Maislin to clarify an issue that was left open in the Maislin decision.

We have seen numerous and conflicting decisions by the federal courts throughout the country addressing tariff issues, contract questions, interpreting the ICC's regulations, trying to reconcile their decisions with decisions of other courts. We are simply ignoring them.

We have seen cases continue to backlog at the ICC while it issues decisions that are consistent in the result, but inconsistent in their analysis.

Finally, we have seen the Congress once again wrestle with proposed legislation to resolve the undercharge controversy. The question today is, will 1993 bring a final end to the controversy? My answer is, probably not.

Turning first to the prospects of a legislative solution, there is widespread belief that this is the year that legislation will, in fact, be passed. Of course, similar predictions have been made in the last three years, and they have all proven wrong. Nevertheless, each year passage of legislation gets closer and closer. Last year, a bill made it through the Senate, but died in the House Public Works Committee. This year, the Senate has already passed the bill and the House is currently working on one. Congress is obviously anxious to get the undercharge monkey off of its back, and the law of averages seems to suggest that, sooner or later, legislation in some form or another will come to be.

The content of any legislation ultimately passed remains open for question and speculation. One thing is certain — the proposal now being considered is not likely to bring a quick end to undercharge litigation. Indeed, ask any lawyer what he thinks about the new legislation and his eyes light up. The reason is that new legislation usually brings more, not less, litigation.

The bill currently receiving attention in the House Public Works Committee is the so-called Mineta bill — H.R. 2121, called the Negotiated Rates Act of 1993. Essentially, it would allow shippers to settle undercharge claims at a steady percentage of the difference between the applicable filed rate and the billed rate. Those percentages, as presently written, are ten percent for undercharge claims for truckload shipments, and fifteen percent for LTL shipments.

Once the shipper does not want to settle at these percentages, the bill resurrects the old negotiated rates defense which was struck down in Maislin. The ICC is given jurisdiction to determine whether the parties negotiated and relied upon an unfiled rate. If so, the ICC can find that the trustee's collection efforts constitute an unreasonable practice, and such a finding would relieve the shipper of all liability for claims involving shipments prior to September 1990. I'm told this date was selected on the theory that by September of that year, which would have been approximately three months after Maislin, shippers should have known better.

Finally, the bill retains the shipper's existing remedies to challenge both the applicability and the reasonableness of the tariff rates sought to be recovered.

This bill is obviously not designed to eliminate undercharge litigation. What it does is to create additional defensive strategies and invite more litigation. Why, for example, would a shipper settle a case when he would have the option of going back to the ICC under the old negotiated rate defense and not have to pay a cent? Ironically, this provision in the bill would require the parties to again litigate the identical issues that they had litigated at the ICC before Maislin.

In addition, this part of the bill creates an extra layer of litigation. In this respect, the bill itself enumerates all of the factors that are necessary for finding of an unreasonable practice. Obviously, the court where the undercharge suit was filed could make that determination simply by referring to the statute itself.

Why then would the ICC have to become involved? If the bill provides that the determination must be made by the ICC, we still have a layer of litigation initially at the court, another layer of litigation at the ICC, and then back to the court for appeal. If the shipper chooses not to settle at the stated percentage or for some reason does not have a negotiated rate defense available, it may still challenge the applicability of the tariff and the reasonableness of the rate.

On the other side of the coin, trustees, I'm sure, will likely challenge the validity of any such law to the extent that it retroactively impacts on their existing claims.

In sum, assuming that legislation is enacted, which is no certainty, it is not likely to make the undercharge problem go away.

In turning to the developments in the litigation area, there are many, and I've only chosen two to talk about. These two are right now on the front burner. Both were touched upon by Fritz. One issue is ripe for resolution at the ICC, and that involves a shipper defense of rate unreasonableness.

The other issue is a tariff applicability issue that is now probably ripe for resolution by no less than the Supreme Court, and that is the so-called void for nonparticipation rule. The void for nonparticipation rule is most closely associated with the Household Goods Carriers Bureau mileage guide.

Just to give you a little background, the mileage guide is a tariff, a rather large tariff, that is published by the Household Goods Carriers Bureau as an agent for any carrier that wants to participate in that mileage tariff. The tariff itself provides distances between thousands and thousands of points throughout the United States, as well as rules on how to compute distances between points that are not specifically provided in the guide itself.

Most carriers publishing mileage rates provide in their tariffs that distances will be determined by the Household Goods Carriers Bureau mileage guide. As it turns out, often times carriers refer to the mileage guide in their rate tariffs, but for one reason or another, allow their participation in the mileage guide to lapse. The ICC's regulations are somewhat unclear, but the Commission has recently clarified that their regulations do in fact require participation in any tariff to which reference is made in another tariff.

Now, in defending trustee lawsuits to recover carrier mileage rates, shippers began arguing that the mileage rates were not applicable because the carrier was not, in fact, a participant in the mileage guide at the time the transportation occurred.

The ICC addressed this issue in one case, although numerous cases were filed with the Commission involving this issue — the case was the Jasper Weinman proceeding that Fritz referred to.

That case involved the tariffs of Overland Express, a bankrupt carrier. In that proceeding, the Commission ruled that under its regulations, the carrier's nonparticipation in the guide resulted in the mileage rates not being effectively on file; therefore, they were void and could not be applied, thus defeating the trustee's claim for undercharges. The Overland estate appealed this ruling to the United States Court of Appeals for the D.C. Circuit. In the meantime, three other Courts of Appeals addressed this same issue in

cases that had never gone to the ICC, indicating that they agreed with the ICC's rationale. The Fifth, Eighth, and Third Circuits reached the same conclusion, that is, the mileage rates were either void or never effectively filed and could not be applied by the trustee.

In June of this year, the D.C. Circuit issued its ruling finding that the ICC's decision was wrong as a matter of law. It said that the Commission has retroactively rejected an effective tariff in violation of the filed rate doctrine and contrary to a 1984 decision of the Supreme Court. Shortly thereafter, the Seventh and Sixth Circuits addressed the same issue and issued decisions agreeing with the D.C. Circuit, thus resulting in an even three-three split among Circuits.

The ICC filed a petition for rehearing in the D.C. Circuit, and that was denied. A petition for rehearing was also filed in the Seventh Circuit, and that was denied. So far, the Supreme Court has declined to hear the issue and has denied petitions to review the decisions of the Fifth and the Eighth Circuits, both of which had agreed with the ICC's rationale.

The Third Circuit case was also taken to the Supreme Court, and the petition for certiorari is pending before the Supreme Court. It was scheduled for a vote at the Court's voting conference last week. I was advised this week that at the request of at least one justice, the vote on that case has been postponed. I'm not sure what you can read into that, but the Court may now be becoming aware of the wide split. Perhaps it wasn't aware of it before.

The ICC has, in fact, voted to seek Supreme Court review of the Overland case, which is the only decision in the Circuit Court involving a direct review of the ICC's decision. The Commission's petition for certiorari is not yet filed with the Court.

Whether the Court will actually hear the issue is open to question. The mere fact that there is a split among circuits does not guarantee that the Court will accept the case, and the Court may be tired of hearing another undercharge case. Nevertheless, these cases do have elements which might peak the court's interest.

Number one, the issue exists on a wide scale in the lower courts, which are in dire need of direction. Number two, there is a direct and major split among circuits. Number three, the Court has previously addressed whether the Act permits the retroactive rejection of an effective tariff, and it may therefore view this issue as sufficiently important to warrant its consideration. If the Court is inclined to take up the question, it is my guess it would probably take the Overland case as the vehicle to review the issue, since it is the only one directly involved with the ICC.

As an interesting side note, new Justice Ginsberg, who has recently taken a seat on the Supreme Court, sat on the panel in the D.C. Circuit that overturned the ICC.

The issue now being focussed on at the ICC is, of course, the rate unreasonableness issue. Although it has been dragging its feet in addressing shipper claims that rates sought to be collected are unreasonable, it appears that the issue is now ripe to be tackled.

In Maislin, the Supreme Court reaffirmed the well-settled maxim that the shipper is bound to pay the filed rate unless he can show that the rate is unreasonable, in which case he might get reparation. Early this year, in the case of Ryder v. Cooper, the Supreme

Court explained the how's and why's of a shipper's ability to pursue his claim as unreasonableness. Holding that such a claim may not be asserted as a defense, the Court nevertheless concluded that it could be raised as a counter-claim for reparations in accordance with the provisions of the Interstate Commerce Act. This is where the fun begins, because it has now become apparent, in view of the Commission's decision in Georgia Pacific, that what the Supreme Court had in mind is not exactly what the ICC has in mind.

This past August, the Commission issued a decision in the case known as Georgia Pacific, announcing the standards by which it will determine whether motor carrier rates are unreasonable in undercharge cases.

To back up a little, last fall, in November, the Commission had issued its first decision in Georgia Pacific, announcing its standards for determining rate unreasonableness in undercharge cases. The intervening decision of the Supreme Court in Ryder v. Cooper, at least on its face, convinced the Commission that maybe it better take another look at this in view of what the Supreme Court said in Ryder.

This past August, not surprisingly, the Commission issued Georgia Pacific II, in which it concluded that Ryder really doesn't affect what it said the first time around, and it simply reaffirmed what it had said the first time.

Traditionally, the most essential element in making a rate reasonableness determination was evidence addressing the carrier's costs and revenue postures in relation to the challenged rates.

The ICC now rejects this type of evidence as irrelevant. Instead, the Commission will determine whether a tariff rate is reasonable by comparing it to other rates the shipper may have had available to it.

These compared rates will comprise what the Commission calls a market cluster. They may consist of tariff rates, unfiled quoted rates, contract rates, or virtually any other type of rate the shipper claims was available to it. The Commission says that any rate substantially higher than this cluster will be deemed to be unreasonable. We have yet to find out what "substantially higher" means and we have yet to see what the market cluster is going to look like.

Perhaps most significant is the fact that the Commission does not propose to determine what a maximum reasonable rate is, nor will it make a determination that the market cluster of rates meets a minimum level of reasonableness. Rather, it will presume that the market rates are reasonable. Any rate in excess of that market cluster will be deemed unreasonable and therefore uncollectible.

Undoubtedly, the trustees will challenge these findings in court, and the Commission is going to have a tough time defending its rationale. As Fritz pointed out, the Georgia Pacific case has already been appealed.

That appeal has been held in abeyance while the parties go through the rigamarole of filing evidence addressing the Georgia Pacific standards. I believe the record is probably closed in that case now. I know the carrier filed its evidence some time in September. I don't see any real change in the type of evidence that either party will submit in that case. There is really no justification for the Commission to drag its feet in issuing a decision in that case. When the Commission's administrative jargon is stripped away, it is really

asserting, in effect, that its finding of unreasonableness will operate as a complete defense to an undercharge claim. Yet, this flatly contradicts what the Supreme Court said in Ryder v. Cooper — that rate unreasonableness is not a defense. Ryder's reliance on the reparations remedy is significantly more limited than the ICC's proposed remedy.

The reparations remedy originally put into the Interstate Commerce Act for motor carriers in 1965 envisions a determination by the ICC of a maximum limit of reasonableness from which a court can then measure the amount of reparations a shipper is entitled to.

Under Georgia Pacific, the ICC does not intend to fulfill this statutory role. Instead, it proposes to tell the court that the tariff rate cannot be collected because it is higher than other rates.

The problem with this is that it completely ignores the concept of reasonableness under the Interstate Commerce Act, in which the Supreme Court, many years ago, recognized that there is a zone of reasonableness and a carrier is free to adjust its rate anywhere within that zone.

There is not a single reasonable rate. There can be rates within the zone that are higher than other rates within the zone, and neither are unreasonable. The Commission might have gotten away with this approach prior to Maislin, but I think many courts will see through this approach as simply an attempt to get around Maislin.

In any event, the Commission is now requiring parties in undercharge proceedings to submit their evidence under the Georgia Pacific standards. Decisions will eventually be issued, but, based on its past track record, who knows when.

These issues will undoubtedly be tested by the trustees, and it is quite likely that some courts will accept the ICC's rationale on the theory that the ICC is the expert in this area and they are not going to touch the Commission's decision. I think, however, that other courts will see through the Commission's tactics and will reject the Commission. Undoubtedly, the Supreme Court will again, and perhaps finally, be requested to resolve the question.

I've only touched upon some of the hot spots in the continuing undercharge saga. Many other issues exist and are certainly no less important than these. Where does this leave us? Obviously, much remains to be resolved. The lawyers will stay busy, that is for sure. Based on past history, I would not bet on a final solution in the immediate future.

George C. Pezold, Esq.
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Let me try to put something in perspective. Rand McNally, for example, sells books, maps, computer programs, software, printed products, etc. Now, supposing for every product that you sold you had to have a published price list and you had to file your price lists with the ICC.

Suppose you also had to file all the terms and conditions of your sales agreements with every single customer that you had. Can you envision that? Let's take Sears Roebuck. Let's take General Foods. Let's take any large manufacturer — General Motors. Suppose you had to file all those prices and you couldn't change them except on notice of seven days, five days, or ten days. Can you imagine what a burden that would be on American industry? Yet, that is exactly what is required of the transportation industry. It is the

only industry that has to do that. It is something that is so out of line with modern business practices in this country that it baffles me, and I've been doing this for 20-something years. How could this system sill exit with the litigation we've been handling?

First of all, let me give you an example. You probably know where I am coming from because Fritz did a good job of telling you who we represent and Brian already alluded to the fact that we are the guys on the other side. We have probably been involved in well over 100 joint defense groups. The joint defense groups are groups of defendants. Some of them are small — five or ten shippers that have been sued by a particular motor carrier. Some of them are large.

The largest joint defense group that we are representing now involves the PIE bankruptcy, and I think we have over 3,000 defendants in that group. My Jones Truckline Group, which is the current hot one we are working on, has about 90 defendants in it. Some of the other groups have 30, 40, or 10.

The strategy and the reason for having a joint defense group is because a lot of people get sued for small amounts. You get sued for $1,800, $6,000, or $15,000. Because this litigation and the issues are so obscure, so complex, there are very few attorneys, first of all, who know anything about it.

Most general practitioners don't know anything about this type of litigation. If you were to walk into a law firm and say you've got an $1,800 case, they would look at you and say, settle it. Pay them. You can't afford to hire us to represent you in an $1,800 case in a federal court litigation.

So, the joint defense groups have basically allowed shippers with both small and large claims to band together and to get the benefit of representation in these cases.

Notwithstanding the skill and persistence of the trustees' attorneys and people like Mr. Troiano, who are handling these cases, and who are very good attorneys, as witnessed by the fact that they won the Maislin case, I think these joint defense groups have been effective in defending the rights of the shippers in many cases and have been quite successful in terms of the cases that we have won and/or had referred to the ICC.

Do you folks have an idea of the magnitude of this undercharge problem in the United States? Does anybody have a feeling for it? The GAO published a report at the request of Senator Exon, which just recently came out. It has some interesting numbers in it. I would say there are probably 250 bankrupt trucking companies that we know of that have sent out dunning notices or have started litigation to collect undercharges from shippers.

The GAO surveyed some 50 of these companies. They sent out 100+ questionnaires and they received about 50 of them back. The 50 that they got back, which I would say is maybe a third or a quarter of the total population in terms of dollars, involves $1.221 billion in undercharges. That is what the report says. The total value of large estates, and that would be the PIE, Transcon bankruptcies, is over a billion dollars in and of themselves, and there are ten large estates which have over a billion dollars in undercharge claims. The value of the other 40 is only about $150 million.

So, you can see the distribution is rather askew. You have a couple or ten large bankrupt carriers that account for

probably 80% of the undercharge dollars involved.

There are a lot of interesting statistics in this report. I was particularly interested in the type of undercharge claims, the breakdown by type. When I looked at the numbers, I thought something was wrong until I saw the little footnote. One of the footnotes said that because of confidentiality requirements, they couldn't put in anything that would reveal the name of the carrier or the name of the trustee.

The five categories are unfiled rates, contracts in violation of statute or ICC regulation, customer accounts codes, tariff construction issues, and other. The unfiled rates group looks to be about a third of the total amount. The contracts group looks to be about a third of the total amount. And, the tariff construction and other amounts to the other third. There are no percentages, and no dollars are reported in the customer account code. Well, the reason for that is pretty obvious, because the Transcon and PIE cases are so large, and the single principal issue is the customer account code issue.

In the PIE cases, probably 80-90% of the total dollars involved are what they call Code 3, which is the shipper account code undercharges. Does anybody know what I am talking about when I talk about a shipper account code?

Traditionally the carriers in this country all were participating in tariffs that were published by the regional rate bureau. For a long time, almost any carrier that you called up, if you said you wanted to ship 1,000 shipment from Chicago to New York, they would say, what is it? You would say, it is wooden boxes or something like that. They would say, that is class 70, the rate is such-and-such, and here is your price. No matter who you called, it would be the same. You could look in your Leonard's Guide and you could find out what it would cost, because all carriers would basically participate in the same joint rate bureau groups that made these rates and published them in the bureau tariffs.

After 1980, as a marketing tool or marketing device, the carriers started giving discounts off the class rate. So, if the official list price on your shipment was $1,000, you might only pay $800, or a $200 discount.

In the early 80's, those discounts were probably 10-15%. When you got up to about 1988 and 1989, most of the nation's carriers were routinely and regularly giving discounts off the class rate list price of between probably 40-60%. Sometimes you find 35% and sometimes you find 65%, but most of them fall right in the 45-50-55% rate.

Now, how do they give a discount? They are required to publish it in a tariff some place. Well, they can put an item in their own discount tariff which says I am providing a discount of 45% for so-and-so, for anything he ships out of Washington, D.C. or Philadelphia. I'm putting another discount in for Joe and I'm putting it at 38% for anything he ships into or out of his plant.

You would actually see these discounts, page after page after page of them, naming a shipper, naming an origin, sometimes naming a destination, and generally applying to inbound and outbound shipments to and from a facility. This is the way most of the carriers were publishing them.

Some of the carriers felt that, for one reason or another, they didn't want to identify the individual shippers by their name. So, they published just the shipper's account code in the tariff. PIE

is one. Jones did it for a while in the middle of 1988. They published a 630 series tariff. You've got 150 pages of just one or two lines with the shipper account code and his discount and his zip code. That is all you have. It doesn't even identify the commodity. It is just anything shipped in or out of that zip code for that account.

PIE and quite a few of the carriers used these account code tariffs. Some of the shippers liked them because if you knew your account code, then you could find your rate, but nobody else would know what discount you were getting.

So, there was a certain confidentiality there. The carriers justified it on the grounds that they used the account codes in their computer system and their billing and they didn't think it was necessary to use the names of the shippers.

This was first challenged in the Transcon case in California in the bankruptcy court. The bankruptcy judge became convinced by the trustee's attorney that there was something wrong with a tariff that only identifies the shipper by an identity code where he was not specifically named. The so-called secret shipper account code was held in that case to be illegal, and the discounts, therefore, were not applicable and were disallowed. The result of this was that the full undiscounted class rate because applicable to the shipment.

Well, that was the decision in the bankruptcy court. It wound its way very rapidly up to the Ninth Circuit Court of Appeals and was reversed on that issue.

The same issue, however, is the major and principal issue in the PIE bankruptcy. The trustee, notwithstanding the Ninth Circuit's decision, decided that he was going to follow the same rationale as the bankruptcy judge in California, and continued with many millions of dollars worth of lawsuits based on his contention that shipper code discounts were not good. That now, just within the last two weeks, has been reversed by the Middle District Judge Moore in Florida and probably will be appealed. No matter who wins these cases, somebody always appeals them.

Anyway, that is what a shipper discount or secret shipper code case is about. As I say, we have a lot of them.

I had thought about talking about the legislation. Brian did such a good job that I don't really have to do it other than to tell you that the Mineta-Schuster bill, as of right now, has over 200 sponsors in the House. That is a majority in the House and I believe that indicates fairly strong support for the bill and a likelihood that it will at least pass the House.

The bill does have to be marked up and, of course, it does have to go to the Senate, assuming the House passes it, and we are getting very close to the end of the year again. People keep calling me and asking me, are we going to get legislation? I well, I'm not going to say yes or no because I've been through this for three years. We got up to around Thanksgiving last year and it looked good, and then all of a sudden it got locked in and died in a committee.

The Teamsters are the spokesmen in opposing this legislation. The Teamsters and the collection interests have allied themselves and have mounted very extensive lobbying campaigns to oppose this legislation. Obviously, the collection interests are making a lot of money. According to this GAO report, in these 48 bankruptcy states they have collected $98 million. That is $98 million for 45 states that reported. So,

there is pretty good money in this business. There are only five or six companies that are doing most of the auditing, and there are only three or four law firms that are representing the trustees in almost all of these cases. The auditors generally have a contingency fee agreement — they get 50% of whatever they collect. If it is litigated, the attorneys will get another 25-30% or whatever their fee agreement is. That is a lot of money, and if it is $90 million that has been collected, there are some people that should be able to afford some pretty nice yachts right now.

The Teamsters' position purports to represent their constituency. They feel that the former employees of the trucking companies have a claim to these undercharges.

When a trucking company goes bankrupt, their pension plan, their wages, their benefits and so on are at risk. They are representing that interest. But if you read this GAO report, it would tell you that very little of the money that is collected in this litigation ever gets to those Teamster employees. As I've pointed out, a big chunk comes off the top for the auditors and the attorneys. That is subject to further whittling away on general administration expenses and legal fees to the bankruptcy estate.

So, even if this legislation does not pass and even if this type of collection activity continues, it is hard to say that much money will ever get into the hands of real, honest, hard-working truck drivers.

Pezold - (in response to a question) The bill passed by the Senate is the Exon bill. It is a different bill.

Comment - Which says there is a legislative solution that has been passed and another one that is about to be passed in response in the House. What are the drawbacks? You seem pessimistic about 1993.

Pezold - Let me put it this way. I was optimistic for three years in a row. In 1990 we were up to the brink and we thought we had legislation and it was going to go. It didn't happen. In 1991 it didn't happen. In 1992 it didn't happen. After a while, experience teaches you to not be excessively optimistic. But, this is the first time we have had something passed in the Senate, and we also have this majority of the House who have signed up for the bill. So, it looks as though it is very likely to happen.

Now, what can happen to a bill between today and a month from today? If you are a student of legislation and the legislative process, anything can happen to it. They always joke about it — if you don't want to see how sausages are made — that is true. There are likely to be very strong back room pressures by the effective interests that could have the effect of either nullifying the positive gains for the shippers, or making it so it doesn't work. The bill already is not really what we want. To start with, it is a compromise that has evolved over the last two or three years.

I have personally sat in meetings where the representatives of the different interests were there at the request of the Congressmen. The Congressmen said, you guys get together and work this out. We want a compromise bill that will satisfy the Teamsters, the collection interests, the shippers, and the trade interests. I'm not very happy with this bill. Brian is not very happy with the bill. It is, in fact, a cut and paste. It is an assembly of compromises that, on the whole, we shippers have no choice but to endorse. It is the only game in town. We have to endorse it. Otherwise, there

will be stand-up litigation for the next ten years. This problem is not going away.

Brian mentioned that the proposed legislation gives you a negotiated rate defense for any shipments moving prior to September 1990. That is kind of a joke because everybody is supposed to know what the law is. Everybody is supposed to know that there was a Maislin decision in the U.S. Supreme Court where they basically stuck their head in the sand, ignored commercial reality and what is going on in the world, and opted to reinforce a century-old myth of constructive notice. That is what this is all about. But they did it.

The thing is, though, that if you walk out and talk to somebody who is loading a truck out there, or you go to small companies all around the country and you go to some big ones, they are still not filing the tariffs. They are still shipping on a handshake, and it is being done every day all over the United States.

Trucking companies by the thousands, people all over the place, are totally ignoring the filed rate doctrine, the Maislin decision, etc. There are all sorts of people using truck brokers. They don't have contracts with the brokers. The broker doesn't have a contract with the carrier. Probably 20% of the truckload traffic is moving through brokers, and probably only half of that is covered by a valid contract.

There will be a lot of claims if those carriers go bankrupt and the auditors are able to convince the trucking companies to sue their customers. There is a lot of business there and a lot of money to be made.

Comment - That is because your carriers and shippers are fighting. They are not adversaries until the bankruptcy puts them in an adversarial position.

Pezold - Most carriers will not sue their customers. A carrier will sue a customer who just doesn't pay his bills. You know, somebody who is a deadbeat and doesn't pay his freight bills or something like that.

But a carrier, when he makes a deal, is like most other businessmen — he shakes the hand, that's the price and he is going to stand behind that price. He's not going to alienate his customers in the community by saying there is some other price; my tariff is more than that.

Pezold - (in response to a comment) Well, that is interesting. There are a couple of debtors in possession, but Jones is a debtor in possession. But, who really is the debtor in possession? Now, as far as I know with Jones, somewhere at the end of 1988 or early 1989, there was a major management change and the "management" bought back Jones from Sun Carriers. They were a subsidiary of Sun Carriers and they bought it back. In so doing, there was a heavily leveraged buyout.

My understanding is that the real parties in interest are the financial people who financed that leverage buyout. I think it was B.J. McAdams, the MNC Bank, that is the real party in interest there. There are quite a few that are like that, where a financial institution that has taken an assignment of the receivables brought on the lawsuit.

Pezold - (in response to a comment) It is interesting that you mention the word "overcharges." I have seen hundreds of these so-called orders by carrier service and FAAC and all these people. They have never ever come up with a single overcharge — not one. Thousands and

thousands of freight bills and always it is an undercharge. I never saw it. That is a real good audit. That shows you who is getting paid for what. I hope I've managed to display my strong bias in this matter.

Answer - (in response to a question) First of all, what you use as a code — when you have a tariff, you have a big, multi-page tariff, and in that are going to be discounts that have basically been tailored for each of the customers. It is going to be a discount that applies for a particular plant location either inbound or outbound or both, and with a discount and perhaps some other terms like minimum charge for LTL services. The fact that it only has a code number instead of having the shipper's name really does not make it legal or illegal, in my opinion. Anybody who ships between a particular origin and destination will get the same rate.